Exam Number __ __ __ __ __

Instructor	:	**Professor Thaddeus Mason Pope**
Course Title	:	**Health Law: Quality & Liability**
Section	:	**Law 9322, Section 1**
Format	:	**Take Home Final Exam**
Total Time for Exam	:	**48 hours**
Total Number of Pages	:	**30 pages**

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Fall 2015 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 BlackBoard site any time after 12:01 a.m. on Thursday, December 3, 2015. All exam answers must be submitted within 48 hours of download. But, in any case, all exam answers must be submitted by the end of the final exam period, i.e. by 11:59 p.m. on Wednesday, December 16, 2015. Therefore, you will want to download your exam no later than 11:59 p.m. on December 14, 2015, to ensure that you have the full allowed 48 hours to complete your exam.

4. Write your answers to all three parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to BlackBoard. Use your **exam number as the name for the PDF file**.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

1. **Honor Code**: While you are taking this exam, you are subject to the Hamline University Code of Conduct. You may not discuss it with anyone until after the end of the entire exam period. It is a violation of the Honor Code to share the exam questions. Shred or delete the exam questions immediately upon completion of the exam. They will be reposted after the end of the exam period.

2. **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.

3. **Exam Packet**: This exam consists of **30 pages**, including this cover page. 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**: The exams are graded 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 10-point deduction.**

6. **Total Time**: Your completed exam is due within 48 hours of downloading it. If your exam is uploaded more than 48 hours after downloading the exam, your exam grade will be **lowered by one point** for every minute in excess of the 48 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 48-hout limit by more than 20 minutes, the situation may be referred for a Code of Conduct investigation and potential discipline. Please save sufficient time to successfully upload your exam.

7. **Timing:** The exam has been written as a 180-minute exam. A student could write basically complete answers to all the questions in 180 minutes. But since this is a take-home exam, you will want to take some extra time (perhaps one hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one hour) to revise and polish your answers, such that you will not be submitting a "first draft." In short, while this is a 48-hour take home, you really need not spend more than around five hours on this exam.

8. **Scoring**: There are 150 total points on the exam. The final exam comprises 50% of your overall course grade, 150 of the 300 total course points.

9. **Open Book**: This is an OPEN book exam. You may use any written materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines.

10. **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.

11. **Format**: The exam consists of three parts:

    PART ONE comprises 60 multiple choice questions.
    These are worth 1 point each, for a combined total of 60 points.

    PART TWO comprises one short answer question.
    It is worth 30 points.

    PART THREE comprises one long answer question.
    It is worth 60 points.

12. **Grading**: All exams will receive a raw score from zero to 150. The raw score is meaningful only relative to the raw score of other students in the class. Your course letter grade is computed by summing the midterm, final, and quiz scores. I will post an explanatory memo and a model answer to BlackBoard a few weeks after the exam.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Numbered List of Letters:** In your exam document create a vertical numbered list (1 to 60). Next to each number type the letter corresponding to the best answer choice for that problem.

2. **Ambiguity**: If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why immediately after your answer choice. 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**: In your exam document create clearly marked separate sections for each of the three problems:
   Short Answer
   Long Answer

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 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

Multiple Choice Questions

- 60 Questions worth 1 point each = 60 total points.
- Mark the letter of the best answer in a vertical list in your exam document.

1. After receiving a kidney transplant, Patient was critically ill. Her hematocrit level was 16.3 and her hemoglobin level was 6.2. Patient underwent an abdominal CT scan, which confirmed the presence of large mass around the kidney and could explain for the drop in hemoglobin. Physician recommended replacing plasma to address these issues. But Patient was a Jehovah's Witnesses and would not accept whole blood or whole blood products. She understood the consequences of her religious refusal. Patient subsequently died. Her family brought a wrongful death lawsuit based on medical malpractice.

Which affirmative defense can the physician most plausibly assert?

A. Assumption of risk
B. Comparative negligence
C. Statute of limitations
D. Statute of repose

2. Leah underwent breast implant surgery. After the procedure, her incision did not heal and the implant began to protrude though her skin. This is a known rare complication that occurs in less than one percent of breast augmentation patients. Surgeon explained that when the woman contacted him to tell him that a "hole" had "opened up" in her breast, she explained that the hole had been there for ten days, and that she did not come and see him upon first discovering it because it was tough for her to get out of work. Surgeon instructed her to come to his office the next day, but she did not come to see him until at least three days later.

Which affirmative defense can the physician most plausibly assert?

A. Assumption of risk
B. Comparative negligence
C. Statute of limitations
D. Statute of repose

3. Plaintiff sought cosmetic treatments from Dr. Nutt in Madison, Wisconsin. At the beginning of treatment Plaintiff had only a very slight problem. But several months later, progress records showed a negative change in aesthetics. Plaintiff consulted with Dr. Chadwick about Dr. Butt's substandard treatment. In response Dr. Chadwick wrote Dr. Nutt a letter stating the deficiencies in his treatment that needed to be addressed. Failing to follow these directives, Plaintiff then sent a letter to Dr. Nutt stating her dissatisfaction and explained that she wished for Dr. Nutt to either complete her treatment in a timely manner or reimburse her for all the monies paid to that point. Plaintiff's letter further noted that should Dr. Nutt decline to complete her treatment in a timely manner or reimburse her, she would pursue legal action.

In response Dr. Nutt sent Plaintiff a letter in which he terminated treatment at the behest of his malpractice carrier. Plaintiff was unable to locate another provider in the Madison area and eventually had her issues addressed by a physician in Beverly Hills, California. Dr. Nutt's letter was:

A. A legitimate termination, because it was required by his malpractice carrier
B. A legitimate termination, because Plaintiff threatened legal action
C. A legitimate termination, because Plaintiff found another provider
D. Tortuous abandonment

4. Plaintiff is suing her spine surgeon. Plaintiff wants to have her family physician to testify about the deficiencies in her spine surgery.

The trial judge should:

A. Allow the family physician to testify. All licensed medical doctors are qualified to testify concerning all medical subjects. It is for the jury to determine the weight to be given to the expert testimony.
B. Allow the family physician to testify. An expert does not need to demonstrate knowledge of every subject matter upon which he promises to express an opinion.
C. Not allow the family physician to testify. Medical witnesses may have expertise in overlapping areas and some doctors may be more qualified than others to testify on certain medical practices. But a medical witness must have some familiarity with the particular technique at issue.

5. In November 2015, Saint Paul, Minnesota police arrested Freddy Escobar for allegedly posing as a doctor (which he was not) and fondling women during massage treatments that he claimed would treat their ailments. Suppose that Escobar had been operating out of a healthcare facility as an independent contractor.

A woman "treated" by Escobar would have a potentially good civil liability claim against the facility for:

A. Negligent selection
B. Negligent utilization review
C. Vicarious liability under the non-delegable duty doctrine
D. Vicarious liability under respondeat superior

6. Patient arrived at the ED. Dr. Pam was the on-call urologist assigned to consult with hospital treating physicians. Dr. Pam was consulted by the ED physician for the specific purpose of rendering diagnostic and medical advice regarding patient's treatment. Dr. Pam received specific information regarding patient's history, symptoms, and diagnostic test results; and evaluated those results. She was compensated for her services.

