

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW I

FINAL EXAM

Professor Pope

Fall 2008

GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.
2. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.
3. **Exam Packet:** This exam consists of eighteen (18) pages, including this cover page. Please make sure that your exam is complete.
4. **Identification:** Write your exam number in these five places: (i) in the upper-right hand corner of this page, (ii) on the cover of *each* Bluebook (or your ExamSoft file) that you use for Parts Two and Three, (iii) on your Scantron form, (iv) by filling in the corresponding ovals on your Scantron form, and (v) on the outside of the exam envelope.
5. **Anonymity:** The exams are graded anonymously. Do not put your name or anything else that may identify you (except for your student number) on the exam.
6. **Timing:** This exam must be completed within three hours. Time will commence *after* everyone has completed reviewing the instructions.
7. **Scoring:** There are 180 points on the exam, one per minute. Thus, you should allot a twenty (20) point question approximately twenty (20) minutes.
8. **Open Book:** This is an OPEN book exam. You may use *any* written materials, including, but not limited to: the Hall casebook, other required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.
9. **Format:** The exam consists of three (3) parts which count toward your grade in proportion to the amount of time allocated.

PART ONE comprises fifteen (15) multiple choice questions worth a *combined* total of 45 points. The suggested completion time is 45 minutes.

PART TWO comprises two short essay questions worth a *combined* total of 65 points. The suggested completion time is 65 minutes.

PART THREE comprises one long essay question worth 70 points. The suggested completion time is 70 minutes.

10. **Grading:** All exams will receive a raw score from zero to 180. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 140 of 180, then that student would typically receive an "A." I will post an explanatory memo and/or a model answer to TWEN a few weeks after the exam. L.L.M. and M.J. students are curved separately.
11. **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** Please note that the multiple choice questions vary in both length and complexity. You might answer some in 30 seconds and others in three minutes.
2. **Identification:** Write your Student ID on the first page of this exam booklet.
3. **Fill-in Scantron Ovals:** Clearly mark your answer on the Scantron form by filling-in the oval corresponding to the best answer with a #2 pencil.
4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in the margin near the question. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do *not* expect this to be necessary.

SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE:

1. **Submission:** Write your answers in your Bluebook examination booklets or ExamSoft file. I will not read any material which appears only on scrap paper or this exam.
2. **Legibility:** If you are not typing, write legibly. Please write only on one side of the page. Leave a blank space/line between paragraphs. I will do my best to read your

handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible.

3. **Outlining Your Answer:** You are strongly encouraged to use one-fourth of the allotted time per essay question to outline your answers on scrap paper *before* beginning to write in your exam booklet or ExamSoft file.

Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues *will* negatively affect your grade.

4. **Answer Format:** This is important. *Use headings and subheadings* to separate chunks of text concerning a particular party, a particular legal theory, or a particular element of a legal theory (e.g. “Patient v. Doctor – Informed Consent” and “Causation – hypothetical consent”). Use short single-idea paragraphs (leaving a space between paragraphs). Less important, but sometimes helpful, are introductory roadmaps.
5. **Answer Content:** Answer all (but only) relevant issues that arise from the fact pattern. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, *apply* the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
6. **Citing Cases:** You are welcome but not required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a substitute for stating the law. For example, do *not* write: “Plaintiff should be able to recover under *Canterbury*.” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
7. **Cross-Referencing:** You may reference your own previous analysis (e.g. “the duty of defendant B is the same as defendant A.”). But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
8. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize key weaknesses in your position and make the argument on the other side. Do not make only slam-dunk arguments for a party. Make *all* plausible arguments implicated by the facts. If some of those are weak, say why.
9. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (implied by or at least consistent with the fact pattern) that you believe to be necessary to answer the question.

STOP!

