Exam ID # _____

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW FINAL EXAM

Professor Pope **Fall 2009**

GENERAL INSTRUCTIONS:

1. **Read Instructions**: You may read these instructions (the first three pages of this exam packet) ***before*** the official time begins.

2. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.

3. **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.

4. **Exam Packet:** This exam consists of **thirteen pages**, including this cover page. Please make sure that your exam is complete.

5. **Identification:** Write your exam number in the space provided in the upper-right hand corner of this page. Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Parts Two and Three. Write your exam number (and fill in the corresponding ovals) on the Scantron form.

6. **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.

7 **Timing:** This exam must be completed within **three hours**.

8 **Scoring:** There are 180 points on the exam, approximately one point per minute.

9 **Open Book:** This is an OPEN book exam. You may use ***any*** written materials, including, but not limited to: the 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.

10 **Format:** The exam consists of three parts which count toward your grade in proportion to the amount of time allocated.

PART ONE comprises 15 multiple choice questions worth three points each, for a ***combined*** total of 45 points. The suggested total completion time is **45 minutes**.

PART TWO comprises one short essay question worth 45 points. The suggested total completion time is **45 minutes**.

PART THREE comprises one long essay question worth ninety points. The suggested completion time is **90 minutes**.

11 **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 into 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." A few weeks after the exam, I will post the exam itself, an explanatory memo, and/or a model answer to TWEN.

12 **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** This Part contains 15 multiple choice questions, worth three points each, for a combined total of 45 points. This part has a suggested completion time of 45 minutes. Please note that the 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 ***both*** on the first page of this exam booklet. ***and*** on the Scantron form. Identify the course on the Scantron form. Fill in all the corresponding ovals.

3. **Fill the Ovals on the Scantron:** For each question***, fill in*** the oval on the Scantron corresponding to the best answer choice.

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 a separately marked section of your Bluebook or ExamSoft file. 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 ***essay*** answers in your Bluebook examination booklets or ExamSoft file. I ***will not*** read any material which appears only on scrap paper.

2. **Legibility:** Write legibly. 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:** I strongly encourage you to use one-fourth of the allotted time per 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***. Use short single-idea paragraphs (leaving a blank line between paragraphs).

5. **Answer Content:** Address ***all*** relevant issues that arise from the fact pattern and that are responsive to the "call" of the question. 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 *A v. B.*" 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.* B's battery claim against C is identical to A's, above, because __." But be very explicit, 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 the key weaknesses in your position and make the argument on the other side.

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, suggested by, or at least consistent with the fact pattern) that you believe to be necessary to answer the question.

STOP !

STOP !

DO NOT TURN THIS PAGE UNTIL THE PROCTOR SIGNALS

PART ONE

15 questions worth three points each = 45 points
Suggested Time = 45 minutes

1. In Delaware, a patient **must** always have a valid advance directive for her life-sustaining treatment to be stopped:

   A. True.
   B. True, but only if the patient lacks capacity.
   C. False.

2. In Delaware, you **must** use an official state-provided statutory form for your advance directive to be valid.

   A. True.
   B. False.
   C. False, but there are still universally mandated witnessing requirements and other signing formalities.

3. In Delaware, if you name a healthcare agent:

   A. You give up your right to make your own healthcare decisions.
   B. Naming a healthcare agent does not take away any of your authority. Your agent has no decision making authority while you are still have capacity.
   C. The authority of a healthcare agent terminates when the principal/patient who gave the authority loses capacity.
   D. None of the above

4. Chapman argues a hospital negligently failed to obtain his informed consent for his leg amputation. Chapman arrived at the ER with a history of coronary artery disease, quadruple coronary artery bypass surgery, hypertension, type II diabetes mellitus, elevated cholesterol, peripheral vascular disease, and back surgery. Medical records at the time of the amputation fail to note that Chapman was counseled regarding the nature of amputation, but do note that he was resistant to the fact that he would need above-knee amputation. At the time of amputation, Chapman's leg was suffering from a severely diminished blood supply. Skin grafts from a prior surgical procedure had come off and the leg was cold with black spots, indicating early gangrene.

   In a *Canterbury* material risk jurisdiction, Chapman will have the **most difficulty** establishing:

A. Duty to disclose
B. Breach
C. Causation
D. Injury

Both Questions 5 and 6 are based on the following:

Several years ago, Mr. John suffered brain damage and had, since that time, been taking a number of medications. In an attempt to wean himself off some of the medications, he ceased taking them. Perhaps as a result of this, he lost consciousness late in the evening. His family called an ambulance, which took him to the emergency room of G.R. Medical Center, where he was seen by Dr. Wilcox.

