

<b>Instructor</b>	<b>Professor Thaddeus Mason Pope</b>
<b>Course Title</b>	<b>Health Law: Quality &amp; Liability</b>
<b>Format</b>	<b>Final Exam, Fall 2020</b>
<b>Total Time</b>	<b>Twenty-four (24) hours</b>
<b>Total Pages</b>	<b>24 pages</b>

#### Reference Materials Allowed

Open Book (all reference materials allowed)

#### Take-Home Exam Instructions

1. Please know your **correct Fall 2020 exam number** and include this number at the top of each page of your exam answer (for example, in a header).
2. Confirm that you are using and have typed the **correct exam number** on your exam document.
3. You may **download** the exam from the course Canvas site any time after 12:01 a.m. on Thursday, December 3, 2020 and before 11:59 p.m. on Wednesday, December 16, 2020.
4. You must **upload** (submit) your exam answer file to the Canvas site within twenty-four (24) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Wednesday, December 16, 2020. Therefore, the latest time by which you will want to download the exam is 11:59 p.m. on Tuesday, December 15, 2020. Otherwise, you will have less time to write your answers than the full permitted twenty-four hours.
6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Canvas.
7. Use your exam number as the **file name** for the PDF file that you upload.

## 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 **final 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 final 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 twenty-four **(24) pages**, including these instructions. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer.
5. **Anonymity:** Professor Pope will grade the exams anonymously. Do **NOT** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**
6. **Total Time:** Your completed exam is due within twenty-four (24) hours of downloading it, but in no case later than 11:59 p.m. on Wednesday, December 16, 2020.
7. **Time Penalty:** If you upload your exam answer file more than twenty-four (24) hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 24 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 24-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save enough time after editing to upload your exam.
8. **Timing:** Professor Pope has designed this exam for completion in three hours. That means you should be able to write complete answers to all the questions in three hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps 45 minutes) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps 45 minutes) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
9. **Scoring:** This final exam comprises 45% of your overall course grade. While the scoring includes 100 points, these points will be weighted.

10. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.
11. **Additional Research:** While you may use any materials that you have collected for this class, you are neither expected **nor are you permitted** to do any online or library research (e.g. on Lexis, Westlaw, Google, reference materials) to answer the exam questions.
12. **Format:** The exam consists of two main parts:
- Part One**      36 multiple choice questions  
Worth 1½ points each, for a combined total of 54 points  
Estimated time = 72 minutes (2 minutes each)
- Part Two**      3 essay questions  
Worth a combined total of 46 points  
Estimated time = 135 minutes (45 minutes each)
- That adds up to just over three hours. Remember, you have twenty-four (24) hours to complete this exam. Therefore, you have time to revise, polish, and proofread.
13. **Grading:** All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. Professor Pope will post an explanatory memo and a model answer to Canvas a few weeks after the exam.

### SPECIAL INSTRUCTIONS FOR PART ONE

1. **Numbered List of Letters:** In your exam document create a vertical numbered list (1 to 36). Next to each number type the letter corresponding to the best answer choice for that problem. For example:
1. A
  2. D
  3. B . . .
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 PART TWO**

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:
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

- Below are 36 multiple choice questions.
- Each question is worth 1.5 points for a combined total of 54 points.
- Recommended time is 72 minutes (2 minutes each).

- 1. Mental health professionals have NOT experienced the same rate of medical malpractice claims as other healthcare professionals. This may likely be due to:**
  - A. Many treatment modalities like psychotherapy do not have a biological intervention. In contrast to psychopharmacology and ECT, even when improperly employed, these treatment modalities do not result in demonstrable physical harm.
  - B. It is difficult for patients to show that an alleged injury (e.g. adverse psychological reaction) was the result of malpractice and not merely a symptom of the disorder for which the person was being treated.
  - C. Both A and B.
  - D. Neither A nor B.
  
