INSTRUCTIONS

This examination consists of three essay questions, all of which you must answer. You should devote 90 minutes to Question I; 30 minutes to Question II; 60 minutes to Question III. Question I is worth 50 points. Question II is worth 20 points. Question III is worth 30 points. You have an extra half hour to use for organization.

If you believe you need to know more information in order to resolve an issue raised by the facts given, tell me what you need to know and how it would affect your legal analysis. But do not add facts to create new issues. Be sure to address all issues raised by the facts even if you think a single issue is dispositive of the case.

Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies and filler all count in your favor.

The examination is closed book. You may not consult any materials or any other person.

Use ONE SIDE of a page only. If you write the exam, SKIP LINES. If you type, DOUBLE SPACE and leave wide margins.

Good luck, and have a good holiday. I look forward to seeing you in 2001.
Question I (90 minutes, 50 points)

Insurance Company owns and does business in a long, one-story ranch-style building in Midtown. Company provides parking for its employees and customers in a parking garage underneath the building. The garage is one story only. The garage is made of concrete, with concrete pillars among the parking spaces that hold the building up. There are two driveway entrances to the garage. Parking is free. There are no gates or bars to entry. Drivers can pull into the garage at any hour of the day, every day of the week. This is typical of Midtown businesses, because Midtown is a suburb, in an area with little mass transportation, and shoppers and customers like to be able to find places to park.

Insurance Company does business Monday through Friday. On those days, the parking lot is usually 3/4 full to full. The employees' cars fill up about half the spaces. The other spaces are filled by Company’s Customers and by local shoppers. Although a sign outside the garage says, "Employee and Customer parking only," on some days local shoppers fill up to 1/4 of the spaces because the location is so convenient to Midtown's best stores.

On Saturdays the garage is usually empty except that 1/4 of the spaces fill up with shoppers' cars. Midtown's stores are closed on Sunday, so the garage is usually empty on Sundays.

Two neighboring families who live in Midtown have children who love to play roller hockey. Roller hockey is like ice hockey, played with hockey sticks, except the players wear roller blades instead of ice skates. They use tennis balls instead of hockey pucks. On weekends, the parents take their children out to play roller hockey. Because hockey is a fast-paced sport, members of both families wear elbow and knee-guards, as well as safety helmets.

One Sunday morning, Father A of Family A took his two sons, Son A1 and Son A2, and Daughter A to the garage, to meet Mother B of Family B, her Son B and Daughter B. They think that the garage is a terrific setting for roller hockey. The concrete floor provides a flat, smooth surface that lets the skaters pick up speed. The pillars can be used as the goal posts. (Plus it is fun to skate 'round and 'round those pillars!) Team A (with three players) plays Team B (with three players). Daughter A is only six years old, so Father A doesn't let her play roller hockey. Of course she doesn't wear the protective hockey equipment.
Once the hockey game started, Daughter A was bored and wandered over to the back end of the garage, near the second driveway entrance. There is a huge puddle there from frequent rain. In the mornings, the sun shines on the puddle. Daughter A liked the rainbow-ish look of the puddle, and while the others were playing hockey, started splashing through the puddle for fun.

Mother B worries a lot about her kids, so while she skates she keeps yelling that everyone should be careful. Father A likes to clown around, so sometimes he skates right up to the other players, yelling "I'm going to tackle you," and waving his stick. Then, at the last minute, he veers away. He did this once to Son B. Mother B yelled at Father A and told him to stop being immature, but three plays later, Father A skated up to Son B again, yelling and waving his stick.

Later on, on another play, the tennis ball started rolling toward Mother B, and she skated toward it. Father A, who was skating behind Mother B, wanted to capture the tennis ball for his side. So he sped up, raced up next to her, and then extended his stick between mother's stick and the tennis ball. Father A captured the ball and skated ahead to score a goal. Mother B tripped over Father's stick, fell forward and broke her leg.

Driver, an employee of Company, decided to pick up some paperwork from her office on Sunday morning. Driver got into her car, drove to work and pulled into the back driveway. Driver knows that the garage is usually empty on Sundays. Driver also was enjoying the sunny day and admiring the glint of the sun on the trees. As Driver turned into the garage, Driver hit Daughter A, who was sitting in the puddle. Daughter A died from her injuries.

