

Instructor	Professor Thaddeus Mason Pope
Course Title	Health Law: Quality & Liability
Format	Final Exam, Spring 2024
Total Time	Twenty-four (24) hours
Total Pages	15 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2024 exam number** and include this number at the top of each page of your exam answer (for example, in a header).
2. Confirm that you are using and have typed the **correct exam number** on your exam document.
3. You may **download** the exam from the course Canvas site any time after 12:01 a.m. on Wednesday, May 1, 2024, and before 11:59 p.m. on Sunday, March 12, 2024.
4. You must **upload** (submit) your exam answer file to the Canvas site within twenty-four (24) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Sunday, May 12, 2024. Therefore, the latest time by which you will want to **download** the exam is at 11:59 p.m. on Saturday, May 11, 2024. Otherwise, you will have less time to write your answers than the full permitted twenty-four (24) hours.
6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before you upload it to Canvas.
7. Use your exam number as the **file name** for the PDF file that you uploaded.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this exam, you are subject to the Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire **midterm exam period**. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the midterm exam period.
2. **Competence:** By downloading and accepting this examination, you certify that you can complete the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.
3. **Exam Packet:** This exam consists of fifteen **(15) pages**, including these instructions. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer.
5. **Anonymity:** Professor Pope will grade the exams anonymously. Do **NOT** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**
6. **Total Time:** Your completed exam is due within twenty-four (24) hours of downloading it, but in no case later than 11:59 p.m. on Sunday, May 12, 2024.
7. **Time Penalty:** If you upload your exam answer file more than twenty-four (24) hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 24 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 24-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save enough time after editing to upload your exam.
8. **Timing:** Professor Pope has designed this exam for completion in about 4 hours. That means you should be able to write complete answers to all the questions in 4 hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps 45 minutes) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps 45 minutes) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
9. **Scoring:** This final exam comprises 40% of your overall course grade. While the scoring includes 100 points, these points will be weighted.

10. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.
11. **Additional Research:** While you may use any materials that you have collected for this class, you are neither expected **nor are you permitted** to do any online or library research (e.g., on Lexis, Westlaw, Google, reference materials) to answer the exam questions unless specifically directed to do so.
12. **Generative AI:** All answers to this exam must be fully prepared by the student. The use of generative AI tools for any part of your work will be treated as plagiarism.
13. **Format:** The exam consists of three main parts:

Part One 30 multiple choice questions
 Worth 1 point each, for a combined total of 30 points
 Estimated time = 90 minutes (3 minutes each)

Part Two 10 short answer questions
 Worth 1 point each, for a combined total of 10 points
 Estimated time = 30 minutes (3 minutes each)

Part Three 3 essay questions
 One is worth 30 points, one is worth 20, and one is worth 10.
 The combined total points for all 3 essays are 60 points.
 Estimated time = 120 minutes

That adds up to only 4 hours. Remember, you have 90 minutes to complete the multiple choice questions and another 24 hours to complete the short answer questions and essays. Therefore, you have time to revise, polish, and proofread.

14. **Summary:**
- | | |
|--|----|
| Multiple Choice (30 1-point questions) | 30 |
| Short Answer (10 1-point questions) | 10 |
| Essay 1 – 25 points | 30 |
| Essay 2 – 20 points | 20 |
| Essay 3 – 15 points | 10 |

15. **Grading:** All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. Professor Pope will post an explanatory memo and a model answer to Canvas a few weeks after the exam.

SPECIAL INSTRUCTIONS FOR PART ONE

1. **Canvas Quiz:** Complete the multiple choice section of the exam on Canvas like any other multiple choice quiz. Click the best answer choice.
2. **Timed Quiz:** You have 90 minutes to complete the 30 multiple choice questions. That is 3 minutes each. This time is separate from the time allotted to complete the essay portion of the final exam.

