

THE NATIONAL MOOT COURT COMPETITION 2018



QUESTION PACK

Kindly Sponsored by Matheson

Matheson



School of Law & Government

September 27th, 2018

A chara,

We are pleased to provide you with this information pack for the upcoming **National Moot Court Competition 2018**. All of the information you need in relation to this competition is in the pack, including the problem question, rules and procedures, and the outline timetable for the day.

The competition will take place in the Criminal Courts of Justice complex on Parkgate Street, Dublin on Saturday November 10th 2018. As indicated on the timetable, registration will begin at 9am and the first round will begin at 10am.

Please note specifically the information below:

1. Institutions may enter a maximum of **5 teams**. We need to receive information on the number of teams that you are entering and the participants' names by 5pm on **Monday October 22nd**. Teams should consist of 3 students, though only 2 students from each team will be entitled to present oral submissions in each round (not necessarily the same 2 students for each round). Please email the team names to nationalmoot@gmail.com
2. As was the case last year, marks awarded to memorials will not count on the day of the Moot itself, except in a tie-break situation (i.e. in deciding which teams



Matheson

progress to the semi-finals, if there are teams on equal points in terms of the oral rounds then they will be divided on the basis of their memorial marks). All participants must submit a memorial for each side and these will be exchanged at the beginning of each round. Failure to submit memorials by the specified deadline will mean that a team cannot participate. No exceptions will be made to this. All arguments must be contained in the memorial and teams cannot add additional substantive arguments on the day (though you could add a new case, for example, so long as the substantive argument is set out in the memorial). A prize will be awarded to the team with the best memorials. This will be announced at the end of the Grand Final on the day of the competition.

3. We need to receive all written submissions (in MS Word or PDF format) by **5pm on Friday November 2nd 2018**. **Late submissions will not be accepted under any circumstances.** Send submissions to nationalmoot@gmail.com. As detailed further within the information pack, these submissions should include a memorial on behalf of the Plaintiff and a memorial on behalf of the Defendant. Each document should be no longer than 2,500 words. Only the designated Team Letter should appear on the memorials; there should be no way to identify the institution submitting the memorials.
4. Once again, thanks to the kind sponsorship of Matheson solicitors, the entry fee for the competition is just **€25 per team**. This must be paid by way of deposit to the bank account below, either by online transfer or in-bank lodgement, and physical **evidence of payment** (e.g. print-out of lodgement slip/evidence of online transfer) **must be presented at registration on November 10th**. **Teams that fail to present this evidence of payment will not be allowed to participate in the Competition.**

- **N.B. Please use “LawGov” as reference**
- Bank Account Details: Allied Irish Banks, 7/12 Dame Street Dublin 2
- Account Number: 91765488 / Sort Code: 93-20-86



Matheson

- BIC: AIBKIE2D
- IBAN: E89AIBK93208691765488

The Winning Team will receive €200 worth of one-for-all vouchers and the Best Speaker in the Final will receive €100 worth of one-for-all vouchers. There will also be a €60 prize (in one-for-all voucher format!) for the Best Memorials.

Please read the information pack in its entirety as it contains important information on the format of the competition, the procedures and rules, and, of course, the problem question itself.

We look forward to hearing from you in relation to your participation, and we thank you for supporting this competition.

If you have any questions do not hesitate to contact us by emailing nationalmoot@gmail.com or by calling me on 01-7006471.

Le gach deá-ghuí,

Dr Aisling de Paor



Matheson



National Moot Court Competition 2018

Kindly sponsored by



Guidelines for Participants

1. For the purposes of this question, students can assume that neither company is registered as a trademark and the case does not address any questions of liability under any intellectual property legislation. You are required to prepare written submissions for the Plaintiff/ Appellant and written submissions for the Defendant/ Respondent. There is no need to prepare additional court documents.
2. There will be no oral evidence taken on the day. This is a legal argument only. The primary question being will the Court of Appeal overturn the decision of the High Court to find a case of passing off. No new pleadings can be raised on the day.
3. This is an appeal on point of law. Submissions should focus on whether there is a prima facie case of passing off. The Court of Appeal will not be hearing substantive arguments on remedies (including damages or an injunction).
4. This question pack contains a total of 19 pages.