Which of the following is MOST true?

A. Dr. Pam is only an informally consulted physician.
B. Dr. Pam owes no malpractice duty to patient, even if she were in a treatment relationship.
C. Dr. Pam is only an IME physician.
D. Dr. Pam owes no malpractice duty to the patient.
E. Dr. Pam is in a treatment relationship with patient.

7. Mother was treated for medullary thyroid carcinoma. Three years later, Mother's daughter, treated by a different physician, was found to have the very same type of cancer. Daughter filed an informed consent lawsuit against the physician who had treated Mother, arguing that if Daughter had known about the genetic risk of thyroid cancer, then she would have taken steps to detect and treat it at a potentially curable stage.

Will Daughter's action succeed in a reasonable patient (material risk) state?

A. Yes, if the reasonably prudent physician would disclose the risk.
B. Yes, if the risk were material or important to a reasonable patient in Daughter's situation.
C. No, because the physician had no duty to disclose to Daughter.
D. No, because the reasonable person would not deem this genetic information important.
E. No, because the reasonable person would not take steps to detect and treat potentially curable cancer.

8. Nancy went to see Dr. Buck because she was having hip pain. During the course of the medical examination, Dr. Buck penetrated her vagina with his fingers. He did not inform Nancy that he would be performing a vaginal exam. He did not wear gloves. He did not use lubrication. He did not make a note of the vaginal exam in the record. Nancy sued Dr. Buck because she thinks that the vaginal exam was sexually motivated. But Nancy failed to designate any experts.

Nancy has a probably successful claim for:

A. Nancy cannot sue Dr. Buck, because they were not in a treatment relationship.
B. Nancy cannot sue Dr. Buck without an expert witness.
C. Medical malpractice.
D. Abandonment.
E. Battery.
F. Informed consent.

9. A physician wants to immediately terminate an HIV-infected individual from her practice. Is this permitted?

A. No, the physician must continue to treat the patient so long as her medical services are still needed or until the patient agrees to end the relationship.
B. No, if the termination is due primarily to patient's disability.
C. Yes, even if the termination is due primarily to patient's disability, so long as adequate notice is given.
D. Yes, if the termination is due to patient's failure to pay her bills.
E. Yes, if the termination is due to patient's disruptive behavior unrelated to her disability.

10. Maggie donated a kidney to Nate. The surgery to remove Maggie's kidney was successful. But when later doing the implant surgery on Nate, Surgeon accidentally stitched across the renal artery. This caused the organ to wither. It had to be removed.

Maggie can sue physician for:

A. Medical malpractice.
B. Informed consent, because had Maggie known the organ would be immediately removed, she would never have donated it.
C. Battery.
D. Abandonment
E. Maggie cannot sue Surgeon.

11. Dr. Yocum served as patient's physician from 1989 to 2008. During this time, Dr. Yocum tested patient's PSA levels as part of patient's annual physical exams. PSA tests may reveal evidence of prostrate diseases. A normal PSA test is in the 0 to 4 range. Results above 4 may indicate prostrate disease. Patient's PSA test results were 3.8 in July 2003, 5.7 in July 2004, 5.2 in July 2005, 5.86 in July 2006, 4.7 in July 2007, and 7.7 in July 2008. After receiving patient's PSA test results in July 2008, Dr. Yocum referred patient to an urologist. The urologist diagnosed patient with adenocarcinoma of the prostrate.

Following this diagnosis, in December 2008, patient obtained all his old PSA test results. On September 14, 2010, patient filed a medical malpractice action against Yocum, alleging that Yocum violated the applicable standard of care by failing to refer him to an urologist in 2004, 2005, 2006, 2007, and that this failure delayed his diagnosis until after his cancer had spread and his treatment options were limited. The jurisdiction has a three-year statute of repose.

Is patient's claim barred?

A. Yes, except as to the lack of referral in 2007, because the lawsuit was filed more than three years after the other negligent acts.
B. Yes, because the last negligent act was performed more than three years before the filing of the lawsuit.
C. Yes, because the first negligent act was performed more than three years before the filing of the lawsuit.
D. No, because the lawsuit was filed within three years of patient's discovery of Yocum's negligence.
E. No, because the lawsuit was filed within three years of the end of the course of treatment by Yocum.

12. Patient was a patient of Doctor. Patient had lab work performed in July 1997, May 1999, and October 2000. Each of these tests revealed that Patient has significantly elevated liver enzyme levels. But Doctor did not notify Patient of these abnormalities. After Patient had begun seeing another physician, in December 2010, Patient was diagnosed with liver cancer. On May 21, 2011, Patient filed a complaint against Doctor for medical malpractice. This jurisdiction has a four-year statute of repose.

Which of the following is true?

A. The claim is barred by the statute of repose.
B. The claim pertaining to the 1997 and 1999 tests is barred, but the claim relating to the 1998 test is not.
C. The claim is not barred by the statute of repose, because it was filed less than one year after the malpractice was discovered.
D. The claim is not barred by the statute of repose, because it was filed less than four years after the malpractice was discovered
E. The claim is not barred by the statute of repose, because of the course of treatment doctrine.

13. Patient was a patient of Doctor. Patient had lab work performed in July 1997, May 1999, and October 2000. Each of these tests revealed that Patient has significantly elevated liver enzyme levels. But Doctor did not notify Patient of these abnormalities. After Patient had begun seeing another physician, in December 2010, Patient was diagnosed with liver cancer. On May 21, 2011, Patient filed a complaint against Doctor for medical malpractice. This jurisdiction has a four-year statute of repose.

What is the latest date on which Jerry could have filed a non-barred lawsuit?

A. July 2001.
B. May 2003.
C. October 2004.
D. December 2014.
E. May 2015.

14. Even if well-performed, a sterilization procedure is not always effective in preventing pregnancy. Plaintiff had a tubal ligation (cutting of fallopian tubes) in October 2012. But in October 2014, she discovered that she was pregnant. She gave birth in June 2015. Plaintiff is now suing the surgeon who performed the sterilization for medical malpractice. This jurisdiction has a one-year statute of limitations and a one-year statute of repose for all claims against a healthcare provider.

Plaintiff must file / have filed her complaint by:

A. October 2013.
B. October 2014.
C. October 2015.
D. June 2016.
E. October 2016.

15. A patient arrives at the private medical office of Dr. Smith, bleeding profusely and in urgent need of medical attention.

A. Dr. Smith has no duty to treat the patient.
B. Dr. Smith has a duty to treat the patient, as a condition of having been granted a license and the privilege to practice medicine.
C. Dr. Smith has a duty to treat the patient, because the patient has an unmistakable emergency medical condition.
D. Dr. Smith has a duty to treat the patient, because sheis physically on Dr. Smith's professional premises.
E. Dr. Smith has a duty to treat the patient, because she had treated the patient for an unrelated condition just a few months earlier.