SPECIAL INSTRUCTIONS FOR PART TWO

Include your answers to the 10 short answer questions in a vertically numbered list as follows:

1. answer x
2. answer y
3. answer z

SPECIAL INSTRUCTIONS FOR PART THREE

1. **Submission:** Create clearly marked separate sections for each problem. You do not need to “complete” the exam in order. Still, structure your exam answer document in this order:
 - Essay Question 1
 - Essay Question 2
 - Essay Question 3
2. **Outlining Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers on scrap paper before beginning to write. 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.
3. **Answer Format:** This is very important. **Use headings and subheadings.** Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space between sections and paragraphs.
4. **Answer Content:** Address all relevant issues that arise from and are implicated by 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.

5. **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 complete substitute for legal analysis. 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?
6. **Cross-Referencing:** You may reference your own previous analysis (e.g., B’s claim against C is identical to A’s claim against C, because __.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
7. **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.
8. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do not invent facts out of whole cloth.

Exam Misconduct

The Code of Conduct prohibits dishonest acts in an examination setting. Unless specifically permitted by the exam or proctor, prohibited conduct includes:

- Discussing the exam with another student
- Giving, receiving, or soliciting aid
- Referencing unauthorized materials
- Reading the questions before the examination starts
- Exceeding the examination time limit
- Ignoring proctor instructions

Part I: Multiple Choice Questions

Complete the 30 multiple choice questions in the timed Canvas quiz.

You have a separate 90 minutes to complete those questions.

REMINDER

Do not forget to complete BOTH parts of the final exam:

- (1) the following short answer questions and essays in an uploaded document, and
- (2) the multiple choice questions as a Canvas multiple choice click quiz.

Part II: Short Answer Questions

- These ten questions are worth a combined 10 points.
- Limit your response to 1 to 5 words each.
- Recommended time is 30 minutes.

Using licensing & certification tools. The following ten questions require you to access several websites to confirm the licensing or certification status of healthcare providers.

1. Go to the Georgia Composite Medical Board. <https://gcmb.mylicense.com/verification/>
In **what state** was Anna Steinberg first licensed (before she was licensed in Georgia)?
2. Is Anna Steinberg's Georgia license **active** and in good standing?
3. Go to the American Board of Medical Specialties. <https://www.abms.org/board-certification/verify-certification/> - or - <https://www.certificationmatters.org/find-my-doctor/>
The ABMS' 24 boards certify doctors in 40 specialties following rigorous standards for training and assessment. In **what medical specialty** is Anna Steinberg board certified?
4. In **what year** was Anna Steinberg first board certified in the specialty identified in the previous problem?
5. Visit the file an administrative complaint section page of the Georgia Composite Medical Board. <https://medicalboard.georgia.gov/consumer-resources/how-file-complaint>
Can a patient file an **anonymous** complaint against Dr. Steinberg? Or must they identify themselves?
6. Visit the OIG exclusions database. <https://exclusions.oig.hhs.gov/>
In **what year** was a pharmacist named "Thaddeus" excluded?
7. If you were advising Anna Steinberg, which would be **the worst** to lose: (a) her license, (b) her board certification, or (c) her Medicare participation?
8. The Joint Commission accredits health care organizations in compliance with all its quality standards at the time of the on-site survey or has successfully addressed requirements for improvement in an Evidence of Standards Compliance within 60 days following the posting of the Accreditation Summary Findings Report. Rothman Orthopaedic Specialty Hospital (ROSH) is in Bensalem, PA. Visit TJC <https://www.qualitycheck.org/> Is ROSH accredited by TJC?

9. ABMS is not the only private organization that offers board certifications. Visit the American Board of Physician Specialties. <https://www.abpsus.org>
Identify **any** specialty area of board or board certification offered by the ABPS that is not also offered by the ABMS.

10. Unfortunately, in addition to the ABMS and ABPS boards there are illegitimate boards that target doctors who have recently immigrated to the U.S., promising them certification with only basic information but a substantial fee. Which of the following is **not** a “fake” board: (a) American Board of Geriatric Medicine, (b) American Board of Geriatrics, (c) American Board of Plastic Surgery, and (d) American Board of Diabetes.

Part III: Essay 1

- This question is worth 30 points.
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 60 minutes.