Matheson

Background and facts to case

OJ Ltd is a successful Dublin based Irish company that primarily makes fruit-based beverages. The company specialises in the production of orange juice. A year ago OJ Ltd was making €100,000 annually on its product “OrangeO” which came in a plastic orange container shaped like an orange. This packaging was designed to be unique and to attract consumers and particularly children. This packaging became associated with the product “OrangeO” and the company OJ Ltd. Annual consumer preference surveys showed that “OrangeO” was the most popular juice amongst children in schools around the country. Sales of this product were consistently high, and reflected the popularity of the product and the brand.

In addition to orange juice, OJ Ltd also manufactured a range of other juices, including apple and grapefruit, which were also sold in fruit shaped type packaging, which OJ Ltd considered to be its unique characteristic. OJ Ltd as a brand and “OrangeO” as a product have been well advertised in the media, both on the television and other media outlets, including national newspapers. The company developed a slogan for OrangeO: “If it tasted any fresher it would still be on the tree.” It also developed a catchy musical jingle that accompanied the slogan and advertisements shown on television. The advertisement and the jingle featured a dancing orange in a tree. This advertising campaign ran regularly on national television stations and was well- known in households around the country.

OJ Ltd had a long- standing reputation of producing high quality juice that tasted fresh and delicious. It consistently rated highly in consumer preference surveys and was one of the best sellers in the Irish orange juice market.

Six months ago, OrangeJ Ltd, a competitor in the Irish market, started to produce orange juice in a similar (albeit darker) orange shaped container that was slightly larger with a flattened side, called “OJuice.” OrangeJ Ltd embarked on an extensive advertising campaign, focused on the national market. It developed a slogan: “The freshest juice from the freshest oranges” and an advertising campaign, including a jingle featuring talking oranges.

OJ Ltd noted a fall in sales of €20,000 and had a number of complaints from customers in relation to the bad taste of the product. On investigation, it was confirmed that the product bought by the customer was “OJuice” and not “OrangeO.” OJ Ltd was immediately concerned and worried that this would cause further confusion amongst customers and a further drop in sales. The company also believed that there would be damage to the reputation of the company and the goodwill associated with the product and brand.

OJ Ltd was anxious to restrain the continued marketing and sale of OrangeO



Ltd's packaging and advertising methods related to its product, "OJuice."

OJ Ltd was also dissatisfied that the rival company, Orange J Ltd had a very similar name, which it felt would cause confusion amongst consumers.

Procedural history:

OJ Ltd contacted its solicitors, a leading law firm, Arthur Black & Associates and obtained legal advice. Following unsuccessful correspondence between OJ Ltd's solicitors and the solicitors for Orange J Ltd to settle the matter, proceedings were initiated on OJ Ltd's behalf in the High Court on 12th December 2017 against Orange J Ltd. OJ Ltd pursued a tort action for passing off. A full defence was entered by the defendant, Orange J Ltd.

OJ Ltd claimed that Orange J Ltd copied the packaging and the general "get up" of the product, which was aimed to confuse customers. OJ Ltd also claimed that Orange J Ltd copied and "deliberately mimicked" the advertising style that it was well known for, particularly the slogan (and use of the term "fresh") and the jingle.

Orange J Ltd argued that there were stark differences in the packaging of the product, such as the colour (which was a darker shade of orange) and the particular shape of the container. Orange J Ltd also argued that there were differences with the slogan and jingle used in the advertising of these products that clearly distinguish the products. In addition, Orange J Ltd pointed out that orange juice is a relatively generic product and it is likely that many competitors in the market use, or are likely to use the description of "fresh" to describe orange juice.

In addition, OJ Ltd claimed that Orange J Ltd copied its name (of which it had built up significant goodwill in), and that this was also damaging to its brand and reputation by creating confusion amongst consumers and the public. It claimed that the name of the company, Orange J Ltd was so similar to OJ Ltd that it would inevitably cause confusion amongst consumers.

