

Pope, Health Law: Quality & Liability: Fall 2013 Final Exam Feedback

Multiple Choice

30 Questions worth 2 points each = 60 total points

1. B	6. F	11. C	16. C	21. A	26. D
2. G	7. G	12. H	17. E	22. F	27. A
3. D	8. C	13. C	18. F	23. C	28. C
4. B	9. C	14. C	19. D	24. B	29. A
5. D	10. F	15. A	20. C	25. B	30. D

Short Essay 1

Battery

Touching

- The facts are unclear whether the nurse touched the patient.
- Still, this is a fair and possible inference.
- Moreover, it may be sufficient that the nurse touched a medical instrument That, in turn, touched the patient.

3

Harmful or offensive

- If there were a touching, it was probably offensive to Keith.
- Keith's objection was only to "black men." It is unclear whether the African American nurse was male or female
- But the facts do say that "the surgeon does NOT accommodate the request"

3

The emergency exception is inapplicable, because Keith's specific objection negates the possibility of implied consent.

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Without a written contract, breach of contract is inapplicable.

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Keith v. Nurse

Intent

- It may be difficult to establish intent (or knowledge with substantial certainty that touching would be offensive.
- It is unclear whether the nurse knew about Keith's objection.

3

Keith v. Surgeon

Touching

- The surgeon's own touching of the patient was not offensive.
- But the surgeon caused the offensive touching (if there were one) by using the African American nurse.
- The surgeon arguably did an entirely different procedure than the one to which the patient consented.
- The surgeon could be vicariously liable for the nurse's battery.

3

Keith v. Hospital

Vicarious liability

- Respondeat superior for nurse battery

3

TOTAL

15

Short Essay 2

David v. Lindstrom Hospital

This is the only party against whom you were asked to assess claims.

Vicarious Liability

Nurse

- The nurse is an employee.
- Therefore, the hospital is vicariously liable for her negligence under respondeat superior. 3

Physicians

- The physicians are not employees. Therefore, the hospital could only be vicariously liable for their negligence under a theory of ostensible agency.
- While ostensible agency is usually used against emergency room physicians, it might also work against the specialists here. David did not select them and only encountered them at the hospital. The H “called them in.” 3
- In contrast, ostensible agency would probably not work for the surgeon with whom David probably had a pre-hospital arrangement. 3

Underlying Liability

Nurse

Infectious Disease MD

Critical Care MD

Orthopedic MD

- This defendant is probably not responsible for the injury, since she was called only called after the condition had already been diagnosed.

Duty

- The plaintiff’s expert witness is a cardiologist. It is unclear that he knows the applicable standard of care for any of these defendants. 3
- The plaintiff’s expert testifies only that the “team” was negligent. He does not specify the standard of care of any particular defendant. 3

Direct Liability

- There were no facts suggesting a claim based on any theory of direct liability.
- Moreover, the facts state that the hospital has an “exceptionally thorough and exhaustive credentialing process. In short, this is not likely a fruitful avenue. --

TOTAL 15

Short Essay 3

Screening

- The new policy applies only once and after the H has already determined the patient lack an emergency medical condition. So, the standard screening would still be performed, prior to the application of the new policy. 5
- On the other hand, the policy suggests that a “health care assistant” will be the one determining the presence (or absence) of the EMC. This is likely not the standard (or minimally adequate) screening required by EMTALA. 5

Stabilization

- The policy only applies to patients whom the H has already determined do not have an EMC. Therefore, EMTALA does not apply to these patients.
- Since these patients could be discharged outright as far as EMTALA is concerned, conditioning further treatment on payment presents no problem.
- Even if the determination of no EMC were erroneous, EMTALA only requires the stabilization of “known” EMCs. 5

TOTAL 15

Long Essay

Gabriela v. Dr. Sean

Prima facie case

Duty

- Dr. Apple is a qualified expert (geographically and by expertise).
 - But his credibility may be lessened given his relationship with Gabriela.
 - Dr. Lucy is not a qualified expert. 3
- Dr. Apple establishes that the reasonable physician would embellish symptoms to qualify for coverage. 3

Breach

- Dr. Sean did not embellish Gabriela’s symptoms. 2

Injury

- Gabriela’s kidney disease exacerbated and she lost her job. 2

Causation

- Had Dr. Sean not breached and had he embellished Gabriela’s symptoms, then Wellpoint would have covered the Soobent. 4
- Had Gabriela received Soobent, her injuries probably could have been avoided.
- On the other hand, the very reason Wellpoint refused coverage was because of its unproven effectiveness in patients like Gabriela.
- Therefore, it is unclear whether the Soobent would have worked. Per ECS 500, there is no lost chance causation in this jurisdiction. 4

Defenses

Statute of Limitations	
• Even if Gabriela discovered Dr. Sean’s negligence immediately, she has until September 2015 to file a lawsuit.	1
Statute of Repose	
• The statute of repose does not run until September 2018 for claims against Sean.	
• But it could be a bar to any claims against Dr. Wright.	1
Gabriela v. Dr. Maccabee	
Gabriela v. Dr. Daly	
• Gabriela was not in a treatment relationship with either of these physicians.	
• Therefore, they owed her no duties regarding medical malpractice.	2
Gabriela v. Dr. Wright	
• There are no facts indicating inadequate informed consent. But it may be worth investigating whether Dr. Wright apprised Gabriela of the risks of donation.	
• It might also be worth investigating whether Dr. Wright should have diagnosed the Gabriela’s kidney disease, such that she was not a qualified donor.	1
Gabriela v. EMMC	
Vicarious Liability	
• Since Dr. Sean is an employee, EMMC is variously liable for his negligence under a theory of respondeat superior.	3
• If negligence of Dr. Wright could be established, EMMC would also be vicariously liable for that negligence	2
Gabriela v. Wellpoint	
ERISA Preemption	
• Gabriela had health insurance as an employee benefit from a private employer.	4
• She is primarily complaining about a lack of coverage/payment.	4
• Therefore, she must proceed under section 502(a)	
○ This will be a tough claim to win on the merits, given the typical standard of review.	
○ Even if a prevailing party, Gabriela cannot recover consequential damages (exacerbated disease, lost wages).	4
<i>Global Organization</i>	5
TOTAL	45

Pope – Q&L Final Exam Scores

ID	MULT CH (60)	SE 1 (15)	SE 2 (15)	SE 3 (15)	LE (45)	TOTAL (150)
10253	32	10	7	3	24	76
10313	34	6	4	4	6	54
10397	44	6	6	12	21	89
10496	38	11	5	5	17	76
11009	48	8	6	9	28	99
11111	52	13	4	12	23	104
11708	42	7	9	12	29	99
12080	40	6	8	12	26	92
12356	46	4	6	10	29	95
13379	30	0	6	8	18	62
13535	46	8	4	12	24	94
14087	46	9	5	6	26	92
14924	40	5	11	8	30	94
15458	44	6	6	11	34	101
15752	50	10	5	10	21	96
16139	42	13	5	13	18	91
16475	38	7	6	11	26	88
16877	36	4	12	8	19	79
17084	50	9	10	7	24	100
17114	46	10	7	7	15	85
17669	38	6	9	9	22	84
18746	48	11	11	4	28	102
19151	38	6	6	8	19	77
19382	46	5	7	9	27	94
19403	40	9	8	12	18	87
19808	50	7	9	12	26	104
19880	44	6	4	7	24	85
19988	46	14	8	11	11	90