TRACY, ET AL. V. ATTENDING DR.

Informed Consent

The attending physician has potentially violated his/her duty to give the patient (Tracy) informed consent. Informed consent includes four elements: (1) a *duty* to disclose the risks, alternatives, and who will be performing the intervention/treatment; (2) *breach* of the duty by not disclosing the risks, alternatives, and who is performing intervention; (3) *injury* sustained by the patient; & (4) *causation*–had the physician disclosed, there would be no injury. The physician does not have a duty to disclose ALL of the risks & alternatives–only a subset (material risk standard–depending on jurisdiction). Under the material risk standard (applicable to Minnesota) information needs to be disclosed to the patient along the lines of what would a "reasonable patient" consider important in making a treatment decision.

It appears that the treating physician has determined that an emergency cesarean section is needed, but has not discussed the benefits or risks for such a procedure. Because the physician has failed to comply with the duty to disclose, there is a breach of the informed consent. Potential injury could be the compromised situation of the infant Lucas who does not have respirations or heart rate and has an Apgar score of zero (however this injury most likely relates to the placental abruption that was discovered during the cesarean section, therefore causation is in question).

Question 3

BRENDAN V. DR. GOFF

Break elements into separate secs

Informed Consent

Related to essay no. 3, the patient, Brendan, who has a debilitating condition of the lumbar spine underwent surgery by Dr. Goff, a Minnesota neurosurgeon. From the information provided, it is unclear what the surgery was supposed to improve. It would be helpful to know what the benefit of the surgery performed by Dr. Goff was supposed to be. We do know that there are at least two inherent risks, one of them being a femoral nerve neurapraxia and the other being the possibility of paralysis resulting from damage to the spinal nerves. We do know that the patient did experience femoral nerve neurapraxia and that he experienced moderate pain for a limited period of time related to the femoral nerve neurapraxia. Fortunately, the paralysis did not occur. Unfortunately, there was no improvement from the performed surgery.

There may be possible claims around the issue of informed consent. First, it is not noted in the facts whether the surgeon discussed the potential benefits and risks of the procedure. If the physician did not disclose the risks, then a breach would be present. It does appear that the patient did experience femoral nerve neurapraxia and thus an injury did occur–the undisclosed risk happened. If the benefits and risks were disclosed to Brendan, then his claim based on informed consent could be negated.

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there is an 8% chance of survival, but with severe medical conditions when resuscitation is performed on a child for longer than 10 minutes.

Breach

The physician did not inform Tracy or her husband that in a study, 92 of 100 infants with Lucas' clinical condition survived after 10 minutes. And the eight infants that did survive were very impaired.

Injury

Lucas died because resuscitation was stopped.

Causation

Tracy and her husband would have to show that had the physician not stopped resuscitation, Lucas would have survived. This would probably be difficult to establish since in a major study, only 8% of children with a similar clinical condition survived after 10 minutes of resuscitation efforts.

Also, Tracy and her husband would have to establish that a reasonable person in their situation would have had the physician continue resuscitation efforts beyond 10 minutes. This would probably be difficult to establish. The survival rate is 8% percent, and a reasonable person would probably have physicians continue treatment because the alternative (stopping resuscitation) is 0% survival; however, the 8% who survive suffer major medical issues such as: cerebral palsy, mental retardation, seizure disorders, microcephaly, and respiratory distress. A reasonable person in this situation may choose to not continue resuscitation in order to not have to care for a child with such issues or burden someone with those issues.

The physician may argue that the continuation of resuscitation is not material; however that would most likely not be successful argument because a reasonable person would want to know if continuing treatment may result in the survival of their child, with medical conditions as opposed to the child not surviving. The physician could also argue that he could not obtain Tracy's consent because she was unconscious from general anesthesia. Again, this argument would most likely not succeed since her husband was in the postoperative birthing center room and available to provide consent.

EMTALA

Tracy and her husband cannot bring a claim against the attending physician under EMTALA because EMTALA does not provide a private right of action. They could on the other hand file a report with the agency that enforces EMTALA.

Tracy and her Husband's claims against the Hospital

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Break into sub-elements

A reasonable person in Tracy's situation would most likely conclude Tracy would still have had the procedure regardless of knowing the risks because Lucas' life was on the line. A reasonable person would know that chance of survival without the caesarean would be practically nothing. A jury could conclude that Tracy would still have had the procedure. On the other hand, the jury may also find that even if Tracy would have had the procedure the doctor should still have informed her of the risks. The issue is up to the jury to decide what a reasonable person would have done.

no Tracy's just duty element

Overall, the physician should have disclosed the risks, but due to the emergency situation and the common knowledge of risks associated with caesareans a reasonable person could conclude that Tracy would still have gone ahead with the procedure.

5. Did the physician have a duty to consult with Tracy and her husband regarding Lucas's chances of survival and stopping resuscitation?

A physician must disclose risks that are material to a reasonable patient's decision concerning treatment.

It is in the capacity of physicians to determine when it is appropriate to continue resuscitation of a patient. In this situation, Lucas was without a heart rate or spontaneous respiration, with an Apgar score of zero. The doctor concluded resuscitation after 10 minutes because Lucas's survival was unlikely in any case. Doctors do not normally consult parents regarding when they will stop resuscitation, it is usually up to the doctor to decide that. The doctor here decided to stop resuscitation based on his medical experience. Tracy would be able to bring in experts to testify that the doctor's actions were below the standard of care.

The study presented in the facts is a little confusing since it says that 92 out of 100 with Lucas' condition survive and then says that the eight that "do" survive have problems. It is unclear whether the study intended to say that only 8 out of 100 survive with problems or that all the children survive and only 8 develop serious health problems. The study would need some elaboration before moving forward with it. Assuming that it meant to say that 92 baby's with Lucas's condition do not survive after 10 minutes then this would support the physician's decision to stop resuscitation. If the study did mean that 92 survived without problems, then the physician did not follow the standard of care.

The choice to stop resuscitation is up to the doctor, not the family, but the family could bring in experts to show that the doctor's decision to stop resuscitation fell below the standard of care, which is medical malpractice, not informed consent.

6. Was there an injury and was the physician the proximate cause of that injury?

However, the defendant's position appears to be the strongest in regards to the injury argument. While the doctor performed the caesarean section without a full explanation of the nature and the risks, there was no injury sustained by the plaintiff or her child. The facts state that the caesarean section was needed because the plaintiff's unborn child had a precipitous drop in his heart rate. Furthermore, the plaintiff's baby's Apgar score was a zero. Therefore, the caesarean section did not cause the injury sustained by the plaintiff's baby. The injury element would not likely be satisfied according to these facts.