**DO NOT TURN THIS
PAGE UNTIL THE
PROCTOR SIGNALS**

PART ONE

15 questions worth 3 points each = 45 points/minutes

1. **Defenses available in a failure to obtain informed consent lawsuit include all of the following EXCEPT:**

- A. Patient waiver
- B. Honest error
- C. Emergency
- D. Therapeutic privilege
- E. The risks are already known

2. **Regarding the law of informed consent, which of the following is TRUE?**

- A. The duty to obtain informed consent is restricted to surgeons.
- B. It does not matter what a health care provider discusses with a patient about proposed treatment as long as the consent form is signed.
- C. Major legal decisions in the 1970s dramatically accelerated the evolution of informed consent cases.
- D. Informed consent law is uniform among all jurisdictions.

3. Which of the following may a surrogate consent to withdraw on behalf of a permanently unconscious under the Delaware Health Care Decisions Act?

- A. Water and nutrition given via tube feeding
- B. Intubation and respiration via mechanical ventilator
- C. Renal dialysis
- D. All of the above

4. Which of the following is NOT true about credentialing?

- A. A hospital would be negligent for permitting a physician onto its staff whom it knows or should know is unqualified
- B. Hospitals have a duty to maintain a systematic process of screening and evaluating qualifications and other credentials before a practitioner's initial appointment and reappointment to the medical staff
- C. Negligence may be proven by a litigant, through discovering whether a hospital properly queried the National Practitioner Data Bank before granting the physician privileges
- D. It includes licensure, required education, relevant training and experience, current competence, and continuing education
- E. All the above are true

5. **Which of the following is TRUE about medical malpractice?**
- A. To prevail in a malpractice suit, a health care professional must demonstrate the degree of care ordinarily exercised by a reasonably skillful, careful and prudent health care professional engaged in similar practice under the same or similar circumstances.
 - B. A health care professional must always perform according to the highest standards, as defined by the respective specialty board.
 - C. A health care professional must practice according to the standards set by the nearest university center.
 - D. A health care professional must practice according to the guidelines set by major malpractice insurers.
 - E. There is no legal test for malpractice. The judge determines whether liability based on personal perceptions only.
6. **Mississippi Code section 15.1.36 provides a two-year statute of limitations and a seven-year statute of repose. Elizabeth had surgery on January 1, 2002. She first discovered (or could have discovered) that a foreign object had been left in her abdomen on January 1, 2008. If Elizabeth wants to file a malpractice lawsuit against her surgeon before the lawsuit becomes barred, she must file on or before:**
- A. January 1, 2004: Her lawsuit is already barred.
 - B. January 1, 2009
 - C. January 1, 2010
 - D. January 1, 2015
 - E. None of the above

7. **Martha was injured in a car accident and taken to Hospital for treatment. While at Hospital, Martha was treated by the ER physician who performed a physical exam and ordered an EKG, chest x-ray, and CT scan. The ER physician found the physical exam and tests revealed nothing abnormal other than tenderness to the chest, although Martha complained of chest pain and shortness of breath.**

Martha was prescribed Motrin and Lortab for her chest pain. When she was discharged, she was told to follow up with her private physician and to seek medical care immediately if she suffered any new symptoms. The next day, while at home, Marth's husband discovered that she had stopped breathing. She was taken back to Hospital, where she was pronounced dead. The cause of death was later determined to be pulmonary embolism. In the subsequent malpractice lawsuit against Hospital, plaintiff relief solely on the expert testimony of Dr. Butt.

Hospital maintains that Dr. Butt should not have been accepted as an expert in emergency medicine because he was not qualified to testify to the standard of care in emergency medicine. Hospital argues that Dr. Butt is a family physician and not an emergency physician, that Dr. Butt is not board-certified in emergency medicine, and that although Dr. Butt once practiced in emergency rooms, he has not done so since the mid-1990s.

Plaintiff argues that Dr. Butt was properly accepted as an expert in emergency medicine. Plaintiff states that Dr. Butt is a specialist in both family medicine and emergency medicine, and has thirty-four years of experience in emergency medicine. Plaintiff asserts that because Dr. Butt has treated numerous patients who have had pulmonary embolism, he was qualified to testify as an expert in this case.