Two years ago, Mimi had abdominal surgery at Dakota Hospital to remove an ulcerated section of her large intestine. Dr. Roth, one of Dakota Hospital's more experienced employed physicians, performed the surgery. Dr. Roth told Mimi that there were no problems with the surgery and assured her that she would not have any issues with her abdomen in the future. But Dr. Roth knew that one of the surgical clamps had been left inside Mimi's abdomen and would likely cause future problems. Apparently, Dr. Roth had another scheduled surgery that same day, so did not want to take extra time to search for and retrieve the clamp in Mimi.

Six weeks ago, Mimi experienced severe abdominal pains and went to the emergency room of Fargo Hospital. The on-call emergency room doctor failed to respond to texts and calls. So, after some delay, the manager of the ED found another surgeon, Dr. Sandler, a non-employed independent contractor who sometimes covers at Fargo Hospital. Dr. Sandler immediately performed emergency abdominal surgery and removed an old surgical clamp. The old surgical clamp had caused a massive infection in Mimi's abdomen. When Mimi asked Dakota Hospital about her first abdominal surgery, Dakota Hospital denied that it was responsible for any of her injuries.

One week after the surgery done by Dr. Sandler, when Mimi was recovering in the post-surgical inpatient wing of Fargo Hospital, it was discovered that her lungs had been permanently damaged by a post-surgery pulmonary embolism (a blood clot that forms in the body after surgery and travels through the bloodstream to the lungs). Dr. Sandler told Mimi that a review of the medical charts indicated that Fargo Hospital's nurses should have discovered the embolism two days earlier than they did. If they had, then Mimi's lungs would not have been damaged.

Dr. Sandler, who regularly works with hospital nurses, emphasized the nurses' failures to (1) take Mimi's complete vitals, (2) appropriately document Mimi's symptoms, and (3) recognize signs of embolism. Dr. Sandler concluded that the nurses' treatment of Mimi fell below the standard of care for registered nurses and that their failings "contributed to the delay in diagnosis and treatment." Dr. Sandler further concluded that the nurses lacked training and that Fargo "was negligent in respect to its core training policies and oversight function in respect to the nursing department." Dr. Sandler opined that had the nurses received appropriate training, Mimi "would have been afforded the opportunity to have healthy lungs."

Dr. Sandler is willing to testify on this matter for Mimi who has two other expert witnesses. Dr. Sandler is also willing to testify that Dr. Roth's count method is inconsistent with surgical customs and practices. Had Dr. Roth counted like other surgeons it is "more probable than not" that Mimi would not have been injured. Mimi's second expert witness will testify that if liability is

established, damages for permanent injury to Mimi's lungs will be \$900,000. Her stay at Fargo alone cost Mimi \$117,000 and \$4000 in lost wages. She will have additional injury-related medical expenses for years.

Mimi's third expert witness, also on staff at Fargo, Dr. Needle, discovered that Dr. Roth has a long track record of leaving instruments inside surgical patients. Both Dr. Roth and the hospital knew that his method of post-operative "counts" was the most probable cause of four previous patients' deaths. Yet, Dr. Roth continued to perform surgery in the same way. While Dr. Needle is unfamiliar with what other hospitals do, she can confidently opine that most controlled scientific studies firmly establish that Dr. Roth's method of post-surgical "counts" is much less safe.

Just as Mimi has three expert witnesses, there are several defense expert witnesses. One Defense expert witness will testify that the massive infection in Mimi's abdomen might have been due to Mimi's underlying intestinal ulcer rather than to the foreign object. Therefore, because Mimi cannot exclude this alternative cause, she cannot establish causation. A second defense expert will testify that Mimi's lungs might have been damaged by the post-surgery pulmonary embolism even if it had been identified earlier. Therefore, because Mimi cannot exclude this alternative cause, she cannot establish causation.

You are Mimi's attorney. Identify and assess all claims that Mimi may reasonably assert against, and for what injuries she can recover damages, from any party.

NOTE: All events occurred in a jurisdiction governed by laws in the Statutory Appendix. To the extent the Statutory Appendix does not address conduct, it is governed by general principles of health law.

Part III: Essay 2

- This question is worth 20 points.
- Limit your response to 1000 words. This is only a limit, not a target or suggested length.
- Recommended time is 40 minutes.

