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Jan D. Weir, B.A., LL.B. • Fran Smyth, B.A., B.Ed., LL.B.

Critical Concepts of Canadian Business Law

Instructor's Manual

Sixth Edition

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Cover concept by Mark P. Tjan.

Pearson Learning Solutions, 501 Boylston Street, Suite 900, Boston, MA 02116
A Pearson Education Company
www.pearsoned.com

Printed in Canada

1 2 3 4 5 6 7 8 9 10 XXXX 17 16 15 14

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ISBN 10: 1-269-99719-X
ISBN 13: 978-1-269-99719-5

Contents

Introduction

Theory of the Text

In the context of legal education, the teaching of law to the layperson is relatively new. The business law courses being taught in Canada were formulated after World War II, and the current texts took form in the early 1960s and late 1970s. The pattern was set in texts written on the academic model and "new" books were primarily clones of these. We believe that there is a need for a new text that deals with the issues facing businesses today and reflects the experience that has been accumulated in the teaching of business law over the past 20 years. Accordingly, the principles that underlie the selection of the materials for *Critical Concepts of Canadian Business Law*, and the format that it takes, are:

- Only principles relevant to businesses at the present time and the foreseeable future are selected.
- Only essential principles, and not all the details, are included so that the business person can gain a general understanding. These courses are not intended to educate people to be lawyers.
- Each principle is taught in four or five different expressions—narration, bulleted format, case brief, and questions. Then there is a review in executive summary format, with review questions following.

Organization of the Instructor's Manual

Each chapter in this manual is divided into two sections:

- Answers to the Business Law—Applied Questions
- Answers to the Closing Questions

In Chapter 2, additional resource material is provided with a sample small claims court and sample assignment for instructors who want to do a small claims court drafting assignment.

Instructors have asked where the questions used in the text came from. Most are based on real situations from the authors' files. They have, of course, been modified for the purpose of illustrating the topic, but these cases did occur.

The Business Law—Applied Questions have been intentionally made easy, so students can answer them in class without the need for extensive study of the topic. Instructors can ask even

the weaker students for responses and elicit that level of student's participation. The instructor will not be limited to repeatedly asking only the same few students for answers.

These questions are, in effect, illustrations in simple question form. It is hoped that this level of ease will give those students, who have a mental block about law, confidence that they can understand the subject.

The authors prepared for writing these questions by making a survey of all of the important points under each topic in every chapter and not simply by writing questions. There is a danger that a writer may only select points that come easily to mind or that are the easy subject matter for questions.

Chapter Resources

Chapter 1
Fundamental Rights

Section 1 Answers to Business Law—Applied Questions

1. Sections 91 and 92 of the *Constitution Act* are reproduced in the Resource section at the end of this chapter of the Manual.
   a) Federal Government, s. 91(21): Bankruptcy and Insolvency.
   b) Provincial Government, s. 92(12): The Solemnization of Marriage in the Province.
   c) Federal Government, s. 91(27): The Criminal Law.
   d) Provincial Government, s. 92(10)(a): Local Works and Undertakings other than such as are of the following classes: (a) . . . Railways . . . connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.
   e) Federal Government, s. 91(22): Patents of Invention and Discovery.
2. a) Yes, because this is a law passed by the Parliament of Canada.
   b) No, because this is not a law passed by a government but an act of discrimination. It may come under human rights legislation but not Charter legislation.
   c) No, this is not a law but an act of discrimination.
   d) Yes, this is a law passed by a provincial government.
3. a) There is no right to bear arms in the Charter. This can be contrasted with the American Constitution where there is a constitutional right to bear arms.
   b) This is a Charter right. It is one of the legal rights in Section 10(b).
   c) Smoking is not a Charter right.
   d) This violates one of the democratic rights in Section 4(1).
4. No, the Charter does not apply to private businesses; it applies to laws made by governments. Absent Competition Act violations such as refusal to deal to give a competitor an advantage and restrict competition, (outside the scope of this chapter), a business is free to accept or reject a customer. In any event, the Charter is not available.

5. a) This proposed Quebec law would violate s. 2 Freedom of Religion and s. 15 Discrimination Based on Religion.

   b) The Quebec government would try to use Section 1 to say the law is justified as its goal is to ensure that the government is secular and religion is not reflected in government offices.

   c) If the Supreme Court rejected the Section 1 claim that it is justified to infringe on the workers' rights, Quebec could use s. 33, the notwithstanding clause, to pass the law even though it violates the Charter. The law would expire after five years, and then it could be reviewed at that time.

6. a) Yes, she does have a ground for complaint. Sex includes being pregnant. Whether the ground would be successful is a question that can only be answered after the students discuss the section on bona fide occupational requirements. The employer could argue that when he hired her, she knew that it was for looks. However, for the present purpose, the student need only recognize that there is a prohibited ground here. We know of no case exactly on point. This question can be revisited after the students read the section on bona fide occupational requirements.

7. a) All of the items except previous work experience relate to expressly prohibited grounds. Asking for a criminal record is a way of asking about conviction. The question would have to be phrased to ask about criminal convictions for which pardons have not been granted. Because Section 25(2) makes drug and alcohol addiction a disability within the meaning of Section 3(1), an employer cannot ask generally if employees use drugs. This item is dealt with again under bona fide occupational requirements. Certain employers may be able to ask that of selected employees.

8. a) Yes, the ATF complaint could be successful based on statistical evidence alone. The concept of systemic discrimination was developed to avoid the necessity of proving intention, which is often a very difficult matter.

   b) Because intention is not necessary, the lobby would not have to show actual incidents of discrimination.

   c) This type of discrimination goes by various names—systemic discrimination, adverse effect discrimination, and constructive discrimination are common terms.

   d) The advantage is that the complainant group does not have to prove any specific acts of discrimination. For example, the complainant does not have to call witnesses to prove specific events occurred. Evidence of this type is often one person's word against another's. It is difficult for the court or tribunal to sort out who is giving accurate testimony. In this situation, it would be difficult for the complainants to prove in specific cases that a person was not hired because she was a woman. On a case-by-case basis, the person who got the job may have had equal or better qualifications than the woman applicant. The bias is seen only when the result is the same in a large number of cases.

      The disadvantage is that this type of statistical evidence is valid only for large numbers. In a small employment situation, it is not likely that this type of evidence could be obtained.

9. a) The Canadian Human Rights Commission has stated that AIDS is to be considered a disability and therefore employers can't discriminate against people who

have AIDS. You might want to discuss with your students the difference between a Commission opinion and a Tribunal decision.

