National University of Singapore
Faculty of Law

LC1003 Law of Contract

Final Examination AY2016-2017 – Examiners' Report

Question 1

The essay question gave students a considerable degree of latitude, permitting them to draw from a wide range of materials covered in this module to explain their answers. Practically all students answered (predictably) "yes" – that "fairness" was something which mattered to the Law of Contract. What distinguished the better answer scripts from the poorer answer scripts was how well the candidate was able to illustrate how, or perhaps to what extent, "fairness" was important to the legal principles that comprise the Law of Contract. Quite a number of candidates chose to approach the question obliquely – by discussing the tension between "certainty" and "fairness" or whether statutes supplement the common law in order to produce "fairness" – possibly influenced (unfortunately) by their pre-examination preparations which focused on examination questions from previous years.

Definitions and choice of topics

Putting quotes around the word fairness, in the question, was deliberate. It required students to try to give the word a workable definition. Some chose to interpret "fairness" to relate to the contracts which parties enter into (focusing, in some cases on the distinction between procedural fairness and substantive fairness), others chose to interpret it as relating to the outcomes which are reached after contract law principles are applied to a contractual dispute. Either interpretation was acceptable, though any conception of "fairness" should reflect the interests and positions of both contracting parties. Some candidates made clumsy references to "fairness to the claimant", "fairness to the defendant" and "fairness to the public" – which seem to give "fairness" a meaning that comes close to "being in favour towards". Many candidates also defined "fairness" as the polar opposite of "certainty" (indeed, one candidate memorably described certainty as the "immortal enemy" of fairness), constructing a false dichotomy between the two concepts (given that promoting certainty in contractual affairs engenders a species of fairness – that associated with reliability, predictability and finality).

Students were expected to make reference to between 2 and 4 topics to illustrate whether or not "fairness" mattered to the Law of Contract. A majority of students chose to focus on the vitiating factors, particularly on the cluster comprising duress, undue influence and unconscionability. Many students covered privity and illegality to show how situations of unfairness might emerge in cases when these doctrines are

applied, while examining how the law in these areas has evolved in response (through the emergence of exceptions or other legal principles) to produce just results. Generally, there was an inverse correlation between the number of topics selected and the depth of the discussion achieved. However, students who chose to cover a broader range of topics, but were able to focus on specific legal issues which demonstrated their arguments, fared just as well those who confined themselves to 2 topics.

Privity of Contract

Many answers identified the "legal black hole" as an unfair situation arising from the doctrine of privity of contract. Some students went so far as to say that the privity doctrine itself was "unfair" or harsh, and that "fairness" was only achieved through the common law techniques and statutory exceptions. Some were, curiously, outraged that third parties – strangers to the contract – were unable to enforce contracts that purported to confer benefits upon them. Better answers were more nuanced, focusing instead on the balance that the law tries to strike between protecting the interests of third parties, promisees and promisors at common law and in the CRTPA.

Illegality

The illegality doctrine(s) gave students a chance to examine situations where contracts are struck down as a matter of public policy, even if this nullification of the contract may produce unfair results to the contracting parties. Astute students picked up on the development of the multi-factorial "proportionality" approach towards assessing the impact of illegality on the enforceability of contracts and how this led to fairer outcomes, as well as the availability of restitutionary remedies in situations where contractual enforcement is precluded because of illegality.

Mistake and Misrepresentation

Students found it more difficult to articulate the "fairness" dimensions of these vitiating factors compared to the other topics. Both these vitiating factors relate to the quality of the consent given by a contracting party when he enters the contract, unaware of the mistake or misrepresentation, and require legal frameworks which circumscribe the situations when it would be fair to allow the mistaken or misled party to be relieved of his contractual obligations. With Mistake, many relied on the availability of an equitable jurisdiction to grant relief for certain mistakes as evidence of the court's concern with generating fair results. With Misrepresentation, students highlighted the unfairness of the "fiction of fraud" in the Misrepresentation Act, as well as the fairness of statutorily empowering courts to grant damages in lieu of rescission. Some answer scripts also showed sympathy for third party purchasers of goods obtained by a fraudster in mistaken identity cases, arguing that (but not necessarily explaining why) applying the presumptions articulated by the House of Lords produced unfair results.