Causation:

In order to satisfy the element of causation, there are three sub-elements that must be satisfied. First, the injury sustained by the plaintiff must have directly resulted from the procedure. Second, disclosure of the nature and risks of the procedure would have led a reasonable person in the plaintiff's circumstances to decline the procedure. Third, the plaintiff would have declined the procedure.

Here, we don't know whether or not the plaintiff would have actually declined the procedure had she been properly informed of the nature and risks. Therefore, the three sub-elements of causation would not be fully satisfied and would prevent a court from finding for a plaintiff on the informed consent claim. However, assuming that she would have declined the procedure, it must be shown that the injury sustained by the plaintiff would have directly resulted from the procedure. As stated above, there does not appear to be any injury associated with the performance of the caesarean section.

Therefore, the plaintiff would not be able to prevail on an informed consent claim for the caesarean section because they lack the ability to prove the elements of injury or causation.

Informed consent 2:

All of the rules stated above that involve informed consent remain true for this claim. The issue for the second informed consent claim is whether the plaintiff can recover because of the doctor's failure to obtain consent for the stoppage of resuscitation efforts.

Duty:

Here, the doctor had a duty to explain the nature and risks associated with stopping, pausing, or delaying resuscitation. A reasonable mother would want to know of the nature and risks associated with stopping life saving efforts on their baby. Thus, the doctor had a duty to inform the plaintiff of the nature and risks associated with stopping, pausing, or delaying resuscitation on the baby.

Breach:

In order to find a breach of duty, the duty must first exist. As stated above, the duty had arisen for the doctor to inform the patient of the nature and risks associated with stopping, pausing, or delaying resuscitation.

As stated in the facts, the defendant doctor breached his duty to inform the mother of the nature and risks by not consulting with the plaintiff or her husband but rather relying on his professional judgment

Injury:

In order to continue with a claim for lack of informed consent, the plaintiff must prove that they have incurred an injury that resulted from an undisclosed risk.

Essay 3:

Informed Consent:

In Minnesota, a case for informed consent is measured against the material risk standard. This standard is framed from a reasonable patient's point of view. Therefore it can be said, would a reasonable patient consider the disclosure important in making his/her decision? Furthermore, a claim made under informed consent requires the plaintiff to prove that each aspect of duty, breach, injury, and causation exists in their case.

Duty:

Here, the doctor had a duty to explain the inherent risks associated with the surgical procedure. The facts do not state that the defendant informed, or chose not to inform, the plaintiff of the risks. Therefore, I assume that the doctor did not inform the patient of the inherent risks. A reasonable patient would want to know of these risks because they included permanent and catastrophic paralysis. Therefore, the doctor had a duty to disclose the risks of the procedure.

Breach:

In order to find a breach of duty, the duty must first exist. As stated above, the duty had arisen for the doctor to inform the patient of the nature and risks associated with the surgical procedure.

Because of a lack of facts, I am operating under the assumption that the defendant did not inform the plaintiff of the risks associated with the procedure. Therefore, the doctor breached his duty to inform the plaintiff of the risks.

Injury:

In order to continue with a claim for lack of informed consent, the plaintiff must prove that they have incurred an injury that resulted from an undisclosed risk.

Here, the facts state that the plaintiff suffered from temporary and moderate local damage to nerves in the thighs, which is known as femoral nerve neurapraxia. This damage resulted from laying on the operating table for an extended period of time. Therefore, the plaintiff sustained an injury.

Causation:

As stated above, there are three sub-elements that must be proven to prove causation. First, the injury sustained by the plaintiff must have directly resulted from the procedure. Second, disclosure of the nature and risks of the procedure would have led a reasonable person in the plaintiff's circumstances to decline the procedure. Third, the plaintiff would have declined the procedure.

First, the injury that the plaintiff resulted from laying face down on the operating table for an extended period of time. Second, the disclosure of the risks of the procedure may have led the plaintiff to decline the procedure; however, a reasonable person in the plaintiff's circumstances would likely have consented anyways. Third, the facts do not specify whether the plaintiff would have declined the procedure.

Therefore, if the plaintiff could prove that he would not have consented to the procedure, then recovery would be possible under the informed consent claim.

this problem because the treatment takes place in Minnesota and Minnesota uses the material risk standard.

2.) Malpractice standard (aka reasonable physician standard/professional provider standard) – this standard does not apply in this situation.

Exceptions to duty:

1.) information already known - to this particular patient or commonly known
2.) emergency - urgent immediate need, no capacity, no opportunity for consent from patient or surrogate - presume people want to be rescued
3.) Therapeutic privilege - disclosing risk information would make the patient so upset that they could not make a rational choice or would materially affect their medical condition
4.) Patients can waive their right to be informed
5.) Public health exceptions - medical care based on a public health interest

Breach:

Breach is not following the duty to disclose risks.

Damages:

- plaintiff must actually be injured from undisclosed risk (no dignitary tort)

Causation:

- need to show that had disclosure been made, a reasonable person in the patient's circumstances would not have consented
- No consent = no procedure; no procedure = no injury

3 sub elements

1.) the materialized risk must have been caused (etiologically) by intervention (scientific causation)
2.) Behavioral causation - disclosure of the risk would have prevented its occurrence because the reasonable person would not have consented under the circumstances - hypothetical question and an objective standard
3.) disclosure of the risk would have prevented its occurrence because the plaintiff would not have consented under the circumstances

In the fact pattern for this problem one can start with looking at the lack of disclosure of the risk of receiving the cesarean. Although the risks of the surgery were not disclosed to the patient, the surgery ultimately did not result in any harm to the patient. The doctor had a duty to disclose this information to the patient because a reasonable patient would want to know the risks both to themselves and their child of having he surgery. The patient was able to consent but was not

Injury

The injury that is alleged here is that the patient's newborn died as a result of not being informed of the risks and alternatives available. The injury was the death of the newborn from having a zero apgars score at birth, thus he died.

Causation

In this case causation seems to be a contentious point. In the fact pattern there is no indication whether the c-section caused the death of the child or whether it would have happened either way. There was no informed consent, but if the chance of the baby dying was more because of the c-section and lack of consent regarding the injury, then you could argue that the c-section caused the injury, but it seems more likely that the baby was having issues before the c-section was even performed. Assuming the mother did not have any complications, there may be an issue proving causation in this case.

There is most likely a risk with c-sections that the baby may die, but during birth in general there is always a risk of death of a baby. Whether the death was caused by lack of consent really concerns whether there was a higher risk of death she was not informed of. Even if there was a disclosure there would have probably still been an injury to the baby, since there is no direct link shown in the facts that the apgar score was 0 because of the c-section, but possibly because of a previous in utero condition the baby was suffering. That would be the contention point in this case.

Informed Consent Newborn CPR

Duty

A reasonable person standard holds here in Minnesota, so in this case there would be a question whether performing CPR and stopping would violate a duty to inform the parents to make a decision. A reasonable person may consider stopping CPR to be a violation of the risks of stopping CPR and starting CPR on the infant. A reasonable person may see a duty to inform the parents of the decisions and make a final decision as to whether to perform CPR and/or stop it.