Only a matter that has been heard by the Tribunal can be considered binding precedent. However, statements by the Commission can be considered "persuasive." As the Commission and Tribunals are considered to be somewhat more pro human rights and the courts a little more conservative by some commentators, the courts may or may not back up the Commission and Tribunal, in provinces where an appeal to the court is permitted.

b) The issue here is bona fide occupational requirement. According to the Canadian Human Rights Commission as reported in its literature, scientific evidence states that AIDS cannot be communicated by a person preparing food. However, if the public found out that a restaurant had a person with AIDS preparing food, undoubtedly that restaurant would lose business. The issue has not come full square before a board. However, in August 1995, the Ontario Human Rights Commission (OHRC), as part of its investigation, told a dentist who wore an extra disposable paper gown on top of her regular protection that she had discriminated against the patient based on a disability and should pay the patient $8,000.00 to compensate him for his mental anguish. The Royal College of Dental Surgeons supported the OHRC. The dentist refused to pay, and the current status of this matter is not known. The patient was a known drug addict with AIDS.

Section 2 Answers to Closing Questions

1. a) No, the pith and substance of this law is aimed at controlling a criminal act, not zoning to control use of the city's areas. Consequently, it falls within federal government powers under s. 91(27): The Criminal Law.

   This question could also be used to explore the delegation of authority by the federal or provincial government to various bodies, such as a city or liquor board.

2. a) No.

   b) Federal, s. 91(21): Bankruptcy and Insolvency; Provincial, s. 92(13): Property and Civil Rights in the Province.

   c) Although the right to sue for wages is a matter of contract law and considered within the category of civil rights and the provincial jurisdiction, this legislation is aimed at dealing with bankruptcy and the rights of creditors in a bankruptcy which is a federal power under s. 91(21).

3. The correct answers are:

   a) Charter of Rights and Freedoms.

   b) Canadian Human Rights Act.

   c) Charter of Rights and Freedoms.

   d) Provincial Human Rights Legislation.

4. a) Yes, this is likely systemic discrimination.

   This question could be used for, and in all probability will give rise to, a variety of discussions and opinions by the students. It will probably be necessary to

guide the discussions to look at the consequences of the actions and not the intentions of the employer. It is the result caused by the employer's action, indicating that the system has gone wrong, and resulting in systemic discrimination, not the intentions of the employer, that is critical for the students to grasp to answer this question.

5. a) Firstly, the division of powers under the constitution. The regulation of Trade and Commerce is an exclusive federal jurisdiction under s. 91.2. Secondly, the Charter s. 2(d), as advertising is a form of expression, but it may be reasonable to limit the expression under s. 1.

   b) The Irwin Toy case is a precedent for upholding the Charter issue. The bottom line, however, is that because it is *ultra vires* the province, the legislation would be ineffective under s. 91.2.

   c) The employees may have a remedy under human rights legislation. There cannot be discrimination in hiring, so there is a very strong argument that there cannot be discrimination in firing. The authors know of no case on point.

6. a) He can claim that he was discriminated against because of his age under the relevant provincial human rights legislation and ask the court to give him back his job or award him damages for his firing. He can claim that the company should have provided adequate training for him or found a position for him that he could have done within the company.

   b) The company will claim that he was not fired due to his age but that he was incompetent at his job so it was a just cause termination and he is not entitled to get his job back nor any financial award.

   c) It is a difficult case to predict, though one that will become more common as many people find they cannot afford to retire. The company may have to prove that it had tried to adequately train him or offered him other positions, and if so it is a just cause dismissal. If the company had not taken those actions he could succeed in his claim. The court may be more willing to award him damages though then give him back his job at that age.

Chapter 2

The Canadian Court System

Section 1 Answers to Business Law—Applied Questions

1. a) The basic limitation period is two years.

   b) It expired May 31, 2016

   c) Yes, the letter requesting time to pay was an acknowledgment of the debt, which started the limitation to run from its date, August 1, 2014 expiring July 31, 2016. So, Vsahman's lawsuit will not be barred by the expiry of the limitation period.

2. a) Ukani could waive the excess of the claim, the $7,000 that it is over the $25,000 small claims court limit, and then sue in small claims court for just $25,000.

3. a) Pushkov can ask the Small Claims Court to bring Al in for a Judgment Debtor Examination. There is a standard form given by the Small Claims Court that a creditor has to fill in. The Small Claims Court will then issue and serve a summon on Al who must attend at the date and time stated. A Small Claims Court Judge usually does the questioning and will ask Al where his bank accounts are located.

   b) If Al fails to appear, it is contempt of court and he can be arrested. This is frequently done. The reluctant debtor is usually held only overnight and is released upon a promise to attend for the next appointment.

4. a) Any patient has the right to sue on their own but if two or more want to form a class action, they can possibly sue as a class.

   b) If they want to sue as a class, they would have to select a representative plaintiff and then apply to the court for certification. They would have to show the court that the class is clearly defined, there are common issues to every class member, the representative plaintiff represents the interests of the entire class, and each case does not have to be litigated on its own and the advantages outweigh the disadvantages.

   c) The advantage is that they can share legal costs, there is power in numbers, and if they get certified, there is a very high chance that they will settle and not go to trial. The disadvantage is that the court may think that each patient should have their case litigated separately. If they do have a class action, the lawyers will take a large amount of the damage awards and it may take a very long time to settle the case.

Section 2 Answers to Closing Questions

1. Government-made law governs. Government-made law is passed by a statute. Often, statutes are used to change or modify a common law principle developed by judges.
2. The stages of a lawsuit are shown in the flow chart by that name in the text.

   They are: pleadings; exchange of relevant documents; examination for discovery; pre-trial conference; trial, judgment; and appeal.
3. A trial court hears evidence given by live witnesses. It is a court of first instance in that the judge makes findings of fact and law for the first time. An appellate court rarely hears live witnesses. The appeal is usually on the transcript of the trial and is in that sense confined to a review of the judge's findings of fact and law.
4. The standard of proof in a criminal proceeding is beyond a reasonable doubt. In a civil proceeding, it is on a balance of probabilities.
5. a) i) Statement of claim
      ii) Statement of defense
      iii) Counterclaim
      iv) Third-party claim

   b) A statement of claim sets out in brief form the plaintiff's complaint against the defendant. The statement of defense sets out the defendant's response to the allegations in the statement of claim. At this point, each party's case is before the court in a very brief form.

      If the defendant has a claim against the plaintiff, the defendant will make that complaint in a form of a counterclaim.