Duress, Undue Influence and Illegality

Many answer scripts which focused on the distinction between “procedural unfairness” and “substantive unfairness” dwelled on the doctrines of duress, undue influence and illegality, competently reproducing what was discussed in the final tutorial of Semester 2. While this may demonstrate how “fairness” is understood and translated into the relevant legal principles, more nuanced answers went on to discuss the ways in which these doctrines adequately preserved the freedom of stronger parties to advance their own interests when they enter into contracts with weaker parties. In other words, are the lines which contract law has drawn, between legitimate and illegitimate pressure, between ordinary and undue influence, and between permissible and reprehensible exploitation of weakness, fair? We can all agree that illegitimate pressure, undue influence and reprehensible exploitation of weakness is bad, but are the legal tests to identify these forms of unacceptable behaviour sound?

Question 2

1. Candidates tended to write the most for this question. (It was not uncommon to see answers for this question that were 50-100% longer than for Q1 or Q3). Indeed, some candidates focused on this question to the obvious detriment of the rest of their exam. One aspect of this problem is explained below. More generally, remember that the allocation of marks among questions is fixed, and that increasing the length of an answer to one question is usually a matter of "diminishing returns".

2. The question may have been perceived as being the most straightforward in the exam. Most students did an adequate job. There were relatively few terrible responses, but – surprisingly – there were relatively few excellent responses.

3. The transaction in the question raised several obvious grounds of challenge, viz, (1) undue influence; (2) duress; (3) misrepresentation; (4) common mistake; (5) unconscionability.

4. The principal weakness in many responses was a lack of critical judgment in discerning which were the important/challenging issues and which were easy. As a result, many answers placed unnecessary emphasis on obvious points and glossed over interesting/hard ones.

5. Typically, the weakness in (4) manifested itself in the following ways:

   (a) Discussing only a few of these vitiating grounds, without explaining why those grounds were chosen and other grounds omitted.

   (b) Discussing the various grounds but in no particular order, or with no connection between them, or with no evaluation of their *relative* strengths. (It would be a brave counsel who opens his or her case with the weakest arguments).

   (c) Trying to discuss every element of all five grounds in detail and, as a result, either running out of time or writing just a line or two on each point.

6. As a matter of substance, three weaknesses were common:

   (a) Going through the elements of each ground in a plodding, "shopping list" fashion, even where they were not apt to apply to the facts.

   (b) Focusing on stating all the legal principles rather than analysing the facts given. For example, it was common to see responses with a half-page statement of the law, followed by a brief, conclusory assertion about how the law applied in the circumstances. Point to the facts that assist your argument, where necessary.

(c) Inventing or stretching facts. For example, many candidates asserted that the transaction between Stefan and Damon involved grossly unfair or imbalanced terms. But the question actually gave little information in this respect. Basic information about the company's performance, the number of shares exchanged and their value, and whether there was a market (or repurchase arrangement) for the shares, etc was not provided. Better answers acknowledged the limitations of the facts and addressed this uncertainty.

7. **Undue influence**. Some candidates misunderstood or conflated the elements of actual (class 1) and presumed (in particular, class 2B) undue influence. Most candidates identified the right elements. Better answers contrasted the two categories and explained why one might be better than the other on the given facts. Weaker answers lacked that explanation. Another puzzling feature was that many answers considered class 2B first, only to say that "if the presumption was rebutted" then class 1 might apply. Of course, if the presumption has been rebutted, then it has been shown that the victim entered independently under his own free will. None of those answers explained how this fitted with causal requirements of actual undue influence.

8. For actual undue influence, the interesting points were (a) whether the influence was undue and (b) causation.

(a) In relation to (a), there is some overlap between duress and undue influence, but in modern times we try to keep them distinct by emphasising misuse of the *relationship* as the basis of undue influence. Better answers pointed to domineering behaviour, emotional guilt-tripping or even, perhaps, misrepresentation.

(b) In relation to (b), better answers identified the different factors that might have led Stefan to sign, and then made a judgment about the relative degree of influence. Better answers were consistent in their view of the facts when analysing causation across undue influence, duress and misrepresentation.

9. For presumed undue influence, the relationship itself was reasonably straightforward. The interesting issue was whether the transaction called for explanation. Unfortunately, many responses: (a) assumed facts not in evidence, or (b) merely asserted a conclusion, or (c) tried to draw tenuous factual analogies with other cases. Better answers looked at *themes* found in other cases and appreciated that there were arguments for and against Stefan on this point.

