

QUEEN'S UNIVERSITY

FACULTY OF LAW

LAW 225 – CIVIL PROCEDURE
PROF. C.D. FREEDMAN

FINAL EXAMINATION

April 2014

CONFIDENTIAL

Turn in exam question paper

- INSTRUCTIONS:**
1. This examination is **TWO (2) HOURS** in length.
 2. This is an OPEN BOOK examination.
 3. There are 100 marks available. Each question clearly indicates its value.
 4. Please put your student number on the front of all answer booklets.
 5. **Please write legibly.** If your answer is illegible, it will not be marked.
 6. Your answers need not be lengthy, just complete.

GOOD LUCK!

PLEASE NOTE: "Proctors are unable to respond to queries about the interpretation of exam questions. Do your best to answer exam questions as written."

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PLEASE NOTE:

THIS EXAM CONSISTS OF A FACT PATTERN WITH A NUMBER OF QUESTIONS.

YOUR ANSWERS TO PREVIOUS QUESTIONS ARE NOT RELEVANT TO SUBSEQUENT QUESTIONS - JUST ANSWER BASED ON THE FACTS PRESENTED.

INITIAL FACTS

Returning from a joyous Saturday evening in the Bell Centre on February 12, 2011, Arlo and his fifteen-year old son Hugo crossed the still as un-yet guarded border between Ontario and Quebec. They stopped for gas in Cornwall and took the opportunity to buy something to drink at a somewhat run-down and dead-beat looking convenience store – *Carlyle's Carry-Out*. Arlo and Hugo bought two cans of *Phaneuf Phunny Phizz* (both orange flavoured), returned to their vehicle and headed westward towards the emerald city of Kingston.

After a few minutes on the road, Hugo opened his can of *Phizz* and took a drink. The taste was somewhere between battery acid and marmite – which is to say, extremely unpleasant. The poor child swallowed rather than spit, and a few minutes later began to vomit violently upon his poor and undeserving father. Arlo smartly pulled to the side of the road, comforted the product of his loins as best he could, and then made the worst of the two choices before him – he tasted the open can of *Phizz* himself just to make sure that it hadn't gone bad. He later said that the sensation was like having a large and ill-tempered animal yell into his ear at the same time as swiping him repeatedly across the face with its tail.

Unfortunately for Arlo and Hugo a variety of symptoms persisted through the night. They went to the hospital the next day and were both admitted, but happily the symptoms abated within 12 hours. While the attending doctors were not sure, the general

consensus was that a strong industrial cleaner had been in the can rather than *Phunny Phizz* (orange flavoured). Indeed, the second can purchased from *Carlisle's* still in their possession was later found to contain a strong concentration of a liquid form of *paradichlorbenzene*, most often used in urinal deodorant blocks.

Arlo brought a Statement of Claim on April 15, 2012 on behalf of himself and as the duly appointed Litigation Guardian of his son in the Superior Court in Kingston for negligence and breach of contract. The named defendants were *Carlisle's Carry-Out* of Cornwall, Ontario (the vendor) and *Phunny Fizz Corporation* of Edmonton, Alberta (the manufacturer). Damages were claimed in the amount of \$2M without further particularization.

On September 1, 2012, *Phunny Fizz Corp.* served and filed its Statement of Defence including a crossclaim claim for damages (to its business reputation) of \$1M against *Kessel Kleaning Corporation* of Edmonton, Alberta (who cleaned its manufacturing plant under contract).

On October 1, 2012, the plaintiffs successfully brought a motion to add *Kessel Kleaning Corporation* as a defendant to the main action as well.

Question 1 (15% total):

Kessel Kleaning has brought an application challenging the jurisdiction of the Court in Ontario to determine the litigation rather than having the litigation determined by an Alberta court.

- (a) You are the motions judge. **How do you rule? (10%)**
- (b) The losing party seeks to appeal the judgment on the motion. **What court will hear the appeal and what will be the standard of appeal that the appellate court will use in determining the appeal? (5%)**

Question 2 (10% total):

In the course of investigating their claim in 2011, the plaintiffs' lawyers learned that the manufacturing facility in which *Phunny Phizz* was made had been experiencing trouble between the plant management and the union representing the workers at the time that the cans were filled in 2009. In particular, it was widely believed that a particularly vocal union steward (Karl 'Krazy Killer' Koulton) had been engaging in acts of sabotage to protest the slow course of negotiations. In December, 2013 the plaintiffs brought an Application to amend their Statement of Claim to add Koulton as a defendant.

- (a) You are the motions judge. **How do you rule? (5%)**
- (b) The losing party seeks to appeal the judgment on the motion. **What court will hear the appeal and what will be the standard of appeal that the appellate court will use in determining the appeal? (5%)**

Question 3 (10%):

A medical expert retained by *Kessel Kleaning Corporation* has delivered a report to its lawyers questioning the symptoms reported by the plaintiffs. The expert says that ingestion of a mouthful of *paradichlorbenzene* would certainly be unpleasant, and maybe even act as a mild purgative, but would not cause lasting symptoms beyond five or ten minutes except in the tiniest minority of cases (perhaps 1 chance in 1 billion). The symptoms reported by the plaintiffs appear to be concocted in the view of the expert.

