

CARLETON UNIVERSITY

MID-TERM TAKE-HOME
EXAMINATION
February 14-18, 2018

DURATION: 96 HOURS

No. of Students: 90 (Section D) + 90 (F) = 180

Department Name and Course Number: LAWS 2302DF

Course Instructor: John Hale

AUTHORIZED MEMORANDA: OPEN BOOK – any book, including any required or recommended or other textbook, any version of the *Criminal Code*; dictionaries; a thesaurus; a recipe book; or anything else with words on a page; the student's written or typed class notes; any handouts from class; any e-mailed materials between instructor and student; any materials posted on cuLearn, including PowerPoint slides and lecture notes; any cases downloaded from the internet; any notes prepared by another student in the same course, with that student's consent.

STUDENTS ARE NOT TO COLLABORATE WITH EACH OTHER ON THE EXAM. IF IT HAS BEEN DETERMINED THAT STUDENTS HAVE SHARED ANSWERS DIRECTLY OR VIA THE INTERNET, A GRADE OF ZERO WILL BE ASSIGNED TO THE EXAMS OF THE AFFECTED STUDENTS.

ANSWER ALL QUESTIONS ON THE ANSWER FORM (a separate file), and upload that form to cuLearn. For more information, read "Submitting a file-based assignment" here: <http://carleton.ca/culearnsupport/students/assessment-tools/#Submitassignment>.

ANSWERS ARE TO BE SUBMITTED BY MIDNIGHT ON SUNDAY FEBRUARY 18, 2018, unless other arrangements have been made with the instructor.

Please read all questions carefully. You are required to answer all questions.

THE EXAM CONSISTS OF 37 QUESTIONS. BE SURE TO ANSWER ALL QUESTIONS. Read a question thoroughly before you begin to write your answer. Questions are worth the number of points indicated, ranging from 1 to 10 points.

- (1) (2%) In *Fagan v. Commissioner of Metropolitan Police*, Fagan was...
- (a) Acquitted on the basis of the “duty” theory
 - (b) Convicted on the basis of the “duty” theory
 - (c) Acquitted on the basis of the “continuing act” theory
 - (d) Convicted on the basis of the “continuing act” theory
 - (e) None of the above
- (2) (2%) In *R. v. Cuerrier*, the Supreme Court of Canada considered s. 265(3)(c) of the *Criminal Code* in the context of a sexual assault case. Specifically, the Supreme Court reviewed the circumstances where fraud could vitiate consent (make the consent invalid). Which type of fraud was recognized for the first time in *Cuerrier*?
- (a) Fraud as to the perpetrator’s identity
 - (b) Failure to disclose that the perpetrator is infected with a serious sexually transmitted disease
 - (c) Fraud as to the sexual nature of the act
 - (d) All of the above
 - (e) Two of the above
 - (f) None of the above
- (3) (2%) In *R. v. Mabior* (2012), the Supreme Court of Canada clarified what the threshold is for when an individual must disclose the existence of a sexually transmitted disease or condition to his or her sexual partner. As a result of *Mabior*, the disease or condition must be disclosed, and failure to disclose vitiates consent, when (please choose the most accurate option):
- (a) there is any possibility of transmitting the condition
 - (b) there is any possibility of causing serious bodily harm
 - (c) there is a significant risk of causing serious bodily harm
 - (d) there is a probability of causing serious bodily harm
 - (e) there is a near certainty of causing serious bodily harm
 - (f) None of the above
- (4) (1%) According to the Supreme Court of Canada in *R. v. Hutchinson* (2014), if a man secretly pokes holes in his condom and then has penetrative sex with a partner, the partner can be said not to have consented. Which of the following is true?
- (a) There is no consent because the partner did not consent to “the sexual activity in question”.
 - (b) There is no consent because the consent was vitiated by fraud.

