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SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

[The underlying facts, minus the fatal visit to the dentist, are based on *Evart v.*

In order to recover against any of the defendants listed below, Gena would have to establish three things: (1) that the defendant breached some duty to her, either by being negligent or by engaging in an ultrahazardous activity; (2) that such breach of duty was a proximate cause of Patrick's death; and (3) that Gena is legally entitled to recover damages for Patrick's death.

Gena's case against the meat suppliers will first be considered in terms of liability. Then the computation of damages will be analyzed.

Claim v. Bob

Negligence. Gena would first have to establish that Bob was negligent.[1] Negligence is the failure to use reasonable care—the care that a reasonably prudent person would use in the same or similar circumstances. Gena might try to establish negligence in a couple of different ways. First, she might argue that a reasonably prudent person would have inspected the burgers or that Bob didn't select his meat supplier carefully enough. Reasonable care is often measured by what other people in the same industry do; if other hamburger places do things to insure that bone fragments don't find their way into the meat, then the jury could find that Bob was negligent. On the other hand, it may be that such injuries are so infrequent, and the cost of detection so high, that it is reasonable for Bob to simply cook and sell the hamburgers without inspection. I don't think this would be successful.

Another method of proving negligence is by showing that there was a statutory violation. A statutory violation may be treated as negligence per se—the court will find negligence as a matter of law—if two conditions are met: (1) the statutory violation was unexcused; (2) the statute's purpose was to prevent injuries like the one suffered by the plaintiff. Here the statute (§ 26536) prohibit selling "adulterated food," but it's not clear that the meat here was "adulterated." The meat apparently had a piece of bone in it. § 26520 excludes naturally occurring substances (like bone) from the definition of "adulterated," provided that the substance in the food is not in a quantity that makes it injurious to health. Maybe this piece of bone, although naturally occurring, was in a quantity large enough to be injurious to health. Although this theory could be argued, it seems to be stretching the statutory purpose, which is presumably to avoid foreign substances.

In any event, even if Bob technically violated the statute, he may have an excuse; he may show that he is "unaware of the occasion for compliance" with the statute. That is, if he doesn't know that the meat patty has a bone in it, then he can't be expected to comply—like someone with a burned out tail-light who doesn't know it's out. Thus, the case in any event would go to the jury for consideration of whether Bob, under the circumstances, was using reasonable care. Frankly, I

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[1]Gena would be relieved of the need to show negligence if the activity was governed by strict liability. However, since grinding and selling meat doesn't involve any of the categories (abnormally dangerous activity, nuisance, or animal trespass) that permit strict liability, she'd have to show negligence.

think a jury would be relatively sympathetic with Bob.

Another avenue to establish negligence would be res ipsa loquitur. It is a means of proving negligence when some kind of gap in the factual record prevents determination of what happened. To establish res ipsa loquitur, a plaintiff has to show (1) that the accident is of a type that doesn't ordinarily occur in the absence of negligence; (2) the defendant had exclusive control of the instrumentality causing the harm; (3) the plaintiff has sufficiently excluded other plausible causes of the accident. Applying this rule: (1) I don't know enough about ground beef to know whether a bone or other object in the meat is usually a result of negligence. If so, then this might be a plausible avenue. (2) Bob was in control of the instrumentality (the meat) when it was sold to Patrick, but he wasn't in control of it when the bone fragment found its way into the meat. (3) Although Bob would certainly argue that the bone got into the meat at an earlier stage in the process, Gena might suggest that she had sufficiently eliminated other causes (such as negligence on Patrick's part, etc.) that the burden of proof should be shifted to Bob to prove that he was *not* negligent. Again, however, even if the judge decided to allow res ipsa as a means of proving negligence, it would be for the jury to decide whether the inference of negligence was strong enough to warrant a finding of liability.