10. **Duress**. Some candidates perceived both duress to the person and economic duress; others thought there was no credible threat to the person. Either of those approaches was acceptable, so long as it was justified by reference to the facts. The former line of analysis is straightforward; most candidates recognised the low degree of causation and reversal in onus of proof.

11. For economic duress, the threat to fire Stefan could have been perceived as lawful (i.e. exercising a contractual right to terminate), or unlawful (i.e. repudiation). Either analysis was acceptable, again, as long as candidates explained the assumption underlying their position. From that starting point candidates might have called in aid the various factors used to establish illegitimacy or legitimacy. It was apparent that many candidates took these from the textbook or lecture slides without really understanding how "abuse of process", "good faith" or "reasonableness" had been interpreted and applied in the case-law. Many candidates rightly noted the confusion over the onus and standard of proof for this kind of duress. Unfortunately, some seemed to get bogged down in lengthy discussions of the point. Those who fell into that quagmire could have asked themselves whether it made a difference on these facts. If so, explain why.

12. **Unconscionability**. This was rarely done well. Many candidates recognised the tension between the "narrow" and "broad" approaches to disadvantage and appreciated that Singapore tends towards the former, though the exact scope of the doctrine is still uncertain. Weaker answers tended to pick a single case (e.g., *EC Investments* or *Fong Whye Koon*) as representing the law without thinking about other decisions.

13. Quite a few candidates struggled with internal consistency. There was often a mismatch between the legal requirement of disadvantage identified by the candidate and the analysis of the facts. So, it was common to see candidates state that the test was one of "poverty and ignorance" and then neglect the element of poverty, or focus instead on emotional instability. A similar problem arose when candidates considered the "exploitation" element of the doctrine. Many candidates failed to connect the relevant acts of exploitation to the particular disadvantage (e.g., poverty and ignorance) they had already identified.

14. Many candidates made assertions about significantly imbalanced or unreasonable terms that went beyond the limited facts given.

15. **Misrepresentation**. Relatively few candidates considered this. Good answers were precise about the possible representations made by Damon (e.g., one as to the success of the trials, another as to the financial prospects of the company), and then considered whether each amounted to a misrepresentation. The latter, for example, was arguably only a statement of opinion. Quite a few students got confused by the difference between (a) representation by asserting the truth of a matter, and (b) representation by impliedly asserting reasonable grounds for holding an opinion on a matter. Another interesting point was whether a misrepresentation induced the contract. Good answers referred to the relevant principles on inducement (e.g, *JTC v Wishing Star* or *Wee Chiaw Sek Anna*) and provided a view that was consistent with the analysis of causation for the other vitiating factors (see above 8(b), 10, 11).

16. Beyond this point, almost all responses displayed a poor understanding of the Misrepresentation Act. Some candidates discussed the measures of loss for deceit and negligence without any attempt to apply those concepts to the facts. That demonstrated memorisation, not understanding and analysis.

17. **Mistake**. Again, a relatively unpopular ground of challenge. Most answers correctly referred to one or more of the main authorities on common mistake, viz, *Olivine Capital*, *The Great Peace*, *McRae*, *Bell v Lever Bros, Solle*, or *Associated Japanese Bank*. The interesting points were (1) what is meant by "fault" and was Damon at "fault"?; (2) was there an allocation of risk? for example, was there a (collateral) warranty by Damon?; and (3) was the mistake sufficiently "fundamental"? Unfortunately, few responses probed these questions with any depth. Many responses noted that it might be difficult to establish the "fundamentality" of the mistake at common law; thus Stefan might fall back on equitable common mistake. However, most answers simply asserted that the mistake was/was not fundamental (at common law or in equity), rather than giving a reasoned argument.

18. **Is rescission available?** This was relevant to undue influence, duress, unconscionability, misrepresentation and equitable common mistake. Many responses merely listed all the possible bars to rescission and then stated that none was applicable. More sophisticated analyses were possible. What knowledge is required for affirmation and were there any acts of affirmation? The impetus for Stefan's complaint seems to be the discovery of the falsification of the results of the trials. Does that bear upon some grounds (e.g., misrepresentation, equitable common mistake) more directly than others? For duress, for example, one relevant consideration is what the victim does once the pressure has been released. When was the pressure released? Does it depend upon the nature of the threat? (see (10) above).