A short time after being placed in a bed, Mr. John regained consciousness and became very aggressive and disoriented. He fought with hospital staff and his family and had to be restrained. Dr. Wilcox then ordered Mr. John's release from the hospital, allegedly before establishing the cause of his behavior or making any attempt to stabilize his condition. Less than 24 hours after being released from the hospital, Mr. John took his own life.

In Mr. John's wife's subsequent lawsuit, plaintiff failed to disclose expert witnesses by the deadline specified in the court's scheduling order. Therefore, plaintiff must litigate the case without expert testimony.

5. On the wife's medical malpractice claim against Dr. Wilcox, on defendant's motion for summary judgment, the Court should:

A. Grant summary judgment because expert medical testimony is ordinarily necessary to establish the relevant standard of care.
B. Grant summary judgment because experts are always required in medical malpractice actions, to establish the relevant standard of care.
C. Deny summary judgment because the Court is not able, nor would a jury be qualified on its own, without expert testimony, to determine what the standard of care is with respect to screening a patient brought into the emergency room unconscious or with respect to releasing that patient after he regains consciousness.
D. Deny summary judgment because the plaintiff is entitled to present her case to the jury.

6. On the wife's EMTALA claim against GRMC, on defendant's motion for summary judgment the Court should:

A. Grant summary judgment to defendant because plaintiff cannot demonstrate an EMTALA violation without presenting expert testimony.
B. Grant summary judgment because plaintiff must do more than merely present evidence establishing the hospital's standard screening procedures and evidence that those procedures were not followed in the particular patient's case.
C. Deny summary judgment because EMTALA mandates only that a hospital adhere to its own screening procedures regardless of the adequacy of those screening procedures.

Both Questions 7 and 8 are based on the following:

On June 1, 2009, Santos, a ninety-three year old woman, was admitted to RGV Healthcare for rehabilitation of a post-stroke condition. Santos suffered from diabetes, high blood pressure, coronary artery disease, and congestive heart failure. On the morning of June 4, 2009, a registered nurse, and a certified nurse's aide discovered that Santos's lower right leg was cool and did not have a pulse. At noon, Santos was transferred to the emergency room at Rio Grande Regional Hospital, and she underwent an embolectomy to remove an embolism that had developed in her right leg. During the procedure, the surgeon discovered that Santos's right leg was pre-gangrenous and amputated it above-the-knee.

For her lawsuit, Santos hired a competent, qualified expert witness who opined, in part:

> In order to meet the standards of care in this case, Santos should have had a daily body check. This means examination of the upper extremities and the lower extremities and her body for evidence of edema, skin integrity, and whether the skin was dry, evidence of abrasions, tears, ulcers, and the temperature of the skin.
>
> In this case when the cold right leg was noted, her physician was notified. The problem is that the arterial occlusion of the right leg more likely than not occurred 24-36 hours prior to its discovery. This is evidenced by the fact that her leg was beyond salvage when she first arrived at the hospital. By the time Santos arrived at Rio Grande Medical Center, her leg was beyond salvage and there was no option, but to amputate her leg. If the arterial occlusion had been discovered earlier then more likely then not her leg could have been salvaged by the performance of an embolectomy.

7. Defendant has a **very strong** argument that plaintiff's expert has failed to establish:

A. Duty (the standard of care)
B. Breach
C. Causation
D. None of the above

8. **Potentially liable** parties for medical negligence, here, include:

A. The registered nurse
B. The certified nurse's aide
C. The hospital (on direct liability)
D. The hospital (on vicarious liability)
E. All of the above

9. In October 2007, Sanchez underwent spinal fusion surgery at Shoreline Health. She was recovering in the ICU when she alleges that Njoh and DeJesus, a registered nurse and a certified nurse's assistant, entered her room and made unwanted sexual advances toward her. Sanchez alleges that one of the men undressed her and exposed her body for the other to see. She claims that they turned her over using their hands instead of a turning pad and, while they were moving her from the bed to a chair in her room, they danced with her. Sanchez alleges that during these physical contacts, Njoh and DeJesus were making sexual overtures and comments and that the improper conduct continued until she was discharged from the hospital a few days later.

If the nurse and CNA were hospital employees, then patient has **potentially valid** claims against the hospital for this conduct under a theory of:

A. Vicarious liability
B. EMTALA
C. ERISA
D. ADA
E. Two of the above

10. Which of the following is the **least likely** standard of care against which a physician defendant would be measured in the United States?