The trial court should:

- A. Permit Dr. Butt to testify
- B. Not permit Dr. Butt to testify, and dismiss plaintiff's lawsuit
- C. Not permit Dr. Butt to testify, but allow plaintiff's lawsuit to proceed without an expert witness
- D. Not permit Dr. Butt to testify, but allow plaintiff's lawsuit to proceed on a *res ipsa* theory

8. **Plaintiff, who was 16 years old at the time, was found to have a 10-centimeter mass in her mid-abdomen after she presented to the Children's Hospital emergency room complaining of a hardness in her stomach area and abdominal pain. The pediatric surgeon, consulted with plaintiff and recommended she undergo medical resonance imaging (MRI). He discussed plaintiff's condition with her parents and tentatively scheduled a surgery to remove the mass. The MRI later revealed a "large spherical mass taking up the area of the pancreatic body." The patient's father then signed this form:**

I hereby authorize [surgeon] and associates to perform the following procedure/surgery: [Removal of abdominal tumor; removal of pancreas; possible removal of portion of intestine.]

My physician has described the proposed procedure/surgery to me and has told me about the potential risks and expected benefits as well as other methods of treatment available and their risks and benefits, and the risks associated with refusing the recommended procedure/surgery. My physician has given me the chance to ask questions about the proposed procedure and all of my questions have been answered to my satisfaction. I understand that all procedures and/or surgeries involve risks of poor results, complications, injury or death from both foreseen and unforeseen causes. No warranty or guarantee has been made as to the result or cure and I understand that further treatment may be necessary in the future.

In subsequent litigation against the surgeon:

- A. This form is strong evidence that substantially weakens plaintiff's claims for battery and informed consent
- B. This form is illegal because it violates public policy, as stated in *Tunkl v. Regents of the University of California*
- C. This form is strong evidence that substantially weakens plaintiff's claims for medical malpractice when it is later discovered that surgeon removed normal-functioning organs and that there was actually no malignancy
- D. More than one of the above

9. **On December 7, 2008 at 7:00 p.m., Mr. Jones, age 86, presented to the Emergency Room of Morton Community Hospital (“Morton Hospital”). Mr. Jones complained of extreme pain in his right side. Jones had previously suffered a stroke and had some expressive aphasia, but was able to communicate his condition. Mr. Jones’ condition significantly deteriorated. Still in the waiting room, he began to groan, hyperventilate, and vomit. The emergency room nurses allegedly did not attend to Mr. Jones despite his and his family's insistence. He went into cardiac arrest and finally was taken back to the emergency treatment room at 8:00 p.m. and seen by an emergency room physician employed by Morton Hospital. Resuscitation efforts were unsuccessful and Mr. Jones was pronounced dead at 8:47 p.m. An autopsy was performed and the cause of death was determined to be a massive “ruptured abdominal aortic aneurysm,” a fatal condition if not surgically treated**

Plaintiff filed a lawsuit in Ohio which recognizes the “loss of chance” theory. Plaintiff's complaint alleged that the defendants negligently failed to timely diagnose and treat Mr. Jones’ medical condition, resulting in his untimely death. Plaintiff’s expert witness testified that Mr. Jones had a 40% chance of survival if operated at the time of arrival at the hospital, but that at 8:00 p.m. when Mr. Jones was brought back to the emergency room in cardiac arrest, he had less than a 10% chance of survival.

If the jury believes that the defendant’s negligence decreased plaintiff’s chances of recovery or survival, then:

- A. Plaintiff still loses because plaintiff probably (60%) would have died *even if* defendant had not been negligent.
- B. Plaintiff still loses because there is no “but for” causation, since the most likely cause of plaintiff’s death is not defendant’s negligence.
- C. Plaintiff can win and recover the value of a 40% lost chance of survival.
- D. Plaintiff can win and recover the value of a 30% lost chance of survival.
- E. Plaintiff can win and recover the value of a 10% lost chance of survival.

