

# Health Law: Quality & Liability

## Professor Pope, Fall 2017 Final Exam Scoring

### Multiple Choice (60)

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

### Essay 1 of 3 (25)

<b>Surgeon – Negligence</b>		
The problem stipulated that there was no negligence in the administration of the surgery.	--	--
<b>Surgeon – Informed Consent</b>		
DUTY - This is Minnesota, so the “reasonable patient” standard applies.	1	
DUTY - A reasonable patient would want to know about the double booking, because of increased risks (for example, from extended duration of surgery), especially since it is avoidable.	2	
DUTY – Defendant may argue that the DB practice is so pervasive that the “common knowledge” exception applies.	1	
BREACH - The surgeon did not disclose the double booking.	1	
BREACH – The surgeon did disclose that she would be assisted. But this is not the same as disclosure of DM. “Assisting” suggests that the surgeon would still be primary.	1	
INJURY - The patient is injured.	1	
CAUSATION 1 - This patient said that she would not have had the surgery, if she had known it would be double booked.	1	
CAUSATION 2 - It is unclear whether the reasonable patient would consent to surgery if she knew it would be double booked. She probably would NOT consent, if there were an alternative with lower risks and the same benefits (for example, surgery with a surgeon that is not double booked).	2	
CAUSATION 3 - It is unclear whether the injury was PROBABLY caused by the double booking. The patient must establish that if she had a non-double-booked surgery, then she PROBABLY would not have been injured.	2	
<b>Fellow – Battery</b>		
The patient did not consent to surgery by the fellow. So, there was no consent to having this procedure performed by this clinician.	2	
The consent form noted that the surgeon would be “assisted.”	1	
But performing is very different from assisting.	1	
<b>Hospital – Vicarious Liability</b>		
The fellow was probably an employee. Therefore, the hospital is vicariously liable for her torts.	2	
It is less likely that the hospital is vicariously liable for the surgeon’ torts unless she is an employee.	2	
<b>Hospital – Direct Liability – Negligent Policies</b>		
DUTY – The plaintiff needs (and can surely get) expert testimony to establish that the reasonable hospital would not allow double booked surgeries.	1	
BREACH – While this hospital allowed double-booking, that appears to at least be a “school of thought.” So, there was no breach, unless the hospital breached standards or conditions of the SOT.	2	
INJURY – The patient is injured,	1	
CAUSATION – As with the informed consent case against the surgeon, it is unclear whether the injury was PROBABLY caused by the double booking.	1	
<b>TOTAL</b>	25	

## Essay 2 of 3 (25)

<b>Adams – Treatment Relationship</b>		
Patient has a malpractice claim against Adams only if she were in a “treatment relationship” with Adams.	2	
Patient and Adams were in a treatment relationship, because this was a “formal” consult. While patient was directly treated by Washington, Adams (a) was on call, (b) billed, (c) got detailed clinical data on patient, and (d) provided detailed advice.	3	
<b>Adams – Malpractice</b>		
DUTY - The consulted experts are qualified to opine on the SOC, because this jurisdiction follows a national standard of care.	3	
BREACH - The consulted experts opine that Adams did not follow the SOC.	2	
INJURY – The patient is injured.	2	
CAUSATION – The testimony of the second expert is adequate. It is fine that there is an alternative cause, so long as malpractice is the most likely cause. The testimony of the first expert is too weak.	3	
<b>Hospital – Vicarious Liability</b>		
The hospital may be vicariously liable for Adams, if he is an employee.	1	
Even if Adams is not an employee, the hospital may be vicariously liable on a theory of ostensible agency, especially since Adams was not chosen by the patient.	1	
<b>Hospital – Negligent Credentialing</b>		
DUTY – While the hospital may have breached its own standards, the tort duty is defined by what the reasonable hospital would have done. Contrast the screening duty under EMTALA.	4	
BREACH – The hospital did not breach the SOC. Its own standards are apparently higher than the standard of care.	4	
<b>TOTAL</b>	25	

## Essay 3 of 3 (25)

<b>CIGNA – ERISA Preemption</b>		
Patient might have had a claim against CIGNA for negligent utilization review. But the claim is preempted by ERISA. The patient’s health insurance is a private employee benefit.	3	
Patient’s only remedy is under ERISA Section 502. She can only recover the value of the denied PET.	2	
It is unclear whether patient was contractually entitled to coverage of the PET.	1	
<b>Physician – Malpractice</b>		
DUTY - There may be an applicable SOC that requires physicians to lie to insurance companies.	2	
BREACH - Defendant did not lie. That looks like breach.	2	
BREACH - But it seems implausible to require the physician to commit fraud.	1	
BREACH - Moreover, there is probably a SOT that physicians should be honest advocates. Since the defendant at least complied with this alternative SOT, there is no breach.	2	
INJURY - The patient is injured.	1	
CAUSATION – Even if there were breach, it probably would not have averted the injury.	2	
CAUSATION - But since it would have reduced chance of injury by 30%, patient could recover lost chance damages.	1	
<b>Physician – Informed Consent</b>		
DUTY – The reasonable patient would want to know the importance of the PET, given her diagnostic history and the high stakes. <i>See Jandre</i> (failure to inform of diagnostically superior test even though not malpractice to use inferior test).	2	
BREACH – It is unclear if the physician told the patient about her need for a PET.	1	
INJURY – The patient is injured.	1	
CAUSATION – The patient must establish that had the physician disclosed, she and a reasonable patient would have paid out of pocket. Then, the lesion would have been detected earlier. Still, the evidence suggests this probably would not have changed the result.	2	
<b>MCC – Vicarious Liability</b>		
Physician is an employee of MCC. Therefore, MCC is vicariously liable for her negligence (if any).	2	
<b>TOTAL</b>	25	