Advise *Kessel Kleaning Corporation*.

Question 4 (10%):

Kessel Kleaning Corporation has recently tendered an offer to settle to the plaintiffs. The terms of the offer would have *Kessel Kleaning* pay each plaintiff \$25,000. Arlo has refused the offer on his behalf and on Hugo's behalf. Hugo's mother and Hugo favour

accepting the offer. The offer remains open for acceptance until the first day of trial (as yet unscheduled).

Advise Hugo and his mother.

Question 5 (5%):

Carlyle's Carry-Out never responded to the Statement of Claim. The plaintiffs recently sought and obtained a default judgment against *Carlyle's Carry-Out*. The owner of the business has retained you and told you that the first he heard about anything was when he got a copy of the default judgment from the Court office a few months ago.

Advise Mr. Carlyle of *Carlyle's Carry-Out*.

Question 6 (10%):

The following exchange took place on the examination for discovery of the president of *Phunny Fizz Corporation* by counsel for *Kessel Kleaning Corporation*:

Q. I have heard that you have been in settlement discussions with the plaintiffs in this matter. Is that correct?

A. Yes.

Q. Have you reached an agreement?

A. Counsel: Objection.

[off record discussion between counsel]

[resume]

Q. Have you entered an agreement to settle any aspect of the plaintiff's claim against your firm?

A. Counsel:

We have agreed that my client will admit that the defendant company has entered into terms of settlement with the plaintiffs with effect from the close of pleadings but will not provide any further information, and I acknowledge counsel's warning that he will bring a motion before the Court.

Advise Kessel Kleaning Corporation.**Question 7 (5%):**

The plaintiffs have served a jury notice.

Advise Phunny Fizz Corporation**Question 8 (15% total):**

Pleadings have been exchanged. Discoveries have finished. The plaintiffs have obtained evidence and admissions that are consistent with poor oversight of its cleaning operations by its own staff and unlabelled bottles of cleaning product having been left behind at the *Phunny Fizz Corporation* manufacturing plant by cleaning staff employed by *Kessel Kleaning Corporation*. Various experts have produced reports dealing with the medical effects of ingestion of *paradichlorbenzene* in general and its effects on the plaintiffs in particular. *Phunny Fizz Corporation* has adduced expert reports on the effect that the litigation has had on its reputation, market share, and the pricing of its stock. No one has implicated 'Krazy Killer' Koulton who has moved for summary judgment.

- (a) You are the motions judge. **How do you rule? (10%)**
- (b) The losing party seeks to appeal the judgment on the motion. **What court will hear the appeal and what will be the standard of appeal that the appellate court will use in determining the appeal? (5%)**

ADDITIONAL FACTS:

The litigation has ended.

Successful Parties and Damages Awarded

The following damages were awarded:

The plaintiffs are awarded damages of \$75,000 each from *Phunny Fizz Corporation* and *Kessel Kleaning Corporation* jointly and severally. As between the defendants, liability is apportioned based upon fault at 25% (*Phunny Fizz*) and 75% (*Kessel Kleaning*).

The plaintiffs claims against *Carlyle's Carry-Out* and *Karl 'Krazy Killer' Koulton* are dismissed.

Phunny Fizz Corporation's crossclaim against *Kessel Kleaning Corporation* is successful and damages for breach of contract are set at \$25,000.

Agreements and Offers

It emerges that *Phunny Fizz Corporation* settled with the plaintiffs in the amount of \$15,000 each, and, under the terms of the agreement in no case would *Phunny Fizz Corporation* have to pay additional damages or costs to the plaintiffs.

At the close of discoveries, *Kessel Kleaning Corporation* offered to settle with the plaintiffs for \$25,000 each and with *Phunny Fizz Corporation* for \$25,000. Neither offer was accepted.

Legal Expenses

The plaintiffs advise submit that their actual costs spent on the prosecution of its claims until the close of pleadings was \$10,000, and, thereafter, \$75,000.

Carlyle's Carry-Out submits that the actual amounts spent on its defence was \$10,000.

Karl 'Krazy Killer' Koulton submits that the actual amounts spent on his defence was \$15,000.

Phunny Fizz Corporation submits that its actual costs spent on its defence until the close of discoveries was \$50,000, and, thereafter, \$75,000.

Kessel Kleaning Corporation submits that its actual costs spent on its defence until the close of discoveries was \$75,000, and, thereafter, \$100,000.

Question 9 (5%):

On damages, who pays what amount to whom?

Question 10 (15%):

You're the trial judge. Who pays what amount of costs to whom?