- (5) (3%) Can a person be convicted of Aggravated Assault for failing to disclose to a sexual partner that he has a serious sexually transmitted disease, if that partner is not affected by the accused or was already infected before the sexual activity with the accused? Answer yes or no; if no, is there anything else that the accused can be convicted of instead, and if so, what? Name the case that supports your answer.
- (6) (5%) Can a person who is in possession of contraband (drugs, weapons, stolen property, child pornography, etc.) be acquitted on the basis of “innocent possession”? If so, what might amount to “innocent possession”? If not, why not? Name one appellate decision that supports your answer.
- (7) (3%) A parent has a legal obligation to provide the necessities of life to a child. Does an adult child have any legal obligation to provide the necessities of life to a vulnerable parent? Answer yes or no, and name the case that supports your position. What section of the *Criminal Code* could create such a duty?
- (8) (1%) The “thin skull doctrine” (“you take your victim as you find him”) applies in criminal law.
- (a) True
 - (b) False
- (9) (4%) The *actus reus* of a crime can consist of up to 3 elements (some would say 4, as one element can be broken down into 2). What are the 3 (or 4) potential elements of the *actus reus*? (No explanation is required.)
- (10) (2%) To be guilty of Assault Causing Bodily Harm, s. 267(b), the accused cannot be found guilty unless the Crown proves beyond a reasonable doubt that he intended to cause bodily harm.
- (a) Always true
 - (b) Sometimes true
 - (c) Sometimes false
 - (d) Always false
- (11) (5%) Compare absolute liability and strict liability offences in terms of (a) what they have in common and (b) how they are different, in terms of what the Crown must prove and what defences are available. Refer to at least one decision of the Supreme Court of Canada.
- (12) (1%) Jail is a sentencing option that is not available for absolute liability offences.
- (a) True
 - (b) False
- (13) (2%) Name the Supreme Court of Canada decision that answers the previous question.
- (14) (2%) Which of the following is *not* a required element of the offence of Possession (for example, of drugs or of stolen property)?

- (a) Knowledge of the qualities of the item (i.e., that it is stolen, or that it is a drug)
 - (b) Exercising control over the item
 - (c) Desire to possess the item
- (15) (3%) Homicide is either culpable or non-culpable. What are the three types of culpable homicide?
- (16) (2%) Under Canadian law...
- (a) ...there is an irrebuttable presumption that a man intends the natural and probable consequences of his actions.
 - (b) ...there is a reasonable inference that a man intends the natural and probable consequences of his actions.
 - (c) Both of the above
 - (d) None of the above
- (17) (2%) Under what circumstances may a peace officer arrest a suspect without a warrant?
- A. Whenever he or she darned well wants to.
 - B. Only between 6 AM and 9 PM, Monday to Friday (except statutory holidays), except with authorization from the Chief of Police.
 - C. Where the officer believes that the suspect has committed a summary conviction offence.
 - D. In some circumstances, where the officer catches the suspect committing a summary conviction offence.
 - E. Where the officer believes that the suspect has just committed an indictable offence.
 - F. C, D and E
 - G. D and E
 - H. None of the above.
- (18) (2%) The current test for causation is:
- (a) Contributed beyond the *de minimus* range
 - (b) Contributed in a not insignificant manner
 - (c) Significant contributing cause
 - (d) Slight or trivial cause
 - (e) Substantial and integral cause
 - (f) None of the above
- (19) (2%) Name one Supreme Court of Canada decision and one Ontario Court of Appeal decision that support your answer to the previous question.

- (20) (1%) In Ontario, where does the trial of a summary conviction offence take place?
- A. The Superior Court of Justice
 - B. The Ontario Court of Justice
 - C. The House of Lords
 - D. None of the above
- (21) (1%) A recognizance and an undertaking are similar in that in both cases...
- A. a surety may be required
 - B. a cash deposit may be required
 - C. a bond (a promise of money) may be required
 - D. the accused will be bound by various conditions
 - E. two of the above
- (22) (1%) The fact that a theft was committed as a prank...
- A. Will always be a defence to the charge of theft.
 - B. Will sometimes be a defence to the charge of theft.
 - C. Will never be a defence to the charge of theft.
- (23) (1%) What is *normally* the maximum penalty for a summary conviction offence, in terms of jail or fine, where the accused is not a corporation?
- A. 6 months jail, \$5,000 fine
 - B. 18 months jail, \$5,000 fine
 - C. 2 years less a day jail, \$5,000 fine
 - D. None of the above
- (24) (2%) Jane is charged in Ottawa with Robbery, an indictable offence contrary to section 344 that carries a maximum penalty of life in jail. She is pleading Not Guilty and wants to go to trial. When setting a trial date, the court clerk asks her what her “election” is (as to mode of trial). Which of the following is one of the options open to Jane?
- A. Jane has no choice. Her “election” refers to her choice of lawyer.
 - B. A trial in the House of Lords.
 - C. A trial in the Superior Court of Justice, with or without a jury, preceded (if she wants) by a preliminary inquiry in the Ontario Court of Justice.
 - D. None of the above.
- (25) (2%) Unless the *Criminal Code* specifies otherwise, the maximum jail term available for an indictable offence is...
- A. 18 months

