

Instructor	Professor Thaddeus Mason Pope
Course Title	Health Law: Quality & Liability
Format	Take Home FINAL Exam
Total Time	Twenty-four (24) hours
Total Pages	13 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2018 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 Monday, April 30, 2018 and before 11:59 p.m. on Sunday, May 13, 2018. You must submit your exam answer file back to the Blackboard site within twenty-four (24) hours of downloading the exam but in no case later than 11:59 p.m. on Sunday, May 13, 2018.
4. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Blackboard.
5. Use your exam number as the **name** for your PDF exam answer file.

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 **thirteen (13) 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 24 hours of downloading it but in no case later than 11:59 p.m. on Sunday, May 13, 2018. If you upload your exam **more** than 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 sufficient time after editing to upload your exam.
7. **Timing:** Professor Pope has designed this exam for completion within three and one-half hours. That means you should be able to write complete answers to all the questions in three and one-half hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps one-half hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one-half hour) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
8. **Scoring:** The FINAL exam comprises 40% of your overall course grade. While the scoring includes 100 points, these points will be weighted.
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:** This exam has three (3) sections with three different types of problems.

Section One comprises six multiple choice questions. These are worth two points each, for a total of 12 points.

Section Two comprises three short answer questions. These are worth six points each, for a total of 18 points.

Section Three comprises three essay questions. These are worth a total of 70 points. Essay One is worth 10 points. Essay Two is worth 25 points. Essay Three is worth 35 points.

12. **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. He 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 6). 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 both (a) Identify the ambiguity or problem in the question and (b) 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:** 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:

Multiple Choice (1 to 6)

Short Answer (1 to 3)

Essay 1

Essay 2

Essay 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

Multiple Choice Questions

- These six questions are worth two points each, for a total of 12 points
 - In your exam file please include a numbered list with the correct answer choice next to each number (e.g. 1. - F; 2. - G).
 - Recommended time is 20 minutes.
- 1. Washington is one of more than 20 states that allows “lost chance” causation. In Washington, Physician misread an MRI that showed Neil had suffered a small stroke. Several days after being released, based on this mistaken reading, Neil suffered a much more severe stroke that left him permanently disabled. All experts agreed that even had Neil been properly diagnosed and treated, there was still a 15% chance he would have had the second stroke. If Neil establishes that physician was negligent, he recovers:**

 - A. Nominal damages
 - B. 85% of his damages
 - C. 15% of his damages
 - D. 100% of his damages
 - E. Nothing
 - 2. Patient has an illness with an 81% chance of dying. But if a certain procedure is performed, then patient would have only a 51% chance of dying (49% chance of recovery). Physician commits malpractice (breach of the relevant standard of care). Patient dies. Can patient successfully sue for malpractice under traditional “but-for” causation?**

 - A. Yes, the physician was negligent, and that negligence probably caused the patient's death.
 - B. No, the patient was probably going to die even without negligence.
 - 3. Physician makes a negligent diagnosis. If physician had not committed malpractice, patient would have a 10% greater chance of recovery. Which of the following are true?**

 - A. Patient can recover for the lost 10% chance in some jurisdictions like Minnesota and Washington.
 - B. Patient can recover in any jurisdiction if her baseline chance of recovery (before malpractice) was 100%.
 - C. All the above.

4. With proper medical treatment, patient had a 45% chance to save her limb. But defendant clinician's negligence reduced that chance to 25%. Patient loses limb and suffers damages of \$400,000. If patient can establish breach in a medical malpractice lawsuit, then in MOST jurisdictions she can recover:
- A. \$400,000
 - B. \$200,000
 - C. \$80,000
 - D. \$0
5. On the same fact pattern as above, assume that defendant's negligence reduced the patient's chances to 15%. If patient can establish breach in a medical malpractice lawsuit, then in MOST jurisdictions she can recover:
- A. \$400,000
 - B. \$200,000
 - C. \$80,000
 - D. \$0
6. On the same fact pattern as above, assume that defendant's negligence reduced the patient's chances to 5%. If patient can establish breach in a medical malpractice lawsuit, then in MOST jurisdictions she can recover:
- A. \$400,000
 - B. \$200,000
 - C. \$80,000
 - D. \$0

Short Answer Questions

- These three questions are worth six points each, for a total of 18 points.
- Limit EACH of your three responses to 250 words. This is only a limit, not a target or suggested length.
- Recommended time is 25 minutes.

