

Faculty of Law
University of New Brunswick



Remedies
Law 3043

Remedies
Professor N. Siebrasse

12 December 2007
9:00 - 12:00 a.m.

INSTRUCTIONS

1. This examination is 4 pages long (including this page). Please check that you have all 4 pages.
2. This examination is 3 hours long.
3. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or any other materials or devices prohibited by university or law faculty rules or regulations.
4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.
6. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective be sure to address both advantages and disadvantages of the rule and the relevant options.
5. Assume all transactions occur in New Brunswick unless otherwise specified.
7. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B-grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.
8. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

Question 1 – 20 marks/minutes

In *Ratych v Bloomer* McLachlin J. remarked that as follows:

The risks inherent in such activities as the use of our highways by motorists are increasingly recognized as a general social burden. In this context, the maxim that compensation must be fair to both the plaintiff and the defendant seems eminently reasonable. That fairness is best achieved by avoiding both undercompensation and overcompensation.

It is clear that over- or under-compensation is unfair from a compensation perspective. What is wrong with over-compensation from a *deterrence* perspective? Confine your remarks to the negligence context, as referred to in McLachlin J.'s statement. You need not consider the issue of under-deterrence from a deterrence perspective.

Question 2 – 20 marks/minutes

Should compensation for the injured plaintiff be a primary goal of tort law? Explain, considering arguments on both sides of the question. You do not need to consider whether deterrence is or should be a goal of tort law.

Question 3 – 10 marks/minutes

Damages in a tort action are paid to the victim rather than to the state. This is clearly consistent with a compensation rationale for tort liability. Is it consistent with a deterrence rationale? Explain.

Question 4 – 35 marks/minutes

Was *Radford v DeFroberville* correctly decided, as a matter of policy. Explain. Be sure to consider arguments both for and against the holding.

Question 5 – 20 marks/minutes

Is the “thin skull” rule sound policy, from a deterrence perspective?

Question 6 – 25 marks/minutes

Is the decision of the House of Lords in *McGhee v National Coal Board* good law in Canada in light of the Supreme Court's decision in *Resurfice v Hanke*? Explain.

Question 7 – 25 marks/minutes

P manufactures aircraft engines. P was competing for the contract for the Airbus A380, the largest airplane in the world. A successful bid would be \$100 million in profit. The tenders were due at 5:00 pm on Friday 12 February. P completed the tender documents at 9:00 am on 11 Feb and contracted with Purolator to deliver the tender on its next day service, with normal delivery by noon on 12 Feb. In breach of the contract, Purolator did not deliver the documents until noon of 13 Feb. As a consequent P's bid was not considered. It can be established that P would have won the contract had the tender been delivered on time.

As a matter of general tort law (aside from specific contractual provisions), can P recover \$100 million from Purolator? Should P recover?

Question 8 – 12 marks/minutes

Is the principle set out in majority decision in *Ratych v Bloomer* sound policy from a deterrence perspective?

Question 9 – 18 marks/minutes

Punitive damages are awarded relatively more often in defamation cases than in other actions. Why?

Question 10 – 25 marks/minutes

In *Cassells v Broome* Lord Reid criticized punitive damages in the following terms: "There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like -- terms far too vague to be admitted to any criminal code worthy of the name." Has the Supreme Court of Canada adequately addressed this objection in *Whiten*? Is this a compelling objection in light of the approach to punitive damages set out by the Supreme Court's in *Whiten*?

Question 11 – 15 marks/minutes

In *Andrews v Grant & Toy* the Supreme Court, in discussing the Court of Appeal decision, remarked as follows:

With respect to Andrews' disinclination to live in an institution, the Court commented: "He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reasons, and that he wished to live in Switzerland or the Bahamas." Andrews is not asking for a life in Europe or in the Caribbean.

In light of the decision in *Andrews*, if a future plaintiff in Andrews' position did ask for life in the Caribbean, would she be entitled to it? Should she be entitled to it? Explain.

Question 12 – 12 marks/minutes

Consider a plaintiff who had a life expectancy of 45 years prior to the accident, and as a result of the accident now has a life expectancy of 5 years. Will the cost of future care be based on a life expectancy of 5 years or 25 years? What should it be based on?

Question 13 – 15 marks/minutes

Is a cap on non-pecuniary loss justified from a compensation perspective? Explain.

***** THE END *****