NOTE: 1. This is an open book examination, and candidates may refer to their class notes, papers, case law, and relevant statutes

2. The exam consists of two sections. Section 1 has 80 marks and is based on a hypothetical fact situation. Section 2 has 20 marks and consists of two essay questions dealing with policy issues in personal injury litigation.
From the time they were young, Felix and Robinson had a dream of opening a restaurant together. Over the years Felix learned to be excellent chef. Felix comes from a poor immigrant family. He started out as a dishwasher at a local eatery and worked his way up to being the head chef of a critically acclaimed restaurant called Edgar’s Tavern. Despite not having any formal training, Felix was widely considered to be a once in a generation talent. Felix was not happy with how much money he earned at Edgar’s Tavern and knew that if he wanted to earn more money, he would need to open a restaurant of his own.

Robinson was talented in his own way. He had also worked in restaurants his whole life, starting as a bus boy and working his way up to being the manager of another local favorite, Café Moose. Robinson had a warm personality and had an ability to make people feel welcome at the restaurant. He was also very skilled at managing the restaurant’s expenses and ensuring that every month Café Moose turned a profit. Robinson was also underpaid given his extraordinary talent and knew that opening a restaurant would allow him to earn a lot more money.

After years of working for other people, Robinson and Felix decided to quit their jobs and open up their own restaurant called My Oh My. They were certain that My Oh My would be the best restaurant in Vancouver and would bring them enormous wealth for years to come. Each of them had saved $50,000 over the years and along with a $100,000 investment from their silent partner, Mr. I Suzuki, they had enough money to proceed with their dream.

Within a couple of months Felix and Robinson acquired location for the new restaurant and renovated and decorated the interior. Felix planned an amazing menu and Robinson hired a staff of waiters for the front of the house. Everything was on track for My Oh My’s opening night on April 13, 2016.

On April 11, 2016, Felix and Robinson were driving in Felix’s Dodge Viper on their way to My Oh My for a pre-opening party with their friends and family. Felix drove his vehicle to Robinson’s apartment and before setting off to My Oh My, Felix and Robinson each had a small glass of wine to celebrate. They left Robinson’s apartment in good spirits and headed north on Granville Street towards downtown Vancouver. Felix’s car was travelling 70 km/h in the left lane as they neared the intersection of Granville and Broadway.
At the same time, Lou was driving his 1977 Cadillac Coupe Deville southbound on Granville Street towards the intersection of Granville and Broadway in the right lane. Lou's best years were behind him. At the ripe age of 72, Lou's career was nearing the end. He had been a restaurant critic for the Vancouver Sun for 50 years. He was known for being a harsh critic who pulled no punches. At this stage in his career, Lou only did restaurant reviews about once a month and he worried that the Vancouver Sun would soon be asking him to retire. Life had taken its toll on Lou. His back hurt most days. He had injured his back years earlier when he had slipped on a discarded paper napkin while he was reviewing a Taco Hell restaurant. The back injury never healed and seemed to be getting worse lately. His memory was also failing him. Lou’s wife Anita constantly had to remind him of appointments and deadlines for his restaurant critiques.

Nelson, a bodybuilding fanatic, was driving his 1987 Ford Festiva Southbound on Granville Street in the left lane approaching the intersection of Broadway. Nelson could bench press 300 lbs. and deadlift 500 lbs. To help with his weight training regimen, Nelson took steroids, which he purchased from his friend Alex, who was sitting in the passenger seat of Nelson’s vehicle. Alex earned most of his money by selling steroids. He also owned a juice bar that sold protein shakes of various flavours. While the juice bar did not earn much money, it gave Alex a way of laundering the money he earned from selling steroids. As a result, on paper, Alex’s juice bar was extremely profitable. Alex also took steroids claiming that they not only made him strong, but also kept his mind sharp and had a positive effect on his mood.

As Nelson's vehicle neared the intersection of Granville and Broadway, he observed a posted “No Left Turns” sign. Nelson had turned left at this intersection many times before and knew he could get away with it. Nelson observed the traffic light turn from green to amber and then saw Lou’s Cadillac come to a stop in the right northbound lane. Nelson also observed Felix's Viper in the left lane approaching the intersection and he assumed Felix's vehicle would also come to a stop. Nelson started to turn left and when he was halfway into his turn, he realized that Felix’s Viper was not stopping. The front end of Felix’s vehicle collided with the rear quarter panel of Nelson's vehicle. Nelson’ vehicle then swerved and crashed into Lou’s Cadillac.

When the collision occurred, Ken Jr. and his father, Ken Sr., were pedestrians standing at the southeast corner of the intersection waiting to cross Granville Street. Ken Jr. and Ken Sr. had a clear view of the accident. Nelson's vehicle narrowly missed Ken Sr. before crashing into Lou’s vehicle. Ken Sr. was terrified that Nelson's car was going to hit him.