A. Standard of the same locality in which the physician practices
B. Standard of a locality similar to the one in which the physician practices
C. National standard

11. If an obstetrician knew the relevant standard of care applicable to radiologists, **could** a patient use the obstetrician as an expert witness in malpractice litigation against a radiologist to establish the standard of care?

A. Yes, such an expert could be qualified.
B. No, the standard of care for a radiologist must be established by a radiologist.
C. Yes, but only if the obstetrician is board-certified in obstetrics.

12. Well-performed sterilization procedures are not always effective to prevent pregnancy. Plaintiff gets the procedure from Dr. Lee and later becomes pregnant. She sues Dr. Lee for medical malpractice.

    A. Plaintiff cannot win without an expert witness showing that the defendant breached the standard of care.
    B. Plaintiff can use res ipsa loquitor.
    C. Plaintiff can use an expert to bolster her case, but the jury can determine negligence, in this case, on its own.

13. Plaintiff consents to a medical procedure, but the physician did not disclose all of the procedure's material risks. If the plaintiff is subsequently injured, then in making a claim for informed consent, she **must establish** that:

    A. The procedure was not performed according to the standard of care.
    B. The injury was the result of the procedure performed by the defendant.
    C. Both A and B.
    D. Neither A nor B.

14. An employer-provided HMO provides both payment/coverage and medical services through a network of independent contractor physicians. A patient injured by a network physician's malpractice would **likely be able** to hold the HMO liable through:

    A. Respondeat superior
    B. Ostensible agency
    C. ERISA
    D. None of the above because of ERISA preemption

15. With respect to its cost containment (utilization review, prior authorization) measures, a managed care organization:

    A. Might be directly liable for the injuries resulting from its negligent cost containment measures.
    B. Can never be directly liable for negligent cost containment because of ERISA.
    C. Can be vicariously liable but not directly liable for negligent cost containment.
    D. Two of the above
    E. None of the above

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

PART TWO

1 short essay question worth 45 points

Suggested time = 45 minutes

On July 1, 2009, Dr. Zhou was the neurosurgeon on call for Good Samaritan Hospital. Dr. Zhou's responsibility to be on call was a condition of his having privileges to treat patients at Good Samaritan Hospital. As the on-call neurosurgeon, Dr. Zhou had an obligation to be available for patients who presented neurosurgical concerns on an emergency basis.

Forzley came to the emergency room on the morning of July 1, 2009, unable to walk due to severe low back pain and weakness in her legs. Dr. Aviva Zigman, the emergency room physician, examined Forzley. A second-year resident was also present in the emergency room and examined Forzley. Based on her findings, Zigman suspected that Forzley either had a herniated disk or was developing cauda equina syndrome, a serious neurological condition caused by compression of the nerves at the base of the spinal cord that requires immediate surgery. Zigman ordered an MRI, and that MRI showed a herniated disc at L3-4. That result caused Zigman to worry even more about the possibility of cauda equina syndrome, and she testified that for that reason she decided to contact Dr. Zhou, who was the neurosurgeon on call that day. Zigman and Dr. Zhou relate different versions of the telephone conversation.

Zigman testified that she personally spoke to Dr. Zhou and concisely presented Forzley's case, describing Forzley's symptoms and the MRI report, including specifically mentioning the herniated disc. Zigman testified that Dr. Zhou told her that Forzley could go home with pain medication and bed rest. Zigman testified that she was surprised by that advice and told Dr. Zhou that Forzley could not be sent home because she could not walk. Zigman testified that Dr. Zhou then told her to admit Forzley for one day for observation and pain management, under her primary physician's name. Zigman noted her consultation with Dr. Zhou in the hospital chart and called Forzley's primary physician, Dr. Kisor, to ask that Forzley be admitted for observation and pain management.

Dr. Zhou presented a different version of the conversation. He testified that he did not speak to Zigman. He did, however, agree that he spoke about Forzley's condition to a male physician in the emergency room who may have been a resident. Dr. Zhou testified that the resident told him that he had a patient "with bad back pain, who was neurologically intact, who had an MRI with a disc bulge, and who had normal rectal tone." He testified that it was his perception that the conversation with the resident was "a sort of a phone call for advice," to determine whether the patient needed to be seen by a neurosurgeon. He testified that, based on the information provided to him by the resident at that time, he believed that Forzley's primary concern was pain and that he did not believe that Forzley's condition demonstrated the existence of a neurosurgical issue.