- 2. A Saint Paul physician investigates a 51-year-old female with angiography using a femoral approach (i.e. catheter inserted in an artery in her groin and threaded through blood vessels to her heart). The procedure is uneventful. But in the following days, patient experiences significant swelling and bruising in her groin, and a 11cm hematoma is identified. The patient files a complaint, stating that she was not told this complication might occur. What is the MOST accurate statement?**
  - A. The adequacy of the consent explanation is judged by what information a reasonable physician would provide.
  - B. The adequacy of the consent explanation is judged by what a reasonable patient would want to know.
  - C. Only the common risks associated with a procedure need be discussed.
  - D. Only the serious risks associated with a procedure need be discussed.
  - E. The signed consent form indicates that an adequate consent discussion took place.

3. A complaint filed on behalf of a woman against a nursing home and an ambulance service includes the following allegations:
- (a) The woman, who was 85 years old and unable to speak after suffering a stroke, was picked up from her daughter's house by the ambulance service and taken to the nursing home to stay while her daughter was out of town.
  - (b) When the woman's daughter returned a few days later, the ambulance service picked up the woman from the nursing home and returned her to the daughter's house. The daughter was shocked to discover that the woman had a broken leg; her leg had been uninjured when she left for the nursing home.
  - (c) A physician's report attached to the complaint stated that the woman's leg injury would not have occurred in the absence of negligence.
  - (d) The complaint further alleges that the woman was under the control, successively, of the ambulance service and the nursing home during the time when she must have sustained the injury, and that either the ambulance service or the nursing home must have negligently moved or handled the woman, causing the injury to her leg.

Both defendants have argued that the allegations in the complaint are inadequate to support a negligence claim because it fails to identify a standard of care or how it was breached. What is the best response to the defendants' argument?

- A. Both defendants owed a duty to the woman because they were in a treatment relationship with her.
  - B. One of the two defendants probably caused the injury, and the circumstances of the injury are primarily within the knowledge and control of the defendants rather than the woman or her representative.
  - C. Each of the defendants is vicariously liable for any tortious act committed by the other.
  - D. There are grounds for the fact finder to infer that both defendants were negligent.
4. A mother took her six-year-old child to a hospital emergency room for treatment. A doctor on the hospital staff molested the child while treating her. At the time, no one was in the treatment room except the doctor and the child. The mother had left the room to get a cup of coffee. Three weeks later, when the child told her mother what had occurred in the treatment room, the mother suffered severe emotional distress that caused her to become physically ill. In an action against the doctor by the mother on her own behalf to recover for intentional infliction of emotional distress, is the mother likely to prevail?
- A. No, because mother was contributorily negligent in leaving the child alone with the doctor during treatment.
  - B. No, because mother was neither the direct victim of the doctor's conduct nor a contemporaneous witness.
  - C. Yes, because doctor's conduct was outrageous.
  - D. Yes, because mother's distress was the natural and foreseeable consequence of the doctor's conduct.

5. A patient who had suffered a severe fracture of her leg was treated by an orthopedist, who set the patient's leg and put it in a cast. When the leg continued to bother the patient six months later, she consulted a second orthopedist in the same town. The second orthopedist surgically inserted a pin to facilitate healing. The patient brought a malpractice action against the first orthopedist, claiming that he should have surgically inserted a pin at the time of initial treatment. The only evidence that the patient offered in support of her malpractice claim was the testimony of the second orthopedist, as follows: In response to the question "Would you have inserted a pin initially?" the second orthopedist testified, "I personally would not have been satisfied that the leg would heal properly without a pin."

At the close of the patient's evidence, the first orthopedist moved for judgment as a matter of law. Should the motion be granted?

