February 2003 Bar Examination Sample Answers

DISCLAIMER
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Question 1 - Sample Answer 1.

1. CEI's motion to dismiss for improper venue should be denied. The venue requirements under the CPA in Georgia apply to defendants named by the Plaintiff(s) in the original (or amended) complaint. CEI is a third-party defendant brought in by defendant and third-party plaintiff EMC. As long as venue requirements are satisfied regarding defendant EMC, venue will not be subsequently denied in a third party action concerning the same operative facts and circumstances in the original action against a third party defendant. Even from a practical viewpoint, a Plaintiff must be required to satisfy the venue requirements only for the universe of named defendants in the Complaint; a Plaintiff might never know what other potential third party defendants could be brought into the action by a named defendant and venue, in such circumstances, would be easy to defeat, requiring separate actions, rise in litigation/court costs, efficiency, etc.

2. Plaintiff's motion for default judgment against CEI should be denied. Again, the action against CEI is a "third part action" brought by the defendant, EMC. CEI must answer the third party complaint served on it by EMC. CEI has no obligation under the Civil Rules to answer the Plaintiff's complaint against EMC. Even assuming there were no TP action and CEI was a named defendant, the 15-day rule would apply, giving CEI an opportunity to "open" the default by paying costs; only after the grace period runs, would a defaulting defendant have the default judgment entered by the Court.

3.(a) EMC's motion for SJ should be denied. SJ should be granted only when there exists no genuine issue of material fact to be litigated. In the present action, EMC provides affidavit testimony pointing to a different "cause" for the deaths. Plaintiffs, in the wrongful death action, contrarily assert that the cause of deaths related to EMC;s negligent wiring of its power lines such wires located near the location of the dead bodies. Plaintiff also supports this allegation by an affidavit filed with Plaintiffs' response to the SJ motion. This affidavit is from C. E. Sparks, an electrical engineer, who inspected the line and opined that it was improperly wired. Mr. Sparks' testimony, even if offered as expert testimony, was not opposed by EMC and, as such, Mr. Sparks' testimony provides contradicting testimony related to the cause of the injuries. Thus, there is a "genuine issue of material fact" such that a granting of SJ would be improper.

3.(b) The court will not consider Mr. Bolt's affidavit and will strike. Mr. Bolt seeks to proffer expert opinion testimony. There is nothing in the record showing his qualifications as an expert, nor that he was disclosed as an expert through discovery, etc. (opportunity to depose, etc.). Also, Mr. Bolt's reference to the NWS records is potential hearsay, as the records have not been attached

to the affidavit, nor properly authenticated, nor judicially noticed by the Court. His opinion, though not on direct personal knowledge of the site, must be based on reasonable and accepted scientific theories from which he bases his opinion. There is no showing that such a scientific basis exists between "high lightning activity" and Mr. Able's death. The court can also strike the affidavit based on the "best evidence rule" – Mr. Bolt did not present the actual NWS records. Personal knowledge, best evidence, hearsay.

The neighbors affidavits: admitted. Affidavits must be based on personal knowledge and the neighbors can attest to what they saw (heard, smelled, etc.) on that particular day. No opinion testimony here.

4.(a) If SJ granted in defendant's favor, the TPC goes away. CEI is not a defendant in Plaintiff's action. The TPC is EMC's action, which goes away with EMC's ruling on SJ.

4.(b) Amend his complaint to add CEI as a co-defendant. Discovery can provide information showing CEI's possible negligence and Plaintiff can amend his complaint up to the start of trial (in State/Superior Court). Plaintiff still has the issue/problem of making sure venue is proper against CEI.

Question 1 - Sample Answer 2.

1. CEI's motion to dismiss for improper venue is denied. Venue over a third-party defendant is proper when the venue is proper in the underlying action. The third-party cannot object. It is unclear from the record whether EMC is a resident of Eaton County. However, EMC filed an answer without objecting to venue, so they are estopped from complaining. Rather, EMC has submitted to jurisdiction of the court.