19. A few responses discussed how rescission could be effected, in light of a possible change in the value of the shares in the company.

Question 3

Time management: Ideally, students should divide their time equally for each question so as to avoid spending too much time on a question. The need to properly manage time is also crucial when discussing issues in a particular question. This can result in other relevant issues not being discussed at all which can impact on the marks to be awarded for that particular question as a whole.

Identifying issues: Take some time to think through what are the relevant issues in the question. Otherwise, one can spent a lot of time discussing irrelevant issues and having little or no time to discuss the relevant ones when it becomes obvious which will be too late. Only relevant issues count while the discussion of irrelevant ones would work against you.

Application of legal principles to the given facts: Merely stating a legal principle without more doesn't help. What also counts is the application of the legal principles laid down in the cases to the facts given in the question. The role of the examinee is to determine the outcome of a particular issue and this can only be meaningfully done in the context of the given facts with the aid of the stated legal principles.

TVD *vis-a-vis* Matt Movers (MM)

An obvious issue here is that of privity. MM is a third party to the contract entered into between TVD and TT which contained an exclusion of liability clause. For MM to be able to obtain the benefit of the exclusion of liability clause would depend on the following.

MM must be able to show that it comes within the Contracts (Rights of Third Parties) Act (Cap 53B), especially by showing that it comes within s 2(1)(b) and (3). Some students mistakenly thought that s 7(4)(b) of the CRTPA would prevent MM from getting the benefit of the Act since it involved a transportation contract. But s 7 goes on to say that the exclusion clause is available to MM if s 2 is satisfied.

Alternatively or in addition, as the case maybe, privity may be shown at common law as laid down in cases such as *Scruttons* and *Eurymedon*.

Some answers did not discuss the CRTPA at all. On the given facts, the CRTPA should be discussed as it provides the easiest means to show privity between the parties compared to the various common law approaches.

The next issue is that of illegality. This would warrant a discussion of the relevant cases, such as *Ting Siew May* and *St John Shipping*. If it is established that there is illegality, then the question arises as to whether TVD can use it as a defence under s.4 of the CRTPA to MM relying on the exclusion of liability clause. It is important to

note here that it is TVD's failure to obtain the approval for Verve Vein that caused the issue of illegality to arise in the first place.

Some students discussed the issues of privity (involving the CRTPA) and illegality independently right to the end. As can be seen above, there is some interaction between the two and the appropriate cross-reference(s) should be made.

TVD *vis-a-vis* Dr Rick

A good number of answers identified illegality as an issue. This is misconceived. It is true that Dr Rick wanted to purchase Verve Vein which had not obtained approval of HSA. Accordingly, there was an issue of illegality discussed above involving TVD and MM. But the contract that was entered into between TVD and Dr Rick at the end of the day was for Nerve Ana which was approved. Thus, there was no issue of illegality between TVD and Dr Rick.

Again, almost all answers identified mistake as to identity of Elena as an issue. This is also misconceived. This is not the typical situation encountered in the cases involving mistake as to identity, namely, where it is the seller who is mistaken and the buyer is the one perpetrating the fraud (see, for example, *Phillips v Brooks* and *Lewis v Avery*). The position is reversed here, namely, Elena, who is acting on behalf of TVD, is the seller who is not mistaken and it is the buyer, Dr Rick, who is the mistaken party. Based on case law, this might not support the case of a mistake as to identity.

However, a better argument is to say that the contract entered into at the end of the day is one between TVD and Dr Rick. The contract would identify TVD as the seller (which Dr Rick is aware of) and Dr Rick as the buyer. Elena is just the salesperson facilitating the transaction between TVD and Dr Rick. There is, thus, no mistake as to the identity of TVD as the seller of Nerve Ana as far as Dr Rick is concerned.

However, a good majority of the answers correctly identified mistake as to terms as an issue. On the facts, it would appear that this is not a case of a mistake as to a fact like in *Statoil* or *Smith v Hughes*. It was more a case of mistake as to a fundamental term of the contract, namely, the subject-matter of the contract. The product to be purchased was crucial in the case. (For cases involving a fundamental term, see *Digilandmall* and *Hartog v Colin*) The contract between TVD and Dr Rick was, thus, void.

