

Health Care Torts Exam  
Professor Richard, Spring 2004

Put your exam number on each page of the examination. Do not put your name or any other identifying information on the examination. Make sure you have all the pages and that they are all different before you start answering the exam. Use no more than the space provided. These are all short answer, a few have room for a couple of sentences. If you are using the computer, make sure you number your answers correctly.

Name that case!

1. Detox patient is hit by a door.  
Lopez v. State, 721 So.2d 518 (La.App. Cir.3 1998)
2. Did she knowingly refuse a PAP smear?  
Truman v. Thomas, 611 P.2d 902 (Cal. 1980)
3. When do you need to tell about unorthodox cancer treatments?  
Schiff v. Prados
4. State liability for bad health inspection  
Gregor v. Argenot Great Central Insurance Co., 851 So.2d 959 (La. 2003)
5. Case of the brain damaged baby that help sort out future medical damages.  
Kelty v. Brumfield, 633 So.2d 1210 (La. 94)

General Questions

6. What were the Stonewall Riots?  
Riots in 1969 in a New York gay bar that started the gay rights movement.
7. Your client is insured by an ERISA qualified health plan. The client has a rare cancer and her physician is recommending that she be treated with an experimental drug that is not FDA approved and is only available on a compassionate IND. The plan has denied her request for treatment, saying that the plan has a blanket exclusion for any treatment that involved drugs that have not been approved by the FDA.

Under Pegram, what type of decision is this and can you sue the plan decisionmaker for malpractice for denying the claim?

Pure eligibility and you cannot sue. This decision does not involve any patient specific information and applies to all insured equally.

8. Your client is insured by an ERISA qualified health plan. Your client has a rare cancer and her physician is recommending that she be treated with a drug that is approved by the FDA, but is not approved for this cancer and is very expensive. The health plan says that it will not approve the treatment for your client because the plan does not think this treatment is medically indicated because there is no proof that the drug will improve the survival in a case where her disease is so advanced.

Under Pegram, what type of decision is this and can you sue the plan decisionmaker for malpractice for denying the claim?

Mixed decision and you can sue. This decision requires specific information about the patient's disease, so it is a mixed eligibility and treatment decision.

9. What school of practice do MDs belong to?

allopathic

10. May MDs normally testify against chiropractors in chiropractor malpractice cases that deal with whether chiropractic treatment is indicated for the patient's condition?

No

11. May MDs serve on medical review panels reviewing chiropractor malpractice cases?

Yes

12. Assume that LSU Law Center decides to ask students about their health conditions in order to better handle any health emergencies that arise while the student is on campus. Would the Law Center be covered by HIPAA? Why?

No - not a covered entity

13. In what situation delineated in the 7 core elements may a HIPAA authorization for medical records release not have an expiration date?

Research:

"• an expiration date or event, (Final Rule allows "none" to be used in authorizations for any research study, as long as the authorization includes a statement that the authorization will have no expiration date)"

14. What are the two ways a physician can become eligible for coverage under the PCF and the caps of the MMA?

Get insurance for 100K or post a bond for 125K. The extra is to cover defense costs.

15. Why did the discretionary immunity defense fail in Berkowitz? (be specific about what action by the agency was at issue)

The regulations required that the agency test all batches of vaccine and it did not do so. There was no allowable discretion.

16. Why did the discretionary immunity defense succeed in Varig Airlines? (be specific about what action by the agency was at issue)

The statute allowed the FAA to test only selected airplanes, so they could not be sued for failing to test all airplanes.

17. Think back to the oyster case holding the state liable for an improper food inspection. Assume you represent a client who was in perfect health before eating the bad oyster and who subsequently dies. How might this affect the outcome of the case?

Causation would fail because the warning was directed to people with impaired liver function or a weak immune system. Since the warning was not addressed to healthy persons, your client could not claim that his failure to see the warning was the cause of his illness. Even if the court thought it would be useful for him to see the warning, it would weaken causation.

18. What does a compassionate IND allow?

An unapproved drug can be used to treat a sick patient outside of a research protocol.

19. Who would be used as subjects for a phase I trial of a new cancer treatment drug?

People with advanced cancer/dying patients - you do not use healthy persons to test potentially dangerous drugs such as cancer drugs.

20. Who can a patient sue under EMTALA?

hospital

21. What is the maximum federal penalty for a hospital that does not comply with EMTALA?

Removal from the federal benefits programs - we called it the administrative death penalty.

22. What provision of EMTALA was designed to trigger state tort law requirements?

Screening requirements - once the health care provider lays hands on the patient, there is a legal relationship and the expectation of standard care.

23. What standard does Louisiana use to decide what a patient must be told to get informed consent to a medical procedure?

Reasonable patient standard for deciding what information is material to the patient's decision.

24. In the usual informed consent case where the physician fails to inform the patient of an important risk, what two things must the patient show to prove causation?

1) that the patient suffered the risk that was withheld; and 2) that a reasonable patient might not have consented if he had been informed of the risk.

25. Why does traditional informed consent causation fail in Lugenbuhl, the leading Louisiana informed consent case?

The withheld risk did not cause the patient's damages.

26. How does the Lugenbuhl court justify awarding patient damages when causation failed?

The court recognized a dignitary injury for lying to the patient.

27. What is the legal relationship between most members of a hospital's medical staff and the hospital?

Independent contractors

28. What is the contract that sets the terms of that relationship?

Medical staff bylaws

29. The infection control committee of a hospital does a study of the number of patients that caught an infection while in the hospital. This data was used to draft a report identifying physicians who were at high risk of spreading infection because they did not practice proper sanitation. The report was used in determining whether a physician's staff privileges would be restricted. Plaintiff is suing the hospital because he was injured when he caught an infection in the hospital. Which of this information about hospital infections can he get in discovery?

Data is discoverable, so the number of infections, but not the conclusions of the committee about the risky docs.

30. One of the physicians whose privileges was restricted in question 29 is suing to overturn the action. What part of the information can the physician get?

Anything that deals with the restrictions of his privileges

31. The medical school is conducting a research program on a new drug to treat diabetes. Plaintiff was a research subject and is now having serious medical problems. You are suing the medical school. Can you get the data from the research study to see if any other subjects got sick?

No - LA 44:7 F

32. What did the Hill-Burton act fund?

Construction of community hospitals

33. How did DRGs change the financial incentives in health care?

Doing more did not result in getting paid more.

34. What has happened to the average length of hospital stays since DRGs were introduced?

Has gotten shorter

35. What does capitation mean in medical insurance?

Providers get a fixed payment per patient for a given period of time, usually monthly or yearly. It does not depend on how much treatment the patient receives or whether the patient is treated at all.

36. What was the Tuskegee syphilis experiment?

Black men with syphilis were not treated to see what would happen. There was no proper informed consent. (They already had syphilis, the experimenters DID NOT infect them.)

37. What is the core group in STI control?

The small number of very sexually active people who spread most of the disease.

38. What should blood banks have screened for in 1980 that would have prevented the problem of transfusion related AIDS?

Hepatitis B

39. What damages are recoverable in a negligent sterilization case when a healthy, but unwanted, child is born?

Cost of delivery, emotional pain and suffering. No damages for rearing or otherwise caring for the child.

40. Most of the reported medical malpractice cases involve medical review panel decisions where all three members found the physician to have not been negligent. Why don't we see cases where some of the panel members found for the patient?

Those cases settle.