2. Plaintiffs motion for default judgment against CEI is denied. CEI was brought in as a third party defendant by EMC and need not answer the complaint directed at EMC by Plaintiff. CEI need only respond to the Plaintiff if Plaintiff also files a claim against CEI. Furthermore, as a procedural matter, a default judgment cannot be entered until an entry of default has been made by the Clerk of the Court. No default entry was made here.

3.(a) A motion for summary judgment is proper when there is no dispute as to any material fact. Here, the claim is for wrongful death and the cause of death, clearly a material fact is in dispute. Motion for Summary Judgment is denied.

When ruling on a Summary judgment the court considers evidence submitted by the parties. All inferences are drawn in favor of the non-moving party. EMC submitted evidence alleging that lightning was in the area but submitted no evidence as to the cause of death other than an opinion by a meteorologist (not a doctor).

While Plaintiff did not respond to this evidence, even proof of lightning in the area does not prove cause of death. Plaintiff did present evidence that the wiring was improper as alleged. Because dispute remains as to the cause of death, Summary Judgment is not proper.

3.(b)(1) The affidavit of L.N. Bolt can be considered to show that a lightning storm was in the area. However, his assertion that lightning caused the death of Mr. Able will not be considered. Mr. Bolt is a certified meteorologist but is not qualified to determine cause of death. This is simply

an assertion and is not evidence. Furthermore, his opinion as to cause of death is not admissible because he is not qualified as an expert in this area.

3.(b)(2) The affidavits from the neighbors will be considered to show the likelihood that lightning was in the area and is a possibility for the cause of death; however, their testimony does not tend to show that lightning, as opposed to electrical current from the power lines caused Mr. Able's death.

4.(a) If the court granted EMC's motion for summary judgment, the third-party complaint against CEI should be dismissed. If the facts were such that it was clear that Mr. Able died as a result of a lightning strike and not, as alleged, from negligent wiring in the poles, then EMC would not need to be indemnified by CEI. Because there would be no underlying negligence on the part of EMC, there would be no claim that CEI was negligent in wiring such that it (the wiring) caused the death of Mr. Able.

If the complaint contained other issues, separate from the underlying case, then it would be proper to continue that case.

4.(b) Plaintiff should file a complaint against CEI. She can accomplish this by asking for leave to amend her original complaint to name CEI as a defendant, or she can file a motion to join CEI as a necessary party.

In state court, plaintiffs may amend their complaints twice as of right. Amending the complaint here would be proper, assuming other amendments have not already been made. Additionally, CEI is not prejudiced by being added as a defendant because CEI is already on notice of the action.

Question 2 - Sample Answer 1.
(disclaimer)

1. The trial court erred in denying the defendants motion to suppress the evidence seized from the rental car. The stop was a routine traffic stop for defendants failure to maintain his lane. Once the warning was issued, the defendant should have been free to go as there was no other probable cause to detain him. Further detention of Mr. Smith was improper. The request for search of the vehicle was refused and Deputy Clark had no sufficient probably cause to search the vehicle without Mr. Smith's consent. There were no suspicions of any recent crimes committed to which Mr. Smith might have been a party, the minor traffic violation only warranting a warning was not sufficient probable cause, (radio announcement had not yet been heard), and there were no open and "in plain view" items that would suggest any illegal activities by Mr. Smith. There were the nervous actions of Mr. Smith and the fact that he was not the authorized driver of the rental car, neither of these were enough to warrant probable cause to search the vehicle. The fact that probable cause came later (i.e., the radio announcement) is irrelevant, an illegal search had already been performed and any evidence resulting was fruit of the poisonous tree and should have been suppressed. The trial court erred.

2. The issue with regard to the testimony of "Blaze" the arson dog is its accuracy and reliability. The facts indicate that Blaze was trained to indicate the presence of certain accelerants and that he had a routine and recognizable reaction (implied by Inspector Wesley's account of how the dog

responded when he detected these accelerants). Use of specially trained police dogs, specifically for purposes of smell, is commonly accepted and absent of showing of discredibility, which defendant was awarded the opportunity to do, “Blaze’s” testimony was improper, however, due to the fact that it was offered as the only substantive evidence of accelerants in the same “hot” spots independently analyzed by a scientific lab. Blaze’s reaction wasn’t certified or proven as reliable evidence of the presence or absence of accelerants and lacking this was improperly before the court.