Dr. Zhou further testified that, after a brief conversation, he told the resident physician that Forzley should be admitted by her primary physician for observation and pain management;

he acknowledged that the implication of his advice was that Forzley did not need neurosurgery at that time. Dr. Zhou testified that he did not expect that the resident physician would rely on his advice, and that he did not consider that Forzley would be admitted to his service. Dr. Zhou testified that he was not asked on July 1 to examine Forzley, that he never told the physician that he would examine Forzley or become involved in Forzley's treatment, and that he never assumed responsibility for and did not expect to play a role in her care. He did not bill the hospital for his telephone conversation on July 1. Dr. Zhou stated that he anticipated that if Forzley's condition deteriorated neurologically, he would be called.

On July 5, Dr. Zhou examined Forzley and looked at her MRI results and determined that she had "a very large herniated disk with cauda equina syndrome." He performed emergency surgery to relieve compression of the nerves. Forzley now suffers from permanent impairment. She is unable to walk without assistance and was incontinent of bowel and bladder. She requires 24-hour assistance and cannot care for her three children alone.

The case went to trial on the theory that surgery should have been provided on July 1. Dr. Zhou asserted that he had no liability to Forzley because the two had not yet entered into a physician-patient relationship at the time of the July 1 alleged negligent conduct. Assess this defense.

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

PART THREE

1 long essay question worth 90 points

Suggested time = 90 minutes

On March 15, 2009, Dr. Jun, an orthopedic surgeon, performed arthroscopic medial meniscectomy surgery to repair a medial meniscus tear in Katherine Conch's left knee. The surgery occurred at Evergreen Medical Center. Evergreen supplied and maintained all of the surgical equipment used during the operation. Evergreen also supplied the nursing and technical staff in the operating room. Prior to surgery, Gray, a surgical nurse, assembled a scalpel, which was composed of a Number 11 steel blade and a Number 7 handle. Dr. Jun used that scalpel during the surgery on Conch on March 15.

During surgery, Dr. Jun made two incisions to Conch's left knee, creating two portals to provide access to the surgical site within her knee. During the second incision, the scalpel blade detached from its handle and lodged in Conch's knee joint. Neither Dr. Jun nor Nurse Gray noticed that the blade had detached from the handle and lodged in Conch's knee when Dr. Jun handed the scalpel's handle back to Gray. Dr. Jun completed the procedure and then closed the two portals made by his initial incisions.

After closure of the incisions, Dora, a surgical technician who joined Gray and the others in the operating room, noted that the Number 11 blade was not in its handle. Following a search of the operating room, the blade could not be found.

Dr. Jun ordered an x-ray of Conch's knee, at which time the missing blade was discovered in her knee joint. While Conch remained anesthetized, Dr. Jun reopened the portals that had previously been sutured closed. After doing so, he located the Number 11 blade within the knee. He then attempted to remove the blade by using a grasping tool. Once he grasped the blade, he attempted to remove it. However, the thin edge of the blade hit soft tissue, bent, and broke into two pieces.

Due to the length of time that Conch had a tourniquet applied to her leg, Dr. Jun decided it would be best to close the incisions and terminate attempts to retrieve the broken blade on that day. Before leaving the operating room, Dr. Jun and Nurse Gray tested the Number 7 handle with a new blade. When pressure was applied, the new blade came out of the handle. Accordingly, Nurse Gray discarded the defective handle. In his deposition, Dr. Jun testified that the handle should not have been used in Conch's surgery and that it should not be used again.

Prior to a second surgery the next day, Dr. Jun, ordered a CT scan “to find the blade's exact location.” Thereafter, with the assistance of another surgeon, Dr. Jun successfully removed the broken blade from the knee joint.

Conch has a fair amount of scarring in her knee from the blade retrieval procedures. She also

has persistent problems with pain in the knee, which has limited her walking and weight-bearing activities.

In preparation for trial, a several depositions have been taken so far. Dr. Jun testified, among other things, that he "saw no reason why Nurse Gray could not have seen that the blade of the scalpel was missing when he handed it back to her." Nurse Gray testified that it was her "responsibility as the scrub nurse to assemble the equipment and instruments for the case and to assist the surgeon during surgery." Nurse Gray also testified that when Dr. Jun handed the instrument back to her after making the incisions she "did not examine it or observe that the blade was missing." No depositions of expert witnesses have been taken because all Ms. Conch's experts were disqualified by the judge as lacking the requisite knowledge because they were general physicians and not surgeons.