16. Philip Seaton is suing doctors after claiming he did not give surgeons consent to cut off his penis. Surgeons at the hospital in Kentucky said they had to take the drastic action after discovering a life-threatening cancer. Mr. Seaton is suing after claiming he suffered "mental anguish, pain, and has lost the enjoyment of life." Mr. Seaton said two doctors amputated his penis without his consent. The lawsuit states doctors had consent to "perform a circumcision and only a circumcision" but that Mr. Seaton did not consent to his penis being removed. Mr. Seaton said the surgeons should not have acted so quickly. "Sometimes you have an emergency and you have to do this, but he could have very easily closed him up and said, 'Here are your options. You have cancer.' The family would have said 'We want a second opinion. This is a big deal.'"

Seaton's best cause of action is:

A. Informed consent, because the amputation was not disclosed as a potential risk or consequence of circumcision.
B. Battery
C. Abandonment.
D. Malpractice.
E. No legal claims are possible, because no treatment relationship had been formed between Seaton and the defendant doctor.

17. The attending physician asks the nurse to obtain the patient's informed consent. Nurse does not completely understand the procedure and fails to mention that a recognized material risk of the procedure is death. Patient dies.

If Patient's family sues, who is the one most likely to be held responsible for failing to obtain informed consent?

A. The attending physician
B. The nurse
C. Both the attending physician and the nurse
D. The hospital
E. No one because Patient signed the consent form.

18. Patient was injured due to a medical error. Although physician was negligent, he shows that Patient did not comply with treatment recommendations.

Which of the following legal concepts is most likely either to bar or to reduce Plaintiff's award?

A. Contributory negligence
B. Mitigation of damages
C. Comparative negligence
D. Assumption of the risk
E. Noncompliance

19. Employee, who works with asbestos in his shipbuilding job, is evaluated by Physician each year for asbestos-related illnesses. Physician is hired by Employer, and Physician sends his report to Employer stating that Employee has a suspicious spot on his lung. Physician does not report this to the patient. The patient suffers harm from a delay in diagnosis.

Which of the following is MOST true?

A. Physician owes no duty to Employee because there is no physician-patient relationship.
B. Physician may be liable for battery.
C. Physician may be liable for informed consent.
D. Physician may be liable for medical malpractice.
E. Physician may be liable for both informed consent and medical malpractice.

20. On August 7, 2009, Surgeon failed to remove a sponge from Patient's body cavity during surgery. On January 13, 2014, Patient began to experience symptoms that later turned out to be associated with the sponge left in his body. On March 4, 2015, exploratory surgery revealed the sponge, and it was removed. This jurisdiction has a one year statute of limitations and a seven year statute of repose.

When is Patient's claim for malpractice against the original surgeon first BARRED?

A. January 13, 2015
B. August 7, 2015
C. March 4, 2016
D. January 13, 2021
E. March 4, 2022

21. Two doctors, a family practitioner and a cardiologist are having lunch. The family practitioner says, "I just saw a patient with abdominal pain." The cardiologist says, "It's probably just indigestion." The patient later goes into cardiac arrest and dies.

Which of the following is MOST true?

A. The widow can sue the cardiologist for malpractice. There was a treatment relationship, because the cardiologist offered medical advice relating to the patient's treatment.
B. The widow can sue the cardiologist for malpractice. There was a treatment relationship, because the family practitioner relied upon the cardiologist's medical advice.
C. The widow cannot sue the cardiologist for malpractice. There was a treatment relationship, because the physicians were discussing a specific patient.
D. The widow cannot sue the cardiologist for malpractice. There was no treatment relationship, because the cardiologist did not speak directly to the patient.
E. The widow cannot sue the cardiologist for malpractice. There was no treatment relationship, because this was an informal consult.

22. Patient continued to suffer severe pain after his knee replacement operation. Subsequent surgery showed that the surgeon had put the knee replacement joint in completely backwards.

What kind of an expert does plaintiff need to show a deviation from the standard of care?

A. Orthopedic surgeon
B. General surgeon
C. Surgeon who has practiced or taught for 4 of the past 6 years
D. Any witness who has the knowledge, training, or experience to know what a reasonably prudent physician would have done under the circumstances.
E. No expert is needed. Under the doctrine of res ipsa loquitor, the act speaks for itself. This is the sort of thing that does not happen unless there was negligence.

23. Connie wanted to help her ill grandfather by donating a kidney. Connie was deemed a compatible match. The operation took place in June 2014 at Hamline Hospital. Clinicians there did not know that grandfather was dying from terminal cancer that had not been properly diagnosed before the transplant operation. Grandfather had been admitted to Mitchell Hospital in March 2014, complaining of headaches. Medical checks revealed an elevated blood pressure. A CT scan was ordered, and the radiologist noted the presence of temporal bone irregularities, often a signal of multiple myeloma (a cancer originating in the blood's plasma cells, or another metastatic disease process). In September 2014, Hamline Hospital doctors discovered that grandfather was terminally ill with multiple myeloma. Grandfather died in November 2014. Connie filed a lawsuit against Mitchell Hospital clinicians, arguing that since her grandfather's CT scan had suggested cancer, she should never have had the transplant operation. Connie contends that the operation was useless in the face of fatal illness.

Connie's best theory is:

A. Medical malpractice
B. Battery
C. Informed consent
D. Abandonment
E. Connie has no claim.

24. Currently, hospitals do a manual count and intra-operative or post-operative x-rays to identify foreign objects. But some hospitals have begun using radio frequency identity chips (RFI) on all towels and sponges (the most frequent type of foreign object). By waving a wand type device over the patient, any objects can be readily identified. RFI kits like Clearcount are inexpensive and make "zero . . . the achievable standard for retained surgical sponges." In Minneapolis, if you were injured by a retained foreign object and the surgeon failed to use RFI, you could probably establish liability:

A. By showing that a reasonable physician should use RFI, because it is very effective
B. By showing that a reasonable physician should use RFI, because it is both very effective and inexpensive
C. By showing that using RFI is supported by evidence-based medicine and clinical practice guidelines
D. By showing that the reasonably prudent physician in Minneapolis uses RFI
E. By showing that the reasonably prudent physician in the United States uses RFI

25. Ken went into a Minneapolis hospital for surgery on his right hand. He came out with a 3rd degree burn on his right shoulder.

In his medical malpractice claim against the surgeon, Ken will need:

A. An expert witness familiar with the relevant standard of care in Minneapolis
B. An expert witness familiar with the relevant standard of care in a locality like Minneapolis
C. An expert witness familiar with the relevant standard of care in the state of Minnesota
D. An expert witness familiar with the relevant standard of care in the United States
E. No expert witness

26. On November 20, 2012, Sallie arrived at the Hospital emergency department with complaints of headache and neck pain. Dr. Frank, the ED physician, diagnosed Sallie as suffering from a tension headache and sent her home with a painkiller prescription. Sallie returned the next day with a worsening headache and inability to move her arms. Dr. Frank ran some more tests and discharged Sallie with instructions to get an MRI with a family physician. On November 23, Sallie arrived at a different hospital's emergency department. Staff there performed an immediate MRI, which revealed a cerebral aneurysm. By the time Sallie was prepared for neurosurgery, she has suffered bleeding and further damage to the blood vessel. This made the surgery more risk and difficult. Due to complications, Sallie was left a quadriplegic.