3. Investigator Wesley’s testimony regarding the presence of accelerant in the Smith’s master bedroom was based on Blaze’s reaction and absent a showing of proper certified reliance/procedure was also improper.

4. The testimony of Fulmer should not have been allowed. The “ex parte order” was improper lack of notice to defendant, was highly improper and the illegal manner of entry (with a valid order they could have gone in without incident) taints all the evidence obtained and further, the score of the order was . . . exceeded by the presence of investigator Wesley (arguably search and seizure mission not merely observance like order anticipated). Defendant should have been awarded notice and an opportunity to be heard and further should have been told of the testimony in advance in order to properly prepare and rebut. This should have been disallowed! Mr. Fulmer should have been restricted to his opinion before the illegal entry/search.

Question 2 - Sample Answer 2.

Memorandum to Judge Wisdom

1. The trial court did not err by denying Smith’s motion to suppress evidence seized from the Chevrolet driven by Smith.

An automobile search is proper when a law enforcement officer has probable cause to believe that a search of the car would reveal instrumentalities of crime and/or contraband. Probable cause can be established during a lawful traffic stop; it need not exist at the time of the stop.

(a) Smith was stopped by Deputy Clark for failure to maintain lane. At some time during the stop, the Deputy developed an articulable suspicion and then probable cause to believe that Smith’s car contained evidence of criminal activity. This probable cause cannot be based solely on the detainee’s refusal for a consented search. Here, the facts that Smith was the unauthorized driver of a rented vehicle, conflicting itinerary information and Smith’s nervousness, justified the Deputy’s decision to request a dog sniff.

(b) Smith’s “detention” was an arrest if Smith reasonably felt that he was not free to leave the scene. There are no facts to indicate that Smith ever asked if he was free to leave the scene following his routine traffic stop, but any detention where a reasonable person would not feel free to leave constitutes an arrest. Smith, however, did not claim that he was unlawfully detained.

(c) Clark’s probable cause to search the car was raised when the drug dog “alerted” to the trunk of the car. Dog sniffs for drugs are valid because they do not unreasonably intrude on a person’s reasonable expectation of privacy. Further, in certain situations (airports, autos) people have a lessened expectation of privacy. In autos, the expectation is reduced because of the very public nature of regulation for their use and their mobility. Once an officer has probable cause to search

a car, he may search the entire car, including the trunk and any containers where he would reasonably believe to find contraband.

Because the dog alerted, Deputy Clark could legally search Smith's car for drugs without a search warrant.

2. The trial court did err in allowing evidence that Blaze had alerted. In order to present this evidence at trial, there must be a certain level of reliability shown. The proponent of this evidence must show that these dog sniffs are viewed as reliable by the scientific community. The results of these sniffs must be predictable to a specific degree of certainty, they must be subject to testing to verify accurate results, and the court must approve such "testimony" before it may be presented to the jury.

Here, the court erred in allowing evidence of Blaze's conduct without the proper foundation.

3. The trial court erred in allowing Wesley's opinion testimony that an accelerant was present at the scene. Because the only evidence/information relied upon by Wesley was the alert by Blaze, the testimony should have been stricken.

Without evidence to show that an "experts" opinion was based on scientifically-reliable knowledge that opinion cannot be presented to the jury.

An expert must demonstrate that he relied on commonly accepted data/information relied upon by others in the field when developing their opinions. Wesley's testimony – his opinion – was based solely on unreliable data, not widely accepted as accurate. Thus, his opinion should not have been allowed.

4. Professor Fulmer's testimony regarding the cause of the fire was based on illegally obtained evidence and should not have been allowed. Although he acted on authority of a valid search warrant issued for probable cause, the execution of that warrant was improper. Search warrants are required to protect citizens' privacy – especially in their homes. An officer/investigator cannot break into a home to execute an otherwise valid warrant. Although Professor is not a state/government actor, he was acting in concert with and on behalf of the Sheriff's Department; thus the 4th amendment protections apply to his search of the home. Professor's testimony was "fruit of the poisonous tree" and should have been excluded. The information "seized" or viewed at the scene to form his opinion was tainted by the illegal entry.

Question 2 - Sample Answer 3.