Orange J Ltd argued that the name of its company, although similar to OJ Ltd, was different and unlikely to cause confusion amongst the average discerning consumer. Orange J Ltd further argued that it was not its intention to cause confusion amongst consumers, and that any perceived 'likeness' between the product, marketing technique and name was an innocent coincidence.



In the initial hearing of the case, the Plaintiff sought the following:

1. Damages for loss of profits, and damage to the goodwill and reputation of the company and the product.
2. An injunction to restrain the continued manufacture, packaging of the product “OJuice” and to prohibit the continued use of the company name of Orange J Ltd.
3. An order for the delivery up or destruction of all names or badges on any goods already marked with the deceptive name or badge and in the possession of or under the control of Orange J Ltd.

The plaintiff provided significant survey evidence to demonstrate both the goodwill associated with OJ Ltd and its product “OrangeO” (and its packaging), as well as the likelihood of confusion amongst the public. Orange J Ltd dismissed the validity of this evidence as not carrying sufficient weight, not reflecting market reality or consumer attitudes to these products.

THE HIGH COURT:

At first instance, Murphy J of the High Court found the following and held in favour of the Defendant, Orange J Ltd in refusing to find a case of passing off:

On considering the question of passing off, the court addressed this question in respect of the product’s packaging, advertising technique (including slogan) and the name of the company.

Firstly, the court considered the packaging of the products in question. Murphy J considered the two rival products and the relevant authorities and concluded that the case in passing off had not been made out by OJ Ltd. Regarding the packaging, the court found that Orange J Ltd’s packaging was different in a “literal sense”, and when it came to the question of “the overall appearance on a first impression... as it is viewed by the average and reasonably observant customer” – the standard which the case law in passing off demands, he believed that the Orange J Ltd’s packaging (particularly its darker colour and flattened shape) eliminated the risk of consumers being confused by the product’s “get-up”. Murphy J reached this decision by referring to the classic “Jif Lemon” criteria for passing off (and subsequent cases in this area that applied this test). Murphy J examined and applied the three strands of the “Jif Lemon” test.¹ He found that the first criterion, “good will” was satisfied.”

¹ [1990] 1 All E.R. 873.

On the second condition, misrepresentation, Murphy J acknowledged that the Courts have made it clear that there must be a likelihood of confusion between the plaintiff's and defendant's products for this condition to be fulfilled.

Murphy J held that he was not satisfied on the evidence that there was a deliberate intention on the part of Orange J Ltd to mimic the "get up" of "OrangeO" and consequently, to deceive the public. Regarding the test for the likelihood of confusion, Murphy J acknowledged that the Court would "put itself in the shoes of the reasonably prudent shopper, who is not in any particular hurry and who neither is overly scrupulous and dilatory and who enters the shop with the wish to purchase a "OrangeO" orange juice..."². In doing so, he endorsed the decision of Clarke J in *Jacobs Fruitfield* which emphasised the first impression rather than "the later opportunities which the customer may have to notice that the wrong product as been placed in the basket or trolley before leaving the shop."³ He found that it was not a reasonably foreseeable consequence that a customer would be misled or confused by the two products. Taking this and witnesses' testimony (orange juice purchasers) into account, Murphy J concluded that likelihood of confusion between the two products was not established and there was insufficient evidence provided to support this claim.

On the point of misrepresentation, Murphy J confirmed that intention on the part of the defendant is irrelevant for the purposes of succeeding in a passing off action. The misrepresentation is actionable even if it is unintentional or unconscious⁴. Murphy J referred to the case of *Guinness Ireland Group v Kilkenny Brewing Company Ltd*⁵ where Laffoy J stated "... The defendant's state of mind is wholly irrelevant to the existence of the cause of action in passing off." However, notwithstanding that misrepresentation is actionable even if it is unintentional, Murphy J found that there was no misrepresentation in this particular case.

On the point of damage suffered, the court had to establish whether the misinterpretation caused damage to the Plaintiff's goodwill (and referring to case of *Tommy Hilfiger Europe Inc v McGarry*⁶), Murphy J found that there was minimal pecuniary damage suffered in terms of loss of profits, and that there was likely no significant non- pecuniary damage in terms of damage to goodwill and reputation.

