Final Exam Memo
LPPE – Section 101
Spring 2016
Prof. Yoon

May 23, 2016

Hi Everyone,

I hope all of you had a good break. This memo provides a brief review of the Spring 2016 LPPE Final Exam. Please note that the Faculty of Law requires that all first-year exams be graded on a curve. Accordingly, your final exam score reflects your individual performance relative to your classmates in your section.

The first part of the memo provides some general statistics, along with brief comments about each of the questions. The second part of the memo provides a student essay response from the class. The student essay response is not meant as a model answer – one that gets every issue – but rather one that covers several of the issues and is well written.

Please read this memo and model answer carefully. If, after reading this memo, you would like to discuss the final exam further, please email me at albert.yoon@utoronto.ca

Thank you again for a wonderful semester, and I hope you are enjoying your summer.

Overall Statistics

- **Average Raw Final Exam Score:** 64.25
    - **Standard Deviation**: 6.90
    - **Range of Raw Scores**
        - **High**: 82
        - **Low**: 43

    - **Average Multiple Choice Exam Score (out of 50):** 26.38
    - **Average Essay Exam Score (out of 50)**: 37.87

- **Distribution of Grades**
    - HH: 13
    - H: 25
    - P: 30

Individual Multiple Choice Questions

Because I may choose to use some of the multiple-choice questions from this exam in the future, I will not be releasing them. I would be happy to discuss your individual performance on this section.

A couple of comments:

Most students performed better on the essay part of the exam than they did on the multiple choice part. Because the entire exam was graded on a curve, you were evaluated not on an absolute scale, but relative to your classmates.

The instructions stated that students could identify questions they thought were ambiguous and/or should be removed from consideration. Only a few members of the class did so. In many instances, the objections related to questions that the student objecting had answered correctly. After reading the student comments, I decided to count all of the questions.

Individual Essay Questions: each of the 4 questions were weighted equally, worth 12.5 points each.

1. **Sonia's suit I** (Average score: 10.0/12.5): The exact question stated,

   "Sonia would like to sue everyone who suffered harm from taking Qalm, with the option of filing suit in either Wallaby or Toronto. Please evaluate."

   This question had an error. It meant to read (italics added):

   "Sonia would like to sue everyone who *caused* harm from taking Qalm, with the option of filing suit in either Wallaby or Toronto. Please evaluate."

   Because of this error, I evaluated responses based on the grounds on which the student answered the question. The vast majority answered the question as I intended (as a suit against any possible defendants). A smaller number of students answered the question as asking Sonia to sue *on behalf of everyone who* suffered harm.

   If students interpreted the question as a suit against defendants, I evaluated their response based on their analysis of jurisdiction. Most responses discussed the factors under *Van Breda*, although a fair number discussed only bringing suit in Ontario and not Queensland. Particularly strong responses discussed the *Van Breda* factors, and also discussed which province would be more compelling under *forum non conveniens*.

   Students who answered the question from the perspective of a class action were evaluated on their analysis of the factors for class action certification. This interpretation of the question was similar to Question 4. Because of the way the question was framed, I also looked for a discussion of jurisdiction in either Question 1 or Question 4, since the lead plaintiff in a class action would still be required to satisfy any jurisdictional requirements. Many students who interpreted the question this way neglected to discuss jurisdiction, in either Question 1 or Question 4.

   Because of the ambiguity of this question, I graded it the most leniently among the four questions. It accordingly had the highest average score among the essay questions.

2. **Melanie's suit** (Average score: 8.9/12.5). This question looked at jurisdictional issues relating to Melanie's ability to enforce her judgment in England in Canada. Fewer than half the responses discussed the Court's recent decision in *Chevron*, which dealt with an enforcement of a foreign judgment in Canada. A fair number of responses ignored the initial foreign judgment altogether and erroneously applied a straightforward analysis of *Van Breda*, as if the court were deciding whether had jurisdiction, *ex ante* to any decision. Students who answered this question particularly well remembered to discuss the jurisdiction vis a vis both Toronto, Ontario, and Vancouver, British Columbia.

3. **Sonia's suit II** (Average score: 10.0/12.4). This question examined statute of limitations. A fair number of students ignored the fact that Sonia was hospitalized for two weeks, leading them to conclude that Sonia failed to bring suit before the statute of limitations had run. One could have argued either way whether the hospitalization resulted in an extension of the limitations period, and whether Sonia brought suit within the limitations period. The key was to engage in a discussion around the hospitalization. Particularly strong responses looked at limitations period from the perspective of different potential tortfeasors: Sheridan as the manufacturer of the drug; and the pharmacist as the dispenser of the drug. Others looked at different harms: Sonia's loss of vision (and the gash on her forehead), and her depression.

