QUESTION I (100 points -- 120 minutes)

Audrey was enjoying a delightful walk on a beautiful, clear spring day in a residential area of a large city, when suddenly everything changed. At about 3:00 pm, Audrey was walking along
the sidewalk and was struck by a bullet, which wounded her shoulder. The bullet had been fired by Cynthia in the direction of Zack.

Cynthia, an elderly woman homeowner, lived alone in her home and was aware of an increase in crime in the city. She also knew that elderly people living alone were often subject to violent crime. Indeed, she was told this specifically when several friends gave her a hand gun for protection. Zack was a middle-aged, homeless man, who had been going door to door soliciting handouts. Zack had knocked on Cynthia's door twice earlier that day; each time, Cynthia had refused Zack's requests for money. On the second visit at about noon, Zack had told Cynthia that he would return again later in the day and that he expected Cynthia to give him enough money to make his return trip worth while. Zack returned that third time at about 3:00 pm and, as he was walking toward Cynthia's door, Cynthia appeared with a gun in hand. Cynthia stated that she had nothing for him and that he should leave. She said she was serious and pointed and shot the gun in Zack's general direction as a warning. At that point, Audrey was walking some distance away down the sidewalk on the other side of the street. Audrey heard what she thought was a loud backfire, and then felt the pain of the gun shot wound to her shoulder. She fell to the ground.

David, who was returning in his car from an organizational meeting for a local chapter of Greenpeace, saw Audrey lying injured on the sidewalk. David pulled over the car and ran over to Audrey, who asked him to call an ambulance. David said there was no public phone nearby and told Audrey he knew the way to the hospital. Despite another request by Audrey to call an ambulance, David picked Audrey up; Audrey then lost consciousness as a result of the shock of the wound. David, who had no training or experience in emergency medical techniques, carried Audrey to his car, placed her in it, and proceeded in the direction of the hospital.

Although David was driving within the city's geographic limits, he drove the car at 45 miles per hour down Main Street with his bright lights on. State law prescribed a 35 mile per hour speed limit for driving within city limits and a city ordinance prohibited driving with bright lights within the city. David was approaching the intersection of Main Street and First Street where the traffic signal was a flashing yellow light (i.e.; exercise caution). The traffic signal for vehicles on First Street was a flashing red light (i.e., full stop).

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Betty had just alighted at the corner of Main and First from a bus, which was travelling down Main in the same direction as David. Betty wanted to cross Main Street and so, after exiting, she walked the few steps to the crosswalk at the corner. She
made certain that the bus was not moving forward and proceeded into the crosswalk. Betty became visible to David just as David was coming alongside the bus.

David slammed on his brakes and turned sharply left to avoid striking Betty. His car just missed Betty, but skidded and collided with a vehicle making a full stop on First Street. The impact of this collision broke Audrey's back and Audrey lost the use of her limbs.

Four years previously, Betty had been quite traumatized when her child was killed in a car accident. As a result of her near accident with David, Betty suffered emotionally. She was often unable to sleep, was often nauseous, and, when she was able to sleep, had vivid nightmares involving ghastly auto accidents.

PART A (85 points): Audrey brings an action against Betty, Cynthia, and David, asserting negligence and intentional tort theories in support of her claim for damages.

Betty brings an action against David, asserting a claim of negligence.

Discuss the specific claims that Audrey and Betty will make in their lawsuits, the defenses available to the claims that will be raised, and the likely scope of each defendant's liability, if liability is imposed. REMEMBER THAT FOR THIS PART OF THE QUESTION ALL COMMON LAW DOCTRINES APPLY.

PART B (15 points): Assume that the supreme court of the state in which these events occurred has adopted a pure comparative negligence system. What effect, if any, will application of this comparative negligence scheme have on the likelihood that Audrey and Betty will be able to recover, as well as on the amount that each may recover from each defendant.

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QUESTION II (70 points -- 80 minutes)

Martha Jordan, a partner in the firm where you work, tells you that the firm has agreed to represent James Patterson on a matter that is summarized below.

Acme, Inc., is a firm involved in the transportation of hazardous wastes. As part of this business, Acme, Inc., has specially equipped the standard-sized trucks it uses to transport large canisters filled with hazardous materials. Bruce is a driver employed and trained by Acme, Inc., to transport the wastes. MS. JORDAN WANTS YOU TO TAKE NOTE THAT, UNDER WELL ACCEPTED PRECEDENT OF THIS HYPOTHETICAL STATE'S SUPREME COURT, TRANSPORTATION OF HAZARDOUS WASTE IS NOT AN ULTRAHAZARDOUS ACTIVITY REQUIRING THE IMPOSITION OF STRICT LIABILITY. SHE TELLS YOU THAT YOU ARE TO IGNORE THE ISSUE OF STRICT LIABILITY IN COMPLETING YOUR ASSIGNMENT. YOU ARE ALSO TO ASSUME THAT BRUCE IS INSOLVENT, THAT ACME, INC., IS LIABLE FOR
ALL OF THE DAMAGES FOR WHICH BRUCE MAY BE RESPONSIBLE IN THIS CASE, AND THAT A CLAIM AGAINST BRUCE IS NOT TO BE CONSIDERED OR DISCUSSED IN YOUR ASSIGNMENT.

Throughout the day of June 16, 1988, there had been warnings of tornado activity near the facility to which Acme, Inc., was transporting hazardous wastes in a truck driven by Bruce. As evening approached and Bruce came closer to the destination, tornado warnings increased and there were reports of tornados touching down and causing substantial damage throughout the area. Bruce immediately contacted his home office, which informed him that there was tornado activity in his immediate vicinity. The office further instructed him to park the truck at the earliest possible moment and wait out the storm. By this time darkness had descended.

