Biotech Torts Winter 2002 - Richards

Put your exam number on each page of the examination. Do not put your name or any other identifying information on the examination. Use no more than the space provided, and not all of the questions require all the space provided. Use specific case and statute references only as necessary to answer the question. **Do not write on the back** - I only read what is on the front. You may use your handouts and your notes, but no commercial materials.

By taking this exam you are on notice that this exam is covered by the honor code. Violating this rule will result in failure in the class and may result in dismissal from law school.

1. Jane has a very rare form of cancer in her bone marrow. She goes to Dr. Mary, a noted oncologist (cancer doctor) for treatment. Dr. Mary recommends a bone marrow transplant and blood exchange. During this process, Jane's blood is replaced with blood transfusions, much like changing the oil in a car. After her blood is changed, she is given a huge dose of radiation, which kills her bone marrow. New marrow is transplanted, and her blood is changed again. The treatment is very successful and Jane appears to be cured of her cancer. About 6 months after the treatment, Jane sees an ad on late night TV looking for people with her cancer. She contacts the advertiser, Roach Pharmaceuticals, and learns that they are buying blood from patients with her cancer and have been for a year. They tell her that they notified every oncologist in the country seeking patients. They are paying \$50,000 for a liter of blood from patients before treatment. Jane calls Dr. Mary and asks her about this. Dr. Mary says that she did know about the offer, but considers it unprofessional to pimp for drug companies so she did not tell Jane. Jane is furious and contacts you to find out her legal options. She wants to sue Dr. Mary for failure of informed consent and any other things you can think of. Discuss the merits of a claim for failure of informed consent, both in Missouri and in California, if they differ, and any other approaches to the problem.

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2. Intro materials:



If you remember and liked Midnight Ecstacy, You are going to love TRIP2NIGHT. 1 capsule is as strong as 3 of the Midnight Ecstacys. This safe and legal product increases sensitivity, stimulation, and gives an intense euphoric feeling. It is the best MDMA (Ecstacy) alternative in existence and many people report that it may work well as an anti-depressant without no harmful side effects. We here at HerbalEcstacy agree. We are eating these things like candy. Now people can dance the night away safely and legally without health risks or legal problems. You will be amazed at how much it feels like the real thing. It usually only takes one capsule and takes about an hour and a half before you get the full effect so give it time before taking the second pill because with two you may not sleep for days. WARNING: If you take 3 or 4 of these at a time, you will experience, irrational thinking, laughter, and euphoria.

Read Testimonials below I just wanted to say that the trip2night is the best product I have ever taken. I took 2 the first night and I felt like I was on meth for about 36 hours. I took 4 the next weekend and I felt like I had ate atleast 6 hits of good acid. I don't know how it is legal but I am one very satisfied customer!

John (New York)

That fucking trip2night blows all the other herbal ecstacy shit out the window! It is more like acid to me but god damn it is fun as hell. Whatever you do, don't take 6...You trip for 3 days!!!

Helen (Boston)

What the fuck is in them red trip2s. I took one and was up for more than 24 hours wired and felt a bit like I was tripping on mushrooms or acid. Those fuckers kick ass!! A lifelong customer!!

Tommy (Alabama)

GODDAMN, TRIP2NIGHT IS NO JOKE. TAKE 4 AND YOU DO FEEL LIKE YOU ARE IN WONDERLAND!! THANKS FOR OFFERING SUCH AN AWESOME PRODUCT.

ANONYMOUS

After trying all the herbal xtc products, I was reluctant to pay 40.00 for 6 capsules but after a friend praises them I took the chance and I must say, I was completely happy! I take one a day and my depression is gone and I have more energy than ever. I have to take the benzos to put me to sleep though and that habit is getting expensive!! Your products work!! CHEERZ

(Anthony, London)

I just wanted to say as an experienced acid tripper I was shocked that 4 capsules fucked me up the way it did. I don't remember much of the night but all I can say was I tripped my balls off more so than ever with acid. The shit is the bomb!!!

(Lance, Maryland)

I took 3 of the t2nights and went to a club. I didn't think they were going to do shit because it took about 2 hours to hit me but when it did, It almost scared me. I wasn't prepared to trip that hard. I tripped for over 12 hours and had one of the best nights ever. THANKS HERBALECSTACY.CC!!

(Miranda, Philly)

How is this shit legal?? It is like meth and acid all combined into one. These are by far the best herbal pills EVER. Satisfaction is an understatement!!!!

(John, DC)

I have always been impressed with your products but triptonight is fucking incredible. I can't believe this product is legal. You guys really outdid yourself on this one!!! Keep up the good work!

(Thomas, NJ)

I took 4 2nights and it scared the shit out of me. I wasn't expect to hallucinate and lose my mind but I will give you one thing, It works. Too good for my taste but if people like to go insane, this is the product for them!!

