



The University of New Mexico

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INSTRUCTIONS

This final examination consists of two questions, which you must complete within two hours. The first question is worth 50 points; you should spend about 80 minutes working on it. The second question is worth 25 points; you should spend about 40 minutes on it. This is a closed book examination; you may not have any notes or outlines with you.

There is ample time to organize, outline, and carefully structure these answers. Please read each question carefully before you begin writing. You will be given ample credit for good organization, careful writing and creativity. If you write in a Blue Book, please write on only one side of each page. Your name should not appear anywhere in your Blue Book or in the text of your Securexam answer.

Good luck, and have fun.

QUESTION 1

Dr. Dona Doctor, an incredibly busy and overworked infectious disease specialist, concluded her first encounter with her new patient, Mr. Patrick Patient, by assuring him that she would let him know immediately as soon as she heard anything from her lab with regard to his HIV test. She had fully counseled him on HIV and AIDS, and she understood that even though he did not seem like a high risk patient, he was neurotically concerned about his HIV status. In fact, Patient was utterly consumed with an irrational worry that he had “caught” AIDS from a coworker in the office who had just died as a result of infections related to AIDS. Doctor explained that the HIV virus that leads to AIDS could not be communicated through casual contact, and she was fairly certain that the test would be returned negative. She couldn’t give it too much thought, though, because she was one of the few doctors willing to treat HIV and AIDS patients, and she had many more patients than she could reasonably handle.

Dr. Doctor ran her own lab in her office. As usual, her lab did an ELISA test, which is quite sensitive but yields some false positive tests. She asked her employee laboratory technician, Larry Laboratory, to expedite the test so she could console the increasingly nervous Patient, who insisted that he would stay in her office until the test result was available. When the result came back positive, she followed her normal procedure, which is to use the initial blood sample to conduct a more expensive and more time consuming, but more accurate, “Western Blot” test to confirm the result. Before that result could be returned, the nervous and impatient Patient walked from the waiting room into Doctor’s office to find out what had happened. When she told him honestly that she was running a second test because the first showed that he could be HIV positive, he heard only that he was HIV positive. He wasn’t concentrating when she told him that there would be no certainty until the “Western Blot” test had been completed; he had already come unglued. His worst fears were realized.

He ran out of the office, drove home, and told his wife, Emily Patient, who was shocked and horrified. Terrified, worried, and uncertain about what to do, she decided that she had to see the doctor immediately. She flew out the front door, accompanied by her husband. They jumped into her car, and she started for Doctor’s office. Out of her mind with fear that she, too, could be HIV positive, she drove very fast – 55 MPH down her residential street, which has a posted speed limit of 35 MPH – to get to Doctor’s office. She didn’t notice when an eight year old boy, Billy Bicycle, darted out into the street on his bicycle without looking to see if there was any traffic, and her car slammed into him, causing him great injury.

She stopped to render help and arranged to have Billy taken to the hospital. She then continued to Doctor’s office, where Doctor apologized as she told her that Laboratory had accidentally given Doctor the result of a test performed on another patient; “we’re so busy here, things just got a bit disorganized.” In

fact, she told the Patients, both the ELISA and the Western Blot tests confirmed that Patrick Patient was HIV negative. Patrick and Emily Patient returned home.

Billy's father has now commenced an action on Billy's behalf to recover the substantial damages sustained by his son. You are law clerk to the lawyer who represents Billy's father (and, thus, Billy's interest). He is concerned about the prospect of recovering damages because the Patients are uninsured and judgment proof, and Larry Laboratory has left the state without a trace. Write a memo for your employer describing whether an action against Doctor might be successful, and describing the potential difficulties with such an action.

QUESTION 2

The current New Mexico Uniform Jury Instructions on Proximate Cause provide:

UJI 13-305. Proximate Cause. A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred. It need not be the only cause, not the last and nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

UJI 13-306. Independent Intervening Cause. An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.

Because of your extraordinary success in your Torts class, the New Mexico Supreme Court Rules Advisory Committee has asked you to draft a short memorandum describing what problems, if any, you see in these jury instructions and suggesting substitute jury instructions on proximate cause that you believe would lead to greater justice in tort cases in New Mexico. Please draft the memorandum, making sure that you identify the advantages and disadvantages of the new instructions you suggest. If you believe the current instructions should not be changed, explain why and identify the disadvantages of alternative approaches.