Proximate cause. If the jury believed that Bob was negligent in selling a hamburger with something in it that could break a tooth, then they could find that *but for* his negligence, there would have been no injury. In addition, however, the jury would also have to find that Bob's negligence was a *legal cause* of Patrick's injury. The jury instruction usually describes a proximate cause as one which "in a natural and direct sequence, unbroken by any new independent cause, produced the injury . . .." This standard is usually divided into three questions: (1) Did the defendant's negligence increase the risk of injury? Here the jury might find that bones in meat don't increase the risk of getting an allergic reaction to an anesthetic, and conclude that this injury was the result of "merest chance." If they found that, it would defeat recovery. I think, however, that it did increase the risk, however slightly, that oral surgery would be required, which is riskier than not having such surgery. Second, Bob might argue that there was a superseding cause, namely the visit to the dentist and the anesthetic. I don't think this would work either. (2) To be a superseding cause, the action must not be foreseeable as a result of negligence. In this case it is foreseeable that some visit to a dentist would be necessary if the bone broke a tooth, and visits to medical facilities always carry the risk of some further injury. (3) Finally, Bob might argue that the injury was unforeseeable. That wouldn't work either, because *Patrick* was certainly a foreseeable plaintiff. The fact that he was allergic to the anesthetic falls under the heading of the "thin-skulled plaintiff"—the defendant takes the plaintiff as he finds him, meaning that the defendant can't complain that the plaintiff was more sensitive than one might expect.

Claims v. Suli and East Coast

The claims against Suli and East Coast would be very similar to the claim against Bob; the statute also makes it unlawful to "proffer for delivery" any adulterated food (§ 26536), and the same questions would apply about statutory intent and excuse. There would be a different kind of res ipsa argument for each of them. It might be more convincing (based upon the testimony of how meat is ground up) that negligence could be inferred either in the process of originally cutting it up (East Coast) or through the grinding and patty-forming process (Suli). Depending upon whether the inference is logical in those cases, res ipsa might apply. Again, Gena should argue that the burden of proof should be shifted to the defendants to explain how a piece of bone could get into the meat in the absence of negligence. However, the res ipsa arguments would be stronger, since theywere more in control of the meat when it is logical to assume that the bone found its way into the burger.

Causation. The causation case would be the same for Suli and East Coast as for Bob.

Damages. Even if Gena establishes liability, she will need to know what she can recover in the way of damages. There are two statutes for wrongful death in Columbia: One is a "survival statute"—§ 573 of the Probate Code—which provides a recovery for the *estate* of the decedent. It allows the recovery of any damages that the decedent would have been able to claim, including punitive damages, but not any pain and suffering damages. Thus, Gena would be able to recover lost wages, plus punitive damages. However, unless there is more egregious conduct than what is listed here, Gena wouldn't be able to meet the standard for punitive damages, which is reckless disregard for the plaintiff's safety.

Under the "wrongful death" statute, the heirs of the decedent are entitled to recover "such damages ... as under all the circumstances of the case [ ] may be just." The statute excludes a double recovery for the wages recovered in § 573. Thus, presumably Gena would be able to recover for her emotional pain and suffering.

Alternative Liability

Although this isn't a strong case for alternative liability, Gena might want to argue that this case resembles *Summers v. Tice*, where the plaintiff was injured by pellets shot from one of two hunters. The court found that the burden of proof should be shifted to the defendants to establish which one *didn't* cause the injury. However, to qualify for this theory, the plaintiff would have to show that each defendant was negligent. That can't be done here, since it may very well be that bones in meat result from an unavoidable process that doesn't involve any negligence. Moreover, it's not a case where all of the defendants were negligent; instead, only one was negligent in allowing the bone to find its way into the meat. Thus, I don't think alternative liability would be viable.

QUESTION 2

[The facts of this case are based upon *Simmons v. West Covna Medical Clinic*, 212 Cal.App.3d 696, 260 Cal.Rptr. 772 (1989). The majority (over a dissenting opinion) rejected use of the loss-of-a-chance theory in wrongful birth cases.]

Dr. Ali would face a wrongful birth suit from Mr. & Mrs. Simmons, and potentially a wrongful life suit brought by Paul Simmons. Even though he has conceded negligence, there are important questions about causation.

The Wrongful Birth Claim

Most jurisdictions permit a recovery by the parents for a child that they would not have had but for the doctor's negligence, if the child turns out to be unhealthy. In this case, Brenda could argue[2] that, but for the doctor's negligence in failing to give her a chance to discover Paul's abnormality, they would not have had this child. The measure of damages will be discussed below. However, before reaching that point the plaintiff must first pass the test of proximate cause: can it be said, more probably than not, that Paul wouldn't have been born if Dr. Ali had used reasonable care? Based upon the percentages given, the answer to that question is no; more probably than not,

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[2]It is conceivable (so to speak) that this case could be treated as a garden variety negligence case rather than a wrongful birth, but I doubt that it would fly. Brenda could argue that if they had been able to abort Paul, they would have tried for another baby and could have had a healthy child. Therefore, the measure of damage should be a healthy child v. Paul (rather than no child v. Paul).

the test would have been useless. However, some jurisdictions have recognized a doctrine called "loss of a chance": where a physician acts negligently, depriving the patient of a chance to avoid some injury, then the patient can recover the value of that lost chance, much like a person can recover the value of a lottery ticket that was probably worthless but has the potential to be the winning number. In medical cases some courts have worried about the effect upon patient care if physicians are immunized from liability so long as their conduct probably wouldn't have helped. If the court chose to recognize loss of a chance in this case then M/M Simmons could recover 20% of the damages they have suffered.

