Health Law Quality & Liability

Professor Thaddeus Mason Pope
Final Exam Feedback (Fall 2015)

Multiple Choice 60 x 1 = 60

1. A	11. E 50%	21. E	31. E 90%	41. D 85%	51. E 90%
2. B	12. A 95%	22. E 95%	32. A 60%	42. C 95%	52. C 95%
3. D	13. C 95%	23. E 80%	33. C 95%	43. A 85%	53. C 95%
4. C	14. A 95%	24. D	34. B	44. D 85%	54. E 65%
5. A 85%	15. A 95%	25. E	35. A 95%	45. E 50%	55. C 85%
6. E 95%	16. B 95%	26. C 70%	36. D 95%	46. A 50%	56. D 50%
7. C 95%	17. A 90%	27. E 85%	37. A 30%	47. C 70%	57. A 75%
8. E 95%	18. C 80%	28. C	38. C 50%	48. D	58. B 60%
9. B	19. A 90%	29. C	39. A 95%	49. A 95%	59. D
10. E	20. C 80%	30. D	40. D 85%	50. A	60. A 65%

Short Answer 1 x 30 = 30

Duty	
Unclear what a reasonable patient would deem material (especially information that they need not consume).	10
It is difficult to prove what a reasonable patient would deem material. This statute expands duties because this was not a legal option before. A reasonable patient would not deem illegal options material. The statute also demands "confirmation" and common law informed consent does not.	
Causation	
Difficult to prove causation	5
Other	
Avoid possible exceptions (like common knowledge; therapeutic privilege)	5
Legal incentive other than tort liability (e.g. damages too low)	5
Overall Cogency & Clarity	5
TOTAL	**30**

Long Answer 1 x 60 = 60

Brendan v. Dr. Kelly (medical malpractice)		
Duty – Brendan has no qualified expert witness to establish SOC.	2	
Duty - Kelly's contemporaneous record indicates SOC.	2	
Breach – If it were a duty, then failure to order MRI is breach. Lack of payment does not affect the duty.	2	
Causation - Dr, Matt is qualified for causation.	2	

Damages – Dr. Monee can establish damages.	2	
Defense - SOL 1 year from discovery	B	
Brendan v. Dr. Kelly (informed consent)		
Duty – a reasonable person in Brendan's shoes would want to know that an MRI would be useful.	2	
Duty - Exception – Brendan already apparently knew of its value.	2	
Breach – Dr. Kelly did not disclose the MRI as a recommended diagnostic.	2	
Causation – Had Brendan and a reasonable patient known of the MRI recommendation, they would have proceeded to obtain one even if out-of-pocket.	2	
Brendan v. Dr. Kelly (negligent referral)		
A reasonable physician would not have made the referral Dr. Kelly did.	--	
Brendan v. Surgeon (informed consent in material risk MN)		
Duty - A reasonable person would want to know that the risks here were 25 times greater than at nearby alternatives.	2	
Breach – Surgeon did not disclose this risk (else presumably B would not proceed).	2	
Causation – Had Brendan and the reasonable patient known of the higher risk, they probably would have had the surgery elsewhere. They would have thereby probably avoided injury.	2	
Brendan v ICU doctor		
Duty – there is no qualified expert to establish the SOC was to discharge later. Dr. Matt not qualified in Minnesota.	2	
Breach – if there was a duty, early discharge was breach.	2	
Causation - Dr. Wilkins is a qualified expert. But his testimony does not establish causation. Wilkins testifies that Brendan would probably be injured even if he remained in the ICU.	2	
Causation – Brendan can still establish lost chance causation with Dr. Wilkins	2	
Damages – with lose chance causation		
Abandonment – Discharge may constitute a separate abandonment tort	B	
Brendan v. Glasgow		
As the employer of the ICU physicians, Glasgow is vicariously liable in respondeat superior for any negligence established against the ICU physicians.	5	
Brendan v. Hospital		
The hospital is vicariously liable for the negligence (if established) of the ICU physicians. This is on a theory of ostensible agency. (Less probably for surgeons.)	5	
Brendan v ETNA (MRI coverage)		
Since this is employer-provided coverage and concerns a denial of benefits, ERISA preempts any other claim.	5	
ETNA already actually paid for the MRI (the maximum allowed damages in any case).	2	
Brendan v ETNA (ICU coverage)		
This is also covered under ERISA. Moreover, it does not appear that ETNA even owes this coverage under the terms of the plan.	5	
Overall Cogency & Clarity	6	
TOTAL	**60**	

Note: Do not invent defendants out of whole cloth. Do not invent claims out of whole cloth based on zero facts. For example, there is no basis to suggest a viable negligent selection claim against the hospital. Sure, you would want to take discovery to see if there were grounds for such a claim. But you have no such claim on the facts provided.