² [2011] I.E.H.C 433 at para. 19.

³ Ibid at para. 31.

⁴ *HFC Bank v Midland Bank* [2000] F.S.R. 176.

⁵ [1999] I.L.R.M. 531.

⁶ [2009] 1 I.L.R.M. 161



The judge was not satisfied that the tests for passing off (as established in the *Jif Lemon* case) had been met.

Regarding the survey evidence provided by the plaintiff to the court to show goodwill and likelihood of confusion, Murphy J dismissed the weight, validity and the “statistical accuracy” of this evidence. The judge labelled such evidence as “informal” and referred to the cases of *R Griggs Group Ltd v Dunnes Stores Ireland Co* and *Smithkline Beecham plc v Antigen Pharmaceuticals Ltd*.

Regarding the claim that OrangeJ Ltd copied the advertising style of OJ Ltd in respect of the products “OrangeO” and “OJuice”, the court acknowledged that goodwill can subsist in an advertising style – and referred to a number of relevant cases, including the case of *Cadbury Schweppes v Pub Squash*⁷. The court again applied the *Jif Lemon* test. Murphy J examined the advertising style of both companies, with a particular focus on the slogans (and jingles) adopted. He found that although similar, there were evident differences. He found that on the basis of such differences, it was unlikely that customers would be confused as to the slogan in question and the source of the products. He also observed that with a generic product like orange juice, it was inevitable that there would be similarities amongst competitors in the market, but that this was not enough to amount to a case of passing off.

Regarding the claim that OrangeJ Ltd copied the name of OJ Ltd, the court again applied the same ‘three step test.’ Murphy J referred to the case of *O’Neill’s Irish International Sports Company Limited v O’Neill’s Footwear Drying Company Limited*⁸ and observed that goodwill can subsist in a name, particularly where a company has acquired a certain reputation in a name. However, the court ultimately found that although the names were similar, they were not sufficiently similar as to amount to confusion.

As the court refused to find that there was a valid case of passing off, regarding the packaging of the product, the slogan and the name of the company, the court refused to consider the question of remedies (including damages, an order for the delivery up or the destruction of all names or badges on any goods already in circulation or an injunction).

⁷ [1981] R.P.C. 429.

⁸ High Court, 30 April 1997 (Barron J)

COURT OF APPEAL:

The Plaintiff, decided to appeal to the Court of Appeal. On 23rd August 2018, the Plaintiff (Appellant) caused a Notice of Appeal to be issued from the Court of Appeal Office, which was served on the Defendant (Respondent) the same day. In the said Notice of Appeal, the Appellant (OJ Ltd) indicates its desire to appeal the findings made by trial judge above.

OJ Ltd

Appellant

-and-

Orange J Ltd

Respondent

The Appellant argues the following:

Murphy J erred in law in finding that there was not a case of passing off in respect of both the packaging and slogan of the product in question, as well as in respect of the name of the rival company. In particular, Murphy J erred in failing to find that there had been misrepresentation or a likelihood of confusion amongst consumers and the public, and in failing to find that there had been both pecuniary and non- pecuniary damage suffered by OJ Ltd.

The Respondent argues the following:

Murphy J was correct in refusing to the Respondent liable for passing off and calls upon the court to uphold the decision of the High Court.



Matheson

Rules and Procedure of the Competition

Plaintiff/Defendant

For the purposes of the National Moot Court Competition the Plaintiff/ Appellant will always be OJ Ltd, and the Defendant/ Respondent will always be Orange J Ltd. In the preliminary oral presentation rounds, teams will be given an opportunity to act as counsel for both the Plaintiff/Appellant and the Defendant/Respondent.

What is required of participants?

A. Written Requirements

Students, working in teams of three, are required to prepare

- 1) A Memorandum on behalf of the Plaintiff setting out the arguments which will be made on his behalf.

And

- 2) A Memorandum on behalf of the Defendant setting out the arguments which will be made on its behalf.

Each document should be no longer than 2,500 words and should make reference to relevant case-law, legislation, constitutional provisions or other relevant legal sources.

Written Submissions must be sent to nationalmoot@gmail.com in MS Word or PDF by 5pm on 2nd November 2018.