In December 2017, Dr. Bender performed an esophageal hernia repair surgery on Lisa using a surgical robot. Dakota Area Medical Institutional Towers (DAMIT) provided the surgical suite, the medical staff, and the medical equipment, including the surgical robot. During the surgery, part of the surgical robot detached and became embedded in Lisa's esophagus. As a result, Lisa developed serious complications over the following months and years.

A second surgery was performed by a different surgeon at another hospital in February 2018 to determine the cause of Lisa's worsening symptoms. But the surgery was unsuccessful. In March 2018, a third, exploratory surgery was performed at another hospital. During that surgery, Lisa's vena cava vein was ruptured, causing considerable blood loss, cardiac arrest, and ultimately her death.

An autopsy revealed the presence of a thin, coiled band encircling the gastro-esophageal junction. Apparently, this was part of the surgical robot that became detached during Lisa's first surgery in December 2017.

1. Identify and describe Lisa's most probably successful theory of liability against DAMIT.
2. Identify and describe Lisa's leading alternative theory of liability against DAMIT.
3. Identify and describe Lisa's most probably successful theory of liability against Dr. Bender.

Essay Question 1

- This question is worth 10 points
- Limit your response to 750 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

Bella was diagnosed with metastatic cancer involving both her left and right tonsils in 2012. Oncologists treated Bella with radiation and, as of 2013, declared her free of cancer.

Bella underwent dental work on her right jaw starting in 2013. The dentists at Bite-Bite Cry Dental Group extracted two teeth in 2013. But they did not perform any x-rays or recommend hyperbaric oxygen. Bella was seen at Bite-Bite Cry on five additional occasions, and at no time did the dentists take x-rays or recommend hyperbaric oxygen. Bella had six teeth extracted at a different dental practice in 2015. She then returned to Bite-Bite Cry for panoramic x-rays of her right jaw. These x-rays were read as normal.

In 2017, Bella consulted an oral surgeon (not part of Bite-Bite Cry), who diagnosed her with osteoradionecrosis of her right jaw. This finding of bone death was caused by the radiation that she had undergone, as well as by an untreated infection. The necrosis was compounded by a fracture of Bella's right jaw. Bella subsequently underwent several surgeries, with removal of part of her right jaw.

Bella began negotiations for a settlement with Bite-Bite Cry and the dentists who had treated her there. But the parties were unable to negotiate a settlement. Bella filed suit on April 2, 2018. This jurisdiction has a five-year statute of repose and a one-year statute of limitations.

You have been hired by the Bite-Bite Cry Dental Group. Please identify and assess your best defenses to the claims that Bella has probably asserted against you.

Essay Question 2

- This question is worth 25 points.
- Limit your response to 1200 words. This is only a limit, not a target or suggested length.
- Recommended time is 60 minutes.

Tiffany was in an automobile accident. She suffered a broken arm, and her car was completely wrecked and undriveable. Tiffany was transported to the emergency room at Minneapolis Memorial Methodist Hospital (MMMh) via ambulance. While at MMMh, Dr. Derse, the emergency room physician at the time, mistakenly prescribed Tiffany the wrong medication. In addition, the emergency room nurse administered that medication improperly.

Tiffany suffered a total and permanent loss of sight due to these actions. Dr. Derse was not employed by MMMh, but instead was privately employed and had privileges at MMMh. The nurse was employed by MMMh. By the time of the deadline for disclosing expert witnesses, Tiffany had obtained only two experts: (1) an economist who could compute the money damages from Tiffany's injuries, and (2) a University of Minnesota nursing professor familiar with the medication that Tiffany received.

In EACH of the following three actions, please address:

1. What theory or theories of liability might reasonably be asserted?
2. What defenses can reasonably be raised?
3. Which side is likely to prevail?

Action 1: Tiffany v. Dr. Derse

Action 2: Tiffany v. Nurse

Action 3: Tiffany v. Hospital

Essay Question 3

- This question is worth 35 points.
- Limit your response to 1700 words. This is only a limit, not a target or suggested length.
- Recommended time is 90 minutes.

