

Answer each question briefly, complete sentences are not necessary. Make sure you put your exam number on each page of the examination. Do not put your name or any other identifying information on the examination. Use no more than the space provided, and not all of the questions require all the space provided. Use specific case and statute references, as necessary. Do not write on the back - I only read what is on the front.

By taking this exam you are on notice that this exam is covered by the honor code. Violating the honor code rule will result in failure in the class and may result in dismissal from law school.

- 1.) Short takes
 - a) An M.D. belongs to what school of practice?
 - b) A D.O. belongs to what school of practice?
 - c) What doctrine historically prevented physicians from being employees of hospitals?
 - d) Which federal law preempts many medical malpractice claims against HMOs?
 - e) Which medical specialty drove the development of the modern hospital?
 - f) What are the state laws called that block product's liability claims against blood banks?
 - g) Which restatement comment discusses "good whiskey"?
 - h) What is "off label" use of a drug?
 - i) What federal agency enforces the Controlled Substances Act?
 - j) The Medical Device Amendments of 1976 divided medical devices into classes. What is the class for the most dangerous devices?

2) Case Info

- a) Which case involved the failure to do a PAP smear?
- b) What was the patient's disease in *Arato v. Avedon* 858 P.2d 598 (Cal 1993)?
- c) What standard does Missouri use for determining what to tell patients to get their informed consent?
- d) Can patients in Missouri get peer review documents? What statute section controls?
- e) Which case allowed the exclusion of testimony as a sanction for discovery abuse?
- f) Which case involved the failure of the physician to inform the patient of the results of a PAP smear?
- g) What is the Aralen case?
- h) Why wasn't the doctor sued in *Feldman v. Lederle Laboratories*?
- i) What case held that the learned intermediary doctrine did not apply when the drug company marketed directly to consumers?
- j) What case held that a phone call was enough to create a physician patient relationship?

- 3) For the following situations, explain why you will be successful or unsuccessful in surviving a motion for summary judgment, based on not being a seller, against a hospital defendant for products liability: Be specific as to how you do or do not meet the requirements of 402a.
- a) Your client was injured when his hospital gown caught fire.
- b) Your client was injured when the artificial hip supplied by the hospital failed.

4) The patient went to the hospital emergency room after a bear took a big bite from his leg. The physician who examined him asked him how he planned on paying for the care. When the patient said he had no money or insurance, the physician stopped the exam, told the patient that he needed care available only at the county hospital, and asked an orderly to drive the patient to the county hospital in the orderly's pickup truck. The physician signed a certification claiming that the patient was stabilized and would be better off with care at the county. The physician threw away the records so HHS would not find out. The patient was injured by the delay in getting proper care.

a) You are the physician's defense attorney. What is your primary defense against a claim brought by the patient under the private cause of action in federal court provided by EMTALA?

b) You are the hospital risk manager. How many different ways did they screw-up this case under EMTALA and what are the potential federal penalties? (list)

5) Patient has AIDS, but does not want to tell anyone. He is going on a trip to China and wants his travel shots. He makes an appointment with a physician who he has never seen and explains that he needs his travel shots. The physician has him fill out a medical history form and the patient does not indicate that he has any ailments. The physician thinks the patient does not look healthy, but when questioned about how he is feeling, the patient is clear that he just wants his travel shots and nothing else. The physician gives him, among other things, oral polio vaccine. The physician gives the patient the provided patient warning and information sheet which warns against taking the vaccine if you have AIDS and the patient signs the required form, clearly without reading it. The physician himself has not read about polio vaccines since he left medical school, well before the AIDS epidemic, so he does not mention AIDS to the patient. The patient gets polio.

What is the patient's prima facie case of negligence against the physician and what are the physician's defenses? (do not blame the drug company as a defense)

6) Same facts as 5. Patient also sues the drug manufacturer for products liability, claiming that the drug company knew that the oral vaccine could cause polio in AIDS patients, and that it was well known that AIDS patients often lied to their physicians about their disease. The plaintiff claims that since there is an alternative injectable vaccine that does not use live virus, and thus cannot cause polio, that the drug company should take the oral vaccine off the market. The oral vaccine is still FDA approved and is useful in some limited situations, and this drug company does not make an injectable version with dead vaccine so it would lose all market share if it discontinues the oral vaccine.

What are the drug company's defenses? (Hint, remember to include the relevant Wade factors from *Feldman v. Lederle Laboratories*.)