Matheson

B. Oral Rounds

On the day of the competition, teams will be given an opportunity to represent both the Plaintiff and the Defendant in preliminary rounds.

Teams will be provided with the relevant Memorandum of the opposing team 15 minutes before each preliminary round. Having had 15 minutes to consider this information, the round will begin. Teams will have been assigned Team Letters so as to ensure anonymity of institutions. Teams **must not reveal** their institution of origin to judges at any time during the competition. The Administrators may disqualify or impose a penalty against any Team that intentionally or inadvertently discloses its institution of origin to a judge, whether or not such disclosure occurs during an Oral Round.

Only **2 students** from each team will be entitled to present oral submissions in each round (though these need not necessarily be the same 2 students for each round). Each student may speak for **7 minutes**. Students may not interrupt one another when speaking, though a student may confer with his/her colleagues (including the third student team member who may sit at the bench as counsel). Students may deviate from their written submissions so as to take into account the submissions of the opposing team. Students will be asked questions by the judges during their oral submissions.

The two speakers on behalf of the Plaintiff will present their submissions to the court first, followed by the two speakers on behalf of the Defendant. Students will then each be afforded **2 minutes** rebuttal time, in the same order as their original submissions to the Court. Rebuttal must be confined to submissions already before the Court and **no new material** may be introduced at this time. Judges may ask questions during rebuttal and su-rebuttal.



Matheson

Ex Parte Procedure

In extreme circumstances, such as when a Team fails to appear for a scheduled Oral Round, the Administrator, after waiting 10 minutes, may allow the Oral Round to proceed *ex parte*. In an *ex parte* proceeding, the attending Team will present its oral pleadings and these will be scored by the judges to the extent possible as if the absent Team had been present and arguing. In such a case, the Team that fails to appear for its scheduled Round forfeits the points.

Advice on Oral Submissions

Teams should address the court at all times with the utmost respect. Students should mirror the language which is used in courts when addressing the judge or their colleagues. The following tips may be of assistance in preparing your legal submissions.

A. Opening Submissions

When a student commences his or her oral submission, the student will stand and say: *“May it please the court, my name is I appear on behalf of the Plaintiff/Defendant in this matter”*

The speaker should also make some reference to his colleague: *“My learned friend, Mr./Ms. X will also be addressing/has already addressed the Court on the Plaintiff’s/Defendant’s behalf.”*

The student should briefly refer to the issues of the case with which he / she will deal: *“I will deal with the issue of ...”*

B. Content of submissions

In different courts, different modes of address may be used. The correct mode of address for judges of the Superior Courts as set out in the Rules of the Superior



Matheson

Courts specify “Judge” or “A Bhreithimh” as the correct modes of address. You can also refer to “the Court” if you prefer.

When a judge asks a question of a student, the student should listen to the question and should never interrupt the judge when he/she is asking the question.

A judge is only human. The judge’s question may not be clear to the student. The student may ask the judge to repeat or rephrase the question: *“Judge, could you please repeat the question?”*

Students representing a party must not interrupt a student who is making an oral submission. A student making an oral submission may consult with a colleague. As a general rule when counsel is on his/her feet, it is customary that the opponent sits. There should only be one barrister standing at a time – unless the judge is addressing them both.

A student may refer to legal materials during the course of an oral submission. Students must have this material in the court with them. The judges may ask to view the legal materials that students rely upon.

When referring to a case in some detail, you should “open the case to the Court” e.g. *“May it please the Court, I wish to open the case of DPP v Potter,⁹ reported in volume 2 of the 1995 Random Law Reports Weekly at page 4 and referred to at paragraph 5 of the Plaintiffs’ submissions. Would you like me to state the facts of the case, Judge?”*

C. Closing submissions

If you are the first speaker for your team, make sure that you have made all your points clearly. Repeat them in summarised form. End by asking if the judge has any

⁹ Always say “DPP and Potter”. Never say “DPP v Potter” or “DPP versus Potter”.

questions. Then introduce your teammate and give a very brief statement of what he/she is about to say. e.g

“In summary, the Plaintiff makes the following points: 1, 2, 3...”