Another aspect of mistake which would render the contract between TVD and Dr Rich void (which was identified in some answers) is that pertaining to mutual mistake. On the facts, it is not clear if Elena knew as a fact that Dr Rick only wanted to purchase Nerve Ana and nothing else. Dr Rick had only intended to purchase Verve vein. If Elena thought that Dr Rick wanted to purchase Nerve Ana when the latter wanted to purchase only Verve vein, then the parties would be at cross-

purposes as to the subject-matter of the contract, thus rendering it void. (see *Raffles* and *Wellmix Organics*)

Another issue would be that pertaining to misrepresentation on Elena's part that she is Katherine. The fact that she "plays along" reinforces the misrepresentation on her part. Further, if Dr Rick can be shown to have been induced by Elena's misrepresentation to make the purchase (see *Anna Wee, Lim Koon Park* and *Redgrave*) in addition to fulfilling the other elements giving rise to an actionable misrepresentation, then the contract will be rendered voidable at Dr Rick's option. The misrepresentation would appear to be one that is fraudulent. Dr Rich can rescind the contract (there appears to be no bars to rescission on the facts) and claim for all losses flowing from the misrepresentation whether foreseeable or not (*Wishing Star*). It is arguable if a claim can be made under s 2(1) of the Misrepresentation Act (see *RBC*).

Final comments: Use of e-examination software

Many students who used the e-examination facility submitted answers that were replete with distracting typographical errors and "stream-of-consciousness" sentences. These students are advised to write out their answers by hand, giving themselves the opportunity to formulate their arguments coherently before committing their thoughts to paper. The word count for answers to this question also tended to be larger than that for the other answers, but their length did not necessarily reflect the quality of their contents. A shorter, carefully-worded and thoughtful essay always receives a better grade than a long, rambling and error-filled answer script.

Students using the e-examination facility should also familiarise themselves with the mechanics of submitting their answers in the correct format. Question 1 should appear in Section 1, Question 2 should appear in Section 2, and Question 3 should appear in Section 3.

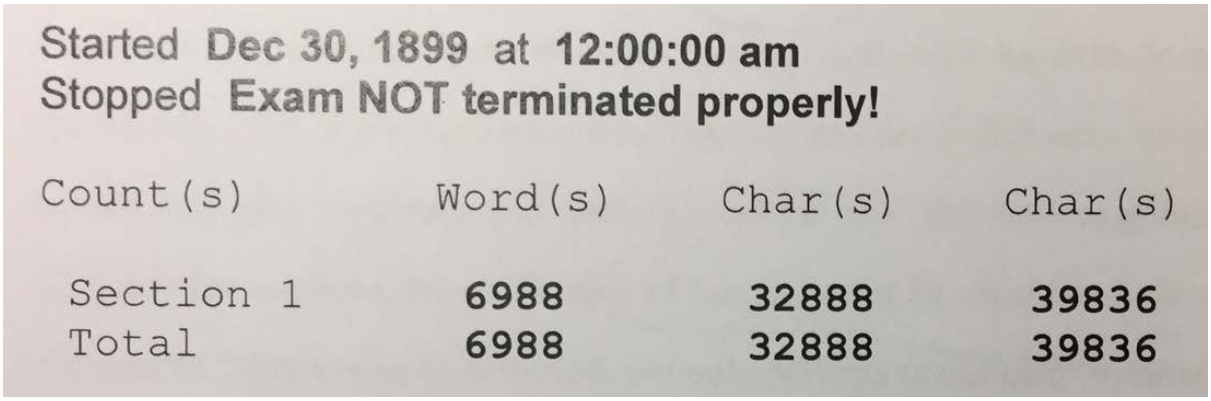
Examples of e-examination answers that were not arranged in their correct Sections are reproduced below. Candidate A did not use answer separators and submitted his answers to 3 questions in one Section. Candidate B submitted the answers to 2 questions in Section 2. Candidate C submitted all 3 answers in the wrong Sections.

Penalties will be imposed in future if students using the e-examination facility do not submit their answers into the correct Sections.

Contract Law Team

AY 2016-2017

Candidate A:



Started Dec 30, 1899 at 12:00:00 am
Stopped Exam NOT terminated properly!