In a lawsuit against Dr. Frank, Sallie's expert established that had Dr. Frank properly discovered the aneurysm on November 20, there would have been a 2% risk of complication from an aneurysm repair surgery. By the time the aneurysm was discovered, the risk has risen to 45%.

A. Sallie can establish only "but for" causation.
B. Sallie can establish only "lost chance" causation.
C. Sallie can establish both "but for" and "lost chance" causation.
D. Sallie can establish neither "but for" nor "lost chance" causation.
E. There are insufficient facts to determine whether Sallie can establish causation.

27. Brandon suffered a herniated disc in his back that pushed against a nerve root and caused pain. Brandon unsuccessfully tried physical therapy. So, he elected to undergo a discectomy to repair the herniated disc. Physician told Brandon that he had an 85 percent chance that his condition would be better after the surgery, a 10 percent chance that there would be no improvement in his condition, and a less than 5 percent chance that the surgery would make his condition worse. Brandon disputed that physician warned him of the risk of an adverse outcome.

Brandon sued physician in a material risk (reasonable person) jurisdiction. Brandon did not retain an expert witness. Which of the following is MOST true?

A. The lack of an expert is no problem in a material risk jurisdiction.
B. Brandon needs an expert to establish what the reasonable physician would have disclosed under the circumstances.
C. Brandon needs an expert to establish BOTH what risks and dangers of the discectomy, even if the jury would determine the significance of those risks and dangers AND what a reasonable patient would have done in light of those risks and dangers.
D. Brandon needs an expert to establish that his current physical injuries were caused by the discectomy.
E. Brandon needs an expert BOTH to establish the risks and dangers of the discectomy AND to establish that his injuries were caused by nondisclosure.

28. Physician has a patient who has not been compliant with the physician's recommended regime for taking hypertension medications. The physician has repeatedly explained the issues of noncompliance and has rescued the patient on several occasions with emergency medication, usually in the local emergency room over a weekend. The patient understands but stubbornly refuses to comply.

Which of the following is MOST true?

A. The physician may not terminate the relationship, so long as the patient has a continuing need for treatment for the same condition physician is treating.
B. The physician may terminate this relationship immediately, because of the patient's non-compliance.
C. The physician may terminate this relationship with adequate notice.
D. The physician can stop seeing this patient immediately. There is no need to terminate a treatment relationship, because in light of the patient's non-compliance, no treatment relationship was even formed in the first place.
E. The physician can stop seeing this patient immediately. There is no need to terminate a treatment relationship, because in light of the patient's non-compliance, the treatment relationship was effectively terminated by the patient's conduct.

29. EMT Brandon came to work feeling very tired and decided to nap before doing his equipment and vehicle checklist. After about 45 minutes, the alarms went off, and Brandon and his EMT partner were dispatched for a seizure. Brandon and his partner's patient was still actively seizing when they arrived at the scene. Brandon discovered that the previous shift had used all the Valium and failed to replace it. As a result, Brandon could administer no medication to stop the seizure. Nevertheless, the patient soon stopped seizing and suffered no apparent adverse consequences.

If patient sues Brandon for medical malpractice:

A. Patient will probably lose, because Brandon owed the patient no duty.
B. Patient will probably lose, because of implied consent in an emergency.
C. Patient will probably lose, because the patient suffered no actual damages.
D. Patient will probably win, because Brandon was negligent.
E. Patient will probably win, because Brandon was negligent AND that negligence caused the seizure.

30. Which of the following situations MOST clearly involves the patient's consent?

A. Mr. Yocum shouts, "No! No! No!" when you try to move him to the cot, but his wife says that "No" is the only thing he can say after his stroke and that he really doesn't mean it.
B. Ms. Bentley, in stage 7 Alzheimer's, opens and swallows when a spoon of applesauce is placed in her mouth.
C. Mr. Stagg, who is drowsy but quite pleasant, has been drinking wine for "2 or 3 days," and cannot remember if he is in Philadelphia or Paris, does not object when Paramedic performs a finger stick to check his blood glucose level.
D. Mrs. Alban offers Paramedic her left arm after he explains to Mrs. Alban that he needs to start an IV to give her medication to relieve the pain from her fractured right humerus.
E. Ms. Cross, who was at first quite agitated, allows Paramedic to examine her after she was placed in four-point restraints.

31. A dentist filling a child's cavities used a newly developed anesthetic that was more effective than Novocain. However, it carried a 1% risk of causing a serious seizure when administered to children, which the dentist did not mention to the child's mother. The child's dental work was completed without any problem, but the mother looked up the anesthetic on the Internet and learned about the risk. She loudly complained to the dentist that she never would have consented to use of the anesthetic has she known of the risk. But the dentist argued that the new anesthetic was justified in the child's case because otherwise the child would not have been willing to sit for the dental work.

Does the mother have a cause of action against the dentist?

A. Yes, because the reasonable person would have considered information about the risk important or material in making the treatment decision.
B. Yes, because the mother would not have consented to the use of the anesthetic, if she had known of the risk of seizure.
C. Yes, because neither the mother nor the reasonably prudent patient would not have consented to use of the anesthetic, if either had known of the risk of seizure.
D. No, because the dentist used his best judgment in deciding that the benefits of using the anesthetic outweighed the risk.
E. No, because the child suffered no harm from use of the anesthetic.

32. Patient died from complications stemming from the surgical removal of a pelvic mass by defendant Dr. Yang. During the surgery, the decedent's bladder was torn and her bowel was perforated. Shaffer filed an action against Yang for medical malpractice. Arkansas adheres to the "same or similar" locality rule. Plaintiff called Dr. Tenhoopen, an obstetrician/gynecologist who practices in Rochester, N.Y., as an expert witness. Tenhoopen testified that Yang should have performed more tests, obtained a detailed medical history, and not attempted to perform the surgery laparoscopically. He admitted he knew nothing about Hot Springs, Ark., where the surgery in question was performed, or the standard of care that prevailed there.

Defendant moved for a directed verdict at the close of the plaintiff's case. The Court should:

A. Grant the motion, because plaintiff's evidence is insufficient to establish an element of plaintiff's medical malpractice claim.
B. Grant the motion, because expert witnesses must come from the same locality as the defendant.
C. Grant the motion, because expert witnesses must come from the same state as the defendant.
D. Deny the motion, because the standard of care in a medical malpractice case may be established through analogy to the standard of care in a similar location. It was irrelevant that Tenhoopen testified that he did not know how large Hot Springs is, that he was unfamiliar with the physicians and medical community in Hot Springs, that he did not know how many ob/gyns practice in Hot Springs, and that he did not know how many hospitals there are in Hot Springs.
E. Deny the motion, if Tenhoopen was familiar with the national standard of care, because all ob/gyns are held to the same national standard of care

33. A woman underwent surgery to remove excess skin from her body following a substantial weight loss. She expressly refused to consent to a breast lift or enlargement. Nevertheless, during the surgery the surgeon enlarged her breasts from a size 34B to a 40DD.