Police attended the scene of the accident almost immediately. A police investigator took photographs and measurements. A police officer spoke with Ken Jr. and took handwritten notes of what Ken Jr. had observed. Another police officer spoke with both
Felix and Nelson and took handwritten notes of what each driver had to say about the accident. The officer suspected that Felix had been drinking and asked Felix to take a field sobriety test, which he passed easily.

Miraculously, Nelson walked away unscathed. Unfortunately, Nelson only had the minimum of $200,000 liability insurance on his vehicle.

Robinson was taken to Vancouver General Hospital in an Ambulance. Robinson had broken his right arm and felt excruciating pain in his neck. Robinson wore a cast on his arm for two months. After the cast was removed, the orthopedic surgeon, Dr. Genius, recommended that Robinson undergo a course of physiotherapy for at least twelve weeks. With all the work that needed to be done for the impending opening of My Oh My, Robinson stopped doing physiotherapy after only three weeks. To cope with his ongoing pain, Robinson used a narcotic pain medication, Oxymorphine, which was prescribed by his family physician Dr. Treator. After two months, Dr. Treator refused to provide any further prescriptions for Oxymorphine, as she was concerned that Robinson was becoming addicted. Thereafter, Robinson obtained Oxymorphine prescriptions from various walk-in clinics. His use of Oxymorphine steadily increased over time.

Felix, who was also taken to hospital by ambulance, complained of stabbing pain in his mid-back. Felix also injured his right ankle and x-rays later revealed a fractured bone in his foot. Felix’s family doctor, Dr. Treator, recommended that Felix should avoid bearing weight on his foot for at least two months. During that time, Felix’ wife Sandra took a leave of absence work to care for Felix and assist him with activities of daily living.

Alex was not wearing his seatbelt when the accident occurred. Alex hit his head on the passenger window and was unconscious for two minutes at the scene of the accident. Alex was taken to St. Paul’s hospital and was given a CT scan of his brain which revealed possible brain damage.

Lou refused any help from the paramedics, insisting that he was fine. Lou inspected his car at the scene and the damage to his Cadillac was minor. Lou muttered to himself, “they don't make ‘em like they used to” and though he was talking about his car, he might as well have been talking about himself. Lou was a tough old man and he was not going to let a little fender bender slow him down. The following day, Lou noticed that his back pain was significantly worse than it was before the accident. His doctor prescribed him strong pain medications, which seemed to help, but upset his stomach and made his mind even more foggy than usual. In the coming months, Lou was consistently late in delivering his restaurant reviews and on one occasion, forgot to do so altogether. Six months after the accident, Lou was fired for cause by the Vancouver Sun. At the recommendation of Dr. Treator, Lou underwent an MRI of his lumbar spine, which showed long-term degenerative changes in his spine.
In the days following the accident, Ken Jr. became increasingly worried about his father. Ken Sr. told his son at the scene of the accident that he had been "scared half to death" by the accident. In the coming days, however, Ken Sr. refused to discuss the accident and would get visibly shaken at the mere mention of it. Ken Sr. became increasingly reluctant to leave his house saying to his son, "it's just too darn dangerous out on those streets". Ken Sr. became increasingly reclusive and his quality of life decreased significantly. Ken Sr. was diagnosed with anxiety and prescribed psychological counselling.

The opening of My Oh My was delayed for three months following the accident. Because the business was not generating any income, Felix and Robinson were forced to ask Mr. Suzuki to invest an additional $30,000 into the business to pay the rent. Three months after the accident, Felix had not recovered enough to work in the kitchen, so Robinson hired a temporary chef to prepare the food until Felix felt up to it.

Robinson was able to return to work in time for the restaurant opening. While his arm had healed, he still experienced significant pain in his neck. The pain Robinson experienced took its toll on Robison's mood and energy level. His overuse of Oxymorphine also affected his concentration and judgment. Robinson hired Fernando to act as the temporary head chef. Robinson used to have keen sense for hiring the right people. In this case, however, Robinson hired Fernando after only a short interview and without interviewing any other candidates. Fernando turned out to be a bad hiring. The food he prepared was mediocre at best. In one of Lou's last restaurant reviews for the Vancouver Sun, he gave My Oh My a scathing review, noting that the steak he was served had the taste and texture of a well-used baseball glove. Even after Felix returned to work, My Oh My failed to turn a profit and eventually went bankrupt.