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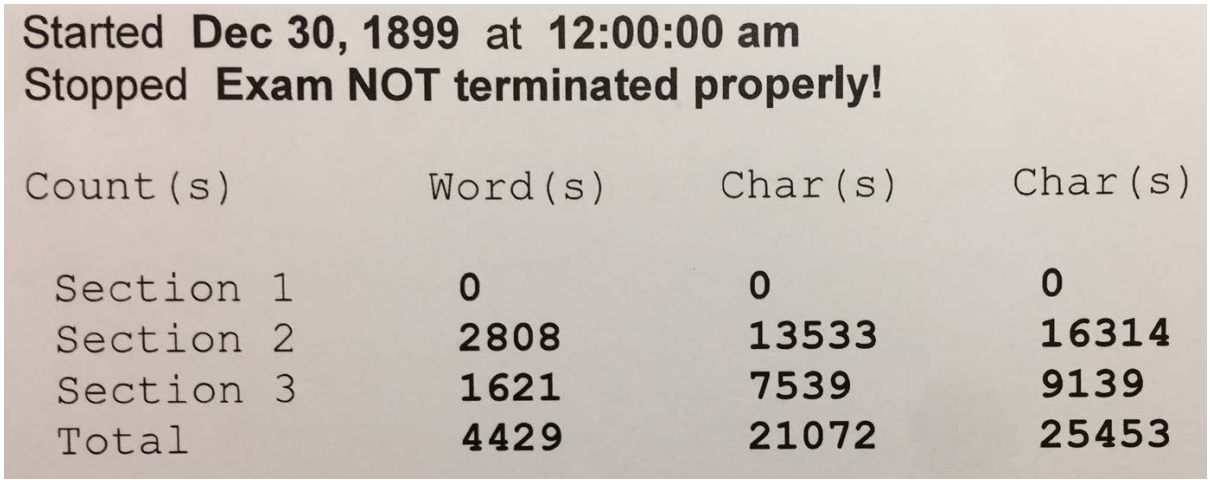
Candidate B:



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Section 3	1621	7539	9139
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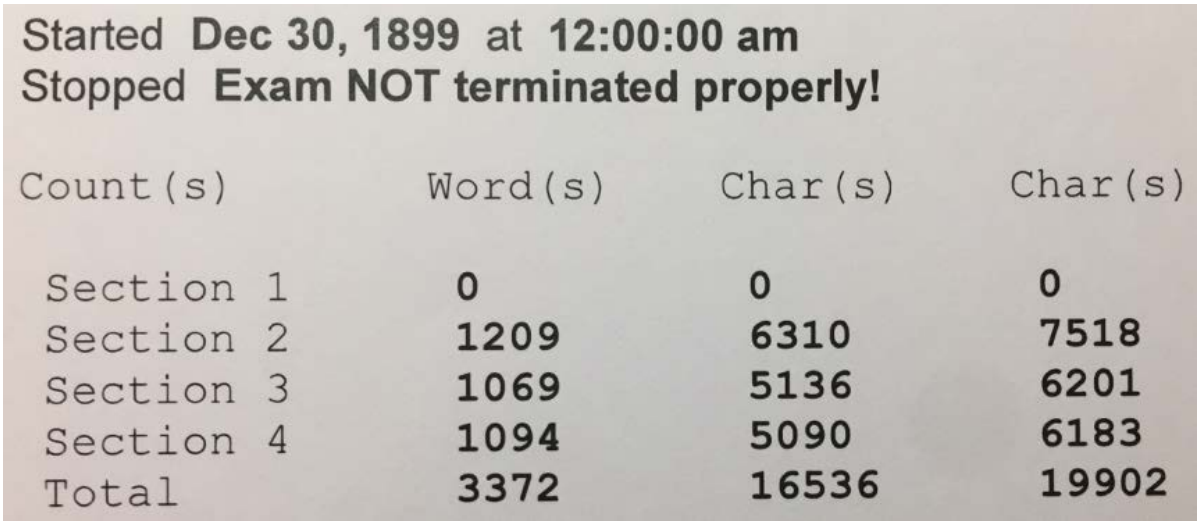
Candidate C:



Started Dec 30, 1899 at 12:00:00 am
Stopped Exam NOT terminated properly!

Count(s)	Word(s)	Char(s)	Char(s)
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Section 2	1209	6310	7518
Section 3	1069	5136	6201
Section 4	1094	5090	6183
Total	3372	16536	19902