Her best cause of action is:

A. Informed consent
B. Medical malpractice
C. Battery
D. Abandonment
E. She has no cause of action, since she has not been harmed.

34. Mississippi law provides a two-year statute of limitations and a seven-year statute of repose. Elizabeth had surgery on January 1, 2008. She first discovered (or could have discovered) that a foreign object had been left in her abdomen on January 1, 2014. If Elizabeth wants to file a malpractice lawsuit against her surgeon before the lawsuit becomes barred, she must file on or before:

A. January 1, 2010: Her lawsuit is already barred.
B. January 1, 2015: Her lawsuit is already barred.
C. January 1, 2016
D. January 1, 2021
E. January 1, 2023

35. Martha was injured in a car accident and taken to Hospital for treatment. While at Hospital, Martha was treated by the ER physician who performed a physical exam and ordered an EKG, chest x-ray, and CT scan. The ER physician found the physical exam and tests revealed nothing abnormal other than tenderness to the chest, although Martha complained of chest pain and shortness of breath.

Martha was prescribed Motrin and Lortab for her chest pain. When she was discharged, she was told to follow up with her private physician and to seek medical care immediately if she suffered any new symptoms. The next day, while at home, Marth's husband discovered that she had stopped breathing. She was taken back to Hospital, where she was pronounced dead. The cause of death was later determined to be pulmonary embolism. In the subsequent malpractice lawsuit against Hospital, plaintiff relief solely on the expert testimony of Dr. Butt.

Hospital maintains that Dr. Butt should not have been accepted as an expert in emergency medicine because he was not qualified to testify to the standard of care in emergency medicine. Hospital argues that Dr. Butt is a family physician and not an emergency physician, that Dr. Butt is not board-certified in emergency medicine, and that although Dr. Butt once practiced in emergency rooms, he has not done so since the mid-1990s.

Plaintiff argues that Dr. Butt was properly accepted as an expert in emergency medicine. Plaintiff states that Dr. Butt is a specialist in both family medicine and emergency medicine, and has thirty-four years of experience in emergency medicine. Plaintiff asserts that because Dr. Butt has treated numerous patients who have had pulmonary embolism, he was qualified to testify as an expert in this case.

The trial court should:

A. Permit Dr. Butt to testify, because he is qualified
B. Not permit Dr. Butt to testify because even though he is qualified, he is not a credible witness
C. Not permit Dr. Butt to testify, and dismiss plaintiff's lawsuit
D. Not permit Dr. Butt to testify, but allow plaintiff's lawsuit to proceed without an expert witness
E. Not permit Dr. Butt to testify, but allow plaintiff's lawsuit to proceed on a res ipsa theory

36. On December 7, 2014 at 7:00 p.m., Mr. Jones, age 86, presented to the Emergency Room of Morton Community Hospital ("Morton Hospital"). Mr. Jones complained of extreme pain in his right side. Jones had previously suffered a stroke and had some expressive aphasia, but was able to communicate his condition. Mr. Jones' condition significantly deteriorated. Still in the waiting room, he began to groan, hyperventilate, and vomit. The emergency room nurses allegedly did not attend to Mr. Jones despite his and his family's insistence. He went into cardiac arrest and finally was taken back to the emergency treatment room at 8:00 p.m. and seen by an emergency room physician employed by Morton Hospital. Resuscitation efforts were unsuccessful and Mr. Jones was pronounced dead at 8:47 p.m. An autopsy was performed and the cause of death was determined to be a massive "ruptured abdominal aortic aneurysm," a fatal condition if not surgically treated

Plaintiff filed a lawsuit in Ohio which recognizes the "loss of chance" theory. Plaintiff's complaint alleged that the defendants negligently failed to timely diagnose and treat Mr. Jones' medical condition, resulting in his untimely death. Plaintiff's expert witness testified that Mr. Jones had a 40% chance of survival if operated at the time of arrival at the hospital, but that at 8:00 p.m. when Mr. Jones was brought back to the emergency room in cardiac arrest, he had less than a 10% chance of survival.

If the jury believes that the defendant's negligence decreased plaintiff's chances of recovery or survival, then:

A. Plaintiff still loses because plaintiff probably (60%) would have died even if defendant had not been negligent.
B. Plaintiff still loses because there is no "but for" causation, since the most likely cause of plaintiff's death is not defendant's negligence.
C. Plaintiff can win and recover the value of a 40% lost chance of survival.
D. Plaintiff can win and recover the value of a 30% lost chance of survival.
E. Plaintiff can win and recover the value of a 10% lost chance of survival.

37. Hutt signed the following hospital consent form: "I, the undersigned, agree to be admitted to Hospital for purposes of removing my gall bladder, using a telescopic camera and instruments to avoid a large abdominal wound. I further authorize Hospital personnel to perform such laboratory examinations of blood, serum, or other body fluids as may be necessary to confirm the presence or absence of communicable diseases including, but not limited to, hepatitis B, human immunodeficiency virus (AIDS), and syphilis."

If his gall bladder surgery goes badly, Hutt probably CANNOT make a plausible claim for:

A. Battery
B. Informed consent
C. Medical malpractice
D. Abandonment
E. Hutt can probably successfully make any of these claims.

38. Chapman argues the hospital negligently failed to obtain 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. Furthermore, he refused to follow physicians' advice regarding diet and smoking. Medical records at the time of the amputation fail to note that Chapman was counseled regarding his disease, 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 material risk (reasonable patient) jurisdiction, Chapman will have the most difficulty establishing:

A. Duty of disclosure
B. Breach
C. Causation
D. Injury
E. Chapman can most probably satisfy any of these elements.

39. In October 2014, Sanchez underwent spinal fusion surgery at Spohn-Shoreline. 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 sher 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. The nurse and CNA were hospital employees who have never been disciplined for such conduct before. Patient has potentially valid claims against the hospital under a theory of:

A. Respondeat superior
B. Ostensible agency
C. Negligent credentialing
D. Negligent retention
E. Negligent selection

40. Plaintiff consents to a medical procedure. But the physician did not disclose all the procedure's significant risks. The plaintiff is subsequently injured.

In making a claim for informed consent, Plaintiff must establish everything EXCEPT:

A. The injury resulted from the procedure performed by the defendant.
B. Had physician disclosed, plaintiff would not have consented.
C. Had physician disclosed, the reasonably prudent patient would have consented.
D. The procedure was not performed according to the standard of care.
E. The reasonable patient would have considered the procedure's risks important or material to her treatment decision.