      If the defendant believes that someone who is not a party to the action has responsibility to the plaintiff, either completely or in part, the defendant can sue that stranger by way of third party proceedings and have the defendant's claim against that stranger filed at the same time as the plaintiff's claim (main action).
6. A barrister is a trial lawyer; a solicitor does legal work that does not involve going to court such as real estate or corporate law. An attorney is used in Canada to describe an agent that has authority to sign a person's name such as by Power of Attorney. It is sometimes used for a government representative such as the Attorney General of Canada. In the U.S., it is a synonym for lawyer.
7. a) Mediation is a process where the parties and their lawyers meet with a mediator. The mediator tries to find ways to have the parties come to an agreement. The mediator can make no findings or force any result on the parties. Arbitration is similar to a trial. The arbitrator(s) is chosen by the parties. But once the arbitrator is chosen, that individual acts like a judge and makes the finding that is binding on the parties and which will be enforced like a court order under the Arbitrations Act.

   b) Mediation differs from a trial in that the mediator makes no findings and tries only to get agreement between the parties. Arbitration differs from a trial mainly in that the parties can choose the arbitrator. Sometimes arbitration is a little more informal concerning the admissibility of evidence, but it is similar to a trial in that the arbitrator can make a final binding judgment.

8.

	Choices	**Correct Answer**
Trial lawyer	Binding precedent	Barrister
Stare decisis	Mediation	Binding precedent
Alternative Dispute Resolution	Statement of defense	Mediation
Certification	Barrister	Approval
Pleading	Approval	Statement of Defense

9. No, it is not excluded because it is wrong, it is excluded because the form, that is repetition by a person testifying who was not present at the event, is considered unreliable.

10. a) Yes, Morgan can have the court (sheriff) seize the car and sell it at an auction to pay his judgment.

    b) No, the chattel mortgage will be paid off first, followed by sheriff's fees, bailiff's fees, and auctioneer's fees before Morgan sees anything other than fees.

11. This exercise is based on loan scams. Students are frequent victims of these loan brokers. You might ask students for their personal experience with loan brokers. We have found that almost every class has a student who has been taken by them. Some have been taken twice, so that it is a very pertinent matter to discuss. While it has to be stressed that there is no requirement of following a specific format in the small claims court, here is an example claim that follows the structure of a formal pleading, but is in simple language. The sample pleading follows the suggest outline above and has corresponding paragraph numbers.

    1. On July 15, 1997, I applied for a loan of $5,000.00 from Sure Finance Inc. and it agreed to give me the loan.
    2. I paid a $500.00 deposit on July 15, 1997, on the agreement that the deposit would be refunded if the loan was not given to me.
    3. Sure Finance Inc. did not give me the loan and refused to return the $500.00 deposit.
    4. I therefore claim:
       a) damages in the amount of $500.00,
       b) interest on $500.00, and
       c) costs, including GST, if any.

    Please note that the above pleading has ignored any consequential damage claim. Additionally, we suggest that students should be encouraged to look at the precedents given to serve as models.

    Loan broker frauds have become such a problem that Ontario introduced legislation to prohibit loan brokers from taking up-front deposits. This has not prevented them from continuing to operate in that province, so a warning to students is important.

12. This question requires doing a report and has no answer.

13. a) The negligent act was done when the report was made, June 1, 2013.

b) The basic limitation period expires in two years, May 30, 2015.

c) Yes, discoverability. An ordinary businessperson would not know if the appraisal was done negligently and would not be put on notice to inquire. Even the low value suggested by a real estate agent at listing may be due to market price fluctuations.

d) The discovery date is likely when the real estate agent said the low price was possibly due to negligence. That time may be viewed as unfair because most businesspeople would not, on an informal opinion, seek legal advice (an expense) or realize the necessity of getting an expert opinion from an appraiser (another expense) to confirm and issue a statement of claim with-in the limitation period. However, it is important for a business student to realize that they must take action immediately. Limitation periods are enforced somewhat "mercilessly" and they should not take the risk if a limitation period is involved.

Small Claims Court Sample Form and Sample Drafting Assignment

Below is a sample assignment that can use involving drafting of a small claims court assignment. A blank small claims court form is included and they are also available on all of the provincial small claims court websites. The forms are changed frequently and so no form on the websites will be identical to the example in the text.

SMALL CLAIMS COURT ASSIGNMENT

Due Date:

On December 3rd, 2013 Carol and John "Jack" Allen Brown, of Toronto, arranged for Susan Jones of Mississauga to be a surrogate mother for them by artificial insemination using John's sperm for the sum of $50,000; $20,000 paid at the time of the insemination and $30,000 on delivery of the baby. The insemination was performed and the $20,000 paid on December 10, 2013.

However, Carol became pregnant on June 1st, 2014, one month before the child was born, and the couple told Susan that same day they did not want the child and refused to pay the further $30,000.

1. Draft a Statement of Claim for Susan's claim against the couple in the proper form for the Small Claims Court. The form must be filled in completely. The claim is only for the balance of the unpaid amount and need not take into account any other possible claims such as the cost of raising the child, etc.
2. Draft the Statement of Defense for Carol and John Brown.

You can assume any further facts that you think are required.

This assignment is due on or before:

Note to Instructors. The dates can be updated, or left to add a limitation period defence

SUGGESTED MARKING SCHEME FOR ASSIGNMENT

Claim
Fill-in names and address of Plaintiff (1 mark); 2 defendants (1 mark)
Jurisdiction–How Much? $25,000, depending on province (2 marks)
Prepared on (1 mark)

Total 5 marks

Marks within body of claim noted within total 10 marks

Total 15 marks

Defence
Fill in the boxes (1 mark)
Fill-in: Defense filed on behalf of John Allen Brown and Carol Brown (1 mark)
Pleading of statutory illegality as noted in the body of defense (3 marks)

Answer 1--Filled In **Claim** Form with Marking Scheme

Small Claims Court
Cour de justice

Plaintiff's Claim
Demande du demandeur
Form / *Formule* 7A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Capital City
Small Claims Court / *Cour des petites créances de*

Claim No. / *N° de la demande*

Seal / *Sceau*

47 Sheppard Ave East
Address / *Adresse*

616-326-3554
Phone number / *Numéro de téléphone*

Plaintiff No. 1 / ***Demandeur n° 1***

☐ Additional plaintiff(s) listed on attached Form 1A.
Le ou les demandeurs additionnels sont mentionnés sur la formule 1A ci-jointe.

☐ Under 18 years of age.
Moins de 18 ans.