TO: The Honorable Justice Wisdom, Supreme Court of Georgia

FROM: Law Clerk

RE: Errors raised on Pyro Smith's appeal

DATE:February 25, 2003

1. Your Honor, it is my contention that the trial court erred in denying Smith's motion to suppress evidence seized (marijuana and Coleman Fuel cans) from the 2001 Chevrolet. My opinion is based

on the following: (a) The stop of the vehicle – although Deputy Sheriff Clark had probable cause to stop Pyro Smith for failure to maintain lane, I do not think that he had sufficient probable cause or even a reasonable suspicion for (b) the detention of Smith. If Smith was weaving in and out of lanes and crossing lane lines, then Deputy Clark was correct in stopping Smith and issuing a warning. However, there is nothing in the facts or in his report as to why Deputy Clark detained Smith. There is no evidence that he saw any drugs or anything suspicious looking or any weapons or even the smell of drugs being used to warrant detaining Smith. Had Deputy Clark felt threatened or in fear for his safety, then he should have searched Smith's person for any weapons. Had he seen or smelled anything suspicious or drug related or anything that could have been the cause for Smith being unable to maintain his lane, then Deputy Clark should have searched the inside of the car himself. Detaining Smith for 30 minutes to wait for a drug sniffing dog was not reasonable and was an unlawful search.

Furthermore, I'd like to reiterate the fact that (c) there was no probably cause to search the vehicle on the part of Deputy Clark. After stopping Smith for a valid reason, there are no facts stating that Deputy Clark had any probable cause to search the vehicle, especially with a dog. Had Deputy Clark felt uneasy or in fear of his safety or had he seen a cigarette butt in the ashtray or smelled marijuana or alcohol on Smith, then he would have had probable cause to conduct a search of Smith and/or his car.

2. The trial court erred in allowing evidence that Blaze had alerted to accelerants – The state proffered evidence that Blaze, a dog trained to give an alert when he smells certain hydrocarbons, had given such an alert at the site in the house where investigators had come to believe an accelerant was used. However, this is unreliable evidence since the state failed to present evidence that dog alerts had reached a state of verifiable certainty or scientific reliability. The dog was only used as substantive evidence purporting to show the presence of an accelerant. Before evidence of this sort may be admitted, scientific reliability in the community must be proven. Since it has not, this evidence must be omitted. Furthermore, Arson Investigator Wesley testified that when Blaze detected the presence of hydrocarbons, he would lie down and point with his nose or paw to the area where the accelerants were present, but that this analysis was based purely on Investigator Wesley's analysis of the dog's behavior and this was how Investigator formed his opinion that accelerant's were present. Again, no evidence has been proven that this is a reliable, verifiable means to come to such conclusions. Investigator Wesley nor his opinions or observations have not been proven to be of an expert or of the standards used in this community and so must not be admitted into evidence.

3. The court erred in allowing the opinion testimony of Investigator Wesley that an accelerant was present in Smith's master bedroom – Again, Investigator Wesley's opinion was based on observing Blaze, a sniff dog's behavior, and the dog's behavior had not been proven to be verifiable as far as certainty is concerned or even scientifically reliable. By observing the dog, Investigator Wesley made an analysis of the dog's behavior and then formed an opinion as to what this behavior meant. The use of the dog, not being proven reliable or certain or even a preferred method in this community to arrive at such conclusions, will present unreliable and misleading information that should not be admitted into evidence.

4. The court erred in allowing the opinion testimony of Professor Fulmer as to the cause of the fire – First of all, Fulmer was allowed to enter the residence of Smith on an ex parte order that the defense had no idea had even been issued. This house was a crime scene that was supposed to be off limits to anyone but officers and investigators. The Professor should not have been allowed at the scene, at least not without the knowledge of the defense and without an opportunity for the defense to be present when Fulmer viewed the scene. Furthermore, Fulmer

stated that he formed an opinion as to the cause of the fire after he had an opportunity to view the fire scene. Since his viewing the scene was erroneous, then Fulmer's opinion as to the fire should not be admitted into evidence. If Fulmer could testify as to the cause of the fire based on his experience as a member of the Tennessee State Police and Fire Academy or something other than the opinion he formed after wrongfully viewing the fire, then perhaps his opinion could be admitted. But an opinion formed after breaking into the scene and after the wrongful search and seizure to view the scene is not to be admitted into evidence.