Damages. Damages in a wrongful birth case are measured by computing the costs of the additional child (out-of-pocket as well as emotional pain and suffering) but subtracting the "imputed benefit" of the joy brought by the child. The out of pocket costs would include the income foregone by carrying and then having to care for the child and the expense (food, shelter, clothing, eduction, etc.) incurred in raising the child. The emotional pain and suffering might be quite substantial in a case where the child is born with significant handicaps; and the imputed benefit might be hard to quantify for the jury. Punitive damages would be awardable where the physician's conduct was more than merely negligent—where it is reckless-but I wouldn't characterize this physician's conduct as such. Nonetheless, it might be plead in the complaint.

Collateral Source Recovery. Traditionally a defendant was liable for the plaintiff's damages even if they had already been paid by another source, like the employer's program here. However, recent statutory changes in many jurisdictions have allowed juries at a minimum to hear evidence about the availability of other compensation sources, and in some jurisdictions the defendant's liability is reduced by the amounts received. If the latter is the case it would be very beneficial to Dr. Ali.

Statutory Damage Caps. Some medical malpractice statutes have enacted caps on pain and suffering awards that would prevent the recovery of more than $X; for example, in California the maximum is $250,000. Some state courts have held such caps unconstitutional, but we would want to see if something like that applied to this case.

The Wrongful Life Claim

Where a child is born with severe abnormalities, some jurisdictions have permitted the recovery by the *child* for the "wrong" of being born. *E.g., Harbeson v. Parke-Davis*. Paul might pursue a wrongful life claim (actually a guardian ad litem would be employed to seek one on his behalf); the claim would be similar to the Simmons' wrongful birth claim-with the same questions about causation—but would differ in the measure of damages. Those courts that have recognized a wrongful life claim have usually limited the recovery to economic losses (not pain and suffering) that are incurred after the child reaches majority. Whether this jurisdiction recognizes such a claim or not, Dr. Ali should expect a claim for lifetime economic losses—whether as part of M/M Simmons' wrongful birth claim, or filed separately as a wrongful life claim.

CHECKLIST

QUESTION 1

- ☐ Overview
- ☐ Claim v. Bob
- ☐ Negligence
- ☐ No strict liability
- ☐ Definition of negligence
- ☐ Custom of the industry
- ☐ Learned Hand test: too expensive?

- ☐ Negligence per se
- ☐ Purpose of statute
- ☐ Definition of "adulterated"
- ☐ Presence of an excuse
- ☐ Jury question

- ☐ Res ipsa loquitur
- ☐ Factual Ignorance
- ☐ Type of accident suggesting neg.?
- ☐ Control of the instrumentality
- ☐ Sufficient exclusion of other causes
- ☐ Shift burden of proof to defendants

- ☐ Proximate cause defined
- ☐ But-for cause defined
- ☐ Legal cause
- ☐ Increased risk
- ☐ Superseding cause
- ☐ Foreseeable plaintiff

- ☐ Claims v. Suli & East Coast
- ☐ Same as with Bob
- ☐ Different res ipsa arguments
- ☐ Control of the instrumentality?

- ☐ Damages
- ☐ Both a survival statute & wrongful death
- ☐ Survival statute permits economic loss
- ☐ Wrongful death permits emotional loss
- ☐ No punitive damages

QUESTION 2

- ☐ Wrongful birth suit
- ☐ Probably not a garden-variety case
- ☐ Big issue is proximate cause
- ☐ More probable than not standard
- ☐ Loss of a chance theory
- ☐ Policy questions on loss of a chance
- ☐ Recovery of 20% of the damages

- ☐ Wrongful birth damages
- ☐ Economic costs
- ☐ Wage loss, out-of-pocket
- ☐ Emotional wear & tear
- ☐ Offsetting "imputed benefit" rule

- ☐ Statutory caps on P&S
- ☐ Constitutional?
- ☐ Collateral source rule
- ☐ Statutory modification of rule?

- ☐ Wrongful life claim
- ☐ Small additional adjustment