- A. No, because the patient has introduced evidence that the first orthopedist failed to give the care that the second orthopedist would have provided.
- B. No, because the second orthopedist practices in the same town and field of specialty as the first orthopedist.
- C. Yes, because the patient has failed to introduce evidence that the first orthopedist's care fell below the professional standard of care.
- D. Yes, because the second orthopedist also treated the patient and is thus not sufficiently objective to offer expert testimony
6. Athlete, a professional football player for the Minnesota Vikings, signed a written consent for the Vikings physician, Doctor, to perform a knee operation. After Athlete was under a general anesthetic, Doctor asked Surgeon, a world-famous orthopedic surgeon, to perform the operation instead. Surgeon's skills were far superior to Doctor's, and the operation was successful. In an action for battery by Athlete against Surgeon, Athlete will:
- A. Prevail, because Athlete did not agree to allow Surgeon to perform the operation.
- B. Prevail, because the consent form was in writing.
- C. Not prevail, because Surgeon's skills were superior to Doctor's.
- D. Not prevail.
7. Karl, a male nursing assistant who worked at Hospital, had sexual relations with Patient, a severely retarded person, in her room at Hospital. In a tort action brought on Patient's behalf against Hospital, Patient will:
- A. Not prevail, if Karl's actions were outside the scope of his employment.
- B. Not prevail, if Patient initiated the relationship with Karl and encouraged his actions.
- C. Prevail, if Karl was an employee of Hospital.
- D. Prevail, if Karl had a treatment relationship with Patient.

8. **Defendant to a medical malpractice action establishes that two schools of thought exist among competent members of the medical profession concerning proper medical treatment for a given ailment each of which is supported by respectable medical authority. If defendant followed one of these schools, then she:**
- A. Can still be liable if hers is the “minority” position.
  - B. Can still be liable if her approach is less likely to be effective than the alternative treatment modality.
  - C. Can still be liable if her approach poses more risks than the alternative modality yet without additional countervailing benefits.
  - D. Can still be liable if her approach has been declining among practitioners.
  - E. More than one of the above.
  - F. None of the above.
9. **Hospital clinicians makes a contemporaneous documentation in patient’s medical record after a typical exam: “no EMC identified.” If this hospital fails to stabilize the patient’s emergency medical condition, then this hospital likely:**
- A. Has violated EMTALA
  - B. Has violated EMTALA if a reasonable hospital would have found the EMC
  - C. Has violated EMTALA because it misdiagnosed the patient
  - D. Has not violated EMTALA
10. **New rules to combat the opioid crisis require primary care physicians to consult a pain specialist when prescribing an opioid dosage above a certain level (the equivalent of 120mg of morphine). If these rules require the consulting physician to review the patient’s records to confirm dosage need, then the specialist:**
- A. Is providing an informal consult and is NOT in a treatment relationship with the patient
  - B. Is providing an informal consult and is in a treatment relationship with the patient
  - C. Is providing a formal consult and is in a treatment relationship with the patient
  - D. Is providing a formal consult and is NOT in a treatment relationship with the patient

11. Patient has been asking for more and more OxyContin pills. And he has been presenting the physician with weird circumstances like having accidentally left his pills on the city bus. Last week, the patient has raised one red flag too many. Given increased scrutiny from the DEA, this is beyond the physician's comfort level. The physician wants to forget it and drop this patient. This is permissible **ONLY** if:
- A. The patient has raised more red flags than a reasonable patient.
  - B. A reasonable physician would drop a patient with this many red flags.
  - C. The physician provides enough notice for the patient to transfer care.
  - D. A and C
  - E. B and C
12. Patient was diagnosed with thoracic discitis/osteomyelitis (inflammation that develops between the intervertebral discs of the spine) and was initially observed conservatively. But the patient gradually became paraplegic and lost bowel and bladder function. A lapse in communication between the nursing staff and the physician resulted in failure to properly diagnose and intervene in an appropriate time frame. Patient's damages are \$900,000. Even though thoracic discitis was the actual cause of injury, patient can show that negligence (via inaction) diminished her chance of a favorable medical result by 20%. In a jurisdiction that recognizes lost chance causation, patient can recover
- A. \$900,000
  - B. \$720,000
  - C. \$180,000
  - D. \$0
13. The AMA Code of Medical Ethics Opinion 1.2.6 provides: "In keeping with their core obligations as medical professionals, physicians who practice as . . . independent medical examiners should: Disclose the nature of the relationship with the employer or third party and that the physician is acting as an agent of the employer or third party before gathering health information from the patient." In Wisconsin, a failure to provide **THIS** information breaches the physician's duty of informed consent when:
- A. The reasonable individual would find this information material
  - B. The reasonable physician would disclose this information
  - C. Either A or B
  - D. Neither A nor B

14. The following is a pattern jury instruction:

When I use the expression 'informed consent' I mean a consent obtained from a patient by a [insert appropriate medical professional] after the disclosure by the [insert appropriate medical professional] of those [risks of] [and] [or] [alternatives to] the proposed treatment which a reasonably well-qualified [insert appropriate medical professional] would disclose under the same or similar circumstances.