41. A ten-year-old boy died of injuries sustained when he was struck by an automobile driven by an eighty-five-year-old man. The driver was taking several prescription medications. The boy's estate sued the driver's physician, asserting that the medications had rendered the driver unable to drive safely and caused him to lose consciousness while driving.

The legal theory that BEST supports plaintiff's claim is

A. Informed consent
B. Medical malpractice
C. Battery
D. Negligence
E. Abandonment

42. Physician provides treatment (cardiopulmonary resuscitation, CPR) that the patient previously specifically decided against by signing a do not resuscitate order (DNR).

Patient's BEST cause of action is:

A. Informed consent
B. Abandonment
C. Battery
D. Medical malpractice
E. Physicians need not follow a DNR order.

43. In which of the following circumstances was a treatment relationship probably formed?

(I.) Defendant physician placed prescriptions by phone as an accommodation to plaintiff, an extended family member who subsequently developed glaucoma. Plaintiff testified that he inquired of physician concerning eye drops and drug. Physician testified that he warned plaintiff that he did not like plaintiff using the drugs and advised him to see his ophthalmologist.

(II.) Plaintiff telephoned defendant physician, who had treated her previously for an unrelated condition. Physician listened late at night to her recital of symptoms. Physician told plaintiff that he could offer no advice until he was able to examine her.

(III.) Sole contact between plaintiff and physician was a telephone call in which the physician informed plaintiff of the hospital's admission policies. Specifically, after ascertaining that plaintiff had a private physician, defendant physician informed plaintiff that she could not be admitted unless arrangements were made for admission by the private physician. But plaintiff was unable to contact the private physician and suffered cerebral hemorrhage.

A. I only
B. I and II
C. I and III
D. II and III
E. I and II and III

44. In December 2009, Terri had breast reduction surgery. But she was surprised and dismayed by the presence of hypertrophic scars. Terri has sued the surgeon and the case has gone to trial. The following three witnesses testified:

Dr. Cooper, plaintiff's expert: Dr. Cooper reviewed plaintiff's medical files and records and found no fault with the surgery itself. He testified that Terri's poor understanding of the English language prevented the signed consent from being valid. Dr. Cooper further testified that he has personally performed nearly 1000 breast reduction surgeries and that in each case he discussed the scarring and other risks involved. Each of those patients elected to undergo the surgical procedure despite the stated risks.

The surgeon: The surgeon testified that consent is an ongoing process of discussion between physician and patient, and that not all risks or matters of discussion are set forth in the signed consent form. Plaintiff testified that she had difficulty reading English and did not understand the consent form that she signed for the surgery. She did not, however, ask to have a Spanish consent form or an interpreter provided, although she did sign a consent form in Spanish for general

medical services to be provided by the hospital. Moreover, although Terri claimed to have difficulty understanding English when spoken, she testified that she acted as a translator for another Spanish-speaking patient while at the hospital.

Terri: Terri testified on direct examination that while she understood the basic nature of breast reduction surgery, had she known about the potential for wide scarring she probably would not have undergone the procedure. On cross-examination, Terri admitted that regardless of the risks involved, she still would have had the surgery because she really wanted to alleviate the pain in her back and shoulders.

The jury is MOST likely to find that, in an action for informed consent, Terri CANNOT satisfy the element of:

A. Treatment relationship
B. Duty
C. Breach
D. Causation
E. Damages

45. Around 20 states allow some form of "lost chance" causation. Ohio is one of those states. In Ohio, Dr. Sonnaben misread an MRI that showed Clay had suffered a small stroke. Several days after being released from the hospital based in this mistaken reading, Clay suffered, as a certain consequence of the release, a much more severe stroke that left him permanently disabled. Plaintiff and defense experts agreed that even had Clay been properly diagnosed and treated, there was a 10% chance he still would have had the second stroke.

Clay can recover:

A. Nothing
B. 10% of his damages
C. 50% of his damages
D. 90% of his damages
E. 100% of his damages

46. Physician's patient, a relatively young man, has come to Physician with back pain. After extensive diagnostic studies Physician recommends that he have a laminectomy, a type of back surgery. Unfortunately, Patient is easily upset and a bit frightened when he asks Physician if the procedure is dangerous. "Not any more than any other surgery," Physician reassures him. But Physician exercises the therapeutic privilege and does not go into all of the risks and consequences because Physician is concerned that Patient will be frightened into rejecting the treatment he needs. The surgery went well, but Patient slipped and fell on his way to the bathroom while in the hospital and ended up partially paralyzed. Patient sues the hospital for negligence and sues Physician for not giving him more information before the surgery about the risks and consequences of falls after spinal surgery.

Which of the following is the MOST likely outcome:

A. The courts will ultimately decide that you breached the standard of care by failing to disclose all of the material facts the patient needed to make his own medical decision.
B. The courts will ultimately decide that your patient has no case against you because the use of therapeutic privilege by physicians is always justified.
C. The courts will conclude that your patient has no case against you because there is no cause of action for violating informed consent.
D. The courts will conclude that your patient has no case against you because he assumed the risks of surgery, which always has the possibility of a bad outcome.

47. Contrary to Physician's recommendation to Patient that his condition be treated with allopathic medical procedures, Patient insists that you also employ a treatment using complementary and alternative medicine (CAM). The procedures Patient wants do not appear to be harmful, and Physician is inclined to go along with Patient's request in order to secure his cooperation with the treatment Physician recommends. Physician's malpractice insurer is likely to recommend that Physician:

A. Never integrate CAM with your practice.
B. Carefully secure your patient's informed consent for CAM.
C. Document an assumption of risk by your patient.
D. Integrate CAM as a normal part of your medical practice as a practical and inexpensive alternative to traditional medicine, keeping in mind HIPAA rules.
E. Do not provide any medical treatment to patients demanding CAM.

48. While performing abdominal surgery, Physician unexpectedly discovers an aortic aneurysm close to breaking. That, of course, was NOT intended to be a part of the original surgery to which the patient has consented. Knowing that an abdominal aortic aneurysm is potentially life threatening, Physician proceeds to repair it and go on to complete the surgery originally intended. Patient decides to sue Physician for going beyond the scope of the surgery originally intended.

What is the MOST likely outcome of the suit?

A. Under the Canterbury rule Physician must disclose important facts relating to a proposed surgery before going ahead. It makes no difference that the surgery was successful. Physician will probably lose the suit.
B. Applying the doctrine of informed consent to the immediate case, it is clear that Physician has committed a battery by not obtaining patient consent to the surgery on the aneurysm and Physician will probably lose the suit.
C. Physician will probably lose the suit because all four elements of malpractice (the "4 Ds") are clearly present in this case.
D. Physician will probably win the suit because informed consent may not be required when an apparent emergency exists.

49. To calm his nerves, a surgeon had a couple of drinks before performing a surgical amputation on a patient. Afterwards, the surgeon learned that he removed the LEFT foot of a patient whose diseased RIGHT foot was supposed to be removed. Two days after the one-year anniversary of the botched surgery, the surgeon is sued by the patient. Your factual investigation with consulting experts confirms that the surgeon's surgery clearly fell below the standard of care. Your legal research reveals that the statute of limitations for medical malpractice is one year.