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
Jones		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Susan		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
123 Acme Street		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Mississauga	**Any Province**	**616 905. 9059**
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
L6M 8N9		**616 905.9057**
Representative / *Représentant(e)*		
N/A		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

Defendant No. 1 / ***Défendeur n° 1***

☐ Additional defendant(s) listed on attached Form 1A.
Le ou les défendeurs additionnels sont mentionnés sur la formule 1A ci-jointe.

☐ Under 18 years of age.
Moins de 18 ans.

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
Brown		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
John	**Allen**	**Jack**
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
456 Main Street		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Toronto	**Any Province**	**616 416.4166**
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
M7G N8B		**416 416.4167**
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
N/A		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		

(*Continued*)

PAGE 1A

Small Claims Court
Cour supérieure de justice

Additional Parties
Parties additionnelles
Form / *Formule* 1A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Claim No. / *N° de la demande*

☐ **Plaintiff No. /** ***Demandeur n°***

☒ **Defendant No. /** ***Défendeur n°*** **2**

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Brown**		
First name / *Premier prénom* **Carol**	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **456 Main Street**		
City/Town / *Cité/ville* **Capital City**	Province **Any Province**	Phone no. / *N° de téléphone* **616 416.4166**
Postal code / *Code postal* **M7G N8B**		Fax no. / *N° de télécopieur* **616 416.467**
Representative / *Représentant(e)* **N/A**		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

☐ **Plaintiff No. /** ***Demandeur n°***

☐ **Defendant No. /** ***Défendeur n°***

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

☐ **Plaintiff No. /** ***Demandeur n°***

☐ **Defendant No. /** ***Défendeur n°***

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		

FORM / *FORMULE* 7A **PAGE 3**

Claim No. / *N° de la demande*

How much? $ **25,000.00**
Combien? (Principal amount claimed / *Somme demandée*) *$*

X☐ **ADDITIONAL PAGES ARE ATTACHED BECAUSE MORE ROOM WAS NEEDED.**
DES FEUILLES SUPPLÉMENTAIRES SONT ANNEXÉES EN RAISON DU MANQUE D'ESPACE.

The plaintiff also claims pre-judgment interest from **June 1, 2011** (Date) **under:**
Le demandeur demande aussi des intérêts antérieurs au jugement de ***conformément à :***

(Check only one box / Cochez une seule case*)*

X
☐ **the *Courts of Justice Act***
***la* Loi sur les tribunaux judiciaires**

☐ **an agreement at the rate of** _____ **% per year**
un accord au taux de ***% par an***

and post-judgment interest, and court costs.
et des intérêts postérieurs au jugement, ainsi que les dépens.

Prepared on: **March 2** , 20 **14**
Fait le :

(Signature of plaintiff or representative / *Signature du demandeur/de la demanderesse ou du/de la représentant(e)*)

Issued on: _____ , 20 ____
Délivré le :

(Signature of clerk / *Signature du greffier*)

CAUTION TO DEFENDANT:	**IF YOU DO NOT FILE A DEFENCE** (Form 9A) with the court within twenty (20) calendar days after you have been served with this Plaintiff's Claim, judgment may be obtained without notice and enforced against you. Forms and self-help materials are available at the Small Claims Court and on the following website: www.ontariocourtforms.on.ca.
AVERTISSEMENT AU DÉFENDEUR :	***SI VOUS NE DÉPOSEZ PAS DE DÉFENSE*** *(formule 9A) auprès du tribunal au plus tard vingt (20) jours civils après avoir reçu signification de la présente demande du demandeur, un jugement peut être obtenu sans préavis et être exécuté contre vous. Vous pouvez obtenir les formules et la documentation à l'usage du client à la Cour des petites créances et sur le site Web suivant : www.ontariocourtforms.on.ca.*

Schedule "A"

1. On December 3, 2013 the Plaintiff agreed/contracted with the Defendants to be a surrogate mother for them. (2 marks)
2. The relevant terms of the agreement/contract were:
   a) the Plaintiff agreed to be inseminated with sperm provided by the Defendant John Allen Brown (2 marks)
   b) the Defendants agreed to pay the Plaintiff $50,000 for the service; $20,000 on insemination and $30,000 on delivery of the baby. (2 marks)
3. The Plaintiff performed the contract, was inseminated and gave birth to a baby from this insemination. (2 marks)
4. The Defendants paid the $20,000 on insemination but breached the contract in that they refused to accept the baby and pay the balance of the amount owing of $30,000. That sum of $30,000 is now owed to the Plaintiff. (2 marks)

Total for Schedule "A" — 10 marks

Answer 2 –filled in **Defence** form with marking scheme attached.

Small Claims Court

Defence / *Défense*

Form / *Formule* 9A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Capital City — Small Claims Court / *Cour des petites créances de*

1234567 — Claim No. / *N° de la demande*

47 Sheppard East

Address / *Adresse*

616.326.3554

Phone number / *Numéro de téléphone*

Plaintiff No. 1 / *Demandeur n° 1*

☐ Additional plaintiff(s) listed on attached Form 1A. *Le ou les demandeurs additionnels sont mentionnés sur la formule 1A ci-jointe.*

☐ Under 18 years of age. *Moins de 18 ans.*

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Jones**		
First name / *Premier prénom* **Susan**	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **123 Acme Street**		
City/Town / *Cité/ville* **Capital City**	Province **New Province**	Phone no. / *N° de téléphone* **616.905.9059**
Postal code / *Code postal* **L6M 8N9**		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)* **N/A**		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

Defendant No. 1 / *Défendeur n° 1*

x ☐ Additional defendant(s) listed on attached Form 1A. *Le ou les défendeurs additionnels sont mentionnés sur la formule 1A ci-jointe.*

☐ Under 18 years of age. *Moins de 18 ans.*

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Brown**		
John	Second name / *Deuxième prénom* **Allen**	Also known as / *Également connu(e) sous le nom de* **Jack**
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **456 Main Street**		
City/Town / *Cité/ville* **Capital City**	Province **Any Province**	Phone no. / *N° de téléphone* **616.416.4146**
Postal code / *Code postal* **M7G N8B**		Fax no. / *N° de télécopieur* **616.416.4167**
Representative / *Représentant(e)* **N/A**		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

(*Continued*)

FORM / *FORMULE* 9A **PAGE 2**

Claim No. / *N° de la demande*

THIS DEFENCE IS BEING FILED ON BEHALF OF:
LA PRÉSENTE DÉFENSE EST DÉPOSÉE AU NOM DE : *(Nom du/de la ou des défendeur(s)/défenderesse(s))*

John Allen Brown and Carol Brown

and I/we: (Check as many as apply)
et je/nous : (Cochez la ou les cases qui s'appliquent)

X☐ Dispute the claim made against me/us.
conteste/contestons la demande présentée contre moi/nous.