Question 3 - Sample Answer 1.

(disclaimer)

1. As attorney for Sue and Bob Smith, I would seek damages to their personal property, their real property, and damages associated with interruption of their business.

In the context of a tort claim (here likely negligence or perhaps some form of recklessness), only forseeable damages are those within the reasonably forseeable risk of harm imposed by defendant. They may include consequential damages such as lost profits if such damages are (1) forseeable and (2) proven to a reasonable degree of certainty. Moreover, harm that is caused by an unforseeable, intervening force may cut off damages.

Here, Sue owns the real property (the building) that was destroyed and she should seek recovery. The fire was a natural result of the truck accident, and would not be viewed as an intervening force cutting off liability. She should seek to recover the cost of rebuilding it. Bob and Sue apparently own the fixtures and furnishings. They should seek to recover those as well.

They should also seek to recover for their "business interruption" lost profits. Such damages are forseeable, but they would need to be proved to reasonable certainty which may be difficult given the short history or track record of the company.

2.A.1. The elements of damages recoverable by Mary are (1) the pain and suffering she incurred before death, (2) any medical expenses resulting from the injury and (3) any funeral costs and related expenses.

These are typical elements of damages awarded under Georgia's "survival statute." Here, we are told she incurred medical expenses of $45,000, which are considered special damages.

Her pain and suffering will be determined by "the enlightened conscience of an impartial jury."

2.A.2. Mary's estate pursues her claims, under Georgia's survival statute. Here, we are told that Will is the personal representative, so he will be the person/entity pursuing them.

2.A.3. Mary's estate receives the damages referenced above, under Georgia's survival statute. They will be distributed pursuant to her will, which we are told exists.

2.B.1. For wrongful death, the recoverable damages under Georgia consist of (1) the present value of the decedent's life (this is reduced to present value) including ability to earn income that has been lost (2) "smell the roses" damages, which include the non- monetary value of life to her, again, determined by the enlightened conscience of an impartial jury and (3) loss of consortium of

her children and spouse.

2.B.2. The above damages are pursued by her heirs. Under Georgia law, a surviving spouse has preference to pursue them. Here, Will has survived and therefore may pursue the wrongful death claim.

2.B.3. The recovery will be shared pursuant to Georgia's intestate laws. Here, Will receives 1/3, and the remaining 4 children will divide the remaining 2/3 of the recovery.

As a practical matter, however, Will will be acting on behalf of all the interested children when he pursues the claim.

3.A. To recover punitive damages, a plaintiff must generally provice malicious, intentional, wanton or reckless conduct. It must be pled in the complaint.

Here, the Smith's should seek punitive damages against both Tom Thompson and Big Blue.

We are told that Mr. Thompson had driven drunk before, but failed to correct that problem. Indeed, he had prior DUIs so he knew the dangerousness of his conduct.

Likewise, Big Blue was aware of the conduct and failed to take any measures to protect against it. The Smiths should argue that Thompson should not have been permitted to drive at all under these circumstances, and that Big Blue's conduct was malicious, i.e., it demonstrated a reckless disregard for the safety of others. Big Blue's knowledge of the 3 DUIs is particularly compelling, as is its failure (apparently) to do anything about them.

If punitive damages were awarded, they would be capped at $250,000 unless plaintiff could prove intent. Here, that appears unlikely.

3.B. I would pursue punitive damages on behalf of Mary for exactly the same reasons above. They could be recovered only under the survival statute, but would likely be capped (as noted above).

Question 3 - Sample Answer 2.

1) The question presents issues in tort and tort damages.

a. Sue only – because she owned/inherited the building prior to her death. She would be entitled the difference between the fair market value of the building before and after the fire that destroyed it.

b. Bob and Sue – Because the business, furnishings and fixtures were acquired during the marriage, Bob and Sue would have equal claims to the property. These are likewise property damage claim, the measure of which is the fair market value of the individual component before and after the fire. The goal is, of course, to make the plaintiffs whole, in so far as is possible. As for lost profits, it is questionable whether they are sufficiently reasonable to quantify. If not, they would be purely speculative. If the business has a demonstrated record of profit production & can be measured with some degree of certainty according to a measurable formula, then they may be recovered. At best, the facts present a mixed bag: one year of no profit, and one year of profit.