This jury instruction BEST represents the law of informed consent in:

- A. Minnesota  
B. Wisconsin  
C. Both  
D. Neither
15. At 8:00PM, patient arrived at a Minnesota emergency department already in the advanced (and probably untreatable and irreversible) stages of toxic shock syndrome caused by a retained tampon. Unfortunately, clinicians initially diagnosed patient with gastroenteritis (a far less serious inflammation of the lining of the intestines). Clinicians did not correctly diagnose patient's TSS and sepsis until 10:00PM. Plaintiff's experts testified that each hour of delay from the time a patient presents with sepsis until she receives antibiotics increases the risk of death by about 7%. If plaintiff can establish the delayed diagnosis was negligent and that she has \$100,000 in damages, then she can probably recover:
- A. \$100,000  
B. \$86,000  
C. \$14,000  
D. \$0
16. In the previous question (#13), suppose the patient sued the hospital rather than the individual clinicians. Further suppose these clinicians were employees of Emergency Medical Clinicians (EMC) a company that had a contract with hospital to provide emergency medical services. On the facts in the previous question, patient could recover MOST probably on a theory of:
- A. Negligent credentialing  
B. Respondeat superior  
C. Apparent/ostensible agency  
D. None of the above

17. The practice of psychiatry requires a medical license. But some private entities may want more than just a license. In according privileges hospitals will also probably want \_\_\_ and will permit only such physicians to evaluate, diagnose, and treat patients with a mental disorder. Third party payors like Blue Cross may also make \_\_\_ a prerequisite for reimbursement.
- A. PhD in addition to a MD/DO
  - B. Joint Commission accreditation
  - C. Board certification by an ABMS member board
  - D. All the above

18. Consider the following excerpt from the obituary of L. Ron Hubbard, founder of the Church of Scientology:

Clients paid Scientology up to \$300 an hour for a one-on-one counseling process, known as auditing. To monitor a client's responses to questions, church staff members use an electrical instrument on the client's skin. The goal of "auditing," which can go on for years and cost clients hundreds of thousands of dollars, is to increase control over thought processes in a portion of the mind where, Scientologists assert, emotional problems and psychosomatic illnesses are born.

If an "auditor" is not licensed as a healthcare professional, then the MOST serious consequence for the auditor may be:

- A. Difficulty getting hospital privileges
  - B. Difficulty getting insurance reimbursement
  - C. Competitive disadvantage in the marketplace
  - D. Criminal conviction
19. The 2016 regulations implementing Section 1557 of the ACA and Title VI of the 1964 Civil Rights Act with respect to limited English proficiency and discrimination on national origin:
- A. Require language access services at the patient's expense
  - B. Apply only to Medicare patients
  - C. Both A and B
  - D. Neither A nor B