You have been hired by all defendants to respond to this complaint that was recently filed in the Ramsey County District Court, Minnesota. You should write separate letters to each client assessing the claims asserted against that defendant.

1. Comes now the Plaintiff, Matt Nip, who alleges the following facts, asserts the following causes of action, claims the following damages, and demands a jury trial from the following Defendants: (a) Saint Paul Methodist Rehabilitation Hospital; (b) Colleen Healthcare Insurance Company of America; (c) Fictitious Defendant A; and Ramsey County Regional Medical Center.
 2. The Decedent, Erica Nip, was an adult female resident citizen of Ramsey County, Minnesota, at the time of her death on March 15, 2018. She was 44 years old. The Plaintiff, Matt Nip, is over the age of eighteen years, and he is a resident citizen of Ramsey County, Minnesota. Plaintiff is the surviving widower of the Decedent.
 3. Upon information and belief, Defendant Saint Paul Methodist Rehabilitation Hospital (SPMRH) is a business entity that operates in Ramsey County.
 4. Defendant Colleen Healthcare Insurance Company of America (CHICA) is a corporation that was created pursuant to the laws of the State of California that has its principal place of business in the State of California. It does substantial, continuous, and systematic business in the State of Minnesota, including Ramsey County.
 5. Fictitious Party Defendant A is the licensed healthcare provider agent of CHICA that provided health insurance to Decedent in March 2018, that interfered with Decedent's health care treatment, that interjected itself as Decedent's health care provider, that terminated and/or altered the course of care and treatment for Decedent ordered by other health care providers, that mandated other health care treatment, and that combined to cause Decedent's death.
1. On March 2, 2018, the Decedent was driving her vehicle northbound on MN-88 in rural Pope County, Minnesota.
 2. While Decedent was driving north on MN-88, another driver (not a defendant in this Action) improperly crossed into Decedent's lane of travel and struck the vehicle being driven by Decedent. The impact between the two vehicles occurred entirely within Decedent's lane of travel. At the time of and immediately prior to the collision, the other driver was traveling well over the posted speed limit.

3. As a proximate consequence of the collision, Decedent was caused to suffer physical injuries, including, but not limited to, a sternum fracture, a foot fracture, multiple rib fractures, and multiple bruises and contusions.
10. As a result of his injuries, Decedent was admitted to Ramsey County Regional Medical Center (RCRMC) on or about March 2, 2018 for further evaluation, treatment, and therapy. Decedent suffered from severe pain and decreased function during his hospitalization.
11. Decedent improved to the point that he was to be discharged from RCRMC on or about March 5, 2018. At that time, Decedent continued to suffer from severe pain and decreased function.
12. Due to his condition, Decedent's physicians (as well as his therapists and nurses) determined that Decedent was to be discharged to an inpatient facility to receive further treatment, rehabilitation, and care in an inpatient setting. Both Plaintiff and Decedent desired that Decedent be admitted to such an inpatient facility. As such, Decedent's physician ordered that he receive treatment, rehabilitation, and care at an inpatient facility following his discharge from RCRMC, and a plan was put in place for Decedent to get admission to Saint Paul Methodist Rehabilitation Hospital (SPMRH) on or about March 5, 2018.
13. In March 2018 and at all times relevant to this complaint, Decedent had health insurance coverage, through his employer Wells Pianos, that was provided and administered by Colleen Healthcare Insurance Company of America (CHICA).
14. In contradiction to the above-mentioned order and determination by Decedent's physicians, therapists, and nurses, CHICA took control of Decedent's medical care and made the medical treatment decision that Decedent should not receive further treatment, rehabilitation, and care at an inpatient facility following his discharge from RCRMC. Instead, CHICA made the medical treatment decision that Decedent should be discharged to his home in Ramsey County and receive a lower quality of care (i.e. home health care) than had been ordered by Decedent's physicians, therapists, and nurses.
15. CHICA made this medical treatment decision after RCRMC personnel, SPMRH personnel, and other personnel all contacted CHICA several times, and used some of CHICA's appeal and review mechanisms, in an attempt to get Decedent admitted to an inpatient facility.
16. By making the above mentioned medical treatment decisions, CHICA imposed itself as Decedent's health care provider, took control of Decedent's medical care, and made a medical treatment decision that Decedent should not receive further treatment, rehabilitation, and care at an inpatient facility. As such, CHICA undertook duties: (1) to act with reasonable care in determining the quality of health care that Decedent would receive; (2) to not provide to Decedent a quality of health care so low that it knew that Decedent was likely to be injured or killed; and (3) to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