Exceptions to Duty

The first exception if that the information is already known. In this case the parents most likely did not know the relevant risks to continuing CPR as opposed to stopping it and were not given that option. The parents were not informed of the risk of stopping CPR and continuing it, when there was still a potential for the baby to survive.

The second exception is emergency. Emergency in this case does apply to starting CPR because unless there is a DNR on file, the physicians have an emergency exception to starting CPR, but the continuation and/or stopping of CPR is not under the emergency exception.

The third exception is therapeutic privilege. In this case, it is possible to argue this. The doctor could have argued that the parents would have been too devastated to make the right decision for their

Mid: 6667 Final: 11111

Essay Question #3

Brandan may have an informed consent action against Dr. Goff. Because this ordeal happened in Minnesota, which is a material risk standard state. Dr. Goff had the duty to disclose to Branden all risks that a reasonable patient would consider important in making treatment decisions. In Branden's case, I feel a reasonable patient would want to know that there is a 1-in-15 chance of permanent and catastrophic paralysis and about the 1-in-300 chance of femoral nerve neurapraxia as well.

In order for Branden to argue an informed consent action against Dr. Goff he will need to argue the following elements:

1. DUTY: There must have been a duty of the physician to disclose to the patient any risks of the procedure and alternatives available to the patient.
2. BREACH: The physician failed to disclose what they had the duty to disclose to the patient.
3. INJURY: Undisclosed risk must have happened.
4. CAUSATION: With proper disclosure, there would have been no injury because the patient would not have consented to the procedure had they known the risks and alternatives available for them. This must be shown in three ways:
    a. It must be shown that the reasonable patient, had they gotten the full disclosure, would not have undergone the procedure.
    b. It must be shown that the specific plaintiff in the case would not have had the procedure done had they known the risks/alternatives.
    c. It must be shown that the injury would not have happened if the procedure had never been performed.

Therefore, Branden will need to argue the following:

1. DUTY: That Dr. Goff had the duty as Branden's physician to disclose to Branden the risk of associated with the surgery- that there was a 1-in-15 chance of permanent and catastrophic paralysis and about the 1-in-300 chance of femoral nerve neurapraxia.
2. BREACH: Dr. Goff never informed Branden of the above risks.
3. INJURY: Branden got femoral nerve neurapraxia, which left him in moderate pain for awhile.
4. CAUSATION: Had Branden been aware of all of the risks associated with the surgery, he would not have had the surgery, and thus not have had nerve neurapraxia.

- severity
- probability
- life lines

why

Finally, Brendan likely has an informed consent claim against the neurosurgeon. We are again in Minnesota, so the Material Risk standard applies (see above question 1 for rules). It is likely that a reasonable person would use information that 1/300 people have temporary moderate pain, or especially that there was a 1/15 chance of permanent paralysis to decide whether to have the procedure or not. Because the reasonable person would deem such information material, the doctor had a duty to disclose such information.

The doctor breached that duty. Because the facts do not suggest any form of disclosure between doctor and patient, it is safe to say the doctor has not provided the patient with the requisite information to make an informed decision. Therefore the doctor has breached his informed consent duty.

The Plaintiff must then show cause. As stated in the question above, cause requires: 1) materialization, 2) scientific causation, 3) Objective Hypothetical Conduct, and 4) subjective causation. First, because the facts say that the injury (moderate pain) is a possible outcome of the procedure, it is within the scope of the undisclosed risk, and therefore the plaintiff can show materiality. Second, without facts suggesting that such moderate pain (nurapraxia) could not happen without such procedure, it is safe to say that but for the materialization of the undisclosed risk, the patient would not have suffered such injury. So, the patient likely satisfies scientific causation. Third, an objective hypothetical person may or may not have gone through with the procedure (that is jury question), the 1/300 may not sway a person to not have a procedure, but the 1/15 may. So a reasonable person may not have undergone the surgery knowing that there's a 1/15 chance of catastrophic paralysis. The fact that that injury (catastrophic paralysis) did not materialize does not matter, what matters is whether the materialization of not disclosing such information would have stopped the reasonable person from having the procedure. Had he disclosed that paralysis possibility, the patient likely would not have gone through with the surgery, so the injury would not have happened. However, it is possible that the pain was so debilitating that he would have taken on such risk. Assuming the pain did not outweigh the possibility of paralysis, it is likely that the patient satisfies objective hypothetical conduct causal element. Fourth, the patient will simply say that if the doctor had told me of the risks I would not have undergone surgery.

Because the plaintiff can show duty, breach, cause, and damage (moderate pain) for the injury due to the lack of informed consent, the patient likely has a plausible informed consent COA.

nice clear structure

ESSAY 2

EMTALA claim against hospital

Cindy can try to bring an EMTALA claim against the hospital as long as the hospital has an ER department and accepts Medicare. Assuming the last former is true, EMTALA duties have been activated because Cindy arrived on hospital property (at the ER), and she either requested to be looked at for her active labor, or it was obvious she was in active labor. The hospital has a duty to screen for an EMC. Active labor is considered an EMC. Since Cindy was in active labor, the hospital had a duty to stabilize, admit, or transfer her.

Duty to Screen:

FIRST EMC—ACTIVE LABOR: The duty to screen was triggered since she arrived in the hospital's ER and she was in obvious need—being in active labor. Cindy was screened and the hospital knew she was in labor.

SECOND EMC—XYZ SYNDROME: The duty to screen was triggered when Cindy arrived at the hospital and requested treatment. She was in fact screened, and lab results showed that she had a second emergency medical condition: XYZ syndrome. Cindy could possibly claim there was a violation of the screening requirement for her XYZ condition. The labs did take 30 minutes for the results, which seem like a long time especially if someone is having an emergency medical condition. Cindy would have to show that the lab work she received was different than someone else in her same situation would receive. This may be difficult considering that she was first screened for active labor as her EMC.

Duty to Stabilize:

FIRST EMC—ACTIVE LABOR: Since Cindy was in active labor, an EMC, the hospital had a duty to stabilize. The hospital did stabilize her by delivering her baby, so Cindy cannot bring an EMTALA claim against the hospital for her active labor.

SECOND EMC—XYZ SYNDROME: Since it was determined that Cindy did have an EMC of XYZ syndrome, the hospital also had a duty to stabilize, admit, or transfer her. Cindy can argue that the hospital failed to stabilize her.

First, the doctor tried to admit her to the hospital. If Cindy would have been admitted right away to the ICU there would be no EMTALA violation. However, the hospital never admitted her to the ICU before she died. The hospital did seemingly admit her by transferring her to another part of the hospital for 48 hour postpartum care. Cindy would have technically been considered an inpatient, and EMTALA does not cover inpatients.