Assess patient Ms. Conch's claims against all parties against whom she has a potential valid claim.

---------- END OF PART THREE ----------

MEMORANDUM

TO: Health Law I class (F09)
FROM: Professor Pope
DATE: January 15, 2010
RE: Your Final Exam

Attached is the scoring sheet that I used to grade the December 19, 2009 final exam. Per the course syllabus and the exam instructions, I used this scoring sheet only to determine a numeric score. There were a total of 180 earnable points on the exam. The scores ranged from 32 to 133. The average score was 95.

After grading all the final exams, I submitted all the final exam scores to the Registrar in order to have them correlated to your names. To compute a letter grade for the course, I added your final exam numeric score to both your midterm score and quiz score total. I then sorted the scores in descending order, applied the mandatory grading curve to the J.D. students, and correlated the other numeric score sums to the permitted letter grades. Finally, per the syllabus, a few adjustments were made for participation. The J.D., L.L.M., and S.J.D. students were curved together.

I am happy to provide you with a copy of your individual exam and exam scoring sheet. And, after you have reviewed these, I am happy to review your exam with you. Because of impending deadlines on deliverables, I can do this review **only after** February 8, 2010. By that time, I will also have posted sample answers.

Pope – Health Law I: Fall 2009 Final Exam Scoring Sheet **Exam ID _____**

Multiple Choice

Question	Correct	% students answering correct	Explanation	Points	Earned
1	C	79		3	
2	C	87		3	
3	B	97		3	
4	C	74		3	
5	A	53		3	
6	C	82		3	
7	D	37		3	
8	E	84		3	
9	A	92		3	
10	A	71		3	
11	A	68		3	
12	A	82		3	
13	B	45		3	
14	B	76		3	
15	A	61		3	
TOTAL			(Mean score = 33) (Range = 12 to 42)	**45**	

Total for Exam: _____ (of 180)

Short Essay

NOTE: This problem was adapted from *Mead v. Legacy Health System* (Ore. App. Oct. 28, 2009). The "call" of the question asked you to "assess the defense" that Dr. Zhou "had no liability to [patient] because the two had not yet entered into a physician-patient relationship at the time of the July 1 alleged negligent conduct." Therefore, you should not have devoted time and space analyzing other issues on the substance of the malpractice claim, such as a possible causation problem (*e.g.* that plaintiff may have had same injuries even if she had surgery on July 1 instead of July 5).

	Issue	Points	Earned
Malpractice requires a P-P relationship	The cause of action against Zhou sounds in **medical malpractice** (professional negligence): "surgery should have been provided on July 1."	**6**	
	A prerequisite for the malpractice action against Zhou is that Zhou was in a **treatment relationship** with plaintiff, and thus owed her a duty to act as the reasonably prudent physician under the circumstances. In other words, the formation argument is logically sound. Zhou's problem is mustering evidence to disprove the formation. It is not (and cannot be) formed because of EMTALA.		
Conduct sufficient for formation: affirmative undertaking	**DEF:** Zhou never personally met the patient and never examined her. Zhou only spoke to the ER physician. Furthermore, Zhou "was not asked to examine the patient," he "never told the physician that he would examine" the patient, or "become involved in her treatment."	**5**	
	PTF: None of this is material. We read cases in which treatment relationships were formed not only (1) over the **phone** but also (2) indirectly, between a physician and a **third party** representing the patient.		
	PTF: Zhou engaged in precisely the conduct that is sufficient to establish a relationship. He listened to Zigman present the case and clinical circumstances. In response, Zhou made **treatment recommendations** ("go home with pain medication and bed rest," "admit for one day for observation"). This diagnosis and treatment decision were noted in the hospital chart.	**7**	
Curbside or informal consult defense	**DEF:** Notwithstanding the above, Zhou might argue that the consult with Zigman was informal and, therefore, insufficient to ground a treatment relationship (both as a matter of law and public policy). Zhou explained that "he never assumed responsibility for and did not expect to play a role in her care." And he "did not bill the hospital for his telephone conversation on July 1." Zhou also suggests that since he spoke to a resident and not directly to Zigman. Zhou testified that it was his perception that the conversation was "a sort of a phone call for advice." Zhou testified that he did not expect that the resident physician would rely on his advice, and that he did not consider that Forzley would be admitted to his service.	**5**	
	DEF: Public policy supports the practice of informal consults. We read a case in which the court held a neurologist, consulted by a pediatrician, was not the patient's physician.	**5**	
	PTF: What matters is the objective manifestation, not Zhou's understanding. There was **reliance.** Notably, Zhou "acknowledged that the implication of his advice was that Forzley did not need neurosurgery."	**5**	
On call status	The most devastating fact to the informal consult argument is that, on July 1, Zhou was **on call.** Therefore, he "had an obligation to be available for patients." The patient clearly had a relationship with the hospital. The hospital, in turn, had a **contractual relationship** (the "on call" system) with Zhou. Put the two together, and patient and Zhou are connected.	**7**	
	Apart from the relationship between Jun and the patient, the relationship between Jun and the ER physician make this look like a formal and not an informal consult. Zhou was not called because he was a colleague. He did not provide the diagnosis as a **professional courtesy** but rather because he was on call.	**5**	
Total		**45**	