17. Due to the medical treatment decisions of CHICA, Decedent was discharged home from RCRMC on March 5, 2018.
18. From March 5, 2018 through March 15, 2018, Decedent continued to experience immense pain from his aforementioned injuries. He continued to suffer from severe loss of function and mobility.
19. On March 15, 2018, Decedent died due to a pulmonary thromboembolism caused by complications of blunt force trauma that he suffered in the wreck made the basis of this suit. However, if Decedent had received further treatment, rehabilitation, and care at an inpatient facility as was required by the standard of care, Decedent would not have died on March 15, 2018 due to the pulmonary thromboembolism. In other words, the negligent and wanton medical care provided by CHICA proximately caused Decedent's death.
20. Plaintiff restates and re-avers each and every factual allegation set forth above.
21. This first count is brought against CHICA and Fictitious Party Defendant A pursuant to principles of common law medical liability.
22. Plaintiff does not seek a claim for benefits against CHICA. Nor does Plaintiff contend that Decedent was due certain benefits under the plan of CHICA. Nor does Plaintiff seek recovery for the value of benefits denied. Instead, Plaintiff asserts that CHICA, and its employees undertook the aforementioned duties which are independent and separate from any duties they had under ERISA. Plaintiff's claims do not derive from any plan or require investigation into the terms of the plan. Instead, Plaintiff asserts that CHICA and its employees made negligent and wanton medical treatment decisions.
23. Specifically, CHICA, and its employees voluntarily assumed one or more of the following duties, jointly or in the alternative: (1) a duty to act with reasonable care in determining the quality of health care that Decedent would receive; (2) a duty to not provide to Decedent a quality of health care so low that it knew that Decedent was likely to be injured or killed; and/or (3) a duty to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.
24. CHICA and its employees negligently and wantonly breached the standard of care that applied to their voluntarily undertaken duties in one or more of the following respects: (a) by providing healthcare for Decedent that fell beneath the standard of care; (b) by making the medical treatment decision and mandating that Decedent not receive further treatment, rehabilitation, and care at an inpatient facility following his discharge from RCRMC; (c) by violating a physician's orders which required that Decedent receive further treatment, rehabilitation, and care at an inpatient facility following his discharge from RCRMC; (d) by interfering with Decedent's medical care and preventing her from receiving further treatment, rehabilitation, and care at an inpatient facility following her discharge from RCRMC.

25. The negligence and/or wantonness of CHICA, and its employees combined and concurred with the actions of the other Defendants as set forth in the other counts to proximately cause Decedent's death.
26. CHICA is vicariously liable for the torts committed by its employees under the doctrine of respondeat superior.
27. Plaintiff demands judgment, determined by jury, against CHICA, and an award of punitive damages that will adequately reflect the enormity of the Defendants' wrongful acts and which will effectively deter and prevent other similar wrongful acts. Plaintiff also demands costs and any other relief which may be proper.
28. This second count is brought against Defendant Saint Paul Methodist Rehabilitation Hospital (SPMRH).
29. Around the time of Decedent's discharge from RCRMC, Plaintiff contacted SPMRH to obtain Decedent's admission. But even though Decedent needed the services of SPMRH and even though SPMRH had capacity, SPMRH refused admission. Because CHICA refused coverage, SPMRH demanded a \$10,000 deposit which Plaintiff did not have.
30. This third count is brought against Ramsey County Regional Medical Center (RCRMC).
31. RCRMC's employed physician determined that Decedent should receive treatment, rehabilitation, and care at an inpatient facility following his discharge from RCRMC.
32. Even though Decedent was unable to obtain admission to SMMRH or any other inpatient rehabilitation facility, RCRMC proceeded to discharge Decedent home, knowing that Decedent would receive a lower quality of care (i.e. home health care) than had been ordered by RCRMC's own physicians, therapists, and nurses.

END OF EXAM