☐ Admit the full claim and propose the following terms of payment:
reconnais/reconnaissons être redevable(s) de la totalité de la demande et propose/proposons les modalités de paiement suivantes :

$ _____ per _____ commencing _____ , 20 ____ .
(Amount / *Montant*) *$ par* (Week/month / *semaine/mois*) *à compter du*

☐ Admit part of the claim in the amount of $ _____ and propose the following terms of payment:
reconnais/reconnaissons être redevable(s) d'une partie de la demande, soit (Amount / *Montant*) *$ et propose/proposons les modalités de paiement suivantes :*

$ _____ per _____ commencing _____ , 20 ____ .
(Amount / *Montant*) *$ par* (Week/month / *semaine/mois*) *à compter du*

REASONS FOR DISPUTING THE CLAIM AND DETAILS:
MOTIFS DE CONTESTATION DE LA DEMANDE ET PRÉCISIONS :

Explain what happened, including where and when. Explain why you do not agree with the claim made against you.
Expliquez ce qui s'est passé, en précisant où et quand. Expliquez pourquoi vous contestez la demande présentée contre vous.

If you are relying on any documents, you **MUST** attach copies to the Defence. If evidence is lost or unavailable, you **MUST** explain why it is not attached.
*Si vous vous appuyez sur des documents, vous **DEVEZ** en annexer des copies à la défense. Si une preuve est perdue ou n'est pas disponible, vous **DEVEZ** expliquer pourquoi elle n'est pas annexée.*

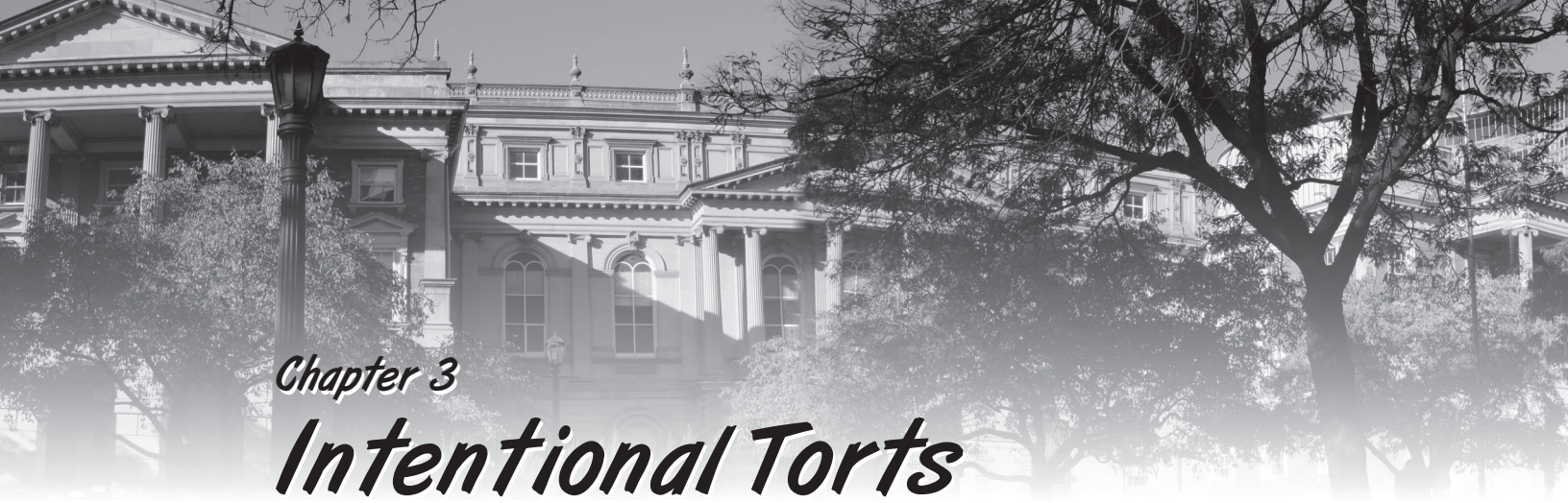
What happened?
Where?
When?
Que s'est-il passé?
Où?
Quand?

1. The Defendants admit the allegations in paragraphs 1 through 5 of the Claim

2. The Defendants deny any amount is owing to the Plaintiff because the agreement is illegal at common law and by statute. The Defendants rely on The Assisted Human Reproduction Act.

[Marking: mention illegality (1 Mark), statute (1 Mark), Assisted Human Reproduction Act (1 Mark. Total 3 marks]

3. The Defendants ask that the Claim be dismissed with costs.



Chapter 3

Intentional Torts

Section 1 Answers to Business Law—Applied Questions

1. a) There was no proof that a crime was committed. Therefore, there would be no justification for holding Wishart.

2. a) There was proof that a crime was committed, and it was reasonable to believe Wilfred had done it. Based on similar case law, Wilfred likely does not have a case.

3. a) The bouncer is correct. The public has no right to enter a business. A business is private property. The business gives the public a licence to enter but can withdraw that licence for any reason. There is no right to enter a bar just because a person is 21.

4. a) He cannot restrain her from picketing in front of a business—that is not a nuisance.

   b) A YouTube video has nothing to do with the use of property and hence it is not a nuisance.

   c) Picketing a private residence is a nuisance as an invasion of a residential privacy which is an incident of the use of residential land.

5. a) This question is drafted to emphasize that a business is private property and that the owner gives people a licence to come onto the premises for the purpose of doing business. Comparative shopping by a competitor is not in accordance with the licence and so Chaytor was a trespasser from the beginning.

   b) According to the civil law alone, the business would not have had a right to detain Chaytor, but simply to ask him to leave, then use reasonable force to evict him if required. The words "watch these people" implied that Chaytor and his colleague were being detained by the security guards.

   c) "You must come with us," spoken by a police officer is sufficient to be a constraint. If the person did not go with the police officer, the police officer would very likely use physical restraint. (*Chaytor et al. v. London, New York and Paris Association of Fashion Ltd. and Price, 1961 30 D.L.R. (2d), 527 (Nfld. S.C.)*) The plaintiffs sued only the manager and the business, not the police, and were awarded damages for false imprisonment.

6. a) Because it is written, the defamatory statement is libel.

   b) Since it was on display, there is a good argument that it was publication as it was communicated to passers-by.

   c) Because this statement is written, actual monetary loss is not required. If the statement had been oral (slander), of course, actual monetary loss would have been required before an action could have been brought.