Emmalee gave birth to her son Seadog at Minneapolis Women's Hospital (MWH). Seadog was born with serious disabilities due to complications during delivery. Dr. Beebee delivered Seadog and was responsible for Emmalee's care before birth.

Emmalee is a healthcare lawyer, formerly employed by a medical device company. She is of small stature—just over 5 feet. She also suffers from diabetes. Babies born to women with diabetes tend to be larger than average, and their mothers are at greater risk of having problems when giving birth, particularly through shoulder dystocia, in which the baby's shoulders become lodged above the pelvis. Thus, Emmalee's pregnancy (her first) was high-risk. Accordingly, she attended a special prenatal clinic at MWH throughout her pregnancy. She was under the care of Dr. Beebee, an obstetrician and gynecologist.

For diabetic mothers, the risk of shoulder dystocia is 10%. Shoulder dystocia presents increased risks to the mother, including postpartum hemorrhage and perineal tears. It also presents risks to the baby. The physical maneuvers required to free the baby can cause it to suffer a broken shoulder or an avulsion (tearing away) of the brachial plexus—the nerve roots that connect the baby's arm to the spinal cord. Such an injury can result in permanent disability, leaving the child with a useless arm. The risk of a brachial plexus injury, in cases of shoulder dystocia involving diabetic mothers, is about 0.2% (1 in 500). In an even smaller percentage of cases of shoulder dystocia, the umbilical cord becomes trapped against the mother's pelvis. It can become occluded (closed up), causing the baby to suffer from oxygen deprivation, resulting in cerebral palsy or death. The risk of this happening is less than 0.1% (1 in 1000).

Dr. Beebee accepted that the 10% chance of shoulder dystocia in diabetic mothers was a high one but didn't tell Emmalee about it. Her practice was not to discuss it. This was because the risk of a grave problem for the baby resulting from shoulder dystocia was so small. She believed that if she mentioned the condition, most women would say, "I'd rather have a caesarean section." In her judgment, that was not generally in the interest of mother or baby. Furthermore, about 75% of cases of shoulder dystocia can be resolved by various physical maneuvers, such as trying to move the baby down by external pressure or even pushing the baby's head back into the birth canal so as to be able to perform an emergency caesarean section.

At her 36-week appointment, Emmalee told Dr. Beebee that she was worried that her baby might be too big to be delivered vaginally. However, Emmalee did not ask about specific risks. Had she done so, Dr. Beebee would have told her about the risk of shoulder dystocia. Rather, she told Emmalee that she would be able to deliver vaginally, and that if there were difficulties in labor, she could have a caesarean section. Emmalee accepted that advice. But if she had requested an elective caesarean section, she would have received one.

Dr. Beebee induced Emmalee's labor with hormones, as she had planned. After several hours, Emmalee's labor stopped. The strength of the contractions was then augmented by administering more hormones over a further period of several hours, to overcome whatever was delaying progress towards vaginal delivery. When the baby's head still failed to descend, Dr. Beebee used forceps. The baby's shoulder then became impacted (stuck) before his head fully emerged.

Dr. Beebee had never dealt with that situation before. It was very stressful. An anesthetist gave Emmalee a general anesthetic to enable Dr. Beebee to try one of the maneuvers to free the baby's shoulder. This did not work. Dr. Beebee decided that she had no other option but to try to complete the delivery. She pulled the baby's head with "significant traction" to complete the delivery of the head. Eventually, "with a big adrenalin surge," Dr. Beebee was able to pull the baby free.

During the 13 minutes between the baby's head appearing and the delivery, the umbilical cord was occluded, depriving him of oxygen. After his birth, he was diagnosed as suffering from cerebral palsy, caused by the deprivation of oxygen. He also suffered a brachial plexus injury causing paralysis of the arm. All four of his limbs are affected by cerebral palsy. If Emmalee had had an elective caesarean section, Seadog would have been born uninjured.

