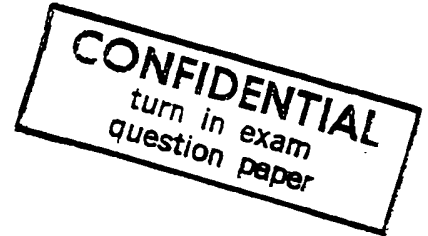


QUEEN'S UNIVERSITY
FACULTY OF LAW
LAW 225 (CIVIL PROCEDURE)
FINAL EXAMINATION
APRIL 2013
PROF CD FREEDMAN



INSTRUCTIONS: This examination is **TWO (2) HOURS** in length.

There are NINE (9) questions on this exam that relate to a single fact pattern. 100 marks are available on this exam. The value of each question is indicated. Apportion your time accordingly.

Please answer all questions in the answer booklets provided. Please write legibly.

Your answers need not be lengthy but must be complete.

Put your student number on the front page of all answer booklets. Please number the booklets in their correct order.

GOOD LUCK!

Special Aids:
This is an open-book examination.

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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Question 1 (15 Marks)

VANESSA MAEDA ('Mrs. Maeda') immigrated to Canada with her husband, **RICARDO MAEDA** ('Mr. Maeda'), in 2009. The young couple was sponsored by Mr. Maeda's uncle who lives in Kingston and teaches at Queen's University. Both Mr. & Mrs. Maeda's English language skills were not great, but passable for most everyday things. Mr. Maeda is a skilled metal worker and found a job relatively easily. Mrs. Maeda's employment prospects were not as good, but she was eventually offered a job as a housekeeper at the **MACDONALD MANOR HOTEL CORP.** ('the Hotel') in Kingston.

Mrs. Maeda was working at the Hotel on March 1, 2011. At around 10:45 a.m., she was making her way from one floor in the hotel to another to clean guest rooms. She pulled a large metal cart with her, in which was stored various cleaning products and her cleaning equipment. She was on the 16th floor of the hotel and pushed the button to call the elevator. The elevator arrived and the doors opened, and she entered the elevator cage – which was still moving up. The cart she pulled with her into the cage became jammed between the cage and the ceiling. After the elevator repeatedly jumped back and then slammed upwards against the cart, the cart broke and parts broke away from it. At this point the remains of the cart stopped obstructing the cage; the elevator then proceeded to the 18th floor floor at which point hotel guests summoned staff who summoned emergency services to attend to Mrs. Maeda who had been seriously injured. Mrs. Maeda remains in Kingston General Hospital in a coma that was medically induced shortly after the accident. Her doctors are of the opinion that she is unlikely to recover and may well be in a permanent vegetative state. There is some, small hope that she will recover. The doctors advise they will only be able to determine her prognosis once the once the barbiturates used to induce the coma are stopped.

Mr. Maeda retained a lawyer specializing in health law in August, 2011 as he was concerned that his poor language skills would interfere with his wife getting good care in the hospital. The lawyer signed a retainer agreement with Mr. Maeda which specifically set out his professional services were restricted to health law. The lawyer assisted Mr. Maeda being appointed his wife's Guardian, without limitation on his powers, under the *Substitute Decisions Act* so that he could make health care and other decisions for her. The lawyer advised Mr. Maeda to see a personal injury lawyer in respect of the injuries to his wife. Between maintaining his employment, visiting his wife, and dealing with the range of issues that confronted him, Mr. Maeda had little time for lawyers. Mr. Maeda did eventually find a lawyer willing to take the personal injury case, and met with the lawyer on February 28, 2013.

On March 8, 2013, an action was commenced in the Superior Court at Kingston in the name of Mrs. Maeda against the Hotel and the manufacturer of the elevator, **PINDLER ELEVATOR CORPORATION** ('Pindler'), in negligence

seeking \$3,000,000 in general, aggravated, and punitive damages. A separate claim was made in the pleadings against the Hotel alone in contract (unsafe working conditions) seeking the same damages. After being served with the Claim, the Hotel delivered its defence including a crossclaim against Pindler for breach of its contract with the Hotel for the installation and ongoing maintenance of the elevator.

Can the Pindler successfully defend based on the *Limitations Act*?

Question 2 (10 Marks)

Pleadings have been exchanged and the parties are now in discoveries. Pindler has brought a 'refusals motion' to require the Hotel to answer certain questions put to its CEO:

Question: Have you had any discussion with Mrs. Maeda's lawyer about how she intends to finance her litigation?

Answer: [Counsel: Don't answer that. You're asking for privileged information. That's not allowed.]

Question: Have you made an agreement with Mrs. Maeda to admit liability and pay her damages?

Answer: [Counsel: Don't answer that. Again you're asking for privileged information. Please move on.]

Question: [Counsel: I'm entitled to the information.]

Answer: [No you're not. You can bring motion if you think I'm wrong.]

If you were the Judge on the refusals motion, how would you rule?

Question 3 (10 Marks)

Mrs. Maeda has brought a 'refusals motion' for an order compelling Pindler to answer questions put to its CEO:

Question: Has the model of elevator your company installed in the Hotel ever malfunctioned and caused injuries anywhere in the world before?

Answer: Yes.

Question: In Canada?

Answer: Yes.

Question: Has your company ever been charged under the Criminal Code of Canada with Criminal Negligence Causing Bodily Harm in relation to the injuries any person has sustained as a result of elevator malfunction?

Answer: [Counsel: Don't answer that.]

Question: Has your company ever been convicted under the Criminal Code of Canada with Criminal Negligence Causing Bodily Harm in relation to the injuries any person has sustained as a result of elevator malfunction?

Answer: [Counsel: Don't answer that.]

Question: Has your company ever been convicted under the criminal law of any country other than Canada in relation to injuries sustained as a result of elevator malfunction in an elevator your company has installed?

Answer: [Counsel: My client refuses to answer. You can bring a motion if you want.]

If you were the Judge on the 'refusals motion', how would you rule?

Question 4 (10 Marks)

Pindler was in fact found guilty of Criminal Negligence Causing Bodily Harm in 2011 in relation to injuries sustained as a result of an accident involving an elevator in Ontario of the same type as was installed in the Hotel. Indeed the judge in the criminal trial found as a fact that 'the accused corporation habitually regards maintenance work as unprofitable, pays insufficient attention to that work as a matter of company policy, and endangers the public as a result. Their habitual business practices constitute the most gross negligence in the Court's view.'

Mrs. Maeda's pleadings have been amended to raise issue estoppel on the question of whether Pindler's maintenance practices fell below the standard of care based on the criminal conviction.

How would you advise responding if you were Pindler's lawyer?

Question 5 (10 Marks)

Pindler has applied for an order to allow for its doctors to examine Mrs. Maeda in circumstances in which the induced coma is terminated and Mrs. Maeda's condition can be assessed accurately. They argue that they cannot defend otherwise. Mrs. Maeda's doctors are reluctant to bring her out of the coma although they do admit that it will have to be done at some point.

How would you advise responding if you were Mrs. Maeda's lawyer?

Question 6 (10 Marks)

Discovery has just completed. Pindler has become frustrated that counsel for Mrs. Maeda replies to their correspondence requesting a meeting with the answer that "I have no instructions to discuss settlement. Mr. Maeda is busy attending to his wife. We will talk in a courtroom when the trial is held." Pinder has applied to have the Ontario Public Guardian and Trustee (OPGT) appointed as the Litigation Guardian for Mrs. Maeda. They argue that Mrs. Maeda's husband, Mr. Maeda, is too grief stricken to conduct the litigation on his wife's behalf.

If you were the Judge, and assuming that the OPGT is willing to act as Mrs. Maeda's Litigation Guardian, how would you rule?

Question 7 (10 Marks)

Counsel for Mrs. Maeda has moved for summary judgment on the question of the liability of the Hotel and Pindler in negligence. Counsel for the defendants deny breach of the standard of care and all other elements of the tort except for an admission that a duty of care was owed to Mrs. Maeda by both of them.

The Record filed on the motion contains the discovery evidence of the Hotel that it had Pindler install and maintain the elevator, and, of Pindler that it installed the elevator and maintained it. There are also three written expert reports made by three different mechanical engineers:

- (a) the engineer retained by Mrs. Maeda opines that faulty maintenance of the elevator's 'comb plates' (metal teeth on that assist in stopping the elevator) was the principal cause of the malfunction and incident;
- (b) the engineer retained by the Hotel indicates that inadequate maintenance of the elevator's brake pads and braking system was the principal cause of the malfunction and incident;

(c) the engineer retained by Pindler opines that there were at least three independent system failures that caused the malfunction and incident, but each can be tied to faulty design of the elevator shaft supplied by the building's architects.

If you were the Judge, how would you rule?

Question 8 (10 Marks)

The Worshipful Company of Elevators and Moving Stairways Professionals ('the Association') seeks to intervene in the litigation premised on the argument that the public interest in both the safety of elevators and the proper regulation of the industry should be accounted for by the trial judge in determining the standards of proper and safe operation of elevators.

If you were the Judge, how would you rule?

Question 9 (15 marks)

The trial has been completed before a judge of the Superior Court. Mrs. Maeda has been awarded general and special damages in the amount of \$1,500,000 against Pindler. Punitive damages were denied. The Hotel has been awarded \$50,000 in general damages for breach of contract against Pindler. Mrs. Maeda's claim in contract against the Hotel was unsuccessful.

The trial judge was presented with a *Mary Carter* agreement made between Mrs. Maeda and the Hotel (without the amount paid being disclosed). The agreement was made at the close of pleadings but was not presented to the trial judge until the costs hearing. No offers to settle were made by, or to, Pindler.

The 'Bill of Costs' presented by Mrs. Maeda to the Court in the costs proceedings indicates that she paid her lawyer as follows:

- (i) prosecuting the claim against Pindler - \$227,000 in fees and disbursements inclusive of HST;
- (ii) prosecuting the claim against the Hotel - \$73,000 in fees and disbursements inclusive of HST.

The 'Bill of Costs' presented by the Hotel to the Court in the costs proceedings indicates that it paid its lawyer as follows:

- (i) defending against the negligence claim made by Mrs. Maeda - \$73,000 in fees and disbursements inclusive of HST;

- (ii) defending against the breach of contract claim made by Mrs. Madea - \$27,000 in fees and disbursements inclusive of HST.

The trial judge's costs endorsement reads:

'The plaintiff achieved mixed results in this case but was largely successful.

The defendant hotel was wholly successful. Pindler was wholly unsuccessful.

Given the agreement between the plaintiff and the hotel, I order costs payable as follows:

by Pindler to Mrs. Madea: costs in the amount of \$200,000 to cover fees and disbursements globally; and,

by Pindler to the Hotel: costs in the amount of \$100,000 to cover fees and disbursements globally.'

If you were Pindler's lawyer, would you advise your client to appeal the costs ruling? If so, on what grounds? If not, why not?