This is not much of a demonstrability of profit making.

2)A. Apart from a claim for wrongful death presented by these facts, there are other potential claims:

1. Mary has claim for pain and suffering, medical bills, lost wages between the time of her accident and death. The measure of these damages can be quantified for medical bills ($45,000) and lost wages as well as lost wages (roughly 8 weeks @ $5,000 or $4,000). Her pain and suffering claim would be a measure for the "enlightened conscience of an impartial juror" could be astronomical given that she died almost two months later and likely the result of burns sustained in the fire. Also, the funeral expenses and costs of administration.

2. These surviving claims would be brought by her husband as personal representative.

3. The proceeds of this recovery would be Mary's estate, be it testate or intestate.

B. 1. The elements of the claim for wrongful death are the full value of Mary's life, loss of consortium and services for Will, hedonic damages (enjoyment of life). Again, these claims would be left to the "enlightened conscience of impartial juror." Because Mary was a young woman, the full value of her life might be considerable. For example, there is a claim for lost wages (future). Mary still had many productive years ahead. The hedonic damage claim based on the time lost with her family could be considerable.

2. Mary's husband Will, as surviving spouse, is entitled to bring this claim.

3. The proceeds would go to her surviving spouse, Will.

3)A. If I represented Bob & Smith, I would attempt to elicit a punitive damages instruction based on a wanton, reckless conduct both on the part of Tom and Big Blue. For Tom, I would assert claim for such grossly reckless conduct in view of his having consumed enough alcohol to result in .24 blood alcohol level and his serious condition. No cap would apply to Tom because of his use of alcohol in the accident. I would also assert a negligent claim against Big Blue on the same underlying factual bases. The cap of $250,000 would apply to Big Blue because it does not fall into one of the exceptions.

B. The same theories as discussed above could be made in terms of Mary's negligence/survival claim. Same theories with the same caps. The personal representative could not recover punitive damages under the wrongful death statute.

Question 3 - Sample Answer 3.

1. Elements and measure for each, of damages for Sue and Bob Smith:

a. Actual damages for building to Sue solely – measured by fair market value of building at time of loss. This will be in addition to any insurance proceeds received under the collateral source rule, which allows damages to not be decreased by any other reimbursement received by plaintiffs, even though there can only be one satisfaction from any defendant.

b. Actual damages for furnishings and fixtures to Sue and Bob jointly – measured by the fair

market value of the furnishings at the time of loss, again not decreased by any insurance proceeds, under the collateral source rule.

c. Incidental damages, which would be lost profits. The business has only started showing a profit for the last year which may make the measure of lost profits difficult, if not impossible to ascertain. However, the last year can be broken down into 12 months, and we are told profits were steadily increasing. So we can determine lost profits based on 12 measuring periods of 1 month each rather than 1 year period.

2.A.1. In the wrongful survival action of Mary, damages are:

a. Actual medical expenses incurred – $45,000.

b. If Mary was conscious of pain and suffering, then damages for pain and suffering, determined by the enlightened conscience of an impartial jury.

A.2. The personal representative of Mary's estate, Will, would pursue the wrongful survival action.

A.3. The proceeds received under the wrongful survival action would go to the estate to be distributed according to Mary's will.

2.B.1. In the wrongful death action of Mary, the damages would be:

a. Lost wages – determined by her wages of $500/week and calculating her life span by actuarial methods;

b. Funeral expenses – actual incurred;

c. The loss of consortium of Will – determined by the enlightened conscience of the impartial jury;

d. The value of the life of the decedent – full value of the life, taking into account life span, with no deduction for expenses which would have been incurred had Mary lived.

B.2. Will and Mary's children would be the parties to pursue the wrongful death action.

B.3. Any recovery for wrongful death would be split between Will and the 4 children, and in no event would Will receive less than 1/3 of the proceeds with the children sharing 1/4 of 2/3 each.