4. **Sonia's suit III** (Average score: 8.99/12.4). This question asked about class actions. As mentioned above, some students interpreted Question 1 as asking about class actions. If they did, I allowed the student's discussion in Question 1 to also apply to Question 4 if the student chose to cross-reference their responses. Particularly strong responses included a discussion of both a) the arbitration clause and the courts' unwillingness to allow private contracts to trump statute; and b) the availability of a class action for those who participated in the compensation scheme (which legally renders them ineligible from participating in any class action).

1)

======== Start of Answer 1 (425 words) ========

Sonia is attempting to decide where to file suit; the place where she purchased the drug and formed the contract (Wallaby) or the location where the drug caused her to begin suffering harm (Toronto).

The current starting point for determining jurisdictional matters is *Van Breda*, which outlines 4 presumptive connecting factors to develop a real and substantial connection which can be used for the court to assume jurisdiction. They will be explored in turn, weighing the benefit of each potential city and considering how Sheridan may act on step 2 of *Van Breda* and rebut this connection.

a) Defendant Domiciled or Resident in the Province. As Sheridan is incorporated in Nevada, it seems as though neither city would contribute. Sheridan does maintain a small payroll office in Toronto however. It seems likely Sheridan could attempt to rebut this though as they do not truly domicile there, being a multinational company. I don't think this presumptive factor would go forward for either city.

b) Defendant carries on business in the Province. For similar reasons as above, Toronto might be a better choice as the Defendant does do business in Toronto through their payroll office. However, Sheridan may attempt to rebut this by showing that while they do businesss, this business has nothing to do with the tort (which is related to the sale of the drugs; this office is only involved in payroll).

c) Tort commited in Province. This is a somewhat complex one as the tort in some ways happened in multiple locations; on a biochemical level, perhaps the harm to the brain was caused back in Queensland when the drug was first taken and it was just not discovered until after the move. In a more straightforward way though Toronto would appear to be a stronger connecting factor as this is where the harm from the tort was manifested (when the vision failed and Sonia hurt her head on a prop). As a result I feel Ontario would be a stronger choice for where the tort occured.

d) K connected with dispute made in province. For this factor Wallaby would be a much stronger choice as this is where the contract was made with the independent pharmacy. This section might be rebuttable though as Sheridan did not actually sell the drug; a third party did, and it is unclear in the wake of *Van Breda* how this might actually be done.

Overall, it appears that the factors connecting Ontario are less rebuttable and I would recommend Sonia choose to file her suit in Toronto.

======== End of Answer #1 ========

2)

======== Start of Answer 2 (346 words) ========

Melanie's decision to file suit in Canada to enforce her verdict seems like an unusual

choice. The jurisdictional system is already fairly complex as it is an American company which was sued in England, and England is both where Melanie lives and where a headquarters for the company is located. I would recommend Melanie remains in England for now and continue to pursue it there; I am unaware why the damages are not being provided but it appears to be a more convenient forum for both of them (as she lives there, and they are based out of it).

Nonetheless, she may be able to come to Canada under the principles of *Chevron v Yaiguaje* which made it much easier for foreign judgements to be enforced in Canada. Comparing the facts to Yaiguaje, England has a much more similar court system which is likely given full faith and credit; if an Equadorian decision was allowed here, it seems likely this one can be as well.

As there is an office here in Toronto which has payroll, it means Sheridan has assets in Canada, which was part of the requirements in Yaiguaje.

As the case has already been lost by Sheridan, as it was with Chevron, it should be simpler to establish the substantiveness of the connection as they had already lost. The presence of the office is enough perhaps to show business is done here (Van Breda).

overall, the facts of these cases are very similar which I suspect is why she would like to enforce her verdict here, as it was also done in Chevron. With this precedent in mind, coming to Canada might not be that unwise if the reason the verdict cannot be enforced in England cannot be overcome.

Overall, I would recommend she come to Toronto as that is where the payroll office is. I understand Vancouver would be a forum of convenience as her family is there but it would be simpler to use an Ontario court. Ontario could be convenient if she comes to stay with her friend Sonia.
It

======== End of Answer #2 ========

3)

======== Start of Answer 3 (499 words) ========

Several issues will be considered which may stand

Statute of Limitations:

One issue which Sonia may encounter for her limitations issue is the timing. The filing of her suit will occur over 2 years after she first experienced symptoms the drug, and the statute of limitations is generally 2 years (**S. 4 of OLA 2002**).