Expert witnesses have been retained for both sides. The gist of the evidence for the plaintiff will be that if the mother expresses concern about the size of her baby, then it is proper practice to discuss the potential problems that could arise, including the risk of shoulder dystocia and the option of an elective caesarean section. The gist of the evidence for the defendant will be that it is reasonable not to discuss shoulder dystocia in such circumstances, as the risks of a serious outcome for the baby are so small. Like Dr. Beebee, the defense expert thinks that, if doctors were to warn women at risk of shoulder dystocia, "you would actually make most women simply request caesarean section." However, the expert accepts that if a patient asked about specific risks, the doctor must respond.

You are Emmalee's attorney. Identify and assess all claims that Emmalee may reasonably assert against, and for what injuries she can recover damages, from any party.

NOTE: All events occurred in a jurisdiction governed by laws in the Statutory Appendix. To the extent the Statutory Appendix does not address conduct, it is governed by general principles of health law.

Part III: Essay 3

- This question is worth 10 points.
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

Dr. Taco, a co-owner and employee of Taco & Associates in Nome, Alaska, was Phil Patient's primary care physician and saw him for a blood clotting issue in September 2022. That problem was resolved through a prescription of Eliquis, a blood thinner and anticoagulant.

In April 2024, Phil Patient fell down the stairs in his house and suffered a leg injury, which needed surgery to correct. Phil Patient alleges that Dr. Taco negligently failed to inform his surgeons of the prior blood clot incident when Dr. Taco conducted a preoperative evaluation for the surgeons. Consequently, after the surgery, Phil Patient was not prescribed anticoagulant. Five days later, he died of a pulmonary embolism caused by deep vein thrombosis (a blood clot) in his left leg.

Plaintiff's first expert is from the Mayo Clinic in Rochester, Minnesota. She opines that Dr. Taco should have discussed with Phil Patient the risk of blood clots following the surgery. Further, had Phil Patient been so advised, then he could have (a) avoided surgery, (b) demanded anti coagulants with surgery, or (c) sought treatment as soon as he noticed warning symptoms post-operatively. Plaintiff's second expert is from the Cleveland Clinic. She opines that Dr. Taco should have relayed the blood clot incident to the surgeons. Further, had this been done, the surgeons would probably have taken action that probably would have avoided the pulmonary embolism.

The defense expert testifies that even if Dr. Taco had done everything that the plaintiff experts say he should have done, that Phil Patient still would have had only a 20% chance of avoiding the pulmonary embolism.

You are Phil Patient's attorney. Identify and assess claims that Phil Patient may reasonably assert against, and for what injuries she can recover damages, from any party.

NOTE: All events occurred in a jurisdiction governed by laws in the Statutory Appendix. To the extent the Statutory Appendix does not address conduct, it is governed by general principles of health law.

Statutory Appendix

Exam Stat. 100

This state rejects the existence of any “limited” treatment relationship as has been recognized in some jurisdictions, *e.g. Bazakos v. Lewis* (N.Y. 2009). Physicians either are in a treatment relationship with an individual, or they are not in a treatment relationship with that individual.

Exam Stat. 200

An action for health care liability must be brought within one year of when the cause of action accrues. Such action does not accrue until there has been either (a) discovery of the facts constituting the health care liability or (b) discovery of the facts that are sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead to such discovery.

Exam Stat. 300

A claimant must bring a health care liability claim not later than four years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within four years, or they are time barred.

Exam Stat. 400

Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. The court shall specifically review the punitive damages award and shall make specific findings.

Exam Stat. 500

The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

- (a) Such failure was a proximate cause of the injury or death; or
- (b) The health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient, the plaintiff must also prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived.

Exam Stat. 600

(a) The following are necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

- (1) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment
- (2) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts
- (3) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts
- (4) That the treatment in question proximately caused injury to the patient.

(b) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether to submit to the proposed treatment.

Exam Stat. 700

In a civil action for damages, the plaintiff's contributory negligence, if any, which is 50% or less of the total proximate cause of the injury or damage for which recovery is sought, does not bar his recovery. However, the total amount of damages to which he would otherwise be entitled is reduced in proportion to the amount of his negligence. This is known as comparative negligence. If the plaintiff's contributory negligence is more than 50% of the total proximate cause of the injury or damage for which recovery is sought, the defendant[s] shall be found not liable.

Exam Stat. 800

In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community or a community substantially similar to the one in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning.