

MID-TERM EXAM

**Instructions**

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS. THIS IS A CLOSED BOOK EXAM!

While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER and "TORTS—SUMMER '92—MIDTERM EXAM" on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

**IMPORTANT:** This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything. If there appears to be an ambiguity in the facts or in the instructions, do your best to address reasonable alternative interpretations.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, *e.g.*, "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. MAKE the discussion in each answer self-sufficient; DO NOT cross-reference the discussion of other questions. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package and can be read sequentially. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, 'Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... '!

In answering the questions, please DO NOT DISCUSS ANY of the following ISSUES:

- Contributory negligence on the part of any plaintiff;
- Comparative fault as between defendants;
- Claims against governmental bodies;
- Any affirmative claims or defenses that would be raised by any defendant.

In other words, you should concentrate on the evaluation of the prima facie case that would be presented by your client(s) (if you represent plaintiff(s)) or against your client(s) (if you represent the defendant(s)).

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Columbia, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (75 points)

Patrick Evert had a flat tire on his way home from work. By the time he finally got it fixed he was too tired to go home and cook, so he stopped at Bob's Burgers. He ordered a cheese combo deluxe, large fries, and a diet coke. Halfway through the burger he bit into a "hard substance" in his hamburger. After he chewed his food carefully he felt with his tongue and recovered a piece of bone along with his broken tooth. He then spoke to one of the high-school kids who worked the cash register, and said he broke a tooth on a piece of bone that was in the hamburger. He showed it to the girl.

"Wow, bumper!" said the girl. "Does it hurt?"

"Well, yes, it does." said Patrick. "I want to speak to your manager about this."

"Well, like, he's gone home already," said the girl. "You can call him tomorrow after 9 a.m."

Patrick's tooth was quite painful, so the first thing he did the next day was to visit his dentist, Danielle Driscoll, to have his tooth fixed. Dr. Driscoll administered a standard anesthetic, and began working on the tooth. However, in the middle of the procedure Patrick stopped breathing. It turned out that he had a rare (and unpredictable) allergic reaction to the anesthetic. Although Dr. Driscoll made every effort to revive him, Patrick could not be resuscitated and died.

Patrick's long-time girlfriend Gena is the sole beneficiary of Patrick's will. She has come to your office to determine whether or not she has a claim against anyone for Patrick's demise. You have done some investigation and discovered the following:

1. Bob buys all of his hamburger meat patties from Steve Suli. Suli buys "round scrap" in 50-pound lots from East Coast Trading Company, and then grinds up the meat in a machine that forms the meat into patties, which he sells to Bob. Bob has stated that his employees simply cooked the hamburger patties and sold them. No one remembers any kind of problem associated with the one Patrick ate.
2. East Coast Trading Company purchases steers "on the hoof" from various cattle ranchers. The steers are slaughtered and "dressed": particular cuts of meat—steaks, roasts, liver, etc.—are extracted, and then whatever good meat is left over is put into fifty-pound lots of "round scrap." This is what East Coast sells to Suli and other distributors.
3. A careful review of the procedures used by Dr. Driscoll indicates that there she was not negligent. In addition, the FDA has determined that the anesthesia, despite incidents like this, is reasonably safe for its intended use.

Please analyze Gena's claims against Bob, Suli, and East Coast. What can Gena recover, if anything?

**QUESTION 2** (60 points)

Brenda Simmons, aged 32, became pregnant in January 1991. She began scheduling regular visits with her family physician, Suneetha Ali, M.D. Dr. Ali did not provide her with information about a genetic test known as the maternal serum Alpha Fetoprotein test (AFP test). Section 6527 of chapter 17 of the Code of Administrative Regulations of the State of Columbia, enacted in April 1986 pursuant to § 289.7 of the Health and Safety Code, requires clinicians to advise all pregnant women in their care of the availability of the AFP test for "pre-natal screening of neural tube defects of the fetus." This information must be given at the woman's first prenatal visit, provided she is within the first 20 weeks of gestation. The AFP test, which involves taking the woman's blood sample, is performed on a voluntary basis between the 16th and 20th week of gestation. Approximately 20 percent of pregnant women under the age of 35 who are at risk with respect to Down Syndrome will be identified through the test. However, about 80 percent of women in that age group who are at risk will not be identified through the AFP test.

On September 29, 1991, Brenda Simmons gave birth to Paul Simmons, who is afflicted with Down Syndrome. Down Syndrome is a chromosomal anomaly—usually the presence of an extra chromosome attached to the number 21 pair—resulting in varying degrees of mental retardation and a number of abnormal physical characteristics. Down Syndrome reportedly occurs in approximately 1/10 of 1 percent of live births. The average lifespan of a person with Down syndrome is 55 years.

You represent Dr. Ali. Dr. Ali tells you the following:

1. Brenda told Dr. Ali at her first visit that she and her husband had talked over the situation before Brenda got pregnant, and they had agreed they would terminate the pregnancy if the fetus displayed any abnormality.
2. The cost of Paul's medical care, and even special schooling, will be picked up by Brenda's employer's health and disability program.

Assume for purposes of your analysis that Dr. Ali was negligent. How would you assess his exposure if the Simmons sue?

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**COLUMBIA STATUTES ANNOTATED (SELECTED SECTIONS)**  
HEALTH AND SAFETY CODE  
DIVISION 21. SHERMAN FOOD, DRUG, AND COSMETIC LAW  
CHAPTER 5. FOOD  
ARTICLE 1. GENERALLY

**§ 26501. Issuance of special temporary permits; regulations**

Whenever the department finds that a class of food distributed in this state may, by reason of contamination with micro-organisms during manufacture, packing, or storage, be injurious to the

health of any man or other animal that consumes it and that the injurious nature cannot be adequately determined after this food has entered commerce, the department shall adopt regulations providing for the issuance of permits to manufacturers, processors, or packers of such class of food. These permits shall establish conditions governing the manufacture, packing, or storage of such class of food for such period of time as may be necessary to protect the public health. The regulations shall prescribe a date after which no person shall introduce or deliver for introduction into commerce any food manufactured, packed, or stored by any manufacturer, processor, or packer, unless such person holds a permit issued by the department as provided by such regulations.

## CHAPTER 5. FOOD

### ARTICLE 2. STANDARD OF IDENTITY, QUALITY, AND FILL

#### **§ 26510. Definitions and standards of identity, quality, and fill of container; establishment by department; nonapplication to wine**

Definitions and standards of identity, quality, and fill of container, and any amendments to such definitions and standards, adopted pursuant to the federal act which are in effect on the effective date of this division, or which are adopted on or after that date, are the definitions and standards of identity, quality, and fill of container in this state. The department may, by regulation, establish definitions and standards of identity, quality, and fill of container for any food whether or not such definitions and standards are in accordance with the federal regulations, when in its judgment such action will promote honesty and fair dealing in the interest of consumers. The provisions of this section shall not apply to wine.

## CHAPTER 5. FOOD

### ARTICLE 3. ADULTERATED FOOD

#### **§ 26520. Poisonous or deleterious substance**

Any food is adulterated if it bears or contains any poisonous or deleterious substance which may render it injurious to health of man or any other animal that may consume it. The food is not considered adulterated if the substance is a naturally occurring substance and if the quantity of such substance in the food does not render it injurious to health.

#### **§ 26521. Added unsafe substance**

Any food is adulterated if it bears or contains any added poisonous or deleterious substance which is unsafe within the meaning of Section 26504.

#### **§ 26522. Food additives; pesticide chemical**

Any food is adulterated if it is, bears, or contains any food additive which is unsafe within the meaning of Section 26504. If, however, a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or a tolerance prescribed under this

division or the Food and Agricultural Code and the raw agricultural commodity has been subject to processing, such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall not be deemed unsafe if the residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of the residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity.

**§ 26523. Contaminated substance**

Any food is adulterated if it consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.

**§ 26524. Insanitary conditions**

Any food is adulterated if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered unwholesome, diseased, or injurious to health.

**§ 26525. Diseased animal or product**

Any food is adulterated if it is, in whole or in part, the product of any diseased animal, any animal which has died otherwise than by slaughter, or any animal that has been fed on the uncooked offal from a slaughterhouse.

**§ 26526. Container**

Any food is adulterated if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

**§ 26527. Radiation; exception**

Any food is adulterated if it has been intentionally subjected to ionizing radiation unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to Section 26203.

**§ 26531. Fresh meat**

Any food is adulterated if it is fresh meat and it contains any preservative or other chemical substance which is not approved for use in fresh meat by the department, the United States Department of Agriculture, or the Department of Food and Agriculture of this state.

**§ 26532. Chopped or ground beef or hamburger**

Any food is adulterated if it is chopped or ground beef or hamburger unless it is composed of voluntary striated muscle of fresh beef which does not contain any substance that is not approved

by the department and unless it has a total fat content which is not in excess of 30 percent by weight.

**§ 26535. Adulteration of food**

It is unlawful for any person to adulterate any food.

**§ 26536. Receipt of adulterated food**

It is unlawful for any person to receive in commerce any food that is adulterated or to deliver or proffer for delivery any such food.

CODE OF CIVIL PROCEDURE  
PART 2. OF CIVIL ACTIONS  
TITLE 3. OF THE PARTIES TO CIVIL ACTIONS

**§ 377. Wrongful death of adults or certain minors; parties; right of action; damages; consolidation of actions**

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs, and his dependent parents, if any, who are not heirs, or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs and dependent parents in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

PROBATE CODE  
DIVISION 2. GENERAL PROVISIONS  
PART 13. LITIGATION INVOLVING DECEDENT  
CHAPTER 2. SURVIVAL OF ACTIONS

**§ 573. Action by or against personal representative; damages; assignability**

(a) Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative.

(b) In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

(c) Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement.

(d) This section applies where a loss or damage occurs simultaneously with or after the death of a person who would have been liable for the loss or damage if his or her death had not preceded or occurred simultaneously with the loss or damage.

(e) Nothing in this section shall be construed as affecting the assignability of causes of action.