(Jane, OH)

2. We have discussed Viagra in class, we have looked at the WWW sites, and the PPI. You had to figure we would have a Viagra question on the exam and this is it. Jim is a swinger, heavy into the club scene. Like many others, he likes to mix Viagra and TRIP2NIGHT. TRIP2NIGHT is an "herbal ecstasy" which he purchased on the WWW. The preceding page is the actual WWW information provided for buyers of this drug. (I did not make this up - put Ecstasy into Google.) He also purchased the Viagra over the WWW. The Viagra site had an online consultation, reviewed by the computer, which asked about allergies, which he did not have, and whether he had erectile dysfunction. It did not ask if he has been diagnosed, only if it he had it. Since, from his point of view, he did, he answered yes. The site also said that he would inform his doctor about the medication, which he figured he would do next time he saw him, whenever that might be. After answering these questions, he clicked away and ordered his drug. (This is also for real.) The combination of Viagra and 4 TRIP2NIGHT capsules proves more than his system can take and he suffers a massive stroke. Assume TRIP2NIGHT is manufactured by Acme. Assume it is legal, but not FDA approved. Assume it was correctly manufactured, that it had received no clinical testing other than by the users who purchased it, and that no one had any idea about its potential drug interactions. Also assume that your investigator had determined that Acme is nothing but a PO box in the US and a string of empty offshore accounts, i.e., it is gone by the time you are bringing the claims. You focus on Pfizer, the manufacturer of Viagra. Assume that the Viagra was manufactured correctly, that it was delivered with the PPI, but since the PPI was complicated, and Jim did not open the package until he had already taken the TRIP2NIGHT, that he did not read it. He had visited the official Viagra WWW site and read all the good stuff about the drug, and he even glanced at the drug interaction section, but not se

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3. Martin Avenue Pharmacy makes nicotine pops. This is all the information they provide on their WWW site and with the lollipops:

"Lick the Bad Habit, Stop Smoking Today!"

Tom's Nicotine Lollipop is a Nicotine Salicylate combined with a natural Sweetener (Stevia Extract) and flavorings in a sugar-free sorbitol base. It is sugar-free and is safe for diabetics to use.

What strengths and flavors are available?

Martin Avenue Pharmacy has both the 2 mg & 4 mg Nicotine Lollipops available. They are available in the following flavors: Strawberry, Watermelon, Cherry, Lemon-Lime, Peppermint, Tangerine, Green Apple, Teaberry, Spearmint, Cinnamon Flavors and an assortment of flavors. Martin Avenue Pharmacy can also customize the dose of nicotine to almost any strength your physician requests.

What strength of Lollipop to use and How to use it?

Tom's Nicotine Lollipops are dispensed either individually or in multiples of 5. Our pharmacists recommend that people who smoke in excess of 1.5 packs per day start with the 4 mg lollipop for approximately 2 to 3 weeks then move down to the 2 mg lollipops for another 2 to 3 weeks. For individuals that smoke less than 1.5 packs per day, the recommended dose is 2 mg for approximately 4 to 5 weeks.

How does an Individual Use Tom's Nicotine Lollipop?

Place the lollipop in the mouth when you feel the urge to smoke. Leave it there until the urge is over. Once the urge passes, replace the lollipop in the bag provided and reuse the next time the urge strikes. One lollipop usually lasts 4 to 5 cigarette breaks.

Why use Tom's Nicotine Lollipop?

Tom's Nicotine Lollipop allows the individual to control the amount of nicotine taken in based on the body's needs. A major part of quitting is psychological. The Nicotine Lollipop deals with both the hand to mouth fixation and the nicotine addiction. To begin licking your bad habit, call Martin Avenue Pharmacy today at 630-355-6400.

Please Note: This product is not candy. It is sold to adults, age 18 or over. Martin Avenue Pharmacy also has the right to ask to see the individual's Personal ID when selling this product. Nicotine Lollipops have been featured on Fox, WGN, ABC, NBC & CBS Local News broadcasts. An article also appeared in the April third edition of the Wall Street Journal.

Your client, Jill, ordered 12 pops before the FDA closed down all non-prescription Internet sales. The pops were correctly manufactured. Your client uses them around the house and was seen by her 5 year old. Two weeks after the FDA crackdown, the 5 year old sneaked a pop from the kitchen drawer where Jill kept them and gave it to his baby sister, June. June sucked on the pop until she started to have seizures. While these were not fatal, she did suffer some brain injury from lack of oxygen. The risk of child poisonings were one of the reasons cited by the FDA for stopping sales.

- a. What are your claims against the pharmacy and what are its defenses?
- b. How would the case against the pharmacy change if Jill has been given a prescription by Dr. Bill for the lollipops and they had been dispensed according to that prescription? Do not discuss any claims against Dr. Bill.

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