However, if a hospital admits the patient rather than stabilizing, the hospital must do so in good faith. Cindy has a strong case that the hospital did not admit her in good faith, and therefore there was an EMTALA violation. The hospital found out that she did not have insurance , and then she continued to wait for ICU spot. They knew about her condition and how she needed emergency stabilization from the

In order to determine the strength of Brendan's claim we need to know what the physician told him. Did he talk about these or any other risks? Did the provider discuss other alternatives including living with the debilitating condition?

If his provider did not discuss this things Brendan can argue that a reasonable patient would not have proceeded given the possible risks and that he ultimately would not have elected the procedure.

The provider can argue that he is exempted from disclosing as the risks are inherent to the procedure and are therefore common knowledge. He will argue that the community as a whole knows or should know with a reasonable inquiry that what the potential risks are. However, since the general public is not as well educated as the physician and based off the relationship this will be a difficult argument to assert.

Next the provider can argue that the risk were not material. First because Brendan's condition was so debilitating that this was the only choice he had. Although it was unsuccessful, knowing the facts a reasonable person would not have made a different decision. Second, the facts were not material as the risks were extremely low. Again given the fact that the condition was debilitating for Brendan coupled with the actual chance one of the risks would occur a reasonable person would have made the same decision and moved forward with the procedure.

Conclusion:

Brendan will struggle asserting an informed consent claim because of the nature of his condition and the low chances of actually having a complication. However, to accurately determine we would need additional information from Brendan. This information would need to detail the conversations he and the doctor had about the procedures and the risks associated.

on time and risks the physician could argue they did not have enough time to completely inform the patient prior to the surgery.

Conclusion:

Tracy's first claim for Informed Consent in relation to the C-section would probably not succeed based on the emergency situation and lack of alternatives.

Informed Consent

Duty:

A provider in the state of Minnesota has a duty to inform patients of any material risk associated with any procedure that they are considering in a course of treatment. The provider in this case failed to discuss alternative treatments including the option of doing nothing before stopping resuscitation. Prior to stopping resuscitation the physician had a duty to discuss treatment alternatives with the parents prior to commencing a course of action.

Breach:

The operating physician breached his duty by not informing the parents prior to stopping the resuscitation efforts on their child.

Injury:

The child died upon delivery.

Causation:

In order to establish causation Tracy must show that a reasonable patient under her circumstances would have refused the treatment provided because of a material risk associated with the procedure and secondly that she would have refused the treatment had she known of the material risk associated with the procedure.

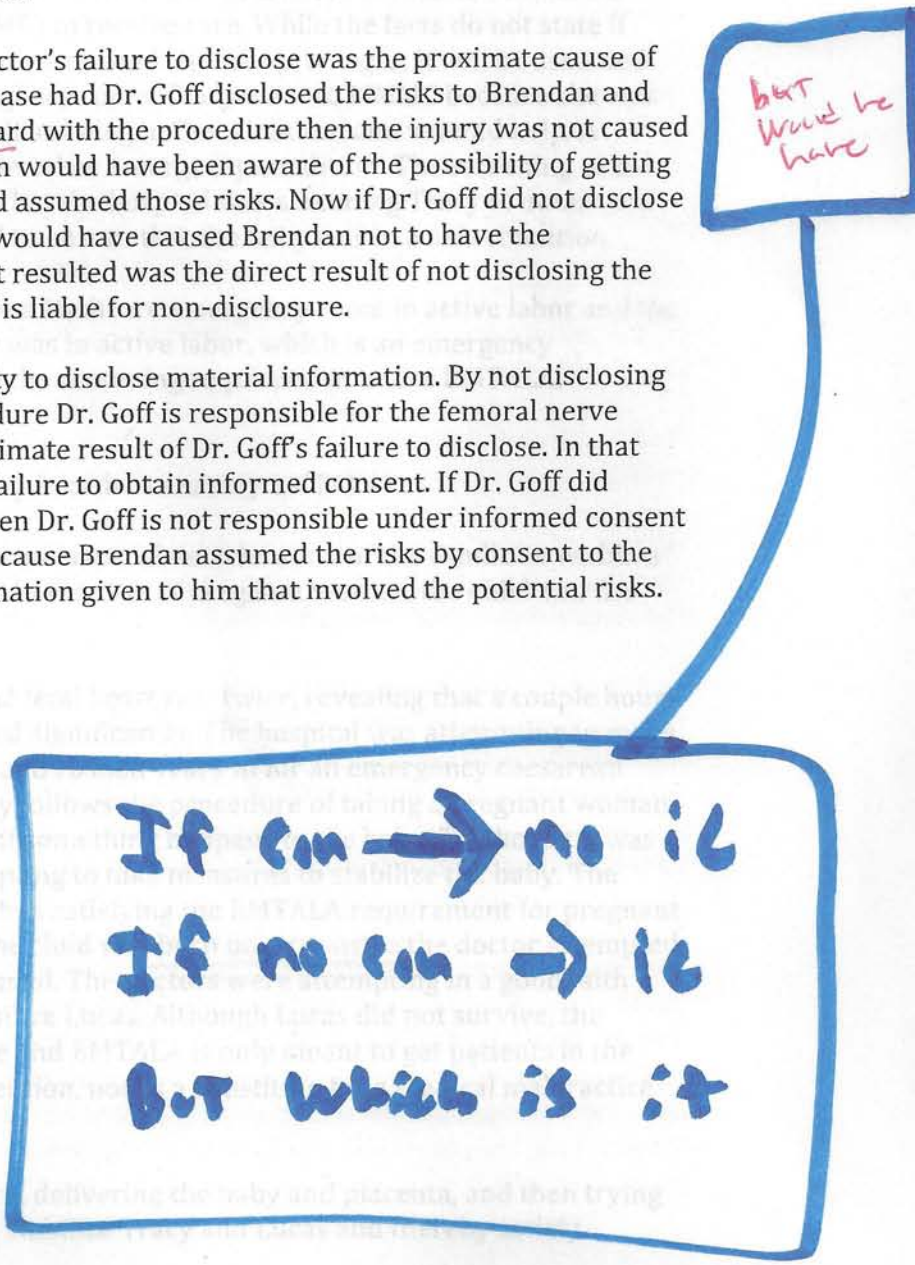
In this case there were inherent dangers, ultimately the death of the child by ending the resuscitation procedures. However, there was a chance, albeit low, that if the procedures had continued the child would have survived. Additionally, if the child would have survived the risks associated could have been grave, such as mental retardation, cerebral palsy, or respiratory distress.

Tracy can argue that a consenting parent in her place knowing the risks and low chances would have wanted the resuscitation procedures continued. The risks compared to not having your child seem less and although the chances are low there is still an opportunity for the child to live, even in a limited fashion.