“If the Court has no further questions, my learned colleague, Mr./Ms. X will make submissions based on to which I referred at the beginning of my submissions...”

or

“Ms. X will rebut the legal submission made on behalf of the Defendant with respect to....”

The second speaker from the team should end his/her speech by summarising the argument of the team as a whole, recapping what the first speaker said, as well as reiterating the points he/she has made. Again, questions should be invited. Before sitting down the speaker should enquire if the court wishes to hear any more from him/her: *“May I be of any further assistance to the court?”*

D. Other tips

Students will be anxious - even the greatest advocates get nervous. A case in point is Cicero who during his defence of Aulus Clentius Habitus for murder stated that:

“I am always nervous when I begin a speech. Every time I get up to speak I feel as if it is I myself who am on trial, nor merely for my competence but for my integrity and conscience as well. I fluctuate between two fears: either I shall be claiming more than I can achieve, which would be imprudent, or I shall not be making the best of my case, which would be a blameworthy act of negligence, a failure to meet my obligations.”

Students should not fear the oral submissions! The judges are not attempting to trick the students but attempting to determine whether students understand the legal issues involved, and can persuade the court.



Matheson

If you have a well-researched and well-constructed argument, presenting it orally should not pose a problem, provided you are familiar with each aspect of it. The aim is to present the argument clearly, calmly, without reading, with only a minimal reference to notes. While you should be relaxed and in control of the argument, you do need to present it with a degree of formality.

E. Useful phrases

- *“In my submission I will show that...”*
- *“It is my respectful submission that...”*
- *“Opposing counsel’s argument overlooks the fact that...”* or *“...overlooks the case of...”*
- *“I appreciate your point, Judge, however, I would (nonetheless) submit that...”* or *“...I would argue that...”*
- *“My learned friend Ms./Mr. X...”*
- *“Learned counsel for the Plaintiff/Defendant...”*

F. Dress Code

Students should dress smartly for all rounds of the National Moot Competition. The winning team will be making legal submissions before a High Court/Supreme Court Judge and therefore teams should look the part as well as act the part.



Matheson

Marking Scheme

Memorials

Teams must submit 2 memorials – each will be given a mark out of fifty. The marking scheme is as follows:

Command of the Issues, including application of relevant law to the facts	30
Structure and Clarity	20

These marks are relevant to the **Best Memorials competition** and will only be relevant on the day of the oral submissions in the context of a tie-break situation, i.e. in deciding which teams progress to the semi-finals, if there are teams on equal points in terms of the oral rounds then they will be divided on the basis of their memorial marks.

Oral Presentations

Each individual speaker on the team will be given a mark out of 100 for their oral presentation, including their rebuttal. The marking scheme is as follows:

Command of the Issues, including application of relevant law to the facts	30
Persuasiveness	30
Ability to answer questions/respond to points made	20
Structure and Clarity	10
Courtroom Manner	10

Scoring will not reflect the merits of the facts of the case but only the quality and force of the legal arguments.



Matheson

National Moot Court Competition 2018

Outline Timetable

Registration:	9.00 - 9.30
Opening Welcome:	9.30 - 9.45
Round 1:	9.45 - 11.00
Teams in Courtrooms:	9.45
Reading of Memorials:	9.45 – 9.55
Oral Presentations:	10.00 - 11.00
Tea / Coffee:	11.00 - 11.30
Round 2:	11.30 - 12.45
Teams in Courtrooms:	11.30
Reading of Memorials	11.30 - 11.40
Oral Presentations	11.40 - 12.40
Lunch:	12.45 - 2.00 (lunch is provided)
Semi-final:	2.00 - 3.15
Teams in Courtrooms:	2.00
Reading of Memorials:	2.00 - 2.10
Oral Presentations:	2.10 - 3.10
Break:	3.15 – 3.30
Grand Final:	3.30 - 5.00
Teams in Courtrooms:	3.30
Reading of Memorials:	3.30 - 3.40
Introduction of Judges & Preliminary Comments:	3.40 – 3.45
Oral Presentations:	3.45 - 4.45
Judgment Pronounced:	circa 5pm



Matheson