



UNIVERSITY  
OF  
JOHANNESBURG

<b><u>FACULTY</u></b>	: LAW
<b><u>DEPARTMENT</u></b>	: PRIVATE LAW
<b><u>CAMPUS</u></b>	: KINGSWAY CAMPUS
<b><u>MODULE</u></b>	: LDL41Y0 LAW OF DELICT
<b><u>SEMESTER</u></b>	: TWO
<b><u>EXAM</u></b>	: SUPPLEMENTARY

<b><u>DATE</u></b>	:		<b><u>EXAM TIME:</u></b>	:	
<b><u>ASSESSOR(S)</u></b>	:	DR F KHAN			
<b><u>MODERATOR</u></b>	:	PROF M WATNEY			
<b><u>DURATION</u></b>	:	4 HOURS	<b><u>MARKS</u></b>	:	60

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NUMBER OF PAGES: 6 PAGES

## **INSTRUCTIONS TO STUDENTS**

1. This paper consists of 5 questions. Answer **ALL** questions.
2. **Please ensure your surname, initials, student number and email address are on the word doc.**
3. **Please ensure your answer is legible.**
4. Do not type your answers in bold and capital letters.
5. **Submit your answer paper via blackboard ??. If students are experiencing connectivity issues then you can email your answer by no later than on the day of the test to [franaazk@uj.ac.za](mailto:franaazk@uj.ac.za). Late submissions WILL NOT BE MARKED. In the subject line of your email it should have the following info: YOUR NAME, STUDENT NO, DELICT SUPPLEMENTARY EXAM JANUARY**
6. **Submit only ONCE.** Attach a read receipt if you need proof that it was received.

If you have any enquiries during the test, please email me.

7. Please take note: You may not seek assistance of a fellow student or the tutor. You may not use any part of another students' answers to complete this assessment. You are reminded that all relevant rules and policies of the University and the Faculty applies to this test. In regard to the assessment, the normal academic integrity rules apply. For example, this means that you cannot cut-and-paste material other than your own work as answers for this assessment. By undertaking this online assessment, you will be deemed to have made the following declaration:

"I certify that my submitted answers are entirely my own work and that I have neither given nor received any unauthorized assistance in this assessment."

8. Good luck
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## **QUESTION 1**

Debbie has a very close relationship with her 15-year-old son, Trevor. One day, while she is at home, a neighbour knocks on the door and tells her that she is urgently needed outside. The neighbour has a grave look on her face. When Debbie asks whether anything is wrong, the neighbour does not reply.

When Debbie goes outside, she sees Trevor lying on his back near the side of the road, after having been run over by a car. There is a great deal of blood at the accident scene, and Trevor is clearly very seriously injured. He is unconscious and very pale, and Debbie becomes hysterical, thinking he is dead. She has to be sedated by paramedics.

Her son is rushed to hospital, where he is in a coma for several days. However, he ultimately makes a full recovery and is able to return to school.

Despite her son's recovery, Debbie was deeply traumatised by what she saw. After Trevor was admitted to hospital, she could not stop shaking and crying, and had to be treated for shock by her general practitioner, who prescribed her anti-anxiety medication and sleeping pills. However, when she slept, she experienced nightmares in which she repeatedly relived the shocking experience. She became anxious, depressed and withdrawn. She could not continue working as a high school teacher.

She was diagnosed by a psychiatrist as suffering from acute post-traumatic stress disorder, and had to undergo six months of psychotherapy with a clinical psychologist trained in trauma counselling.

Debbie wishes to lodge a claim with the Road Accident Fund ("the Fund") for the harm she suffered as a result of seeing the aftermath of her son having been run over by the car.

Advise Debbie on what she will need to prove in order to institute an action in delict to recover damages for the harm she has suffered. [10 marks]

**[Total Q1: 10 marks]**

The issue to be determined is whether Jane can successfully sue in delict for damages arising out of nervous and emotional shock suffered by her as a result of seeing Peter run over by a car driven negligently by the defendant.

Damages arising out of psychiatric injury caused by nervous and emotional shock are available under the Aquilian action (*Bester v Commercial Union*).

Damages for nervous and emotional shock have been awarded in respect of psychiatric injuries such as post-traumatic stress disorder (*RAF v Sauls*), impaired sleep (*Bester and Sauls*); and emotional trauma (*Barnard v Santam*).

Our courts have in the past been prepared to make damages awards arising out of nervous shock in cases of fears for the safety of a relative or loved one, such as a brother (*Bester*), a wife and child (*Masiba*), a fiancé (*Sauls*), or a son found lying in the street after an accident (*Majiet*).

Courts have been prepared to make damages awards arising out of nervous shock in cases of shock and psychological harm caused by witnessing a gruesome or disturbing accident (*Majiet* and *Sauls*).

In *Bester*, brothers Deon (11) and Werner (6) were crossing a road together when Werner was knocked down and killed by a vehicle. Deon witnessed the collision. As a result, Deon developed an anxiety neurosis. The court made the following findings relating to claims in delict for nervous shock:

- Injury to the brain and nervous system was a bodily injury as contemplated in the relevant third party legislation in operation at the time.
- Compensation for nervous shock or psychiatric illness was not dependent upon the claimant having been physically injured himself.
- Compensation for nervous shock or psychiatric illness was not dependent upon the claimant having been physically threatened.
- If a person suffers nervous shock or psychiatric illness as a result of a negligent conduct of another there is no reason why such person should not recover damages, provided a reasonable person in the position of the wrongdoer would have foreseen the consequences and avoided them.
- No compensation would be payable for inconsequential emotional shock of short duration.