7. a) The statement is slander.

   b) The statement was not communicated to a third party and it did not result in actual monetary loss.

   c) The statement is slander.

   d) There is still no monetary loss; so, Nowark cannot bring an action against Youssoff. The statement has been communicated.

   e) There is still no actual monetary loss. However, this is a statement about a person in respect of profession or calling and is actionable without proof of actual loss.

      This question also foreshadows defenses dealt with next. If Youssoff felt that he had a duty to tell his boss because Nowark was incompetent and could back-up the opinion, Youssoff would have the defenses of qualified privilege. However, if Youssoff did this out of spite, that would be malice and the defenses of qualified privilege would not apply. You might want to revisit this question after the defenses have been covered.

8. a) The author could rely on truth and the publisher could do the same. The library, however, could rely on innocent dissemination even if the statements were untrue. Some students will have difficulty grasping that the privilege defenses apply when the statement is false.

9. a) No, because a statement in court is absolutely privileged.

   b) No, the boy cannot be sued for defamation because there is an absolute privilege for statements made in court.

   c) No, there would be no defense. The statement is given to be untrue in the question. This is an obvious allusion to the Michael Jackson situation. The class will be divided as to whether they believe the allegations in the Michael Jackson case to be true or not. However, in the fact situation as given, the readers are to assume the allegations untrue to answer the question. A defense such as qualified privilege would not apply here because the boy is not reporting it to an authority such as the police who have a duty to investigate.

   d) The newspaper has a privilege defense. Since the statement was made in court, the newspaper can report it. While technically the newspaper's privilege is called a qualified privilege, this term was not mentioned in the text as an unnecessary detail. It was felt that it was sufficient to outline absolute privilege for court matters. The newspaper also has special media defenses that are outlined in the text that may apply depending on assumptions.

10. a) The parking of the car outside the dealership could be unlawful interference with business, economic relations. The painting of the car and the sign "purchased at Fred's Car Dealer" could also be injurious falsehood.

b) Truth is a defence to unlawful interference. It is generally accepted that if a car repeatedly needs repairs over a lengthy period of time, it is a "lemon." For injurious falsehood, there is also a defence of truth.

11. a) She would have the defense of truth if she could establish that the software was in fact effective. However, if the problem was caused by her not being able to use it correctly, she might not have any defense. However, businesses often do not want to take the risk of adverse publicity by way of a YouTube video going viral. A good example is a criticism of United Airlines baggage handling in the video that got wide attention "United Breaks Guitars".

b) Because she had created the web-site, she would be jointly responsible with anyone who had posted messages. She and the persons who posted would have the defense of truth if the contents were true, but no other relevant defense.

12. a) It is difficult to determine—perhaps breach of contract, defamation. The class discussion needs to attempt to define what unlawful acts are.

b) A possible suit for unlawful interference with business relationship, if they can show some unlawful means.

Section 2 Answers to Closing Questions

1. a) Conversion.

b) No, though they can be liable for negligent supervision.

c) No, and the YOA is of no impact because it is criminal law.

d) Petty Trespass Act.

2. The discussion should include the practical difficulties of running a business versus personal freedom concerns.

3. a) The tort of defamation.

4. a) The intentional tort of assault and battery has been committed by Greyson on Frank DeValeriote. Students may also identify an unintentional tort based on negligence because of Greyson's actions and Mrs. DeValeriote's third degree burns from the dropped cup of coffee.

b) Provocation would not act as an absolute defense for Greyson. At best, it would help to reduce the damages he would have to pay if found liable. It is unlikely that provocation would be available given the fact situation in which the obscene words and Frank's refusal to move occurred.

This fact situation can be used to explore the nature of intentional and unintentional torts using the two individuals, Frank DeValeriote and Marsha DeValeriote. In discussing the unintentional tort involving Marsha, the concept of remoteness of injury and the plaintiff's ability to recover could be raised.

5. a) The necessary elements for an action based on defamation are present as it is an untrue statement that causes harm to the reputation of the individual, and that false statement has been communicated to a third party. The damage suffered might be the loss of job opportunity if it can be shown that she was turned down for the

position applied for as a result of the comments made by the previous employer. Even if no actual monetary loss can be proven, the statement made might fall within the exception relating to statements that a party has committed a crime.

b) On the assumption that the employer was not aware that the real thief had been caught, the employer might argue the defense of qualified privilege. The statement was made out of a duty to respond to the inquiry made by the potential employer of the young woman, and it was made without malice or for any improper purpose.

The fact situation is unclear as to whether the former employer was aware of the real thief having been caught or whether the discussion with the potential employer had taken place prior to the real thief being determined. This uncertainty can be used to explore the nature of the defenses, which may or may not be available.

6. a) The police officers' remedy would be an action based on malicious prosecution. They appear to meet the four criteria required to be successful. However, there may not be a great deal of financial advantage in bringing an action against a person charged with armed robbery.

7. a) Sun Yat would have the remedy of an action for false imprisonment. Students should discuss the nature of the restraint imposed on Sun Yat by the manager of the store. The students could be asked to act as a jury to give their opinion by writing it without discussing with others as to how much should be paid in compensation. There may be an initial reaction that they can't do it, but after insisting that they give a number in confidence, there may be a consensus in the class with some interesting divergent opinions when the numbers are disclosed. Juries are always faced with this problem of coming up with a number in such cases. It is purely subjective, but there is often a consensus.

b) There is no defense of reasonable grounds or honest mistake.

The question presents an opportunity to review the principles of intentional torts, in particular the intentional tort of false imprisonment. As well, it is an opportunity to discuss the concept of remoteness of damage when injury has occurred.

8. a) Elliot would bring an action for the intentional tort of conversion.

Conversion is very much a business-related tort and this very broad example of the tort of conversion could serve as a starting point for further examples which are more specifically business-oriented. For example, a customer obtaining goods under false pretences by deliberately using checks which will not be honored at the bank.

9. a) The statements concerning the cook would be dealt with under defamation. The statements about using leftovers in hamburgers fall in the tort of injurious falsehood.

b) The neighboring chef would be successful in a court action for injurious falsehood as Kirk's actions are not of the same nature as those of a consumer group seeking to protect consumers at large. The comment about the cook's abilities has been qualified with the words "in my opinion," and would not have the quality required of a statement of fact which is false.

10. a) The framers of the law wanted to discourage lawsuits for slander, so the restriction of monetary loss was created. There is an often-repeated quote from an old slander case: The best defense for slander is a thick skin.

b) An underlying principle may be permanence. One of the aspects of libel being in printed form is its permanence, which results in it being more likely to be seen by more people. This principle may help to distinguish between less permanent expressions on the Internet, such as in chat rooms, and more permanent ones such as web-sites. The mid-category of bulletin boards is problematic.

