



<b><u>FACULTY</u></b>	: Law
<b><u>DEPARTMENT</u></b>	: Private Law
<b><u>CAMPUS</u></b>	: APK
<b><u>MODULE</u></b>	: LDL41Y0 Law of Delict
<b><u>SEMESTER</u></b>	: First
<b><u>EXAM</u></b>	: 04 June 2019

<b><u>DATE</u></b>	: 04 June 2019	<b><u>SESSION</u></b>	: 08:30-10:30
<b><u>ASSESSOR(S)</u></b>	: Prof M Njotini		

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**MEMO**

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## **SECTION A**

### **Question 1**

- 1.1 The purposes of private law is to regulate relations between individuals in a community. Its function is to recognise, the individual interests that the continually in a state of real or threatened conflict, delimit these interests in relation to each other and harmonise those that are in conflict. (2)
- 1.2 The *res perit domino* principle means that each person must bear the damage she or he suffers (see, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA). It is founded on the fundamental premise of the law that damage or harm rests where it falls. If someone drives her or his car carelessly, and collides with a tree, or clumsily drops and breaks her or his watch, or hail damages to her or his crop, or lightning kills her or his horse, she or he has, in principle, no legal ground for complaint. (3)
- 1.3 A delict is defined as the act of a person that in a wrongful and culpable way causes harm to another. Thus, the mere fact that a person has caused another to suffer damage is insufficient to constitute a delict for which he or she may be held liable. To found liability in delict further requirements or elements must be met. These are an act, wrongfulness, fault, causation, and harm.

Whereas, a breach of contract is a different from of wrongful conduct in private law. It is normally an act by one person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party). In addition, it is only constituted by the non-fulfilment by a contracting party of a contractual personal right (claim) or an obligation to perform. The primary remedy for breach of contract is directed at enforcement, fulfilment or execution of the contract, a claim for damages as a remedy only plays a secondary part. (5)

- 1.4 In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), the court accepted the doctrine of subjective rights. The fundamental premise of this doctrine is that wrongfulness consists of the infringement of a subjective right. (2)
- 1.5 In *Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA), the Supreme Court of Appeal held that private defence must be determined by

asking whether a reasonable person would have been of the opinion that a real risk of death or injury was threatening. From this, Fagan concluded that the test of wrongfulness is not determined ex post facto, with reference to the true state of affairs, but ex ante, with reference to a reasonable belief of the state of affairs (2)

- 1.6 In cases where impossibility does not amount to an absolute, physical impossibility, it may exclude wrongfulness. The case of *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) is an example. In this case, A, the owner of a piece of land traversed by a stream, requested an interdict forbidding B, the owner of a farm bordering the stream at a higher point, to allow loose slate to wash down onto A's land. This was because there was danger that the stones could cause damage to A's property. The court found that while it would have cost B about R10 000 to build the wall to prevent the slate washing down, B's failure to build the wall was not wrongful because it was impossible for him to avert the threatening damage. Accordingly, B's failure to build the wall was not wrongful because it was impossible for him to avert the threatening damage.

OR

Impossibility does not mean physical or absolutely impossible. Rather, it means impossible according to the legal convictions of the community. To determine what is reasonably possible, the interests that the defendant would have to sacrifice to avert the danger are weighed against the plaintiff's interests that would probably be infringed should the defendant fail to act. In this instance, impossibility is, in applying the general test for wrongfulness, a ground of justification that excludes wrongfulness. (4)

- 1.7 To qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme. It must demonstrate, where there is found to be conscious risk-taking, a complete obstuseness of mind or, where there is not conscious risk-taking, a total failure to take care. (2)

(20)

## **Question 2**

Match column A with column B. In your answer sheet, you are only required to write the number and the answer, for example, "1 B".

- 2.1 C.

- 2.2 L.
- 2.3 A.
- 2.4 I.
- 2.5 R.
- 2.6 T.
- 2.7 H.
- 2.8 E.
- 2.9 O.
- 2.10 N
- 2.11 V.
- 2.12 Y.
- 2.13 Q.
- 2.14 P.
- 2.15 D.
- 2.16 W.
- 2.17 U.
- 1.18 Z.
- 2.19 B.
- 2.20 G.

(20)

**Question 3**

- 3.1 (a) (1)
- 3.2 (c) (1)
- 3.3 (a) (1)
- 3.4 (c) (1)

3.5	(d)	(1)
3.6	(c)	(1)
3.7	(a)	(1)
3.8	(c)	(1)
3.9	(a)	(1)
3.10	(a)	(1)
		(10)
		<b>(50)</b>

## **SECTION B**

### **Question 4**

- 4.1 (a) only an act of human being is accepted as conduct,
- (b) Human action only constitutes conduct if is performed voluntarily, or
- (c) Conduct may be in the form of either a positive (active conduct – *commissio*) or an omission (*omissio*). (2)
- 4.2 Reflex movements is one of the conditions that may cause a person to act involuntarily in that they render him or her incapable of controlling his or her bodily movements. However, the court in *S v Ramagaga* 1964 (4) SA 254 (O) stated that the defendant (in this case, the accused) must be so ticklish that he or she could not control his or her actions. As regards X, his actions amount to voluntary impulsive or spontaneous acts that do not signify reflex movements. (2)
- 4.3 The *boni mores* test is an objective test based on the criterion of reasonableness. The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in an unreasonable manner. (2)
- 4.4
- 4.4.1 The test to determine whether the omission is in conflict with the legal convictions of the community is an objective one, in the sense that all the relevant circumstances of a particular case must be taken into consideration. Thus, all the factors, which, according to the legal convictions of the community, may be indicative of legal duty to act positively, must be considered. (2)

- 4.4.2 Omissions are *prima facie* lawful. Liability for omissions follows if the omission was in fact wrongful, and this will be the case only if (in the particular circumstances) a legal duty rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty. The question is whether such a duty existed is answered with reference to the flexible criterion of the legal convictions of the community and legal policy.

Mr Mpho has the legal duty to ward off the danger or harm. This duty arises because he has knowledge and foresight of possible harm. Therefore, a reasonable person in his position would have taken appropriate steps to put up warning boards to alert pedestrians to the danger. (2)

(10)

## **Question 5**

### 5.1

- 5.1.1 Fault is a subjective element of a delict, because it is concerned to a large extent with a person's attitude or disposition. It refers to the legal blameworthiness or reprehensible state of mind or conduct of someone who has acted wrongfully. There are two forms of fault: intention (*dolus*) and negligence (*culpa*). (3)

- 5.1.2 In *Jones NO v Santam Bpk* 1965 (2) SA 542 (A) the court stated that the fact that the plaintiff was, for example, 30% negligent, does not automatically imply that the defendant was 70% negligent. In order to establish the respective degrees of negligence, the carefulness of the conduct of each party must be measured separately against the standard of the reasonable person.

In this case ratio between Ms Lolo's and Ms Koza's degree of fault is (4)

- 5.1.3 Yes, the damages will be apportioned in terms of section 1 of the Apportionment of Damages Act 34 pf 1956. This Act does not deal with the division of damages between the plaintiff and the defendant. Simply, it covers the reduction of damages received by the plaintiff because of his own fault (negligence) in respect of the damages he or she sustained. The criteria the court uses is the reasonable person test for negligence. The process involves the comparing of the respective degrees of negligence of the parties involved. Each party's degree of negligence is determined by expressing its deviation from the standard of the reasonable person as a percentage. (3)

(10)

(20)

**Total: [70]**