20. After plaintiff was rear-ended by an Amazon delivery van, she brought a personal injury suit against Amazon. Dr. Carroll conducted a medical examination of plaintiff in connection with that suit at the request of Amazon. Plaintiff recovered no damages in that lawsuit. Plaintiff then sued Dr. Carroll, alleging that she committed medical malpractice. Plaintiff alleges that Dr. Carroll should have told her that she had examined plaintiff seven years earlier in connection with a different automobile accident suit. Plaintiff alleges that, had she known, she would have advised Amazon to use a different doctor. Plaintiff's medical malpractice lawsuit will:
- A. Succeed, if a reasonable patient would want to know the physician may be biased
  - B. Succeed, if a reasonable physician would disclose the prior examination
  - C. Succeed, because a treatment relationship was formed during the prior exam
  - D. Fail
21. Substantial evidence shows that physicians often do not take seriously the complaints of black patients. This prejudice has deadly consequences. The law that MOST directly addresses this is
- A. ADA
  - B. Section 1557
  - C. EMTALA
  - D. ERISA
22. Unfortunately, since the beginning of formalized medical training, the profession has viewed Black bodies as inherently different from White ones. Black veterans were more than twice as likely to be “doubted” by their physicians when reporting pain or aches, more than three times as likely to be accused of “exaggerating” their illness, and 15 times more likely to be described as “ignorant.” This resulted in higher mortality rates. If this discrimination is still common and pervasive, then an individual physician engaged in such conduct will LIKELY:
- A. Be liable for malpractice, since this is inaccurate diagnosis
  - B. Be liable for malpractice, since this inaccurate diagnosis resulted in injury
  - C. Be liable for malpractice, since this is unethical
  - D. Not be liable for malpractice, because she must only comply with the norms of the profession even if those norms are deficient

23. **Inadequately staffed maternity units with high workloads and poor infrastructure are leading to potentially fatal delays during birth. If mother's baby dies, the MOST obvious form of hospital liability on these facts is**
- A. Vicarious liability for nurses because they are employees
  - B. Vicarious liability for nurses even if they are not employees
  - C. Direct liability for negligent credentialing
  - D. Direct liability for negligent supervision
24. **Patty patient can be sent from hospital A to hospital B and it is reasonably foreseeable that no material deterioration will result from or during this transfer. On these facts, if hospital A transfers Patty to hospital B when Patty still needs treatment, then:**
- A. No EMTALA violation if there is no bad intent
  - B. No EMTALA violation because patient has already been stabilized
  - C. EMTALA violation if there is no physician certification or patient consent
  - D. EMTALA violation unless hospital B has specialized capabilities that hospital A does not have
  - E. C and D
25. **On March 30, 1981, John W. Hinckley attempted to assassinate President Ronald Reagan in Washington, DC. In addition to Reagan, Hinckley shot three other individuals. Some of these individuals sued a psychiatrist who had been treating Hinckley. They alleged that had the psychiatrist properly performed his duties, Hinckley would not have shot them. If plaintiffs' lawsuit fails, it is MOST probably because they cannot establish:**
- A. Causation
  - B. Breach
  - C. Duty
  - D. Damages (the assassination was unsuccessful, and Reagan lived)
26. **Hospital formally admitted patient with an emergency medical condition without stabilizing the EMC before admission. Even five days after admission hospital has still failed to stabilize the EMC. Is this an EMTALA violation?**
- A. No, because the hospital's EMTALA duties end at admission
  - B. No, because EMTALA applies only to the emergency department
  - C. Yes, because the patient is not now stabilized
  - D. Yes, because the patient must be stabilized before being admitted since that is a transfer from the ED to another separate unit of the hospital

27. Pam was injured as the result of a traffic accident for which she had three shoulder surgeries. She requested increasing opioid drugs, but the orthopedic surgeon refused. Pam later saw three other physicians. The first offered to prescribe Suboxone (a prescription medicine used to treat adults who are addicted to opioid drugs) but Pam refused. The second physician discharged Pam after she tested positive for cocaine. Pam's third doctor refilled her high-dose oxycodone prescription and continued treating her and prescribing Xanax, despite her drug-seeking behavior. Pam later died from an accidental overdose. In defending a malpractice lawsuit Pam's fourth physician will likely:
- A. Obtain a defense verdict due to Pam's negligence
  - B. Obtain summary judgment because he owed no duty to Pam
  - C. Reduce the amount of any plaintiff verdict due to Pam's negligence
  - D. None of the above
28. Jurisdiction has a three-year statute of repose and a one-year statute of limitations. On January 1, 2017, patient had a vasectomy. Physician stated that the procedure was a total success. Relying on this statement, patient and wife discontinued other contraception methods. But on December 18, 2019, patient learned that his wife was pregnant. In a claim for negligent failing to warn of the possibility of recanalization (reopening of a previously occluded passageway), plaintiff must file this lawsuit by:
- A. December 18, 2020
  - B. December 18, 2022
  - C. December 18, 2023
  - D. The lawsuit is already barred
29. Evan is a transgender man who was diagnosed with gender dysphoria. He was scheduled to undergo a hysterectomy on November 30, 2020. The timing was important because it needed to be performed 60 days before a phalloplasty scheduled for January 14, 2021. But on November 15, 2020, when hospital discovered that Evan's hysterectomy was going to be performed on a transgender person, it canceled the procedure. Fortunately, Evan's physician had privileges at another hospital across the street and performed the procedure on the same day as originally scheduled. Evan may have a strong claim against the first hospital:
- A. Under Section 1557
  - B. For tortious abandonment
  - C. Both A and B
  - D. Neither A nor B