- B. 2 years less a day.
 - C. 2 years.
 - D. 5 years.
 - E. 10 years.
 - F. 14 years.
 - G. 25 years.
 - H. Life.
 - I. None of the above
- (26) (3%) You get into a fight with someone at a beach, punch him, knock him out, and leave him lying on the beach. You're tired from the fight so you go lie down nearby. You fall asleep. While you are asleep, the tide comes in and the other person drowns. Assuming that the punch itself was not a fatal blow, did you cause that person's death at law? Refer to at least one case that helps decide the issue.
- (27) (2%) Same facts as in the prior question, with one exception. Before the tide comes in, a sudden thunderstorm hits the beach and the knocked-out person is hit by lightning. He dies of electrocution. Did you cause his death? Why or why not?
- (28) (3%) The police conduct surveillance in the Byward Market in Ottawa, by installing hidden cameras at various locations and filming, among other things, transactions between street prostitutes and their prospective clients. They let the cameras run for a year and then do a sweep where they make a number of arrests. On February 10, 2017, the cameras caught Chris make a deal with a client for a sexual transaction. The police charged Chris on October 20, 2017 with Communicating for the Purposes of Prostitution, a summary conviction offence. Can the Crown proceed with this prosecution? State why or why not.
- (29) (2%) In a judge-and-jury trial...
- A. ...the trial judge makes all legal rulings and findings of fact; the jury's function is to deliver the verdict that the judge tells them to render.
 - B. ...the trial judge is the judge regarding the law, while the jurors are the "judges" regarding the facts.
 - C. ...the trial judge is the judge regarding the facts, while the jurors are the "judges" regarding the law.
 - D. ...the jurors make all legal rulings and findings of fact; the judge is there to maintain order in the court.
 - E. None of the above
- (30) (5%) *R. v. Hundal* (1993, SCC) established the "modified objective test" for crimes of negligence. Please describe this test. Please describe how this test was clarified in *R. v. Creighton* (1993, SCC).

- (31) (5%) What is the “*de minimus*” defence? Does it exist in Ontario? Please refer to at least one case that discusses the issue.
- (32) (2%) Jane is convicted of an indictable offence after being tried in the Ontario Court of Justice. She wishes to appeal her conviction. To what court does she appeal?
- A. The House of Lords
 - B. The Supreme Court of Canada
 - C. The Ontario Court of Appeal
 - D. The Superior Court of Justice
 - E. The Ontario Court of Justice (Appeal Division)
 - F. This is a trick question. She cannot have her trial in the Ontario Court of Justice.
 - G. This is a trick question, as Jane has no right of appeal to any court.
 - H. None of the above.
- (33) (2%) Which of the following statements is most accurate with respect to negligence offences?
- (a) The reasonable person test never takes into account the personal characteristics of the accused.
 - (b) The reasonable person test always takes into account the personal characteristics of the accused.
 - (c) The accused’s personal characteristics are relevant to the reasonable person test for offences (of negligence), but not for defences (such as provocation).
 - (d) The accused’s personal characteristics are relevant to the reasonable person test for defences (such as provocation), but not for offences (of negligence).
- (34) (2%) In order to be guilty of criminal negligence for failing to fulfill an undertaking (s. 217 *Cr. C.*), the undertaking must be... (choose the *most accurate* answer)
- (a) An expression of willingness by the accused to do something for the victim.
 - (b) A suggestion by the accused that he will do something for the victim.
 - (c) A statement by the accused that he will probably do something for the victim.
 - (d) A promise by the accused that he will do something for the victim.
 - (e) A solemn commitment by the accused, that the accused is bound by, that he will do something for the victim.
- (35) (2%) Identify a leading case that answers the above question.
- (36) (8%) Joe sits at his computer and accesses a child pornography website. The still and video images available on this website satisfy the *Criminal Code* definition of child pornography. Joe does not download any of the images onto his hard drive, but merely

looks at them on his computer screen. Is Joe legally in possession of child pornography in this scenario? If not, can you think of any scenario where a person could be in possession of an image that is not on one's hard drive but is on the Internet? In answering this question, please describe the distinction between "personal possession" and "constructive possession", and refer to the case that decided the issue conclusively.

- (37) (10%) Please do a case brief of *Kazenelson*, which is excerpted below (I have removed the discussion of a second ground of appeal, as well as comments relating to the sentence appeal, you do not need to comment on these aspects of the case).

R. v. Kazenelson

[2018] O.J. No. 452

Ontario Court of Appeal

J.M. Simmons, P.D. Lauwers and G.I. Pardu JJ.A.

Heard: December 13, 2017.

Judgment: January 30, 2018.