3.A. Sue and Bob could seek punitive damages under a negligence theory against Tom, the driver, personally and against Big Blue Trucking under a theory of respondeat superior, Tom being an employee, with the loss happening during the course of the scope of his employment with Big Blue. Under respondeat superior, an employer/master is liable for the torts of its employee/servant committed during the scope and course of employment. Punitive damages are capped at $250,000 unless there can be shown to be wilful, wanton or gross misconduct or negligence. In this case, the cap would not apply as it can be shown that Big Blue let Tom continue driving knowing that he had been driving impaired 3 prior times. To allow Tom to continue to put other people in danger by driving a truck on open highways, can be shown to be wilful and wanton gross negligence on the part of Big Blue, and on Tom individually.

B. As to claims regarding Mary, punitive damages could be sought under the same theory of negligence and respondeat superior against Tom and Big Blue, and would be claimed in regards

to the wrongful death action and the wrongful survival action, with the same cap of $250,000 unless wilful, wanton, gross negligence or misconduct is shown and then there is no cap.

Question 4 - **Sample Answer 1.**
(disclaimer)

1. Challenge under Free Speech Clause of the First Amendment

The due process clause of the 14th Amendment makes, among others, the first amendment applicable to states. Thus, we are understandably concerned about whether the first amendment is violated here. Under the 1st Amendment, the government can make no law which restricts the right of free speech. It is not as simple as it sounds – not all speech is protected, only certain kinds. The Supreme Court has said that government cannot compel anyone to speak, or endorse any particular words. Under Section 2 of this statute, every child in school will be required to demonstrate knowledge of the words of the pledge of allegiance. Thus, an argument could be made that children are being subjected to forced speech or forced endorsement of the pledge allegiance, which would be a violation of the 1st Amendment.

2. Standard of review

As freedom of speech is a fundamental right, the legislation will be subjected to the toughest standard: strict scrutiny. To survive under this standard, the law must be necessary for a compelling governmental interest.

3. Arguments in Favor

First I would argue that the students aren't being forced to speak or endorse the pledge. All that they are being required to do is demonstrate knowledge of the pledge.

I would next argue that the government interest in 1.) encouraging patriotism in the face of terrorism and 2.) in honoring and supporting our soldiers constitutes a compelling governmental interest. I would also argue that such interest is necessary to ensure those goals. However, this may not be seen as necessary, as there are probably less restrictive means by which to achieve this goal. For example, the children could merely be told to sit quietly while the pledge was recited, saying it only if they want to.

4. Equal protection Challenge

Under the equal protection clause, the government may not enact legislation that discriminates against any group. Section 2 of this act purports to give men who register for the draft a certificate of appreciation and a check for $500 to all males who register for the draft. Thus, under the act men, and only men, are to receive this benefit. Thus, an argument can be made that women are being discriminated against solely because of their status as women, which would violate the equal protection clause.

5. Standard of Review

As this legislation purportedly discriminates against women, intermediate scrutiny will be applied. Substantially related to an important governmental interest.

6. Arguments in Favor

I would argue that this does not discriminate against women intentionally. As indicated in footnote two, only men are required and permitted to register for the draft.

I would argue that encouraging registration for the draft by the certificate and $500 dollars, in the face of the terrorism facing our country today. I would argue that we have done similar things in the past, i.e. the "G.I. Bill" which was constitutional and was of tremendous benefit to the country. I would also argue that this legislation is substantially related to this interests, as encouraging the registration of men is promoted by these enticements. I'm not sure however, whether this could not be accomplished by less restrictive means.

Question 4 - Sample Answer 2.

1. Challenge under Free Speech Clause of the First Amendment

A potential claimant could challenge the Georgia Patriot Act by alleging that Section 2 of the Act violates the free speech clause of the First Amendment by forcing students to know and participate in the pledge of allegiance every morning. Citizens right to free speech includes not having to adopt the government's speech, which in this case is participating in the "pledge of allegiance." The right to free speech is a fundamental right and is protected by our government. Free speech includes action.

2. Standard of review

Accordingly, in a violation of a free speech issue, the court would apply the strict scrutiny test. This test asks whether the legislation/statute is necessary to serve a compelling state interest.