10. **Troy arrived at the Christiana Emergency Department on December 7, 2008 at 1:11 p.m. He complained of chest pain. At 1:22 p.m. Troy was seen by Dr. Moro. Dr. Moro ordered an electrocardiogram, an x-ray, and lab work for Troy. But Dr. Moro did not order additional screening tests that were routinely given to patients who had “current chest pain.” Specifically, Dr. Moro failed to consult a cardiologist as he did for patients with similar symptoms. Troy was discharged by the Emergency Department, and the medical records state that his “symptoms resolved.” The next day, Troy was found passed out in his truck. He was transported by helicopter to the Emergency Department, admitted at 7:47 a.m., examined at 7:50 a.m., and pronounced dead at 9:05 a.m.**

In the subsequent litigation, the plaintiff:

- A. Has a weak EMTALA claim, because the ER actually did a detailed screening
 - B. Has a weak EMTALA claim, because the ER did a screening and found no emergency medical condition
 - C. Has a strong EMTALA claim, because the ER negligently missed the emergency condition that the reasonable ER would have caught.
 - D. Has a strong EMTALA claim because the ER’s screening was disparate treatment.
11. **Ellen is 87 years old and has been admitted to the hospital for pneumonia. Her attending physician has confirmed that she can understand and appreciate health care decisions. Assuming that all of the following are now reasonably available, who is now authorized to make health care decisions on Ellen’s behalf?**
- A. The agent designated in Ellen’s advance directive
 - B. Ellen’s husband (from whom she is not divorced, but with whom she fights)
 - C. Ellen’s sister
 - D. Ellen’s oldest child
 - E. None of the above

12. Which of the following formally or informally regulate (or influence) the practice of medicine:

- A. State Board of Medicine
- B. Hospital credentials and quality review
- C. National Practitioner Data Bank
- D. Threat of malpractice liability
- E. All of the above

13. _____ is voluntary, but 85% of U.S. doctors currently possess this credential.

- A. State licensure
- B. Joint Commission accreditation
- C. Specialty board certification

14. Which of the following statements is NOT true under the Delaware Health Care Decisions Act?

- A. Your health care agent has the right to make virtually all health care decisions on your behalf.
- B. Your health care agent can make decisions over your objections.
- C. Without an advance directive, health care providers must put and keep a terminally and incurably ill patient on life support systems, regardless of the cost.
- E. Once an advance directive has been signed, it cannot be changed.

15. Which of the following will a court probably NOT enforce?

- A. A pre-treatment agreement not to sue or to limit the amount of suit
- B. A pre-treatment agreement to arbitrate a claim instead of taking it to court
- C. A pre-treatment informed consent form assuming the inherent risks of treatment
- D. More than one of the above

----- **END OF PART ONE** -----

PART TWO

2 short essay questions worth 30 & 35 points = 65 points/minutes

SHORT ESSAY ONE:

(35 points/minutes)

Ruth is an employee of Quality Fruit. That company maintains an employee dental plan administered by Inhumana. Under the plan, Ruth is entitled to reimbursement for dental care up to a maximum of \$2,500 per year. All costs for “preventative services” such as routine cleaning and oral examinations are reimbursed, while “basic services” such as emergency exams, palliative care for pain relief, oral surgery, and endodontics (root canals) are repaid at a rate of 80 percent after a \$50 yearly deductible.

On December 1, 2008, Ruth filed a negligence complaint in the Superior Court of New Jersey, claiming that she endured pain and suffering as a result of Inhumana's administration of the plan. Specifically, the Complaint states that:

“Plaintiff was referred to a contracted provider of Defendant, Dr. Drill DDS, a member of Inhumana’s in-network. This contracted provider stopped in the middle of a surgical treatment, causing Plaintiff to suffer three infections.”

“Defendant refused to reimburse costs incurred as a result of those infections.”

“Defendant knowingly and voluntarily continued to inflict pain despite notice of numerous telephone calls and letters concerning Plaintiff’s benefits claim, demanding that defendant charge back their provider so Plaintiff could obtain a qualified provider for help to relieve the infection and pain.”

You are counsel for Inhumana. What motions will you file and what arguments will you make in response to Ruth’s lawsuit? How strong are these motions and arguments?

Remove 502

SHORT ESSAY TWO:

(30 points/minutes)

Bell was housed in County Jail as a pretrial detainee. He suffered from a mental condition known as bipolar affective disorder. At the time, Bell was taking Prozac for his condition. Dr. Amin is a licensed psychiatrist, who was, worked for Wexford Health Sources, which was under contract with the County to provide psychiatric services to County Jail inmates. Dr. Amin met with Bell, in order to conduct a psychiatric examination. It was standard procedure at the County Jail to have a correctional officer present during any type of medical examination/evaluation of an inmate

At the start of the examination, Bell objected to the correctional officer's presence, claiming that he had a right to communicate confidentially with Dr. Amin. The correctional officer would not leave the room. Bell grew increasingly belligerent, refusing to participate in the examination until the correctional officer left the room. Along with refusing to participate, Bell also refused to sign the "refusal of treatment" form, which he instead crumpled up and threw away. Dr. Amin left the jail without completing the examination and planned on following up on Bell's condition another time. Two days later, Bell committed suicide.

Evaluate only Bell's claim of tortuous abandonment against Dr. Amin.

----- **END OF PART TWO** -----

PART THREE

1 long question worth 70 points = 70 points/minutes

LONG ESSAY:

(70 points/minutes)

You represent the insurance company for Carneeval Cruise Lines. Carneeval has been served with the following Complaint. The Complaint makes lots of factual allegations but fails to *explicitly* identify any causes of action. Assess all the legal theories that PLAINTIFF might bring against Carneeval.

1. PLAINTIFF contracted for a seven day cruise with CARNEEVAL on its vessel the GOOD SHIP LOLLIPOP to begin July 21, 2008. The subject cruise began and ended within the territorial waters of the State of Florida, specifically, Tampa, Florida.
2. While on the cruise, specifically in the casino bar on the LOLLIPOP, the PLAINTIFF slipped and fell on a substance and injured her body and extremities.
3. As a result of the fall, PLAINTIFF was injured in and about her body and extremities, suffered pain therefrom, incurred medical expenses in the treatment of the injuries in the past and will incur additional medical expenses the future, suffered an aggravation of a pre-existing condition, suffered a physical handicap and her working ability has been impaired and she has lost time from work and her earnings capacity has been diminished in the future and her injuries are permanent and continuing in nature and she will continue to suffer these losses and impairment in the future. A fair assessment of the PLAINTIFF's damages exceed \$100,000 and continue to grow while she remains unable to perform her normal functions as a law enforcement officer.
4. On Expedia.com and other travel sites, CARNEEVAL has represented that it supplies a fully qualified medical staff including, doctors, nurses and technicians and a fully equipped, adequately stocked, infirmary/clinic/medical facility on board the LOLLIPOP to examine and treat passengers such as the PLAINTIFF who should become injured/sick or infirm during the voyage.
5. CARNEEVAL's medical staff signs onto the ship's crew as members of the crew with contracts as officers/crew with titles and rank, by clothing them with crew member uniforms identifying them as members of the crew, by addressing them as staff crew members by rank and title and by requiring their 'medical crew' to devote their exclusive work time to treating and examining passengers and other crew.
6. CARNEEVAL provided its 'medical crew' with the space designated as a clinic/infirmary/medical facility to work in and further equipped them with the tools of their trade and supplies needed to carry out their 'only mission' on the voyage which was to examine, treat and care for, passengers and crew. CARNEEVAL mandates the

hours of operation of the clinic/infirmary/medical facility.