Since Dr. Goff did have a duty to disclose the risks of the procedure, and if he did breach that duty by not telling Brendan of the risks, there must also be an injury for a claim of failure to disclose. Here Brendan sustained femoral nerve neurapraxia, leaving him with moderate pain for a limited period of time. Femoral nerve neurapraxia is precisely the risk that Brendan should have been told about and is what he sustained from the surgical procedure. Therefore if Dr. Goff did not tell Brendan of the risks, then the injury sustained satisfies the third element for a breach in informed consent only for femoral nerve neurapraxia because it was the only injury. Dr. Goff is not responsible for not telling Brendan about the paralysis because no injury was sustained.

The last element is that the doctor's failure to disclose was the proximate cause of the injuries sustained. In this case had Dr. Goff disclosed the risks to Brendan and Brendan still chose to go forward with the procedure then the injury was not caused by the non-disclosure. Brendan would have been aware of the possibility of getting femoral nerve neurapraxia and assumed those risks. Now if Dr. Goff did not disclose the information and the risks would have caused Brendan not to have the procedure, then the injury that resulted was the direct result of not disclosing the risks. In that situation Dr. Goff is liable for non-disclosure.

Overall, Dr. Goff did have a duty to disclose material information. By not disclosing the risks of the surgical procedure Dr. Goff is responsible for the femoral nerve neurapraxia that was the proximate result of Dr. Goff's failure to disclose. In that situation Dr. Goff is liable for failure to obtain informed consent. If Dr. Goff did inform Brendan of the risks then Dr. Goff is not responsible under informed consent for the injury that occurred because Brendan assumed the risks by consent to the procedure based on the information given to him that involved the potential risks.



P's situation worsened in regards to the newly born child. MMMC could not risk transferring P's child because in all likely hood P's child would not survive.

C: MMMC could have violated stabilizing P because MMMC did not inform P of risks of caesarian section. On the other hand P may already be an impatient because she came to the hospital because P had experienced mild labor, which may or may not be a serious medical condition. MMMC did try to stabilize P's child after surgery.

INFORMED CONSENT CLAIMS

I: MATERIAL RISK STANDARD P V. MMMC

R: The material risk standard is shown by (a) a reasonable patient...what would a reasonable patient consider important in making a treatment decision.

1) The materialized risk must have been caused by the intervention
2) Disclosure of the risk would have prevented its occurrence
3) Because the reasonable person would not have consented under the circumstances

A: P could have a claim of material risk against MMMC. The breach may have occurred when MMMC did not inform P of the risks of a C-section. Additionally, P could have a claim against MMMC because MMMC did not inform P that he believed stopping the resuscitation was the appropriate course of action. There fore MMMC could have breached in those two circumstances because MMMC did have a duty to disclose those issues. P's are actually injured because of the C-section P's child was born with a disorder that in all likelihood will not survive. P could also be injured because the stopping of the resuscitation did cause P's child to die. If the proper risks for the C-section were disclosed P reasonably might not have gone along with either procedure. MMMC did have a duty to P's because by the time of the EMC MMMC was there physician.

DEFENSES MMMC

D: MMMC has a defense regarding material risk because the procedure was done in an emergency situation. P's health was deteriorating quickly, therefore MMMC in the first instance my not be responsible for the placental eruption during the C-section. The same goes for after the surgery where the infant in all probability is not going to survive MMMC again is put into an emergency situation so may not be held liable.

D: MMMC also may assert Therapeutic Privilege as a defense. Disclosing the information about P's child may make them so upset that they could not make a rational choice after the child was born with a harsh defect. Also if the P's want the child to live it would materially affect the medical condition of the child a.k.a being disabled.

D: MMMC could also argue to show that disclosure of the resuscitation was not material to the claim.

ESSAY QUESTION 3 – 15 Points – 1000 Words

Brendan probably has an informed consent claim against Dr. Goff. To prove an informed consent violation, Brendan must prove: duty, breach, causation, and damages.

Duty

Brendan must prove that Dr. Goff had a duty to disclose to Pete all of the available options for treating this issue with his spine. Brendan and Dr. Goff were in a treatment relationship because Dr. Goff gave medical assistance to Brendan and performed the procedure on him. Because of this, Dr. Goff should have informed Brendan of all of the information a reasonable patient would consider "material" to making a treatment decisions. Since the procedure and the doctor would be located in Minnesota, the reasonable patient standard reigns. Information required to be given to a patient include alternative surgery options, risks, and healing time.

Breach

It seems that Brendan was not informed of the "inherent" risks of the procedure: The 1-300 chance of temporary local damage to nerves, or the 1 in-15 chance of permanent and catastrophic paralysis. Brendan should have been told of these risks. The doctor could probably argue that a breach didn't exist because of the "inherent" nature of the risk and that the information could or should have been known to the patient about the surgery on his spine. However, the chance of the risks actually occurring were oddly specific and actually did occur. Because of this, the doctor should have informed Brendan about the risks of his procedure and offered alternatives to the risky surgery.

Injury

QUESTION ONE

too much case law / wide scope

EMTALA STANDARD

The first issue is whether Tracy has a claim against the hospital under EMTALA. The court in *Hurley* stated that a physician does not have a duty to treat a patient even in cases of emergency, while the court in *Manlove* cut into the no duty rule by holding that a hospital must treat a patient when someone presents an unmistakable medical emergency. After these two cases, physicians may decline to treat in cases of emergency while hospitals must treat when there is an unmistakable medical condition. EMTALA requires hospitals that have an emergency department and receive federal funding must treat patients that have emergency medical conditions if the patient is on the hospital grounds. Hospital grounds are very broadly defined and include the parking lot and also a hospital owned ambulance. If these four requirements are met the hospital has a duty to screen the patient and if that screening uncovers a medical condition, the hospital must stabilize that condition. The hospital must screen the patient if the patient is in obvious need of help or presents symptoms that indicate an emergency medical condition. The screening must be comparable to an exam offered to other patients with similar symptoms and does not have to meet any "national standard". There is no violation if the screening is bad, as long as they screen all patients bad in that circumstance. According to the court in *Franz,* the hospital must only screen for conditions that are consistent with the symptoms they are aware of. Section(e) of the statute defines an emergency medical condition as severe enough symptoms, that without immediate medical attention, serious complications with the patient's health or bodily functions would result. The section also makes specific reference to a pregnant woman. If the screening reveals an emergency medical condition, the hospital must stabilize a patient to the extent where the patient would not experience material deterioration

ESSAY THREE

Brendan has a plausible informed consent case against Dr. Goff. In orders to establish a prima facie case of informed consent, Brendan will have to prove the elements of:

- **Duty:** A physician has a duty to disclose the risks of the procedure and any alternatives to the procedure available. This includes the risks and benefits of both the prescribed procedure and any alternatives. Doing nothing is considered any alternative and should disclosed.
    - In Brendan's case, Dr. Goff had a duty to disclose the possible risks of the lumbar spine procedure. Dr. Goff also had a duty to discuss any alternatives to the surgical procedure.
        - Minnesota applies the material risk standard to informed consent cases. This standard evaluates what a reasonable patient would consider important in making an informed decision in consent to a specific procedure.
            - Specifically to this case, the court would consider if a patient in Brendan's similar circumstances would want to know the risk of femoral nerve neurapaxia when deciding if to have the surgery. This would also include if there were alternatives to the procedure. For example, if the condition could be managed with medications or non-invasive or surgical treatment.
                - Dr. Goff could potentially argue a therapeutic privilege exception because the risk of the injury was 1-300 and could adversely have affected Brendan in making a decision about having the surgery. Pain is a common sides effect of surgery, but yet could be viewed as a reason for a patient to decline even if the procedure is the best treatment option. The risk did not impose a high probability of occurring and Dr. Goff could argue this as the reason for not disclosing it to Brendan.
- **Breach:** Breach is the failure to disclose either the risks or alternatives of the prescribed treatment or procedure.
    - The failure of Dr. Goff to disclose any inherent risks or alternatives with Brendan constitutes a breach of his duty to obtain informed consent.
- **Injury:** The plaintiff suffered an injury specific to the undisclosed risk.

- Brendan suffered the injury of femoral nerve neurapaxia as a result of the undisclosed risk to the surgery. The risk of femoral nerve neurapaxia was 1-300 and this risk materialized in Brendan's case.

- **Causation:** To link the injury to the breach, the plaintiff will have to prove:
  - 1.) There was an injury from the procedure;
    - Brendan suffered the injury of the femoral nerve neurapaxia as a result of the surgery. The risk was a known risk of the procedure.
  - 2.) Disclosure would have led a reasonable person in the plaintiff's circumstances to decline; and
    - The risk was a known risk of the procedure. It is plausible that a person in Brendan's situation would have wanted to know about the inherent risk prior to going forward with the surgery because or the pain experienced as a result of the injury. This could lead to a need for more pain medication and having to take an extended amount of time off of work. The injury would cause a slowing healing time and it is reasonable that someone would want to be aware of this prior to consenting to the surgery and most likely would decline to have the surgery.
  - 3.) Disclosure would have led the plaintiff to decline.
    - It can be inferred from the facts that Brendan would have declined the procedure because it was unsuccessful in improving his lumbar condition and he had the injury of the femoral nerve neurapaxia, which would have caused him to heal slower and take more time off of work.

Brendan has a potential informed consent case against Dr. Goff because Dr. Goff failed to inform Brendan of all of the risks, benefits, and alternatives to the lumbar spine surgery. Brendan was not able to give informed consent to the surgery because he was not aware of the risks that were incorporated with having the surgery.

Under the Hybrid Standard, the disclosure will be considered against the risks that a skilled practitioner in the community would disclose, or risks of particular importance to the patient when the Doctor is aware of the attached importance.

Here, in regards to the the Reasonable Patient Standard, the rule out of Canterbury v Spence states that the doctor's duty to treat the patient is a duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved. True consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. Here, we know that there was an inherent risk of a 1-in-300 chance of temporary and moderate femoral nerve neurapraxia, and a 1-in-15 chance of paralysis. We are not told from the fact situation whether Dr. Goff informed Brendan or not of the risks, but had he not, there would likely be a claim for negligent non-disclosure because a reasonable patient would want to be informed of the risks (even if as low as 1-in-300) of injury resulting from the procedure. Because Brendan did not know of his available options (ie: stay the way you are, or possibly be worse after the surgery from the risks of the procedure), he was not able to make an informed choice, and therefore Dr. Goff breached his duty under the Reasonable Patient Standard.

Because a reasonable practitioner in the same field would likely make a disclosure of the risks involved in a spinal operation, it would likely be said that Dr. Goff breached the professional standard practiced by other doctors in the field because he did not disclose the 1-in-300 or the 1-in-15 risks to Brendan and allow him to make an informed decision.

Similarly to the Professional standard, under the Hybrid standard, a skilled practitioner in Brendan's community also would likely disclose the risks of the spinal surgery, and again, because Dr. Goff did not disclose the 1-in-300 or the 1-in-15 risks to Brendan and allow him to make an informed decision, he violated his duty to disclose under the Hybrid Standard.

Under either standard, the risks were material information (ie: something that a reasonable person would attach significance to in deciding whether to go through with the proposed treatment) that required disclosure under Dr. Goff's duty to Brendan as his patient.

Causation

Here, the causation would would be: had Brendan been informed of the risks of the procedure under either of the above standards, he would have possibly not gone through with the procedure, however, he was not informed, he went through with the procedure, and he was harmed by the risk of femoral nerve neuraplaxia manifesting itself. Because Brendan would likely have not gone through with the procedure, Dr. Goff's non-dislosure caused Brendan to go through with the procedure, letting the risk manifest itself.

Damage

5809

ESSAY 3

Choice of Law for Issues I, II & III.

Standard of Disclosure

Minnesota follows the reasonable patient standard of disclosure in informed consent cases. This standard places the burden on the plaintiff to show that a reasonably prudent person in the patient's position would have decided differently had the physician fulfilled their duty of disclosure.

Expert Testimony

Brendan will be able to establish by expert testimony what a reasonable patient with Brandan's symptoms would have wanted to know about the alternative treatment options and risks under the circumstances. This expert testimony is not required in Minnesota, but can sufficiently prove a reasonable patient standard of care in an informed consent case.

Scope

5809

Issue II – Department of Health and Human Services claim against second attending physcian for failure to stabilize.

In this case, the HHS will bring an action against the second attending physican for failure to stabilize Christy's EMC. The Department of Health and Human Services can bring an action against individual physicians for failing to abide by EMTALA. The HHS has the power to do this by levying Civil Monetary Penalties against the physician.

In this case, since the hospital had actual knowledge of Christy's EMC, the hospital could provide the necessary services, the hospital knew that Christy had no insurance, and the fact that the second attending physician transferred Christy to a room that was not in the ICU, but was only for treating her postpartum symptoms, the HHS will most likely levy fines against physician two.

The policy behind ETMALA was to mandate treatment of individuals who went to hospitals seeking treatment of life threatening conditions. Congress made this intent clear under the statute by stating that hospitals "shall" comply. In this case, the fact that the patient was already admitted to the hospital, had been attempted to be moved to the ICU before the hospital knew she was uninsured, and that no more attempts were made by her attending physician to stabilize her EMC or move her to an ICU makes this case particularly egregious and worthy of HHS attention.