Analyze the possible tort lawsuits that are available against Company and Father.
Question II (30 minutes; 20 points)

What are the arguments for and against abolishing the wrongful life suit?

Would you recommend that states retain or abolish this cause of action?
Question III (60 minutes, 30 points)

Doctor is an obstetrician and gynecologist with a large medical practice in the State of Perfection. He gives contraceptive advice, delivers babies, and assists pregnancies through artificial insemination, in which sperm is implanted in a woman's body so that pregnancy may be achieved.

The statutory law of the State of Perfection includes the following provisions:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship.

Doctor's Professional Association has written a code of doctors' ethics. That code states that doctors "shall obtain signatures on informed consent forms from the husband of any woman who undergoes artificial insemination."

Mary works in Doctor's office as his administrative assistant. She answers phones and files patient records. Mary married her Husband in 1990. She gave birth to their only child, Sam, in 1996. They divorced in 2000. When Husband was divorced from Mary, he learned for the first time that he was not the biological father of Sam. Husband found out that Doctor had used the artificial insemination procedure on Mary. Doctor used his own sperm for the insemination. Mary didn't know it was Doctor's sperm; she thought it belonged to an anonymous donor. As a result of the procedure, Mary gave birth to Sam. Husband paid all the bills for Sam’s birth and general medical care. He also provided financial support for Sam from Sam’s birth in 1996 until the divorce in 2000. At the dissolution proceedings, Husband disclaimed all parental rights to Sam. Because of this proceeding, he will not be responsible for Sam’s future upbringing.

Husband is distraught by this information that the child he loves so dearly is not his own child. He tells you that he is really depressed and has trouble sleeping at night. He wants to know if he can sue Doctor in tort.
Analyze the possible tort suits that are available to Husband against Doctor. Will he win or lose? Why?

Write about all the lawsuits that you consider, even if you decide that Husband would not succeed in them. Identify the lawsuit that has the best chance of succeeding.
This class was subject to the School of Law grade curve for first year courses. I assigned the following grades based on exam point totals:

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<th>Grade</th>
<th>Points</th>
<th>Description</th>
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Remember that these are midterm grades. They will not appear on your final transcript. Your final letter grade can change considerably based on the point total from your spring exam.

Question I had a lot of issues to spot: Company’s liability as landowner and under
respondeat superior; an attractive nuisance; Father’s assault of Son and battery of Mother. Mother also had a potential negligence suit against Father unless it was barred by primary assumption of the risk. On this last point, you had to: a) distinguish the negligence suit from a possible battery and b) distinguish between the defenses to those two torts, namely assumption of the risk and consent. The best answers also included analysis of the garage cases.

For Question II, you earned ten points if you described Greco and distinguished wrongful life and wrongful birth. To gain the next ten points, you had to discuss policy. You should have mentioned, e.g., the purposes of tort law. I was surprised that no one mentioned the Rowland considerations at 172-73.

Question III was conceptually difficult. Most of you spotted IIED. The hard part was to figure out why and how Doctor had a duty in negligence to Husband. This was not a question where you could easily identify the existing duty and then apply the law. You had to consider how you would find a duty where the law does not usually permit one, because doctors usually have duties only to their patients.

Husband was not Doctor’s patient. . . . so could the statute or the professional standard be used as a source of duty?

Husband had emotional distress . . . . so could any of our ED tests (direct/indirect/bystander) make Doctor liable to him?

Did the facts fit the economic loss cases?

You received a few points if you remembered the old tort of interference with the marital relationship.

FYI, on similar facts, a California court concluded that this statute did not create a tort duty on the part of Doctor toward Father because the statute’s purpose is to identify the child’s father and to equalize the status of legitimate and illegitimate children, not to impose liability on doctors. In addition, Doctor’s duty ran to his patient, not to her husband. Without physical injury, Husband could not recover emotional damages. Nor did Husband qualify as a bystander for emotional distress because he had not seen the insemination. The court also concluded that there was no IIED because there was no indication that Doctor’s act was directed at the husband in any way. Outrageous conduct was not enough; intentional means that the act must also be directed at the plaintiff.

There are model student answers on reserve in the library.

I am available to discuss your exam results and improvement strategies with you during the new semester.