30. On the previous question (#27), if the applicable statute of limitations is 2 years and the statute of repose is 4 years, then Evan's claim must be filed by:

- A. November 15, 2022
- B. November 15, 2024
- C. November 15, 2026
- D. None of the above

31. Farrah underwent a cholecystectomy (surgical removal of the gallbladder) from an employed physician at Milwaukee Memorial Hospital in Wisconsin. While in the post-op ward, Farrah signed herself out of the hospital against medical advice.

I, Farrah, a patient in Milwaukee Memorial Hospital have determined that I am leaving the hospital and I acknowledge and understand this action of so leaving the hospital is against the advice of the attending physician and of hospital authorities.

I further acknowledge that I have been informed of the possible dangers and risks to my health and the health of others by my so leaving the hospital at this time, and I have been given full explanation of the consequences of my leaving the hospital and I do not wish any further explanation.

I accept the consequences of my departure from Hospital at the time and hereby release all health care providers, including the hospital and its staff, from all liability and responsibility for the ill effects that may result to myself, my family and to others resulting from this discontinuance of treatment in the hospital.

I have read and fully understand this document and understand the risk and benefits of leaving Against Medical Advice.

Farrah later suffered complications related to her cholecystectomy and she sued the surgeon for failing to provide follow-up care. If defendant has FAILED to assert any affirmative defenses, then Farrah may be successful if:

- A. A reasonable physician in Wisconsin would have followed-up
- B. A reasonable physician in Milwaukee would have followed-up
- C. A reasonable physician in Milwaukee or a similar community would have followed-up
- D. A reasonable physician in the United States would have followed-up
- E. Farrah will not be successful

32. On the previous question (#29), the MOST applicable affirmative defense is
- A. Contributory negligence
  - B. Comparative negligence
  - C. Assumption of risk
  - D. Res ipsa loquitor
  - E. Agreement to arbitrate
33. A jury recently awarded plaintiff \$1.5 million in pain and suffering, \$300,000 in medical expenses, and \$45,000 in lost wages. If this state (like many) statutorily caps all non-economic damages at \$250,000, then the court must adjust the award to:
- A. \$1,845,000
  - B. \$595,000
  - C. \$250,000
  - D. None of the above
34. OB/GYNs are the most sued specialty. Suppose that an OB/GYN commits malpractice during Eileen's birth on December 1, 2020. Further suppose that this state has a two-year statute of limitations that does not start until an injured party reaches age 18. This state also has a four-year statute of repose. Eileen must bring any malpractice claim BEFORE:
- A. December 1, 2022
  - B. December 1, 2024
  - C. December 1, 2040
  - D. December 1, 2044
35. Just days after Salerno was discharged from the hospital, the state board of medicine filed a "statement of charges" against Salerno's physician alleging that she "demonstrated professional incompetency in failing to provide appropriate surgical care to several patients." Salerno experienced complications from the surgery. If Salerno learns of the board of medicine's action, it MOST clearly signals Salerno may have a claim against the hospital under a theory of:
- A. Respondeat superior
  - B. Ostensible agency
  - C. Negligent credentialing
  - D. None of the above

36. Scott scheduled hernia repair surgery with Dr. Pringle, a board-certified surgeon in Minnesota. But most of the procedure was performed by Dr. Oliver, a fourth-year surgical resident. Scott's bowel was perforated, a recognized complication of this surgery. Scott testified that he would have declined the surgery if he had been told a resident would be so involved, though introduced no evidence that having Dr. Oliver perform the surgery created an additional risk. In an informed consent action against Dr. Pringle and Dr. Oliver:
- A. Scott will probably win.
  - B. Scott will probably win only if a reasonable patient would have also declined.
  - C. Scott will probably win because if did not consent at all to Dr. Oliver's involvement.
  - D. Scott will probably lose.