What is the likely outcome of the law suit?

A. The suit will be dismissed.
B. Res ipsa loquitur controls, and the jury will award a verdict for damages against the surgeon.
C. It is a prima facie case, and the jury will award a verdict for damages against the surgeon.
D. It is a case so outrageous that the jury will award a verdict for punitive damages against the surgeon.
E. Under habeas pedes, the jury will award a verdict for punitive and compensatory damages against the surgeon.

50. An intoxicated vagrant who has been sleeping in a cardboard box under a freeway overpass has stumbled into your client's clinic with a nasty, infected wound on his left arm. He explained that he was cut while fighting with another vagrant over a half empty bottle of wine. Although the physician is not running a charity clinic, she agreed to clean and bandage his wound without charge. She also gave him some powerful antibiotics. The physician warned the vagrant that he must take all of the antibiotics without interruption and asked him to return to be checked and have his dressing changed. He sells the antibiotics on the street. He didn't like them because they didn't give him a high. He didn't replace the bandage when it became filthy and he did not return to see the physician. But he did fall asleep in the doorway of a legal aid clinic. When the lawyers opened the office in the morning, they glanced at his infected wound, asked who his doctor was, and they sued your client. The vagrant was particularly eager to get money from the 'rich' doctor.

You will probably advise your client:

A. You had a duty to treat the patient at the recognized standard of care, but the patient was non-compliant and he implicitly rejected any further care by you. Ultimately, you should not be found liable.
B. You have abandoned the patient and thereby committed a tort for which you can be held liable.
C. You have failed to practice at the accepted standard of care and can be liable for the harm that has resulted.
D. Your conduct was wreckless, and you may be charged with a crime.

51. Dr. Smith, a neurologist, has been hired by an insurance company to conduct an independent medical examination of a patient who is claiming neurological injury at the workplace.

Dr. Smith's principal duty is to:

A. Render treatment within the standard of care.
B. Communicate with patients.
C. Apologize for medical errors.
D. Make the medical report as favorable to the insurance company as possible.
E. Provide an honest and medically competent report to the insurance company on the findings of your medical examination of the patient.

52. A patient with no insurance who has been paying cash for treatment has fallen behind on his payments to your physician client. When he shows up for his regularly-scheduled cardiac appointment, he reports that he has chest pains. Your client tell him that she will not see him or treat him until he pays his outstanding bills.

Your client should:

A. Hire a debt collection attorney to track him down, sue him, and garnish (seize) his wages until you are paid in full.
B. Phone and write to him before suing him for non-payment to see if easy repayment terms can be worked out.
C. Prepare to be sued for abandonment.
D. Write the account off as a bad debt and have your receptionist phone him and tell him not to come back.
E. Obtain a judgment and get a writ of execution to seize his property and sell it at a public auction.

53. In a medical malpractice trial, the standard of care accepted within the medical community is:

A. Presented as evidence in Jury instructions.
B. Given in legislative statutes.
C. Expressed as evidence in courts through the testimony of expert witnesses.
D. Set by the Board of Medicine.
E. Set by the U.S. Department of Health and Human Services.

54. Surgeon is on-call at an ER when a patient arrives with an abdominal aortic aneurysm. Unfortunately, the patient arrives just as the ER doctors are undergoing a shift change so there is a delay in reaching the correct diagnosis. It is 3:00 a.m. when the ER doctor finally recognizes the symptoms and phones Surgeon for emergency surgery. Surgeon's cell phone is on her night stand and is set to vibrate rather than to ring, so she does not awaken to answer the call. The patient is dead by sunrise. The following week, the lawyer of the patient's family gives notice that he is going to sue everyone because of the delay in treatment.

Your BEST legal advice to Surgeon is that:

A. The ER doctors are liable because they fumbled the case diagnosis during shift change, but you are not responsible because you could not have changed the result.
B. You may be liable under respondeat superior.
C. You may be liable under the 'Captain of the Ship' doctrine.
D. Nobody is liable because you and the ER doctors acted appropriately given the circumstances surrounding the event.
E. You may be liable for the tort of abandonment.

55. A Minnesota just recently issued a medical malpractice verdict for $9.137 million. A 51 year old auto mechanic was paralyzed, because he had been negligently dehydrated while under anesthesia. The damages included: $2.1 for future medical expenses, $1 million for future lost earnings, $600,000 for past pain and suffering, $262,000 for past medical expenses, $175,000 for past lost earnings, and $5 million for future pain and suffering. Suppose this verdict had been issued in a state, like California or Texas, with a $250,000 cap on non-economic damages.

What would be the new allowable damages total?

A. $9.137 million
B. $4.127 million
C. $3.787 million
D. $250,000

56. Six-year-old inpatient Jack Adcock died after a hospital physician interrupted attempts to save his life via cardiopulmonary resuscitation when she mistook him for another child who was under a "do not resuscitate" order. The physician, who had never been previously disciplined, was found guilty of manslaughter by gross negligence for failures that led to Jack's death. The physician said in her defense the hospital had made her work a 12-hour shift with no break and there was a lot of miscommunication in the ward.

In a civil liability lawsuit against the hospital, the most promising theory would be:

A. Respondeat superior
B. Negligent selection
C. Negligent retention
D. Negligent supervision
E. Negligent utilization review

57. In the same case as described in problem 56, Jack had Down's syndrome. If the physician refused CPR specifically because of this condition (one that would not make CPR contraindicated), then:

A. The physician probably violated the ADA
B. The physician probably violated EMTALA, by failing to stabilize an emergency medical condition.
C. Both A and B
D. Neither A nor B

58. Which of the following excerpts of expert witness testimony is MOST likely sufficient to establish but for causation?

A. "Patient would have had a real chance versus no real chance of saving the finger."
B. "More likely than not, Patient would have wound up with a better result."
C. "Defendant reduced Patient's likelihood of achieving a better outcome."
D. "An earlier consultation with a specialist might have yielded a fifty-fifty chance of some recovery."
E. None of the above would be sufficient.

59. Annie was examined by a physician in the Roseville Hospital ED consistent with hospital protocols. She was diagnosed with influenza, and discharged in the early morning. Sadly, the diagnosis was incorrect, and Annie returned to the hospital later that night, suffering from a heart attack, and died.

Which of the following is MOST probably true?

A. Hospital violated its EMTALA screening duty
B. Hospital violated its EMTALA stabilization duty
C. Both A and B
D. Neither A nor B

60. Dr. Bone, an orthopedic surgeon, performed surgery on Lilly's elbow. Now Lilly cannot bend her arm past an arc of 20 (normally it is 170 degrees). Lilly would MOST probably be able to recover damages from Dr. Bone, if:

A. Dr. Bone assured her in writing that she would recover full use of her elbow
B. Reasonably prudent doctors usually get better results from this surgery than Dr. Bone
C. Dr. Bone did not use a technique that might have given her greater movement
D. Dr. Bone usually operated on knees, rather than elbows

Short Answer Question 1

- 1 Question worth 30 points
- Limit your response to 2000 words. This is an outside limit and not a target.