7. CARNEEVAL has a full time employee with his land-based headquarters in Miami-Dade County, Florida and has designated this employee as the ‘ Medical Operations Manager’ who is medically trained and whose job it is to hire, fire and oversee the delivery of medical care by the medical crews on all their ships.
8. Carneeval employs a licensed physician as the ‘ Director, Medical Credentialing’ whose job it is to screen potential ships' physicians, review their credentials, check their references, review prior performance and determine suitability for employment or continued retention as ships' physicians.
9. CARNEEVAL employs a Medical ‘Credentialing Committee’ to screen its medical crew. CARNEEVAL's ‘AGREEMENT’ with its physicians for ‘ Shipboard Physician Services’ allows them to be terminated ‘for cause’ which includes ‘...malfeasance... or failure to perform duties to the satisfaction of CARNEEVAL.’ Furthermore ‘such causes will be determined solely at the discretion of CARNEEVAL.’”
10. Because CARNEEVAL operates cruise ships throughout the waterways of the world on dozens of ships, CARNEEVAL’s Credentialing Committee has only been able to screen and investigate the training, experience, and qualifications of only some of its medical personnel.
11. Because CARNEEVAL hires doctors, nurses and other health care professionals from many different countries to work on geographically dispersed ships, it has not undertaken to train them or to require ongoing continuing medical education.
12. Onboard their ships and on the LOLLIPOP all medical attention comes from CARNEEVAL's medical crew as no other non-staff is allowed to practice or perform medical care on passengers and crew and there are no alternative “independent” medical crew or medical facilities on board. Carneeval's medical crew enjoy all of the rights and benefits of other ship's crew members and additionally receive full medical benefits.
13. CARNEEVAL's “AGREEMENT” with its physicians allows CARNEEVAL to photograph them and use their “...name, voice, pictures, photographs and other likenesses for the purposes of promoting and publicizing CARNEEVAL's vessels in any and all media.’ If a ship's physician fails to ‘execute’ duties satisfactorily in the discretion of CARNEEVAL's shipboard management ... he can be ‘terminated.’
14. In fact, CARNEEVAL rarely reviews its medical staff’s professional performance; and has never terminated one for conduct not measure up to CARENEEVAL’s professional standards.
15. CARNEEVAL bills passenger/patients directly for the services of its physicians and other medical staff and determines on its own the appropriate charges for services and collects the amounts from its passengers. The ship's physician does not share in the

amounts collected by CARNEEVAL from its passengers for professional medical services, but is paid a bi-monthly salary as all other crew are paid.

- 16. CARNEEVAL did not have onboard the LOLLIPOP all the equipment necessary to diagnose and treat the PLAINTIFF's injury, namely an adequate and working x-ray machine and qualified staff to perform the x-ray and interpret the results and provide appropriate care to PLAINTIFF.
- 17. Carneeval's medical crew failed to timely and accurately diagnose the PLAINTIFF's injury, failed to timely triage her injury and provide for appropriate examination, testing and treatment by another means if they did not have the means, expertise or qualifications to properly perform those functions on board the LOLLIPOP in a timely manner.
- 18. As a result of the delay in receiving effective treatment, PLAINTIFF' s initial injury was exacerbated, made worse and it has affected her ability to timely recover from this injury and it has caused additional necessary medical care, treatment, operations, therapy and medical expenses and she has been left with a injury causing her to lose earning, lose earnings capacity and suffer pain and suffering, and loss of the capacity to enjoy life and all these losses will continue in the future. She has suffered physical handicap and permanent impairment, aggravation of preexisting conditions and these losses will continue into the future.

1st doc – relationship + std care + causation
 Resources
 actual
 apparent
 no nondel or emtala
 direct select
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----- **END OF PART THREE** -----