## Essay Question 1

- This question is worth 15 points
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 45 minutes.

Two years ago, Breyer was injured when his car slid off an icy highway during a winter storm and overturned. Breyer was rushed to a Duluth, Minnesota hospital in its own ambulance. There, hospital surgeons performed emergency surgery on Breyer. He remained in the hospital for 11 days following his admission. Numerous medical instruments were used during Breyer's surgery and subsequent hospitalization, including clamps, needles, and surgical tools. Fortunately, Breyer did not need a blood transfusion or any blood products.

Four days after Breyer was released from the hospital, he developed a fever. He visited his personal physician, who is not affiliated with the hospital. This physician ordered routine blood tests. Those tests revealed that Breyer had a serious infection that is transmitted in virtually all cases through exposure to either (1) contaminated blood products or (2) improperly sterilized medical instruments (clamps, needles, surgical tools, etc.) that contact a patient's blood. Still, there are other possible sources of Breyer's type of infection in a hospital environment. For example, it might have been caused by a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another. It might have been caused by staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received blood products and who have not been hospitalized during the period of likely exposure are possible but extremely rare. The physician told Breyer that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 9 to 14 days and Breyer was a patient at the hospital during that entire relevant period. Breyer's physician also stated that "at those hospitals that adopted expert-recommended medical instrument sterilization procedures, cases of this infection are almost non-existent."

Breyer has no history of intravenous drug use. Nor did he receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the sterilization procedure used while Breyer was hospitalized cannot be determined because, while the hospital now uses expert-recommended sterilization procedures, there is no evidence of when it started using that procedure.

While Breyer's personal physician is willing to testify, Breyer's lawyer has retained two expert witnesses. The first is a physician from Cedars-Sinai Medical Center in Los Angeles. This expert, a foremost expert in hospital patient safety and sterilization, has practiced in Los Angeles for her entire career. The second expert is not a physician but a University of Minnesota professor with a Ph.D. in public health who teaches and published on hospital disinfection, sterilization, cross-infection, healthcare-associated infections, outbreaks, antibiotic-resistant pathogens.

**Breyer has hired your law firm to represent him. Identify and assess non-frivolous claims that Breyer might bring against the hospital.**

## Essay Question 2

- This question is worth 15 points
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 40 minutes.

Five months ago, Sabrina visited her family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told Sabrina that her cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol. But Sabrina said she did not want to start taking drugs. She preferred to try dietary change and “natural remedies” first. The physician told Sabrina that natural remedies are not as reliable as prescription drugs, so urged Sabrina to come back in two months for another blood test. The physician also told Sabrina about a recent medical study report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

Sabrina purchased the herbal tea at Whole Foods and began to drink it. Sabrina also began a cholesterol-lowering diet. Recently, Sabrina returned to her physician and underwent another blood test. Happily, the test showed that Sabrina’s cholesterol level had declined considerably. However, the test also showed that Sabrina had an elevated white blood cell count. In fact, Sabrina’s test results were consistent with several different infections and some cancer types.

Over the next week, the physician put Sabrina through more tests. These tests showed that Sabrina’s liver was inflamed. But the reason for the inflammation was unclear. So, the physician referred Sabrina to a hepatologist (a medical specialist with expertise in liver diseases). In the meantime, Sabrina continued to drink the herbal tea.