Long Essay

NOTE: This problem was adapted from *Ripley v. Lanzer*, 215 P.3d 1020 (Wash. App. 2009). The "call" of the question asked you to "assess patient Ms. Conch's claims against all parties against whom she has a potential valid claim." Some mentioned claims against the manufacturer of the scalpel, which is surely something that was explored by these parties. But it was outside the scope of our course.

	Issue	Points	Earned
Patient v. Dr. Jun			
Malpractice (professional negligence)	**Duty/Breach:** Dr. Jun may have been negligent either (1) for not noticing that "the scalpel blade detached from its handle and lodged in Conch's knee joint" and/or (2) for not doing a sharps count before closing the incisions.	**5**	
	To establish a breach, plaintiff must first establish the standard of care. In a malpractice case, that is normally done with an expert witness who knows the relevant standard. Here, plaintiff has **no expert**.	**10**	
	Res ipsa loquitur: This doctrine supplies the necessary inference of negligence. Expert testimony is not necessary to establish the standard of care when medical facts are observable to a lay person and describable without medical training.	**5**	
	Element 1: Leaving a **foreign object** in a patient's body is a paradigm case, an injury that does not ordinarily happen in the absence of someone's negligence.	**5**	
	Element 2: Jun had actual or constructive control since he had the scalpel in his hand when the blade came loose. Alternatively, sufficient that Gray had control.	**5**	
	Causation/Injury: The evidence strongly suggests that the "but for" reason for patient's knee problems is the recovery of the broken blade. Still, the lack of experts could be problematic here too.	**4**	
Vicarious liability	If nurse Gray was negligent (below) and was a "borrowed servant," then Jun may be liable if he had control over her during the surgery.	**5**	
Patient v. Nurse Gray			
Malpractice (professional negligence)	**Duty/Breach:** Nurse Gray may have been negligent for failing to notice the missing blade immediately when Jun handed it back to her. [Whether or not Jun or Evergreen is vicariously liable for Gray does not affect Gray's own liability.]	**5**	
	Whether Gray was negligent must be measured against the standard of care for nurses in a surgery situation. That standard must be determined by an expert. But Gray could be looped into the res ipsa claim (above).	**5**	
	Since the plaintiff has **no expert witnesses**, the plaintiff probably cannot establish the standard. Gray and Jun are surely qualified as experts. We know from them that: (1) Gray did not examine the scalpel, (2) she could have examined it, and (3) it was Gray's responsibility to assemble the equipment and instruments for the case and to assist the surgeon during surgery. But none of this quite establishes a duty to inspect the equipment after its use by the surgeon.	**5**	
	Causation/Injury: Had Gray noticed the missing blade, then it might have been retrieved more readily, thereby scarring and pain avoided.	**4**	
Patient v. Evergreen Medical Center			
Direct liability	Evergreen "supplied and maintained all of the surgical **equipment** used during the operation." It may have been negligent in its procurement, storage, or upkeep. The scalpel handle was defective (per Jun) and that might have been detected and prevented with an **inspection or replacement policy**. Evergreen may have been negligent in personnel-oriented policies too (*e.g.* re sharps counts).	**10**	
	But, again, plaintiff lacks expert testimony to establish what the reasonable hospital deals with scalpels.	**5**	
Vicarious liability	Evergreen "supplied" the nursing staff in the operating room. If nurse Gray was negligent (above) and was an employee, then Evergreen is vicariously liable. One weak response might be that Gray was Jun's servant at the time.	**10**	
	If Gray was not an employee (the facts did not say), there may still be vicarious liability because she may have been an apparent agent	**5**	
	Less likely is Evergreen's vicarious liability for the negligence of Jun (above).	**2**	
Total		**90**	