After the Accident, Alex experienced chronic headaches. His focus and concentration were impaired and he became increasingly depressed. Alex had experienced bouts of depression before but he never experienced the prolonged and debilitating depression he did following the accident. Alex stopped selling steroids altogether after the accident. He also stopped taking steroids because he could not afford them and his headaches prevented him from lifting weights so why bother. He continued to operate his juice bar for one year after the accident, but the business could not survive without the income from Alex's illicit steroids operation. Alex shut down the juice bar after six months and his depression only got worse. Alex was able to find a job working as a security guard but was fired after calling in sick too often. Alex has rarely seen his family doctor, Dr. Treator, since the accident. On the few occasions that Alex did consult her, Dr. Treator recommended that he get counselling from a registered psychologist and prescribed the anti-depressant medication, Smilex. Alex insists that he cannot afford to pay for counselling. He also refuses to take Smilex because he had read in a bodybuilding magazine that Smilex can cause male pattern baldness.
You should assume that all court actions will be brought in British Columbia (BC) and that the actions are subject to the BC Civil Rules of Court and other relevant BC legislation and case authorities. If you need to make any additional factual assumptions in answering the question, clearly state what those assumptions are.

Value  Question 1
6 Marks  Discuss Lou's non-pecuniary damages and the factors (both positive and negative) that are relevant to this assessment?

Value  Question 2
12 Marks  You are retained by the Insurance Monopoly of British Columbia (IMBC) to act as defence counsel in relation to Alex's claim. Alex is claiming significant damages for pain and suffering, past and future income loss and cost of future care. What defences to Alex's claims would you pursue at trial? How would you build your case before trial?

Value  Question 3
8 Marks  You represent Felix. Explain why you would prefer to have Felix's case heard by a judge or a jury. Assuming that this is a jury trial, explain how you would frame/draft the opening.

Value  Question 4
5 Marks  You represent Felix. Argue why Nelson is liable for the accident. What evidence would you obtain to prove liability?

Value  Question 5
12 Marks  Without reference to dollar amounts, provide a quantum assessment of Felix's potential claims.
Value Question 6
3 Marks Is Ken Sr. entitled to Part 7 benefits? Why or why not? What further information, if any, is needed?

Value Question 7
8 Marks Discuss causation as it pertains to Lou's back injury.

Value Question 8
6 Marks Dr. Hedschrink, a psychiatrist, is retained by IMBC to perform an independent medical examination of Robinson. Dr. Hedschrink interviewed Robinson for three hours and administered a battery of tests. She prepared a medical legal report which provides the following in part:

With regards to Robinson's obvious addiction to Oxymorphine, it is my professional opinion that Robinson is genetically predisposed to addiction and therefore would have become addicted to some kind of intoxicating substance even if the accident had not occurred. My opinion is based in part on the result of the Braintest2000 scan, which I administered during the course of my assessment. The Braintest2000 is a device that is widely used in parts of Estonia, but has yet to be approved for use in Canada. The Braintest2000 scan shows indicators of genetic predisposition for substance abuse. Given that the Braintest2000 is an objective measurement of genetic predisposition, I have not taken into account less reliable evidence, such as Robinson's denial of prior narcotic pain medication use and Dr. Treator's clinical records, which contain Robinson's subjective reports of symptoms.

Robinson reported pain in his neck throughout his interview. I find it very unlikely that Robinson is actually experiencing pain in his neck at this time. Any neck injury he may have sustained in the accident has long since healed. In my professional experience, people who are addicted to narcotic pain medications will say anything to justify the use of those medications. In other words, addicts will lie about anything to get what they want. I do accept that Robinson fractured
his arm in the accident based only on the x-ray image of his right arm, which demonstrated a fracture.

You represent Robinson. What is your strategy for dealing with Dr. Hedschrink's opinion evidence at trial?

Value Question 9
3 Marks You represent Alex and have obtained a medical legal report from Dr. Treator. Dr. Treator opines in part that Alex has major depressive disorder as a result of the accident. Defence counsel has objected to the admissibility of Dr. Treator's report on the basis Dr. Treator is not a psychiatrist and the diagnosis is outside of her area of expertise. Make an argument in response to this objection.

Value Question 10
4 Marks Discuss the duty to mitigate as it pertains to Robinson's claim.

Value Question 11
6 Marks Discuss joint and several liability as it pertains to Alex's claim.

Value Question 12
5 Marks Two years after the accident, Felix is involved in another motor vehicle accident in which his vehicle is rear-ended. Felix's back pain, which had improved somewhat since the first accident, was significantly aggravated in the second accident. As Felix's lawyer, you are concerned that Nelson's insurance policy will not cover the full value of Felix's losses from the first accident, the claim for which is ongoing. How does the second accident affect Felix's ability to be compensated for all of his future losses?

Value Question 13
2 Marks Can Robinson claim for the cost of his Oxymorphine as special damage? Why or why not?
SECTION 2 – ESSAY 20 Marks

Value Question 14

20 Marks Answer both of the following policy questions:

A. Why did the Supreme Court of Canada (in the trilogy) put a limit on non-pecuniary damages and explain why those considerations either apply and/or are no longer relevant today?

B. Make an argument for or against severing joint and several liability in the case of contributory negligence.

END OF EXAM