11. a) The research may yield any number of facts. Here is a summary: **Wayne Crookes** is a Vancouver businessman and former Green Party organizer. In 2006, he filed a lawsuit against several blogs for alleged defamatory postings. In 2007, he expanded his lawsuits to include Yahoo, Google, PBwiki, and Wikimedia, some of the largest websites on the Internet, charging that they allowed anonymous users to post (what he called) defamatory content [1]. He also sued Michael Geist, a prominent legal scholar active in many Internet-related causes in Canada, after Geist published a column warning of grave implications for freedom of speech were Crookes to prevail [2]. Crookes also sued other known activists on similar causes, giving rise to the accusation that his lawsuits were so-called SLAPP lawsuits to silence critics who engaged him on public issues, rather than to recover actual damages he suffered. He even sued a domain name registrar for respecting the confidentiality of a domain holder. The suits immediately triggered a flood of negative publicity still visible on the net.

In October 2008, the BC Supreme Court ruled against Crookes in one defamation lawsuit he filed against p2pnet.net, because the site hyperlinked to unfavorable articles about him. The judge ruled that while "a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site" [3]. This decision may have set national precedent regarding file sharing, influencing the legal strategies involving Bit Torrent, as file sharing programs exchange links to materials rather than the materials themselves.

Several other lawsuits remained active as of March 2009. After the ruling, several persons targeted in them outlined other legal precedents they expected would be set in the resolution of the remaining cases he had filed [1] including political freedom of speech and anonymity rights, and other legal issues relevant to the operation of large public wikis debating public issues, including whether such services can exist at all or be used by any Canadian.

b) Repetition of a defamatory statement is defamatory. Telling to even one person such as a teacher is publication. There is no educational purpose exception such as in copyright. Technically, the repetition, assuming a defamatory statement, could be actionable against the student. Of course, that is highly technical reasoning and would never result in an action. None of the standard defenses apply.

12. **Pro:** The general principle is that repetition of libel is libel. Newspapers are responsible for repeating a libelous story. The search results page will show an excerpt of the libel. A Google search contains more than just a name but is directed also by content which contains the libelous allegation. A telephone directory gives only a name and an address. Also a person can opt out of the telephone directory for confidentiality reasons.

Contra: Google is not repeating the story, merely directing to it like a telephone directory. It does not affirm the truth of the contents of the website. The better analogy is likely to website linking without an affirmation of the truth. The case of *Crookes v Wikimedia* is a precedent that supports this argument.

Making Google liable could put a high burden on Google. It could never carry any results linking to, say, the National Enquirer.

A new provision in the common law of libel might be necessitated by this new technology. Analogous to a newspaper notice, perhaps the wronged person would have to give Google a notice of the alleged libel and an opportunity to make certain that the search results did not go to any website that contained the libelous statement, which would be similar to the notice and take down procedure used in US copyright law.

The question has yet to be determined.

13. This is an exercise to examine how the case law might be developed referencing the values and principles in the existing law. There may be many other respectable opinions.

    i) **The issue:** First the issue must be stated: When should a webmaster/blogger be responsible for a defamatory statement posted by a user?

    ii) **Analogy:** A review of the existing defenses suggests that a close analogy is Innocent Dissemination, a defense that is often used to protect librarians who may be offering books to the public that contain libelous statements, but do not know of the statements.

    iii) **Similarity:** A similarity between librarians and webmasters would be that they would not know the detailed content of every posting or link just as a librarian would not know the content on every page of every book in the library.

    iv) **Differences:** Librarians are not expected to read every book in the library; however, websites often have moderators and even options for users to bring objectionable content to the webmaster's attention. When a website allows a post, it impliedly approves of the content and must be taken to have at least scanned the contents.

    v) **Proposal:** A possible solution here might be, by analogy to the Libel and Slander Act relating to newspapers and broadcasters, that the webmaster be given notice and a short period of time to take down and publish either a retraction or a disclaimer; alternatively, the more neutral notice, and takedown of the US copyright law could be adopted.

14. a) Stewart can sue John for breach of confidence as he had told him information that was confidential and John is liable for misuse of the confidential information. John used it for his own benefit and the detriment of Stewart.

    b) John can claim that there was no contract or joint venture so he is not bound by their discussions to develop the property together. But given the confidential nature of the information Stewart shared, he has no defense to the breach of confidence claim by Stewart. The court made John divide proceeds of this development on the original 30 percent to Stewart and 70 percent to John. See case *Walter Stewart Realty Ltd. v. Traber*, 1995 ABCA 307 (CanLII)

15. a) Kevin can sue Company M for wrongful dismissal. The company had no right to fire him. Kevin can also sue cable Company C for inducing breach of contract. You may think that he could also sue company C for intentional interference with economic relations; however, the court in this case took a strict view of that tort and ruled that C had not used any "unlawful means" to have Kevin fired, just a policy it had to exclude certain workers, so since that element of Unlawful means was absent, it was

not liable for the tort, intentional interference with economic relations. He was only awarded damages for his claim against company C for inducing breach of contract.

b) Kevin was awarded damages for the lost income that he suffered during his periods of unemployment and the difference in wages made at his new position compared to his income as a cable installer. See case: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 (CanLII).

16. a) Steve can claim breach of contract because he had bought the exclusive right to sell water and the beer company and Ron had let others sell water and forced Steve to give away much of his water for free. He could also succeed in a claim for intentional interference with economic relations.

b) The court would rule that there was clearly a breach of contract as Steve had been given the exclusive right to sell water, but others were allowed to sell water as well. The claim for intentional interference with economic interests should also succeed. The beer company and Ron had committed unlawful conduct that was directed at Steve, it was done intentionally to hurt Steve and resulted in provable economic losses. Ron was liable for the lost profits in contract law, for tort damages for intentional interference and punitive damages. (See case *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570 (CanLII)

Chapter 4
Negligence

Section I Answers to Business Law—Applied Questions

1. a) The test the courts will apply is reasonable foreseeability to establish whether Seel owed a duty to Kuz. Reasonable foreseeability is a question of fact, not of law. Opinions will vary. Another way of asking the test of reasonable foreseeability is whether the event was surprising or unexpected. In jurisdictions where there is jury, this would be a question for the jury. You could take a vote of the class and see if there is any consensus as to whether the presence of Kuz was reasonably foreseeable. There is no absolute answer. This finding will vary with the judge or jury.

   In spite of the word formula, there is a tendency by courts to increase liability. This is particularly so when a judge is making a decision, as a judge will assume there is insurance.

   b) If the presence of Kuz is foreseeable, then the type of injury, i.e., burning, is foreseeable. This question foreshadows the discussion of limitation because of the unexpected type of injury later.