Appeal From:

On appeal from the conviction entered on June 26, 2015, with reasons reported at 2015 ONSC 3639, 122 W.C.B. (2d) 341, and the sentence imposed on January 11, 2016, with reasons reported at 2016 ONSC 25, 128 W.C.B. (2d) 76, by Justice Ian A. MacDonnell of the Superior Court of Justice, sitting without a jury.

The judgment of the Court was delivered by

P.D. LAUWERS J.A.:--

A. OVERVIEW

1 Following a judge alone trial, the appellant was convicted of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. The charges arose from an incident in which five workers employed by Metron Construction Incorporated ("Metron") fell more than 100 feet to the ground when the swing stage¹ on which they were working suddenly collapsed. None of these workers was attached to a lifeline as required by both provincial law and industry practice. Tragically, four of these workers, including the site foreman, died; the fifth worker suffered serious permanent injuries. A sixth worker, Shoruh Tojiddinov, had tied himself off to one of two lifelines available on the swing stage and, as a result, did not fall when the swing stage collapsed.

2 The appellant was Metron's project manager. The trial judge found that he was with the workers on the swing stage when it collapsed, but was holding onto one of the lifelines, and he managed to grab an adjacent balcony and pull himself to safety.

3 The trial judge also made the following critical findings concerning the appellant:

- (i) he had the authority to direct the workers who were on the swing stage (a fact conceded by the appellant both at trial and on appeal);
- (i) he became aware, well in advance of the swing stage collapse, that there were only two lifelines available on the swing stage for the six workers working their way down the building from the top floor;
- (i) knowing that fall protection was available for a maximum of two persons, he not only did nothing to rectify that situation, he permitted all six workers to board the swing stage with their tools in circumstances where he had no information concerning the weight capacity of the swing stage.

4 Under s. 219 of the *Criminal Code*, "everyone is criminally negligent who ... in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

5 Section 217.1 of the *Criminal Code* imposes a duty upon "everyone who has the authority to direct how another person does work or performs a task" "to take reasonable steps to prevent bodily harm to that person or any other person arising from that work or task".

6 The trial judge concluded that the appellant's failure to take any steps to prevent the workers from boarding the swing stage in the above-noted circumstances constituted a breach of his duty under s. 217.1 and showed a wanton and reckless disregard for their lives and safety, thus amounting to criminal negligence. In addition, he concluded that the appellant's failure to ensure that each worker had a lifeline "was a significant contributing cause of the harm that resulted." He therefore convicted the appellant of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm.

7 The trial judge imposed a sentence of three and a half years on each count to be served concurrently. Mr. Kazenelson appeals both conviction and sentence.

8 I would dismiss the appeal. The trial judge's reasons for conviction and sentence are clear and the chain of reasoning is rooted firmly in his findings of fact. He made no legal or other errors. The appellant largely repeated arguments considered and dismissed by the trial judge.

B. THE CONVICTION APPEAL

9 The trial judge's consideration of the applicable law relating to criminal negligence starts at para. 108 and extends over many paragraphs. The appellant did not take issue with the trial judge's self-instruction. The trial judge summarized the *actus reus* at para. 111, noting that the Crown must prove that: Mr. Kazenelson had the authority to direct how the workers employed by Metron did work or performed a task; he failed to take reasonable steps to prevent bodily harm to those workers; and in failing to do so he showed wanton or reckless disregard for their lives or safety. Counsel focused on the last element, and drew the court's attention to the decision of Hill J. in *R. v. Menezes* (2002), 50 C.R. (5th) 343, [2002] O.J. No. 551 (Ont. Sup. Ct.), at para. 72:

Criminal negligence amounts to a wanton and reckless disregard for the lives and safety of others. This is a higher degree of moral blameworthiness than dangerous driving. This is a marked and substantial departure in all of the

circumstances from the standard of care of a reasonable person. The term wanton means "heedlessly" or "ungoverned" and "undisciplined" or an "unrestrained disregard for consequences". The word "reckless" means "heedless of consequences, headlong, irresponsible". [Citations omitted.]

Counsel agreed that for the purpose of a prosecution under s. 217.1 of the *Code*, the "reasonable person" should be taken to be the "reasonable supervisor".

10 The appellant made two arguments that the verdict was unreasonable. The context for the appellant's first argument is that this was the first conviction of an individual supervisor under s. 217.1 of the *Code*. He argued that "the approach of the trial judge stretches penal negligence too far" and that his conduct "simply did not rise to the high level of criminal negligence." He added that, even assuming a breach of s. 217.1, his acts or omissions did not show "a wanton and reckless disregard for the workers." This rendered the verdict unreasonable:

[T]he trial judge failed to consider the acts of the workers in not securing more life lines and the fact that a life line was available when the stage was boarded, but not utilized, *establishing that neither the Appellant nor the workers adverted to the objective foreseeability of the risk of collapse*. In this context, it cannot be said the acts or omissions of the Appellant constituted a wanton or reckless disregard for their safety. [Emphasis in original.]

