

## Professor Pope, Health Law: Quality & Liability Final Exam Scoring Sheet (Fall 2012)

### Multiple Choice (2 points each = 40 points)

1. C	5. D	9. C	13. C	17. C
2. F	6. E	10. D	14. C	18. C
3. F	7. A	11. B	15. E	19. D
4. C	8. A	12. F	16. C	20. E

### Short Essay 1 (25 points)

<b>Duty</b>		
DEF had an informed consent duty, because he was in a <b>treatment relationship</b> with PTF. He actually treated her.	2	
DEF had a duty to disclose the information that a <b>reasonable patient</b> in PTF's circumstances would consider material to a decision about how to treat her breast cancer.	2	
A reasonable patient would consider the PtDA's more effective <b>format and presentation</b> of risks and alternatives to be important and material. Alternatively, the reasonable patient would want to know about the alternative of learning her options with a PtDA.	3	
The reasonable patient not only wants the underlying <b>data and statistics</b> but also wants to understand them. She needs her physician to disclose information in a way that it is <b>meaningful</b> .	3	
<b>Breach</b>		
If DEF had a duty to use a PtDA, then failure to use it was breach.	2	
Still, the breach argument seems <b>strained</b> where DEF actually and accurately disclosed all the risk and alternative information a reasonable patient would consider material. The PTF seems to be complaining not about the <b>content</b> of the DEF's disclosures but only about the <b>manner</b> .	2	
<b>Injury</b>		
PTF lost her breasts.	2	
<b>Causation</b>		
Had DEF used the PtDA, a <b>reasonable patient would have declined</b> the procedure. Statistically, this seems probable. Patients viewing PtDAs generally choose less aggressive procedures. On the other hand, it is unclear how a jury would tradeoff/balance breasts and a higher risk or recurrence.	3	
Had DEF used the PtDA, PTF would <b>herself have declined</b> the procedure.	1	
Had PTF declined the procedure because of the PtDA, then PTF would not have lost her breasts. The <b>procedure necessarily entailed</b> the claimed injury (removal of the breasts).	2	
<b>TOTAL</b>	<b>25</b>	

### Short Essay 2 (15 points)

<b>Duty</b>		
DEF had a duty to disclose what a <b>reasonable physician</b> customarily would/does disclose under the circumstances.	2	
PTF must establish this duty with an <b>expert witness</b> .	2	
PTF will probably be unable to establish this duty, because <b>most physicians do not use PtDAs</b> .	4	
In some malpractice standard jurisdictions where the DEF is measured only against the reasonable physician in the state (e.g. VA, WA, AZ) or in a similar locality (e.g. MN), then PTF might be able to establish a duty to use PtDAs. While they are not generally used in the USA, their use might be the <b>standard where DEF practices</b> .	4	
<b>Breach, Injury, Causation</b>		
The remaining elements are the same as in Short Essay 1	3	
<b>TOTAL</b>	<b>15</b>	

### Short Essay 3 (25 points)

Creativity	10	
Cogency of argument	10	
Use of cases and materials	5	
<b>TOTAL</b>	<b>25</b>	

**Long Essay (80 points)**

<b>Treatment Relationship (Hutt)</b>		
Yes, because DEF actually treated PTF.	3	
<b>Medical Malpractice (Hutt)</b>		
<b>Duty</b>		
PTF must establish what the reasonable physician in Minnoza would do.	2	
PTF expert Kurt is from New York, and may not know the Minnoza <b>statewide</b> standard of care.	4	
Moreover, it appears that Kurt is prepared to testify only as to causation, not to the standard of care. If so, then PTF most probably has no COA against Hutt, MDC, or St. Matthew.	4	
Even if Kurt establishes a SOC, Hutt may be able to establish a <b>school of thought</b> regarding examining one's own specimens. Many respected clinicians do this. But note that the existence of a national school of thought does not mean there is a statewide SOT.	4	
<b>Breach</b>		
If PTF establishes a duty to have specimens examined by a third party, then Hutt breached.	3	
Kurt also suggests that Hutt misdiagnosed the 2005 specimen. Gunderson also indicated that this specimen was misdiagnosed. This misdiagnosis may be a negligent error separate from the failure to consult.	2	
<b>Injury</b>		
PTF is dead.	2	
<b>Causation</b>		
PTF must establish "but for" causation, that DEF's negligence is the most likely cause of the injury.	3	
PTF can only establish that DEF's negligence is just as likely as an alternative cause (20% v. 20%)	4	
<b>Statute of Repose</b>		
Hutt may have misdiagnosed PTF in August 2005. That event is more than <b>four years</b> before PTF filed her lawsuit (in August 2010).	4	
But PTF saw Hutt for the same condition. Therefore, she and Hutt were in a <b>continuous treatment</b> relationship that did not end until June 2007 (within four years of filing).	4	
<b>Statute of Limitations</b>		
PTF did not <b>discover</b> her injury until January 2010. This was within one year of filing.	2	
<b>Informed Consent (Hutt)</b>		
Hutt arguably had a duty to disclose his malpractice history and the financial incentives under which he was operating.	--	--
<b>Minnoza Dermatology Clinic</b>		
MDC is <b>vicariously liable</b> in respondeat superior for Dr. Hutt's negligence, if any, since he is their <b>employee</b> .	4	
MDC may also be <b>directly liable</b> for <b>negligently retaining</b> Hutt despite his extensive malpractice record.	4	
<b>St. Paul Pathology Associates</b>		
Hutt's sending the specimen to the SPPA pathologist was a formal consult. Thus, the pathologist was in a <b>treatment relationship</b> with PTF and owed her a duty to comply with the SOC.	3	
It appears that the August 2005 specimen was misdiagnosed. But it is unclear whether PTF can establish the SOC for the pathologist through Kurt.	3	
The claimed SPPA negligence occurred in August 2005, more than 4 years prior to filing. In contrast to the case against Hutt, there is no continuing treatment relationship. Therefore, this claim is <b>barred by the SOR</b> .	3	
<b>St Matthew Hospital</b>		
Hutt took the last three specimens at the hospital, and examined them himself.	--	--
The hospital may be <b>directly liable</b> for <b>negligently retaining</b> Hutt in light of his extensive malpractice record.	4	
The hospital may be <b>directly liable</b> for <b>not supervising</b> Hutt and assuring that he had the specimens reviewed consistent with the prevailing standard of care.	4	
It is unclear that PTF can establish causation between these breaches and her injury. But non breach likely would have led to an <b>earlier</b> correct diagnosis. In that case, PTF would have had a better chance of recovery.	4	
It is unlikely that PTF can establish any actual or ostensible agency for vicarious liability. She had an established treatment relationship with Hutt before and separate from the hospital.	--	--
<b>Kno-Care</b>		
The insurer denied PTF coverage that arguably should have been provided.	2	
The plan was employer-provided, and this is a dispute over coverage. Therefore, any state-based claims (like breach of contract) would be <b>preempted by ERISA</b> .	4	
PTF paid for and received the desired treatment. Therefore, all she wants is <b>reimbursement</b> . This is probably all that she would be able to recovery anyway under ERISA.	4	
It is unclear whether Kno-Care can be vicariously liable for Hutt's negligence. There are insufficient facts to establish ostensible agency.	--	--
<b>TOTAL</b>	<b>80</b>	