2. a) Again, this calls for the application of reasonable foreseeability. Since the other driver was driving illegally, that may be a factor that makes the second driver unforeseeable. However, this will be a matter of opinion.

   b) If the second driver was foreseeable, then it was foreseeable that the driver would have a family. In *Oke v. Weide Transport Ltd., (1963) 41 D.L.R. (2d) 53 (Man. C.A.)*, the court held that this was a freakish accident and that the defendant could not have anticipated that someone would endeavor to pass a car when it was wrong to do so.

3. a) The court would apply the test of reasonable foreseeability. Was it reasonably foreseeable that a child would go to the back of a gas station? Our answer is yes.

   b) The court would apply the test of what a reasonable person would have done, knowing that a child might go wandering to the back of the gas station.

c) This is a question of fact, not of law. The finding of a court in any particular circumstance is not a binding precedent but is, of course, a guideline. You can use this situation to have the class assume that it is a jury and ask it what they think a reasonable person would have done. There will likely be a consensus that there should have been a fence put around the cesspool and that the fence should be at least eight feet high. You can point out that this is how the jury system works. There is a consensus about certain standards of care. Most will agree that a warning sign or a low fence would not be sufficient.

4. a) This, again, is a question of fact. There will likely be some division of opinion on this. The argument for the contractor would be that it was good for 25 years and also that the owner got a lower price. The cold spell was a freak and hadn't happened for 50 years. Contractors don't look at weather records back 50 years but judge by their own lifetime experience. The homeowner's argument is given in the next question.

   b) The homeowner would argue that freak cold spells were known and therefore reasonably foreseeable, even if only every 50 years.

5. a) Kwan will not be successful because she was the one who was inattentive and caused the accident.

      i) Linden owed a duty to Kwan because it was foreseeable that any lack of care on Linden's part might involve hitting another driver on the road.

      ii) Linden was probably in breach of the standard of care by driving when he had been pronounced unfit to drive because of previous careless acts. It is arguable that on this day, however, he did nothing wrong and so was not in breach of any standard. He was driving within the speed limit on his side of the road. It was Kwan who was careless.

      iii) No, Linden did nothing to cause the accident.

   b) Linden will probably be successful in suing Kwan.

      i) Kwan owed him a duty of care because it was foreseeable that her actions might injure another driver on the road.

      ii) Kwan breached the standard of care because her mind wandered.

      iii) Kwan caused the accident because her car crossed over the center of the road into Lindens' lane.

   c) Even though Linden might very well escape an action based on negligence because his action did not cause the damage, he would still be subject to prosecution under the criminal law for driving while his licence was under suspension. Students may feel strongly that because he was driving without a licence, he should be fully responsible for all the loss. However, his conduct at the time was not the cause of the loss. That important element of causation was missing and so Linden was not negligent even though he broke the law.

   d) Kwan did not breach the standard of care even though she caused the accident. Keeping the windows rolled down would not be a breach of standard practice in driving. See case *Sinclaire v. Nyehold*, [1972] 5 W.W.R. 461 (B.C.C.A.).

6. a) The court would ask whether the damage to the school was reasonably foreseeable. In the reported case, the court did find that damage to the school should have been reasonably foreseen by the boy. (Hoffer *v. School Division of Assiniboyne South, [1973] W.W.R., 765 (S.C.C.)*). The father was also held liable for failure to supervise.

b) The court held that it was reasonably foreseeable by the gas company that if they left a defective pipe in front of the school window, an accident could happen, causing gas to escape into the school. So, it was held partly responsible along with the father and son.

7. a) In terms of causation, the ship captain's actions did cause a change of events that lead to the death of the patient.

   b) This question draws the students' attention to the fact that the chain of causation alone is not enough. The courts don't make the defendant liable for all acts in the chain of causation, but draw the line. In the text, we have suggested the test of reasonable foreseeability. Of course, this test is only one of several that have been used by the courts, others being: possibility; real risk; proximate cause; or direct cause. All of these word formulas have been found to be inadequate. It is a question of value and it is hard to predict at what point the courts will draw the line. In a U.S. case, the court posed the present situation as hypothetical and said that few judges would impose liability on the ship captain. (*Kinsman No. 1, (1964) 338 F. (2d) 708.*)

8. a) The paralysis was not reasonably foreseeable.

   b) This illustrates the thin skull plaintiff rule, one of the exceptions to the reasonable foreseeability or proximate cause test. The courts say that tortfeasors take their victims as they find them, ". . . it is no answer to the sufferer's claim for damage that he would have suffered less injury or no injury at all if he had not had an unusually thin skull or an unusually weak heart." (*Dulieu v. White & Sons [1901] 2 K.B. 669, at 679.*)

   In the *Oak v. Weide* case, the car that tried to pass illegally and got speared by the sign-post was a Volkswagen Beetle which has no engine in the front. The defendant argued unsuccessfully, on this one basis, that there should be no liability because the plaintiff was driving a "thin-skinned car" and would not have been injured if driving a regular car with an engine in the front.

9. a) No, the spectator would not be successful. The spectator would be taken to have known that a puck can stray into the stands and assume the risk. This is a complete defense. (*Elliott v. Amphitheatre Ltd., [1934] 3 W.W.R. 225 (Man.).*)

10. a) This question focuses on the limits to a spectator's consent. The spectator can be taken to have consented to a stray puck or stick during play, but have they assumed the risks created by improper conduct? The Ontario Court of Appeal held not, and awarded damages to the spectator in this situation against a Toronto Maple Leaf player. (*Payne v. Maple Leaf Gardens et al., [1949] 1 D.L.R. 369 (C.A.).*)

11. a) No, the golfer could not recover from the partner. This is the type of risk that could ordinarily be expected. In respect of golf balls that go astray. One judge quipped, "everyone knows that a golf ball does not always go in exactly the direction intended, in fact, for most people, it rarely does." (*Ratcliffe v. Whitehead, [1933] 3 W.W.R. 447 (Man.).*)

12. a) This, again, demonstrates the limit on assumption of risk. A skier will not be taken to have assumed that a ski resort has failed to mark a dangerous trail and the doctrine of *volenti non fit injuria* will not prevent recovery. The skier did not know that the resort failed to mark dangerous trail. (*Wilson v. Blue Mountain Resorts Ltd., (1974) 4 O.R. (2d) 713.*)

   The courts have decided the above cases on the principle of *volenti*. We suggest that they are really saying that such conduct is not negligent in the sense of not