Bruce turned into the first available large driveway. Although the driveway was large enough to accommodate the truck, the truck did destroy the overhanging limbs of several rare trees as it drove up the driveway to a clearing away from the threat of flying debris. The trees, valued at $50,000, subsequently died as a result of this damage to them. The driveway, trees, and adjoining property were owned by James Patterson (your client), who was away from his property vacationing in the Florida keys.

Bruce stayed in the clearing all night and, by morning, the threat of tornados had passed. He then checked the condition of his truck, noticed nothing unusual, and prepared to depart. As he was starting the engine, he heard a crashing sound, and saw out of his sideview mirror that several large canisters of hazardous wastes had fallen from the truck and were rolling downhill in the direction of Patterson's house. Lying in the path of the four imposing canisters that had fallen were several modern sculptures owned by Patterson, who was an avid art collector. By the time the canisters had come to a rest, they had destroyed three works of art, for which Patterson had paid a total of $1.2 million. Fortunately, the canisters did not leak, 60 that the damage they caused was limited to the art works that were destroyed.

When Patterson learned several days later about these events, he contacted the law firm of Clay and Dunster -- another law firm in your city. Clay and Dunster had brought an action against Acme, Inc., in November 1989 and had claimed in that action that, as a result of the negligence of the defendant and its employee, James Patterson's trees and art works had been destroyed and that he had suffered damages of $1.25 million. The investigation conducted by Clay and Dunster into the facts disclosed only what was described in the previous paragraphs,
without any additional details. There is no reason to believe that this investigation was in any way deficient.

Late this fall, the case went to trial and at the close of the plaintiff's case, which presented the facts detailed above, Acme, Inc., moved for a directed verdict. On November 29, 1990, the trial court granted that motion, holding that there was no evidence that either the destruction of the trees or the art work was the result of negligence.

During the course of the litigation, Patterson became increasingly dismayed by the work of the firm of Clay and Dunster and decided to retain new counsel. He has now retained your firm. He wants to know whether the trial court's decision should be appealed and whether he has any other options in terms of recovering his losses.

Ms. Jordan has therefore come to you and requested that you prepare a memorandum (which need not be formal) responding to these inquiries by Mr. Patterson.

Specifically, she wants you to assess, first, whether the trial court decision was correct and, in particular, the likelihood of success if the decision were appealed. She wants you to assume that Patterson has not waived any possible grounds for appealing the directed verdict.

Second, she wants you to consider whether there are any additional claims that Patterson may have raised or might yet raise to seek recovery for his losses. For any such claim or claims, Ms. Jordan asks that you assess the likelihood of recovering damages.

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QUESTION III (30 points -- 40 minutes)

In December 1984, Jeffrey's mother, who was then 23 years old and married, underwent a legal abortion. During this procedure, Doctor B. -- then Jeffrey's mother's physician -- negligently perforated Jeffrey's mother's uterus. In June 1986, Jeffrey's mother brought a malpractice action against Doctor B., alleging negligence in the performance of the abortion. This action was settled in February 1990 by the payment of a substantial sum to Jeffrey's mother.

Jeffrey was conceived in September 1988 by his mother and her husband. After what was apparently a normal term pregnancy, Jeffrey was born in June 1989. Subsequently, however, it became clear that Jeffrey had been born brain damaged. Jeffrey filed a complaint in spring 1990, alleging that, as a result of Dr. B.'s negligence in the performance of the 1984 abortion on his mother, Jeffrey's development in the uterus was adversely affected and he suffered brain damaged. The complaint seeks damages for that injury, including the costs of extraordinary
medical care and the pain and suffering related to the effects of a diminished childhood.

Dr. B. moved to dismiss Jeffrey's complaint, alleging that it failed to state a cause of action. The trial court granted that motion in August 1990, stating that the complaint fails to state a valid cause of action. There is no legal authority for holding defendant liable to the plaintiff based on injuries sustained by his mother several years before his conception." Jeffrey has now appealed this decision to the state supreme court.

You are a law clerk for a state supreme court judge. That judge has instructed you to assume both that Doctor B. failed to conform to the applicable standard of care in performing the operation on Jeffrey's mother and that this negligence was the cause in fact of the brain damage. The judge wants to rule that Jeffrey's claim states a legally cognizable cause of action. She has therefore asked you to prepare a memorandum that presents the best argument in favor of liability that conforms to the basic principles of negligence liability. She also wants you to state whether you think her view that Jeffrey has stated a cause of action is correct based on your understanding of tort law.

TORTS

Fall 1990 Mr. Healy

PROBLEM 4

A was flying a kite in a brisk wind at a park adjacent to B's house. The kite was above B's property when it suddenly plunged straight down toward the ground, impacting with electrical wires installed and maintained by the Electric Company. The kite ignited when, as a result of the impact, two wires with worn insulation touched together. The insulation was worn because the wires tended to rub together when it was windy. The Electric Company was aware of this problem, but did not take any action to correct it.

The flaming kite fell from the wires onto B's house, which was thereby ignited. The fire then spread to C's detached garage, which was adjacent to B's property. D, a ten-year-old boy, was visiting C's son. D had been badly burned several years before and was very afraid of fire. When he saw the nearby garage on fire, D became frightened and jumped from the second story window of C's house. D suffered serious injuries.

B, C and D bring actions against A and the Electric Company seeking recovery for their injuries. Discuss why each plaintiff should or should not recover from each defendant.