The SCA has pointed out that the reasonable foreseeability test does not allow for a broad range of policy considerations to be taken into account to limit liability and thereby prevent indeterminate liability (*Barnard*). Accordingly, the courts have sometimes used the wrongfulness and legal causation enquiries to limit liability (*Barnard*, *Sauls* and *Masiba*).

The facts of *Majiet* bear a close resemblance to the facts of this question. A mother had come upon the body of her son lying in the road after an accident. She had not witnessed the collision. She had also not suffered bodily injury herself or feared personally for her own safety. However, the court held that she was entitled to damages for the harm she had suffered. A reasonable person in the position of the wrongdoer would have foreseen that a mother could come upon the body of the primary victim, her son, and suffer psychological harm as a result of the nervous and emotional shock caused by witnessing the aftermath of the collision. In addition, the mother's psychological harm was not trifling or of short duration. Thus, her claim in delict succeeded.

In the present matter, Debbie came upon her son in circumstances that were highly traumatising and disturbing. Her son was clearly very seriously injured, and there was a great deal of blood at the accident scene. She feared that her son was dead. Owing to

the close relationship that exists between mother and son, it was reasonably foreseeable that someone such as Debbie would suffer psychological harm arising from the shock of seeing her son seriously injured on the side of the road. In line with the approach taken by the courts in *Bester* and *Majiet*, it does not matter that Debbie did not witness the collision, suffer bodily injury or fear personally for her safety. In addition, the harm Debbie suffered was not passing or trivial. She was diagnosed with a recognised psychological disorder, and had to receive medication and counselling to overcome it.

The driver of the car that ran over Debbie's son acted wrongfully in causing Debbie to suffer psychological harm, and his conduct must also be regarded as the factual and legal cause of Debbie's harm. There are no compelling policy considerations that militate against a finding of liability in this case.

Accordingly, Debbie would have good prospects of success in suing the driver of the car that ran over her son for damages arising out of nervous and emotional shock.

## **QUESTION 2**

Advocate Flunky, the National Deputy Director of Public Prosecutions (NDDPP), signed an affidavit for a court application for review of the decision of the former Acting National Director for Public Prosecutions, Advocate McDummy, to drop criminal charges against Mr Gaju, the then Deputy President of the African Freedom Charter (the AFC), a political party.

In his 50-page affidavit Advocate Flunky writes:

*"Upon listening to the so-called spy tapes, acting National Prosecuting Authority head, Advocate McDummy was shocked at the cavalier tone and light-hearted manner in which the prosecutor in the case, Advocate Muck, and the former national director for public prosecutions, Advocate Goop appeared to regard the National Prosecuting Authority as merely a political tool to be placed at the disposal of the Mfengu administration.*

*At critical points in the investigation against Gaju, Advocate Muck discussed the case with former intelligence minister Snoop. He took direction from Snoop about strategies to proceed with charging and prosecuting Mr Gaju.*

*As far as I was concerned, Snoop was a confidant with whom Muck could discuss strategy about the Gaju prosecution. I believe he also served as an intermediary between Advocate Muck and Mr Mfengu."*

At the time that Advocate McDummy dropped the charges against Mr Gaju, Mr Mfengu was the President of the AFC and the President of the Republic of South

Africa. Snoop served under Mr Mfengu as the minister for intelligence. Mr Mfengu was also seeking to be re-elected as the AFC President for the third time and Mr Gaju was his challenger for the same position.

Mr Mfengu and Snoop are no longer involved in active politics. The two are incensed about the allegations that Advocate Flunky levelled against them in the affidavit. Mr Mfengu and Snoop consider suing Flunky for damages in delict, for defamation of character. They thus approach you for legal advice in the matter.

**Advise both Mr Mfengu and Snoop fully, while referring to relevant law, on:**

2.1 Whether or not the affidavit is defamatory of both Mr Mfengu and Snoop, and indicate their *prima facie* prospects of success in claiming for damages.

[10 marks]

2.2 Assuming Mr Mfengu and Snoop are unsuccessful in their defamation claim, advise them of their prospects of success in a claim based on an alleged violation of their right to dignity

[10 marks]

**[Total Q2: 20 marks]**

### **QUESTION 3**

In any delictual claim, once the plaintiff has proved the elements of delict delictual remedies become available to the plaintiff. Typically, damages awarded under the *actio legis Aquilia* serve a different purpose to damages awarded under the *actio iniuriarum*..

Discuss this statement and the difference between the damages [10 Marks]

**[Total Q3: 10 marks]**

#### **QUESTION 4**

Mr. Bland is your client and has indicated that he intends to apply for an interdict against his ex girlfriend to prevent her from posting defamatory statements about him in social media. Advise him of the different types of interdicts and the requirements. [10 marks]

**[Total Q4: 10 marks]**

#### **QUESTION 5**

Discuss the different approaches taken by South African courts to the question of apportionment of delictual damages in cases of contributory negligence. [10 marks]

**[Total Q5: 10 marks]**

~~~~~ END OF MAIN EXAM PAPER ~~~~~