-She took the drug on the 21st of March 2012
-Symptoms first appeared 5th of November 2012
-Symptoms told to be related to the drug on 23rd of November 2014
-Systems returned requiring the Suit 24 of Noevember 2014

-Suit can be filed 1st of Deember 2014

Sheridan will likely attempt to show that the 23rd of November 2014 was the last day she should have been able to file her suit as that was the day she reasonably would have had knowledge to bring an action, as her doctor told her the drug was causing the symptoms.

However, Sonia will be able to argue that a person reasonably would not know they were suffering lasting neurological damage from the drug. The ideas of *Novak v Bond* hold that we should look at what is reasonable for the plaintiff. In **s. 5** the claim is discovered on the day that a reasonable person with teh abilities and in the circumstances of the person with the claim first ought to have known (**5.1.b**). Sonia can say that a reasonable person would not have known she was suffering lasting neurological damage until 24 November 2014, when the symptoms returned. At this point a reasonable person would have realized that the injury, loss or damage had appeared. Thus, the statute of limitations should have begun at that day, and she would be well within it (and with no issues from the 15 year statute of repose **S. 15**)

Arbitration Requirement:
Sheridan has fine print which requires that all disputes be resolved through arbitration on an individual basis. They may attempt to demonstrate this bars not only proceedings but also class proceedings. However, I suspect this would not succeed as in Ontario (and Queensland, with the same laws) the Consumer Protection Act holds that these terms are invalid, thus it will have no force.

Res judicata:
Sheridan could try to point out that the issue has been already solved via administration with Kenneth Derby; especially if Sonia has already failed to correctly opt out.
Sonia can however argue that this is unfair to preclude civil action with some sort of administrative action (*Penner v Niagara*) and she deservs a chance to pursue in court her civil action. I suspect a court would likely agree with this as the scope of the groups is much different; there were conflicts of interest in this proceeding (Sheridan's own accountants worked with Derby, who was in the employ of Sheridan), the scope of the proceedings was lacking (they only were consideration loss of vision and not other harms) and it would unfair to allow them to impact on broader rights to litigate.

======== End of Answer #3 ========

4)

======== Start of Answer 4 (525 words) ========
For Sonia to pursue class proceedings, she will need to have her class certified as described by in the **Class Proceedings Act S. 5**. The 5 criteria will be explored here. In order

a) Claim discloses a cause of action. This aspect will likely be straightforward to

make out as the drug is causing harm to plaintiffs in terms of their vision as well as other systems; it would likely be characterized as a product liability tort.

b) Identifiable class of two or more persons. This aspect will also likely to be simple to make out as they are including all users of Qalm who have suffered harm. As discussed in the fact pattern, there are different subclasses within who have different levels of suffering and different vision loss, and as a result their claims might not be shared by all. However **S. 6** allows subclasses with different issues. Additionally as the class has many people afraid to come forward we do not know everyone yet but once again this is not a large issue (s.6).

c) Claims Raise Common Issues. The overall issues for all of these people is vision problems; within there are several different problems such as both losing vision and the harm people may cause because of their lost vision. Shared issues only need to extend to the resolution of the common issue (Cloud) and in this case the fact each case might require subsequent individual resolution should not undermine the process.

d) Procedurally Preferable. This is one of the harder issues as within the sufferers there is a very large mix of different issues. While Section 6 says that that claims should not be barred because individual assessment may be required and different remedies are sought, the fact that different class members such as Melanie have been involved in car accidents might add large causation issues which would be very difficult to solve in a class (i.e. people who car accidents, what level of responsibility is Qalm? Would likely be simpler to solve individually). As the damages are all likely quite large (loss of vision is very detrimental) it may be something better solved with individual action. Class actions are often preferred when otherwise there would be no suit (*Cassano).*

e) Representative P must fairly and adequately represent interests of class. Sonia might not be a good choice as a represenative P as she was once electrocuted and hit by a train. One might wonder if that could lead to a causation issue for her vision issues, and make her not as good of a choice as a plaintiff who has only taken the drug and suffered no other harms. She is also someone with a pharmacological background which might develop conflict of interests which harm the case. I wouldd recommend someone else be used as the representative plaintiff.

Overall, I think the class might be made out despite the wide variety of harm on similar ideas as *Cloud*; by proving the overall breach of duty, only causation and harm will remain to be proven on an inidivudal basis which largely advances the class and contributes to access to justice

======== End of Answer #4 ========

5)

6)

7)