11 More particularly, the appellant argued that the trial judge "did not consider the other circumstances that were objective and contextual markers of the high fault required for criminal negligence", which the appellant identified as the following:

- (i) The workers had worked on drop 5/6 [a descending row of balconies on the building face] for the entire day, apparently not adverted to the risk of mechanical failure of the swing stage;
- (i) The absence of foreseeability that the swing stage was so deficiently manufactured to the extent that it would have collapsed under its own weight;
- (i) When the workers boarded the stage, none of them, other than Tojiddinov, saw any need to utilize the available life line; and
- (i) Mr. Kazenelson himself boarded the stage (on the trial judge's findings) without either a fall arrest system and, like the other workers, without even attempting to secure himself to the available life line.

12 I would not give effect to this argument. As the appellant acknowledged, the question for the trial judge was whether the appellant's conduct constituted a marked and substantial departure from what *a reasonable supervisor* would have done in the circumstances. The trial judge identified the circumstances relevant to this question at para. 127 of his reasons:

The fundamental rule requiring fall arrest protection for each worker on a swing stage is a reflection of the simple fact that suspended access equipment can fail. The risk of such a failure is brought home to everyone who undergoes the

suspended access training provided by the CSAO. Mr. Kazenelson had not only taken that training, he had followed it up with a course equipping him with the ability to train others. I am satisfied that he knew that swing stages are not fail safe. When he returned to the job site in the afternoon of December 24th, he became aware that six of his workers were more than 100 feet above the ground using a swing stage with only two lifelines. Not only did he fail to do anything to rectify this fundamental breach of the *Construction Regulation*, the standards of the Construction Safety Association, and industry practice, he permitted the workers, at the end of the day, to board the swing stage with all of their tools. The recklessness of his conduct was exacerbated by the fact that he had no information with respect to the capacity of the stage and thus no way of knowing whether it was capable of carrying the weight of all seven persons who boarded it. His conduct can only be characterized as a wanton and reckless disregard for the lives and safety of the workers and as a marked and substantial departure from what a reasonable supervisor would have done in the circumstances.

13 In any event, the trial judge addressed these "contextual markers" relied on by the appellant a number of times in various sections of his analysis, including at paras. 18, 114, 129-130, and 142-143.

14 As to the unexpected failure of the swing stage, the trial judge found, at para. 146, in the section of his analysis addressing causation:

The relevant question, therefore, is whether a reasonable project manager would have contemplated the risk of equipment failure "as part of the general risk involved" in failing to provide lifelines for workers on a swing stage suspended 100 feet or more above the ground. In my opinion, the only possible answer to that question is yes. The risk of equipment failure was not only an objectively foreseeable risk, it was virtually the entire reason why the provision of a fall arrest system was regarded as the fundamental rule of swing stage work. The failure of the swing stage, even if unexpected, was not an event that was outside the ambit of the general risk animating the requirement for a fall arrest system. It is not necessary that the precise cause of the failure have been foreseen.
[Footnote omitted.]

15 Similarly, in addressing whether the actions of the workers broke the chain of causation through their failure to use the one available lifeline, and in failing to insist that sufficient lifelines for all of them be provided as the law requires, the trial judge found, at para. 148:

The premise underlying the defence submission is that the workers were solely responsible for their safety. That premise runs head-on into s. 217.1 of the *Criminal Code* and ss. 27(1)(a) and [2](c) of *OHS Act*. The former provision puts a duty on persons like Mr. Kazenelson to take reasonable steps to prevent bodily harm to workers. The latter provisions require such persons "to take every precaution reasonable in the circumstances" for the safety of workers and, more specifically, to ensure that a worker "works in the manner and with the

protective devices, measures and procedures required by [the] Act and the regulations".

16 There is no legal error in the trial judge's expression, understanding, or application of the legal test for criminal negligence. I would agree with his assessment, which was amply supported by the facts.

34 I would dismiss the conviction appeal...

[The Court then dealt with the sentence appeal...]

D. DISPOSITION

49 I would dismiss the appeal.

P.D. LAUWERS J.A

J.M. SIMMONS J.A:-- I agree.

G.I. PARDU J.A.:-- I agree.

¹ A swing stage is a platform used to ascend and descend the exterior of a building. In this instance, the swing stage was a modular model made up of four ten-foot platforms bracketed together and was operated by motors on each end of the platform.