

**NATIONAL UNIVERSITY OF LESOTHO**

**FACULTY OF LAW**

**LL.B - FINAL EXAMINATION**

**L283 – THE LAW OF DELICT**

**MAY 2017**

**MARKS: 100**

**TIME: 3 HOURS**

**INSTRUCTIONS:**

1. Underline any decided cases that you refer to in support of your arguments;
2. Answer FOUR questions ONLY;
3. You may use a clean copy of the COURSE OUTLINE; and
4. In answering questions ONE, THREE and/or FIVE, try to deal with as many of the likely issues as possible given time constraint. If you believe that additional information is needed to deal with an issue, say so. When appropriate, make whatever assumptions seem most reasonable.

## QUESTION ONE

In 2016, Soli Mashapa and his wife, Tanki Mashapa, underwent in vitro fertilisation and embryo implantation at In Vitro Fertility Centre of Lesotho. By mistake, an embryo consisting entirely of their genetic material was implanted in Donna Fasano's womb, along with another embryo that Mrs Fasano had fertilised with her husband. The Fasanos are white and the Mashapas are black. Mrs Fasano gave birth to one white child – the genetic child of the Fasanos – and one black child – the genetic child of the Mashapas. The mistake was discovered a few months after the birth of the twins when the Fasanos and Mashapas met at a baby clinic.

The Mashapas have filed suit against the In Vitro Fertility Centre of Lesotho for medical negligence. They also seek damages for emotional distress and mental anguish they suffered when they realised that the Centre had implanted their genetic material in a white woman's womb.

Assess the likelihood of the Mashapas' success in each of these claims.

**[25 Marks]**

## QUESTION TWO

Briefly describe the following expressions:

(a) *Res perit domino*

**5 Marks**

(b) Abuse of right

**5 Marks**

(c) A 'but for' test

**5 Marks**

(d) Goodwill

**5 Marks**

(e) *Actio de pastu*

**5 Marks**

**[25 Marks]**



### QUESTION THREE

Earlier this year, Botle and Tello received on-the-job training in business management at LEBELO (Pty) Ltd. After the training, LEBELO offered Botle a very good job, which she accepted without hesitation. Tello has searched in vain for a job since the training. Last week, Tello bumped into Botle at Maseru Mall car park. At that moment, Botle was inside a company car getting ready for a business meeting. Tello immediately got into the car and closed the door. Then he gave Botle a DVD and asked her to play it immediately. Botle innocently inserted a DVD into the car's DVD player and pressed a play button. Immediately, she realised that it was a videotape of an old incident when she was as high as a kite at a party. She switched off a DVD player and stared at Tello in disbelief. LEBELO monitors all its cars by radar and as the video was playing it could clearly be seen on the radar screen. A technician who was at work at LEBELO's tracking station copied clips from the video on the radar and uploaded them on social media for the world to watch.

Botle has filed suit against LEBELO (Pty) Ltd and Tello for defamation. Is she likely to succeed in this claim? Support your answer with applicable principles and decided cases. **[25 Marks]**

### QUESTION FOUR

With the help of decided cases critically examine the notion of 'a reasonable person'. **[25 Marks]**

### QUESTION FIVE

Thoso (Pty) Ltd manufactures and packages yoghurt marked '*Sebabane*' and then distributes it to the retailers within and outside Lesotho. Tom, a sole trader, ordered a huge quantity of *Sebabane* from Thoso (Pty) Ltd on the 24/03/2017 and the stock was delivered on the same day. He consumed one pot of *Sebabane* immediately after taking delivery of the stock, but it tasted quite differently. After a few minutes he had rash all over the body, vomited blood and then wheezed. He was rushed to hospital and he began to recover after two days under life-saving treatment. It turned out that the expiry date (24/06/2017) marked on the sachets of yoghurt was factually incorrect because at the time of delivery the yoghurt had long reached the expiry date.

The medical evidence shows that Tom's illness was caused by the consumption of yoghurt (*Sebabane*) long after the actual expiry date. On the basis of this evidence, Thoso (Pty) Ltd recalled all its products from the market including the stock purchased by Tom. Thoso (Pty) Ltd has also reimbursed the affected retailers for all the expenses incurred in the course of and for the purpose of purchasing the recalled stock.

Tom has filed suit against Thoso (Pty) Ltd for products liability and loss of profit. Assess the likelihood of Tom's success in each of these claims.

**[25 Marks]**

### **QUESTION SIX**

Under common law, competition *per se* does not lead to delictual liability. This is so because in a free market system, commercial demand is open to all competitors. However, Prosser has succinctly observed that:

Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. The trader has not a freelance. Fight he may, but as a soldier, not as a guerrilla. In the interest of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as [unlawful] competition for which, in general, [Aquilian] action will lie in favour of the injured competitor, although very often the [delict] is given some other name.

[Prosser, W. L., 1971 Handbook of the Law of Torts (4<sup>th</sup> ed) pp. 749-750]

In this context, identify and critically analyse three practices that have been marked out as unlawful competition for which an *Aquilian* action will lie in favour of the injured competitor.

**[25 Marks]**