In October 2015, California Governor Jerry Brown signed the End of Life Option Act (ABX 15) which had earlier passed both houses of the state legislature. Basically, this law (once it goes into effect) will allow California physicians to prescribe lethal doses of drugs to terminally ill patients who want to hasten their deaths. The provision of aid-in-dying drugs are permitted, so long as patients and physicians follow certain procedures for making and fulfilling requests.

One provision of the End of Life Option Act (to be codified at California Health & Safety Code § 443.5(a)(1)) requires, among other things, that the attending physician "confirm that the individual is making an **informed decision** by discussing with him or her all of the following:"

(A) His or her medical diagnosis and prognosis.
(B) The potential risks associated with ingesting the requested aid-in-dying drug.
(C) The probable result of ingesting the aid-in-dying drug.
(D) The possibility that he or she may choose to obtain the aid-in-dying drug but not take it.
(E) The feasible alternatives or additional treatment options, including, but not limited to comfort care, hospice care, palliative care, and pain control.

Common law (tort based) informed consent in California is much the same as in Minnesota. That is, a California physician has a duty to disclose that information which would be deemed material or significant to the reasonable patient in the patient's situation. So, arguably, a California physician already would have had a legal duty to disclose all the information enumerated in new section 443.5 to a terminally ill patient requesting aid-in-dying drugs.

There may have been political reasons to include this "safeguard" language in the statute. Do NOT address those. But consider whether and/or how the statute better assures that these patients are informed. You do NOT need to separately address each of the following questions. They are illustrative only. Does the statute merely codify already-existing common law duties? Does it expand those duties? Does it otherwise better assure that physicians will disclose this information?

Long Answer Question

- 1 Question worth 60 points.
- Limit your response to 3000 words. This is an outside limit, not a target.
- Use the statutory appendix to the extent that it is relevant to your legal analysis. These statutes are controlling to the extent that they directly address a matter. Otherwise, Minnesota law, as covered in the course materials, controls.

Brendan is a Saint Thomas University law student who works part-time for Trader Joes grocery store in Minneapolis. On June 6, 2014, when walking to the law library to study for his *Health Law* exam, Brendan felt a serious pain in his leg. The pain made it difficult for him to walk. Brendan went to a chiropractor that afternoon. The chiropractor referred Brendan to an orthopedic specialist, Dr. Kelly. Fortunately, Brendan had health insurance coverage from ETNA through Trader Joes. Brendan was able to see Dr. Kelly only two days later.

During his examination at Dr. Kelly's office, Brendan requested an MRI. But Dr. Kelly said that she could not give him an MRI. (Brendan later requested a copy of his medical records under HIPAA. He learned that Dr. Kelly had judged the MRI to be medically indicated. But ETNA had refused to approve payment.) Over the following weeks and months, Brendan repeatedly asked for an MRI. But both ETNA and Dr. Kelly refused his request. Instead, Dr. Kelly provided other ETNA-approved treatments, including an epidural and physical therapy.

Finally, five months later, ETNA approved the MRI. It was performed. But, by then, it was too late. At that time, Dr. Kelly diagnosed Brendan with a very large cancerous mass. Drug and other treatment to eliminate the mass did not work. In order to save Brendan's life, Dr. Kelly told Brendan that surgeons would have to amputate his left leg, part of his pelvis, and a section of his spine. Surgeons performed that operation, the next day, at Winona Memorial Hospital.

Since Winona is a small city, its surgeons perform only a relatively limited volume of major surgeries. Studies show that when clinicians do not do something often and it is complicated, they do not perform it as well as clinicians who perform that intervention frequently. Indeed, the risk of serious side effects (like an infection) from Brendan's procedure at a high volume hospital is 1 in 1000. The risk at Winona Memorial is 1 in 40.

After the operation, Brendan was transferred to the surgical intensive care unit for, according to his medical orders, "96 hours of observation and recuperation." Winona Memorial runs a "closed" ICU, meaning that patients there are treated by critical care specialists ("intensivists") rather than by their regular attending physician.

But ETNA refused to cover Brendan's ICU stay beyond the initial 24 hours. Even though the physicians work in the ICU and wear Winona Memorial white coats with Winona Memorial name tags, they do not actually work for Winona Memorial. Winona Memorial uses contract doctors to staff its ICU. Technically, the ICU physicians work for a Delaware company called Glasgow Healthcare. Brendan had never heard of Glasgow Healthcare and no one told him that the doctors in the ICU were not employed by Winona Memorial.

Nevertheless, the ETNA customer service representative told Brendan: "You are responsible for everything." Even though the Winona Memorial doctors work in Minnesota, their employer, Glasgow, is out of state. Because the doctor's paychecks come from Delaware, ETNA explained, the physician's services are out of network. "Out-of-network" means that the services are not covered.

Winona Memorial demanded that Brendan immediately tender $6000 for the remaining three days in the ICU. But Brendan, a poor law student, did not have it. So, Brendan's ICU physician at Winona Memorial discharged him to a skilled nursing facility. At the SNF clinicians detected an infection that required Brendan be readmitted to Winona Memorial. There, physicians had to cut away even more flesh from around Brendan's hip area to keep the infection at bay. Things were touch and go. Brendan had to remain at Winona Memorial for twelve days. Fortunately, Brendan eventually recovered.

Brendan has come to your law firm, because he wants to bring a malpractice action against any and all parties culpable for his injuries. So far, a colleague in your law firm has already retained three expert witnesses.

1. Dr. Matt is from Los Angeles and has never been to Minnesota before. Dr. Matt's declaration states that a reasonable physician would not have discharged Brendan just 24 hours after such a major surgery. Dr. Matt's declaration further states that had an MRI been performed when Brendan first asked, the mass in his leg probably would have been detected early enough that amputation probably would not have been necessary.

2. Dr. Wilkins is from the School of Medicine at the University of Minnesota. Dr. Wilkins' declaration states that had Brendan remained in the ICU, there is a one in three chance that the infection could have been averted.

3. Dr. Monee is an economist from Mankato State University. His declaration states that Brendan's economic and noneconomic damages from the amputation are $3 million. Dr. Monee's declaration further states that Brendan's economic and noneconomic damages from the infection are $65,000.

You are an associate at the firm. You have just been assigned to this case. The senior partner has asked you to assess and evaluate all the civil liability claims that Brendan can assert against any party. The partner wants to be sure that you have carefully and comprehensively considered all avenues of relief. So, the senior partner has asked you not to omit discussion of a claim that you determine will probably ultimately fail. Instead, if a claim seems implicated by the available facts and evidence, she wants you to discuss that claim and explain why it fails.

Statutory Appendix for Long Answer Only

Exam Stat. 100

This state of 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 discovery of the facts constituting the health care liability or facts 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 five 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.