Just days before Sabrina’s scheduled consultation with the hepatologist, she heard an NPR news story that USDA and FDA investigators had found that the type of herbal tea Sabrina had been drinking was contaminated with a highly toxic pesticide. The investigation took place after hepatologists at Stanford realized that several patients with inflamed livers and elevated white blood cell counts, like Sabrina, were all drinking the same type of herbal tea and the hepatologists reported this fact to the local health department.

All commercially grown herbs used for this tea come from China, and are tested for pesticide residues by exporters that sell the herb in bulk to the U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more Chinese warehouses where bulk herbs are briefly stored before sale by exporters. However, investigators cannot determine how the contamination occurred or what bulk shipments were sent to U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide

contamination. The investigators concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

The tea sold by different companies varied substantially in pesticide concentration and toxicity. Sabrina purchased all her herbal tea from the same Whole Foods store. Sabrina purchased several different brands of the herbal tea at the store, but she cannot remember which brands. Whole Foods sells all brands of herbal tea currently marketed in the United States.

Sabrina has suffered permanent liver damage. All parties stipulate that Sabrina's liver damage was caused by her herbal tea consumption.

**Sabrina has hired your law firm to represent her. Identify and assess non-frivolous claims that Sabrina might bring against her family physician.**

## Essay Question 3

- This question is worth 16 points
  - Limit your response to 1500 words. This is only a limit, not a target or suggested length.
  - Recommended time is 45 minutes.
1. The stethoscope is an acoustic medical device used for auscultation (listening to internal sounds of the human body). It typically has a small disc-shaped resonator that is placed against the skin, and one or two tubes connected to two earpieces. A stethoscope can be used to listen to the sounds made by the heart, lungs, or intestines, as well as blood flow in arteries and veins.
  2. Stethoscopes are the tool that physicians overwhelmingly use for conducting auscultation as described above. Indeed, they are so ubiquitous that stethoscopes are a “symbol” of healthcare professionals. Healthcare providers are often seen or depicted wearing a stethoscope around the neck.
  3. But it may be time to retire the stethoscope and put it out to pasture. As of December 2020, dozens of well-conducted studies shows that auscultation is better conducted with point-of-care ultrasound, a hand-held device equipped with the ability to both emit sound waves and interpret them as they reflect off structures of interest, similar to how a bat uses sonar to navigate its surroundings. The device looks like an old flip phone and is easy and convenient to carry.
  4. There are many clinical scenarios in which point-of-care ultrasound provides more and better information than a stethoscope. Lung examination may be the most telling. Take pulmonary edema, a buildup of fluid in the lungs often caused by congestive heart failure. When this fluid is present, it can cause a crackling sound to be present as the patient takes a breath. Listening for these characteristic “crackles” with a stethoscope picks up only about 40% of cases. In contrast, point-of-care ultrasound is almost perfect, accurately detecting 97% of cases. Point-of-care ultrasound also outperforms auscultation in diagnosing asthma, COPD, and pleural effusion, a buildup of fluid between the lung and chest cavity.
  5. Despite all these (and other) proven and large diagnostic advantages, point-of-care ultrasound has not yet been embraced by many U.S. clinicians - except in obstetrics and gastroenterology. Elsewhere, the stethoscope persists as the dominant, if not exclusive, means of auscultation.
  6. Rachel’s physician misdiagnoses her using a stethoscope. Had Rachel’s physician used a handheld ultrasound, she probably would have made a correct diagnosis and Rachel’s injury probably could have been avoided.

7. Rachel has sued her physician for making a negligent misdiagnosis. Specifically, Rachel claims that her physician was negligent for not using a handheld ultrasound during her examination and treatment. Rachel has retained qualified experts who can establish the facts in paragraphs 1 to 4 above.

**Rachel has hired your law firm to represent her in this lawsuit. The partner in charge has asked you to answer two questions: First, she wants you to evaluate whether Rachel will be successful in her medical malpractice lawsuit. Second, because the partner sits on the state law reform commission, she wants you to analyze what this case shows is right or wrong about medical malpractice law. Specifically, if you think Rachel will be successful, argue why that is a good result. On the other hand, if you think Rachel will be unsuccessful, argue why that is a bad result.**