The merits of whether or not Christy was admitted to Memorial in good faith are discussed in Issue I in Essay #2, Sub-sections (1)(A) and (1)(B).

Essay Question 3 - Brendan

Brendan's Informed Consent Claim

In order to prevail on his informed consent claim, Brendan must establish that there was a treatment relationship, and based on that relationship Dr. Goff had a duty to disclose the alternatives and risks of the spinal procedure. Once he establishes this duty under Minnesota law, Brendan then has the burden to prove that Dr. Goff breached that duty, he suffered an injury, and the breach caused the injury.

Treatment Relationship***

Here, Dr. Goff was in a treatment relationship with Brendan because Dr. Goff was actually treating him by performing the surgery on Brendan. Therefore, Dr. Goff inherently had a duty to inform Brendan of the procedure's risks.

Duty

Minnesota has a material risk standard with regard to duty for informed consent claims. Under this standard, what is reasonable depends on what a reasonable patient would consider important in making a treatment decision. If the reasonable patient in Brendan's circumstances would have considered the risk information important, then Dr. Goff had a duty to disclose that information to Brendan.

Here, Brendan was experiencing a "very serious" and "debilitating" condition of his spine. A reasonable patient in Brendan's condition would want to know about both of the stated risks of the surgery. First, a reasonable patient would want to know about the risk of femoral nerve neurapraxia (FNN) because it would likely inhibit one's daily activity, even if only "temporary," because it would affect the nerves in the thighs and would likely cause pain or make it difficult to walk. The risk of 1/300 here suggests that FNN is unlikely, however the reasonable person would want to know nevertheless because "temporary and moderate" nerve damage in the thighs would likely make daily life more difficult.

Second, and perhaps more persuasively, a reasonable patient would want to know about the 1/15 chance of paralysis. A reasonable patient would want to know whether he or she faced a risk of "permanent and catastrophic" paralysis because it would change daily life forever by making it impossible to walk, move, or even live on one's own. A reasonable patient would especially want to know of this risk because a 1-in-15 chance is a high risk, at least relative to the 1-in-300 risk of FNN.

Therefore, because a reasonable patient would have considered the risks of FNN and permanent paralysis important in deciding whether to have the surgery, Dr. Goff has a duty to disclose both risks to Brendan.

Good

Good structure

because we have no idea whether the doctor told Brendan of the risks or not. We would need more information to determine if there was a breach.

Injury

The plaintiff must have incurred an injury that resulted from the undisclosed risk.

1-in-300

The risk of femoral nerve neurapraxia did materialize. If the jury determines that the doctor did have a duty to tell Brendan of this risk, he would be able to meet the element of injury because he did actually suffer femoral nerve neurapraxia.

1-in-15

However, because the second risk did not happen he would not be able to succeed on an informed consent claim because the undisclosed risk did not happen.

Causation

Finally, a plaintiff must also prove causation to win an informed consent claim. The plaintiff just show that 1) the injury resulted from the procedure, 2) disclosure of the information would have led a reasonable person in the plaintiff's circumstances to not have the procedure and 3) the plaintiff would not have consented.

1. The first sub-element of causation looks at if the undisclosed risk happened and the plaintiff was injured.

1-in-300

Brendan was injured because he suffered from moderate pain because of the femoral nerve neurapraxia.

1-in-15 that from the procedure

Brendan would not be able to prove causation if the paralysis was not disclosed because the risk did not happen so he was not injured. (But I will still include the analysis for this under the other sub-elements)

2. The next sub-element asks if disclosure of the risk would have prevented the injury because the reasonable person would not have consented under the circumstances.

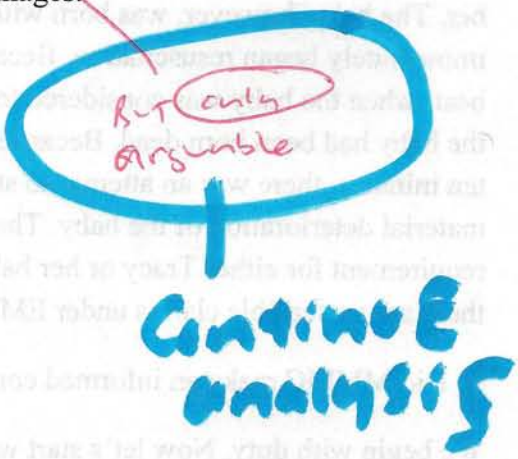
1-in-300 risk

I do not think that disclosure of this risk would have affected the treatment decision of a reasonable person. The probability of the risk happening is low. Also the symptoms that femoral nerve neurapraxia are not permanent and only include moderate pain. A reasonable person would still have

a duty if the information is already known to this particular patient or if it is common knowledge. A physician also may choose to not disclose under therapeutic privilege if the physician believes that the information would make the patient so upset that they could not make a rational choice or that would materially affect the medical condition.

Because the doctor received Tracy's verbal consent without informing her fully of the nature and risks involved with a C-section, the physician did not disclose specific information. We now must determine if the physician had a duty to disclose. Tracy was experiencing a major problem when her baby had a drop in the fetal heart rate. If Tracy were informed of the risks of a C-section, her other option would have been to wait for natural birth to occur, which would have likely taken far longer than a C-section. With a drop in fetal heart rate, immediate action would have been required. Because of those facts, a reasonable person with the information that a C-section had risks but the risks of waiting were greater would not have chosen otherwise as waiting could have posed a larger risk to both her and the baby. Because C-sections are far more common today in both real life and in television and films, it is clear that the nature and risks of a C-section is common knowledge to the public at large, therefore, the physician did not have a duty to disclose since it was common public knowledge. It shows that the doctor did not have a duty to disclose the risks and nature of a C-section.

We are not done with informed consent because after the C-section the doctors had made attempts to resuscitate the baby. After ten minutes, the physician, on his professional judgment, without consulting Tracy or her husband, ordered the stop of resuscitation. Because the information that the baby would likely not come back from resuscitation, but that it could occur, would have upset the patient so much that they could not have been able to make a rational choice and the physician did not have a duty to disclose under therapeutic privilege. To conclude, the physician did not owe Tracy and her husband to disclose information regarding the C-section and stopping of resuscitation. Without owing a duty to the patient, there is no point to go through the elements of breach, injury, causation and damages.



ESSAY #1

EMTALA

EMTALA maintains that medical facilities that have an emergency room are required to provide proper screening, stabilization, and transfer to individuals that arrive on the hospital property in obvious need or request of emergency medical treatment. EMTALA does not allow private causes of action brought by a patient or patient's family member against the attending physician. Tracy and her husband do not have a strong EMTALA case to allege against MMMC because the appropriate screening and stabilization were provided to Tracy.