3. Arguments in Favor

It appears that the strongest argument for the constitutionality of the Act is that Section 2 does not infringe on the right to free speech. It requires that the pledge be a part of morning school activities, but it doesn't require each individual student to stand up, place their hand over their heart and recite the pledge. The student could have the option to opt out by not standing or not reciting the pledge. The requirement that students from fourth grade and up have knowledge of the contents of the pledge, doesn?t require the students to have to recite it as a form of speech. It can be construed as merely a civic requirement.

Further, specifically applying the test, it can be argued that preparing a country for war is a compelling state interest. The success of the war will depend largely on the support of the citizens of Georgia and the United States. An understanding of what our country is based on, which is accurately conveyed in the pledge is necessary to inspiring and encouraging the citizens of Georgia. It reiterates the importance and reasons for going to war. Accordingly, knowing the contents of the pledge of allegiance is necessarily related to the interest of garnering support and upping morale in preparation.

4. Equal protection Challenge

The Act could be challenged by alleging that Section 3 violates the equal protection clause because it offers an advantage, money for school, to men. Since only men can register for the draft, they will always be eligible to receive money from the state, whereas women will never be eligible for any money from the state for education.

5. Standard of Review

Gender is considered a quasi-suspect class and any regulation that bases a benefit or penalty on one's gender is subject to intermediate scrutiny. That test requires that the regulation be substantially related to an important government interest.

6. Arguments in Favor

One of the stronger arguments for the constitutionality of the Act is that the regulation is not discriminatory on its face. It doesn't base the receipt of the $500 on the recipient being male or female, but bases the receipt of the money on the recipient registering for the draft. Although only men register for the draft, it is a requirement that is imposed only on them and women are exempt from that duty/obligation of citizenship in America. Further, it is an important government interest to gather the morale of the country in the face of a long war. The $500 gift and certificate provide encouragement to potential draftees and recognize their potential services.

Question 4 - Sample Answer 3.

1. Challenge under Free Speech Clause of the First Amendment

The first amendment to the United States Constitution guarantees every citizen the freedom of speech. This freedom is from State action. The Supreme Court has held that the freedom of speech from state action also prevents the imposition of speech by the government on its citizens. A citizen is free not to adopt speech forced on them by the government (e.g. slogans on license plates.)

Here, the proposed legislation forces speech upon citizens. The entire clause or portions of it may be offensive to citizens and yet the government is mandating its adoption. Therefore, a timely challenge is that the forced adoption of the pledge violates the right to free speech, and the freedom not to speak.

2. Standard of review

The test or standard applied by a court is whether the proposed law advances a compelling state interest. Strict scrutiny applies.

3. Arguments in Favor

A state has a compelling interest in developing support for the state in the form of patriotism. This is particularly true in wartime and even more so when confronting a faceless enemy.

Another argument is that the law only requires "knowledge" of the pledge. It does not require

that one has to believe it. Furthermore, the law does not require penalties for not reciting the pledge. Thus, there is no state action compelling such speech.

4. Equal protection Challenge

The equal protection clause requires two things. The first is due process of law and notice. The second is that laws are fair.

A challenge to Section 3 of the proposed law is that it financially discriminates against women. It is potentially discriminating because only men would benefit, since only men can register for the draft and in doing so receive $500. Equal protection demands that citizens are treated the same as other citizens.

Another possible challenge is that is discriminates against Georgia citizens in out of state schools.

5. Standard of Review

Being that the challenge is one based on gender, the standard is whether law is substantially related to a government interest. Gender is a quasi-protected classification. It is subject to intermediate scrutiny.

6. Arguments in Favor

It is important for the country to have an armed force to protect it. In the event a draft becomes necessary having a broad pool from which to draw will be very important. Therefore, creating an incentive to have a broad based draft pool may discriminate but it will be substantially related to a legitimate government interest, which is protection.

One of the fundamental purposes of any government is to advance the welfare of its citizens through education opportunities.

The law requiring the tuition credit only be applied to Georgia schools would be viewed under the rational relation test. Here, encouraging in-state education advances a cause that is rational and would _____ be upheld. (similar to lower tuition for in-state students).