

Gerla
Torts II
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Question I

Childhood bacterial neuritis ("CBN") is a bacterial disease which affects children. Approximately 10,000 children per year develop CBN. In ninety percent of the cases, whether CBN is treated or untreated, the victims of CBN suffer no lasting damage from the disease, although they suffer for the several week course of the disease through, headaches, nausea, vomiting, general weakness, diarrhea and severe itching. In ten percent of the cases, however, untreated CBN will lead to lasting neurological damage. Out of the group of ten percent who will suffer lasting neurological damage, one or two children per year will suffer such severe neurological damage that they will die, approximately one hundred children will suffer severe neurological damage meaning that they will require constant custodial care for the rest of their lives, another two hundred will suffer moderate neurological damage which handicaps them severely, and the remainder of the group will suffer mild neurological damage which means that they will be able to function on their own, but with some impairment of motor or mental abilities.

For the past thirty years, the CBN has been able to be successfully treated through the use of the antibiotic, neuromycin. Neuromycin has its problems however. Approximately one percent of those receiving the drug have some form of mild allergic reaction to the drug (itchy burning eyes, runny nose, hives), although when the drug is given to CBN patients, it is difficult to determine which symptoms are from the allergic reaction and which are from the disease itself. Another one tenth of one percent of persons receiving the drug suffer a much more serious reaction to it which results in the permanent loss of hearing.

Fifteen years ago, Roaring Drugs, Inc. ("Roaring") brought out a new antibiotic to fight CBN, tryptosporin. While tryptosporin is no more effective in treating CBN than neuromycin, it does have a number of advantages over the older drug. First, it has virtually none of the allergic risks of

neuromycin. Second, tryptosporin can be given orally. Neuromycin must be administered in a series of three injections spaced out over a one week period. The series of injections must, of course, be performed by the physician during an office visit. This makes the treatment expensive and a pain in **** for both the patient and his or her parents. With tryptosporin, a patient can simply be given a prescription, and the medication administered at home.

When Roaring developed tryptosporin, it heavily promoted the product through advertisements in medical journals, displays at medical conventions and direct advertising to physicians through "detail men" (sales persons). The general theme of the promotion was s "Tryptosporin, the more convenient, safer alternative for the treatment of CBN." Soon after tryptosporin was developed, it became the treatment of choice for CBN, although neuromycin has remained on the market because it is more effective in treating certain other diseases. Now, disturbing new discoveries have been made about tryptosporin. It seems that the drug interferes with normal development of the female reproductive system and that some five percent of females given the drug will be unable to bear children. This problem has only manifested itself recently. All concede that when tryptosporin was first developed and marketed, Roarer initially did all the testing and research that a reasonable manufacturer would have undertaken. The experts, however, disagree on what the results of the research showed. One group of experts states that the evidence produced by Roarer's research showed absolutely no indication of a potential problem with tryptosporin. Another group of experts maintains that the data gathered by Roarer showed certain anomolies which warranted further research. These experts claim that further research "might have" revealed the effects of tryptosporin on the female reproductive system. Present day attempts to alter tryptosporin to eliminate its effect on the female reproductive system have proven to be totally unsuccessful.

Jessica Baker developed CBN fifteen years ago. Her physician, Ben Casey, prescribed the new drug tryptosporin, about which he had read and heard so much. The drug was effective in curing Ms. Baker. Today, Ms. Baker is married and wishes to start a family. Unfortunately, she cannot have children because the tryptosporin which she took fifteen years

ago interfered with the development of her reproductive system.

Ms. Baker has now brought suit against Roaring on a tort theory of so-called "strict" products liability. Discuss Roaring's possible liability to Ms. Baker.

Question II

State Routes 711 and 222 cross the Lazy River in the State of Jefferson via the "Y" bridge. The State of Jefferson is responsible for the maintenance of the bridge. The Jefferson Department of Transportation ("JDOT") is the state agency responsible for the safety and maintenance of the bridge. An inspection of the bridge by JDOT engineers revealed that its structure was dangerously weakened. The engineers were divided on what to do. All the engineers agreed that immediate repairs were needed. What divided the engineers was whether traffic could be maintained on the bridge while repairs were ongoing. One group believed that maintaining traffic would be too risky while the other group believed that traffic could be maintained with a sufficient margin of safety. The entire JDOT was just as divided as the engineers over whether traffic should be maintained on the "Y" bridge while repairs were being made. Eventually, the issue was referred to the Secretary of Transportation, an official appointed by the Governor of the State of Jefferson and a member of the Governor's cabinet, for decision.

The Secretary of Transportation decided to allow traffic to be maintained over the bridge. The Secretary was cognizant of the risks involved in maintaining traffic, but she was convinced that closing the bridge to traffic pending repairs was unacceptable. Closing the bridge would force vehicular traffic to take a two hour 100 mile detour to cross the Lazy River. The Secretary felt that while normally such delays were acceptable if regrettable, in this particular instance, the delays would be intolerable. The area in which the "Y" bridge was located was extremely poor and underdeveloped. A new agricultural chemical plant was being constructed which offered some hope to the local economy. Unfortunately, construction on the plant had been severely delayed, and the firm developing the plant indicated that any further delays would lead it to abandon the project. If the "Y" bridge were closed, new construction delays would be

inevitable. The Secretary, therefore, decided to side with the engineers who argued that the bridge should stay open during repairs.

Ali Aba lived on the south side of the Lazy River. Aba scratched out a meager living by raising small herds of livestock (cows, pigs, goats, sheep, etc.). One day, a disease began to ravage Aba's herds. Aba was distressed because his entire livelihood, small as it was, depended on those animals. Fortunately, a local veterinarian was able to diagnose the disease, and there was a serum which would cure the disease. The veterinarian, however, did not have any of the serum and with this disease, every minute that treatment was delayed significantly decreased the animals' chances of survival. The veterinarian made some calls and found a colleague on the other side of the Lazy River who had some of the serum. Aba indicated that he would personally get the serum. The veterinarian told Aba that while every minute was important, he would not advise crossing the river today because when the veterinarian crossed the bridge in the morning, it seemed to be extremely shaky. The veterinarian told Aba "From what I could see, that dang thing could come down at any time!" Aba replied, "Well, what difference does it make——if I can't get the serum I'm ruined and my life is shot anyway." Aba got in his truck and sped off. He passed the JDOT sign which stated "BRIDGE UNDER CONSTRUCTION-- PROCEED AT YOUR OWN RISK." Just as Aba put his truck on the bridge, it collapsed. Miraculously, Aba survived, but he was severely injured and his truck completely wrecked. Aba is now suing the state of Jefferson under the Jefferson Torts Claim Act ('JTCA") claiming that the State was negligent in allowing traffic on the bridge while it was being repaired.

The JTCA reads as follows:

The State of Jefferson shall be liable for tort claims, in the same manner and to the same extent as a private individual under like circumstances. The State of Jefferson shall not, however, be liable on any claime based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.

Discuss any affirmative defenses (i.e., things which are not elements of plaintiff's case in chief) which the State of

Jefferson may reasonably raise against Aba's suit.

N.B. You are to assume that the State of Jefferson has adopted the pure form of comparative negligence, but that neither the statute adopting comparative negligence nor the courts of the State of Jefferson have determined the effect of the adoption of comparative negligence on any other defense.

END OF EXAMINATION
