UNIVERSITY OF KWAZULU-NATAL, PIETERMARITZBURG
EXAMINATIONS: NOVEMBER 2011

SUBJECT, COURSE AND CODE: DELICT (LAWS2DL/LAWS3DL)

DURATION: 3 HOURS TOTAL MARKS: 75

External Examiner: Mr RN Scott
Internal Examiner: Ms PP Singh

STUDENTS ARE REQUESTED, IN THEIR OWN INTERESTS, TO WRITE LEGIBLY.

PLEASE NOTE: This paper consists of FOUR (4) pages. Please ensure that you have them all.

INSTRUCTIONS:

• All questions are compulsory and must be answered.
• Please pay attention to the mark allocation to make sure you apportion your time appropriately.
• Questions can be answered in any order. However you must clearly indicate the question number you are answering. A failure to do so may result in a student losing all marks for the question which is not clearly marked with the correct question number.
• Students must write legibly as any illegible content or content which cannot be read will be disregarded.
John, Tom and Harry are Grade 10 students at Unity High School. John received a new computer from his parents as a present for his 16th birthday on the 5th March 2010. While playing with the new computer he enters a pornographic website and downloads a picture of two naked gay men - sitting snug together on a couch fondling each other while masturbating. He then digitally removes the faces of the two men and substitutes their two faces with the faces of the principal [Mr Smith] and deputy principal [Mr Uys] of Unity High School which he obtains from the school’s website. The exposed genitalia of the men on the original picture are then obscured with the school’s emblem.

John is very pleased with the picture he has created and thinking it quite funny he downloads the picture to his cellphone and sends it to Tom. Tom then sends the picture to other students at the school [including Harry]. Harry finds the photo hilarious and as he hates both the principal and the deputy principal, he decides maliciously to print the photo out in colour. After printing out the photo he then places the photo on the school notice board.

Later on that day another teacher at the school Ms Jackie finds the photo on the school notice board and removes it. By this time many students at the school have already seen the photo. She then heads to Mr Uys’ office where she hands him the photo and lets him know that she found it on the school noticeboard. Both Mr Uys and Mr Smith feel utterly humiliated and, to make matters worse, they later hear that the picture was also sent by Tom via cellphone to hundreds of pupils at the school and had "spread through the school like wildfire".

Mr Uys says that: "I honestly felt like just sitting in my office and not coming out. I wanted to crawl into a hole."

He said also that every time he passed pupils on the school’s playground or in the corridors and heard them giggle he would imagine it was because of the image they had in their heads of him and the headmaster masturbating. He also felt embarrassed when dealing with students and colleagues because most of them had seen the images.

Things eventually became too much for Uys and, after devoting himself to the school for more than 12 years, he eventually left the school at the end of 2010. He is now headmaster of a new school in another province.

Mr Uys alleges that the publication of the offending picture was defamatory as the reasonable observer would understand that the men in the picture were engaged in a sexual act. In addition he alleges that the reasonable observer would also understand that the men portrayed in the photo were homosexual. As such he alleges that the pictures in addition to being prima facie defamatory also have the additional sting of alleging that he and Mr Smith are homosexual.
All three boys acknowledged that they were behind the offending picture but said they thought the manipulated picture was "a huge joke". They allege that it was clear that the image was done in an amateurish manner and that the picture had been manipulated. As the picture was not reality, they argue that the reasonable observer would understand that the photo was meaningless and was merely created as a joke since they allege that it is clear for all to see that the heads on the image had nothing to do with the bodies.

Mr Uys wishes to claim R600 000 in damages from the three pupils for defamation. In the alternative, if the claim of defamation does not succeed, he is claiming the sum of R600 000 for an infringement of his right to dignity.

Assume that Mr Uys contacts you with a request to advise on whether he can successfully sue John, Tom and Harry. Set out the applicable law, including relevant defences that might be raised, and advise Mr Uys.

In your answer you must focus on the following issues:
(a) Set out whether Mr Uys’s claim meets the essential requirements of defamation
(b) Advise him as to whether he can sue simultaneously for a defamation of his right to reputation and an infringement of his dignity
(c) Advise him whether the defendants can raise any defences to his claim/s

QUESTION 2 (15 marks)

The McCurry restaurant has operated in Pietermaritzburg for the last five years. The restaurant’s speciality is curry and the most popular dish is a spicy chicken curry. The restaurant is very popular and it has a very loyal group of supporters. You are approached by Angus, the owner, of the restaurant. He is very worried as he has received a letter from the McDonald chain of restaurants ordering him to stop using the name McCurry for his restaurant as they claim that consumers may believe that McCurry is linked to the McDonald chain of restaurants because of the use of the ‘Mc’ prefix.

McCurry's signboard has white and gray letters against a red background with a picture of a smiling chicken giving a double thumbs-up, in contrast to McDonald's red and yellow "M" logo. McCurry also serves only Indian food. Angus does not believe that McCurry’s is passing itself off as being associated with McDonald’s as he believes that they are operating in two very different segments of the food industry.
Question 2 continues…

(a) Angus informs you that the name of the restaurant is an abbreviation of the house speciality, a spicy Maritzburg Chicken Curry. Advise Angus whether McDonald’s may be successful in a claim for passing off in unlawful competition.

(b) Would your advice change if you discover that McCurry is in fact Angus’ surname and that the restaurant is named after him? Explain with reference to relevant cases.

**QUESTION 3 (20 marks)**

Pansy takes her daughter, Rose, to a funfair owned and operated by Thabo. Rose wants a ride on the rollercoaster so Pansy, who does not like high speeds, leaves her in the queue and goes for a ride on the big wheel which is about 50 metres away. While Pansy is watching from the big wheel, the carriage in which Rose is riding flies off the rails of the rollercoaster track, due to a loose bolt in the framework, and plummets 60 feet to the ground. Rose is badly injured, and Pansy is at first hysterical, and later suffers from recurrent feelings of anxiety and from insomnia.

Sage, who is also on the big wheel at the time of the accident, is so shocked at what he sees that he later suffers from catastrophic neurosis and is unable to work for 15 months. Some 10 years earlier Sage had been a voluntary patient at a mental hospital, where he had been treated for a neurotic condition.

Rose’s father, Chrys, hears that Rose had been injured in the rollercoaster accident on the radio news that evening and is so shocked that he suffers from extreme grief and later needs extensive psychiatric counselling to overcome his post traumatic stress disorder caused by hearing of Rose’s accident.

Advise Thabo whether he is liable in delict for the psychological harm caused to Pansy, Sage and Chrys.