Screening

EMTALA requires that an individual who arrives upon hospital property in request of treatment or is in critical condition providing obvious implied request for treatment, needs to be screened for an emergency medical condition. An "emergency medical condition" is defined under 42 C.F.R. § 489.24(b)(4) as being a medical condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in placing the health of the individual or an unborn child in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. § 489.24(b)(4) specifies that pregnant women are considered to have an emergency medical condition if there is inadequate time for a safe transfer to another hospital before delivery or the transfer may pose a threat to the health or safety of the woman or unborn child. The screening test must be uniform intra-institutionally in order to meet the standard, meaning that the hospital must provide uniform screening for all individuals that arrive in their emergency room facing similar emergency conditions. If there is an existing emergency medical condition, further examination and stabilization is required under EMTALA. However, if there is no existing emergency medical condition, EMTALA does not apply.

Upon Tracy's arrival to MMMC, she was properly screened with an initial examination revealing a reassuring fetal heart rate. As long as Tracy's screening was uniform with the screening provided to other pregnant women with mild contractions who arrive at MMMC's emergency room, the screening requirement under EMTALA was fulfilled.

Stabilization

If the presence of an emergency medical condition is obtained through appropriate screening of the individual, the individual then becomes an outpatient of the emergency room that needs to be stabilized. As defined under § 489.24(b)(4), "to stabilize" means to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from discharge or occur during the transfer of the individual or a pregnant woman has delivered the child and placenta. The standard of stabilization is based on a good faith effort, even if stabilization is not ultimately reached. Stabilization is required under EMTALA, unless the patient requests no further treatment or transfer before stabilization poses a greater benefit than the risk of unstabilization.

Once the fetal monitor indicated a fetal heart rate drop, a few hours after Tracy's arrival to the emergency room, the attending physician obtained Tracy's verbal consent and performed an emergency caesarean section in order to stabilize the patient. Then, a code team began

that needs to be stabilized. As defined under § 489.24(b)(4), "to stabilize" means to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from discharge or occur during the transfer of the individual or that a pregnant woman has delivered the child and the placenta. The standard of stabilization is based on a good faith effort, even if stabilization is not ultimately reached.

Christy gave birth to Rachael forty-five minutes after arrival to the emergency department. Her condition of active labor was stabilized, once the child and placenta have been delivered. However, Christy's condition of XYZ syndrome needed to be stabilized to a state that no material deterioration of the condition was likely to result from discharge or transfer. Three hours after Christy's delivery physician learned that Christy was suffering from XYZ syndrome and needed to be transferred to the hospital's ICU, Christy was transferred to the ICU, but only for postpartum care, not for stabilization of her emergency medical condition of XYZ syndrome.

The Plaintiff has a strong case that Memorial Hospital violated their EMTALA obligations, since they never stabilized Christy for her XYZ syndrome. Memorial Hospital is likely to argue that she was not transferred to Memorial Hospital's ICU to be stabilized, since beds were not immediately available for Christy in their ICU, and they were simply following the "exception of application to inpatients" under § 489.24(b)(4) and were trying to act in good faith in order to stabilize the patient in their ICU.

However, Memorial Hospital was aware that Christy was facing a life-threatening emergency medical condition and needed to be stabilized, so they either needed to provide sufficient stabilization in their emergency room for the meantime or transfer Christy to another hospital that could stabilize Christy. The benefit of being transferred without stabilization would benefit the patient and outweigh the risk of waiting for an ICU room to become available at Memorial Hospital, with a lack of stabilization all along. Instead, Christy waited for several hours and was never stabilized for XYZ syndrome. Once an outpatient is admitted to the ICU, they become an inpatient and the EMTALA obligations no longer stand. Christy should have been stabilized prior to being moved into the ICU for post-partum care.

Appropriate Transfer

Appropriate transfer of the patient without proper stabilization is permissible if the benefits of a transfer outweigh the risks or if the patient requests a transfer without stabilization. In order for a transfer to be appropriate, the transferring hospital needs to make certification, minimize the risk with its own capacity, and make transfer with qualified personnel and equipment. The receiving hospital needs to be capable of providing care and agree to accept. Major medical facilities with specialized units must accept a transfer if there is room available.

The Plaintiff shall argue that Memorial Hospital should have made a certification, made a good faith effort to minimize the risk, and transferred Christy with qualified personnel, equipment, and her medical records to a local receiving and agreeing hospital to stabilize Christy's XYZ syndrome, after a reasonable amount of time of determining that Memorial Hospital's own ICU was full and incapable of stabilizing Christy.

Essay 3

I. Did Dr. Goff make an informed consent violation?

Again we are in Minnesota and therefore a material risk jurisdiction. Under this standard, to determine what a physician should disclose to a patient, you look at what would a reasonable patient consider important in making a treatment relationship. The disclosure of the risk would have prevented its occurrence because the reasonable person would not have consented under the circumstances. However, there is not a duty if the information is already known to this particular patient or if it is common knowledge.

We need to apply the reasonably prudent person standard to the facts to determine in Dr. Goff had a duty. Because the first risk of temporary and moderate local damage to nerves in the thighs was 1-in-300 the chance of risk was small and the outcome was so minor in that it was just temporary that a reasonable person in the position of the patient would have not changed their mind and gone along with the procedure. In regards to the second risk, because of its permanent nature of paralysis and the high risk chance of 1-in-15, a reasonable person in the position of the patient would have likely gave heavy consideration to not performing the surgery. Because of the second risk being of a grave nature and high risk, Dr. Goff owed Brendan a duty to disclose the second risk, but not in regards to the first risk.

Now we go to breach. In order to show that there was a breach of a physician's duty, we have to show that the doctor did not inform the patient of the risk that needed to be disclosed. The facts do not say if the doctor disclosed the risks, but due to the grave likelihood of paralysis, it is best to assume that Brendan was not informed. Therefore, there was likely a breach by Dr. Goff.

We now look at causation. Causation requires first that there was an injury from the procedure, second that disclosure would have lead a reasonable person in Brendan's circumstances to decline procedure and finally that disclosure would have lead Brendan to decline the procedure.

We first look to see if there was an injury. Brendan suffered from the unlikely first risk of femoral nerve neurapraxia. This resulted in temporary and moderate local damage to nerves in the thighs. Because of that temporary condition, Brendan suffered an injury, albeit, a minor one. The second risk of paralysis has not materialized. Next we look to see if disclosure would have lead reasonable person to decline the procedure. Based off of the likelihood of some injury, and the high chance of paralysis, a reasonable person would have likely declined the operation. Finally, Brendan would have at least considered to not have the procedure based on the possibility of paralysis because of the high costs of the injury from being immobilized and needed constant support from others that may not be family and would have to be paid.

Finally, we look at damages. The unrevealed risk must have materialized in order to be compensated. There are no nominal damages in regards to informed consent. Because the second risk, of a high likelihood of paralysis never materialized, Brendan cannot argue for damages on