

LCR4802

(499322)

May/June 2014

MEDICAL LAW

Duration 2 Hours

100 Marks

EXAMINERS .
FIRST
EXTERNAL

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PROF S A STRAUSS

MRS L PIENAAR

Closed book examination.

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This examination question paper consists of 7 pages plus instructions for the completion of a mark reading sheet

THE QUESTIONS IN THIS PAPER COUNT A HUNDRED (100) MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PART A AND PART B.

PART A CONSISTS OF TEN (10) MULTIPLE CHOICE QUESTIONS. EACH QUESTION COUNTS THREE (3) MARKS, WHICH MEANS THAT YOU CAN EARN A MAXIMUM OF THIRTY (30) MARKS BY ANSWERING PART A.

IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION SCRIPT ITSELF. THE QUESTIONS IN PART B COUNT SEVENTY (70) MARKS.

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PART A

IMPORTANT NOTICE: THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET.

Question 1

In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) the Constitutional Court intimated that the appellant's application to receive **dialysis** at a state hospital had to be considered in terms of the provisions of the Constitution dealing with the right to

- (1) have access to health services
- (2) have access to health services, and the state's duty to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right
- (3) emergency medical treatment
- (4) emergency medical treatment, and the state's duty to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right

Question 2

In *Van Biljon v Minister of Correctional Services* 1997 (2) SACR 50 (C) the court had to consider the meaning of "adequate medical treatment" as envisaged in section 35(2)(e) of the Constitution, in terms of which (inter alia) prisoners are entitled to the provision of adequate medical treatment at state expense. The implication of this judgment is that

- (1) it is the court's function to determine whether antiviral treatment should be prescribed to a prisoner
- (2) HIV-positive prisoners are not entitled to better treatment than is provided by the state to HIV-positive patients who are not prisoners
- (3) a prisoner would not be entitled to the only adequate form of treatment for a certain medical condition if it would be too expensive for the state to provide it
- (4) a certain form of treatment may be regarded as adequate medical treatment if it is less effective but more affordable than a form of treatment that would place an unwarranted burden on the state

Question 3

In the absence of an express agreement, the contract between doctor and patient usually entails the following implied term

- (1) The doctor will personally treat the patient if he/she diagnoses the patient's ailment
- (2) The patient will be cured of his/her disease
- (3) The doctor will treat the patient with the **highest** degree of professional skill, competence, care and judgment
- (4) The doctor is entitled to claim a reasonable professional fee from the patient

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Question 4

In which one of the following instances is **written** consent for the performance of the specific action mentioned **NOT** required?

- (1) To disclose information regarding a patient's treatment in a health establishment to a member of the public
- (2) To sterilise a patient
- (3) To examine a patient's health records for the purpose of the patient's treatment
- (4) To perform an operation on a 14-year-old who is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation

Question 5

A person in a permanent vegetative state ...

- (1) has no cognitive functions
- (2) cannot breath spontaneously
- (3) is legally dead
- (4) is brain dead

Question 6

An agreement/covenant in restraint of trade

- (1) may only be either enforceable in its entirety, or unenforceable in its entirety
- (2) which militates against the public interest, will be valid and enforceable since inviolability of contract now enjoys precedence over freedom of trade
- (3) concerning a rare kind of speciality could help to prevent that rare expertise remains limited to a specific geographical area
- (4) that seeks to protect a senior partner against the possibility that her junior partner leaves the practice and opens a concurrent practice in her area, is enforceable after the senior partner's retirement

Question 7

Which one of the following statements **CANNOT** be reconciled with the judgment in *Clarke v Hurst* NO 1992 (4) SA 630 (D)?

- (1) Feeding loses its special symbolic significance where the patient is quite unaware that feeding is being withheld from him or her.
- (2) It is generally accepted that a doctor acts lawfully if he or she administers medication to a terminally ill patient in order to alleviate the patient's pain, knowing that such medication would hasten the patient's death.
- (3) A patient's right to self-determination and privacy necessarily outweighs society's interest in the preservation of life
- (4) In this case, artificial feeding did not support human life as it is commonly known

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Question 8

It is sometimes very difficult to prove that a doctor's acts have led to a harmful result. A number of cases are discussed in the study guide which illustrate just how difficult it may sometimes be to prove that the alleged negligent act of the doctor led to the harm for which damages are sought. Which of the following statements is correct?

- (1) In *Pearce v Fine* 1987 (3) SA Practice Management 14 (D) the court found that Dr L's conduct, namely to leave the presence of the patient without satisfying himself that it was safe to do so, did not constitute negligence.
- (2) In *Silver v Premier of the Gauteng Provincial Government* the court found that, although the plaintiff's bed sore was caused by the nursing staff's negligent omission to take the necessary precaution against the development of a pressure sore, necrotising fasciitis would in any event have developed.
- (3) In *Pearce v Fine* 1987 (3) SA Practice Management 14 (D) the court found that, had it not been for the fact that the patient suffered from cardiomyopathy, it would have been possible to save him by immediate application of resuscitative measures.
- (4) In *Michael v Linksfield Park Clinic (Pty) Ltd* [2002] 1 All SA 384 (SCA) the court found that brain damage would have occurred, even if the clinic had instructed its staff properly on the use of the defibrillator, and even if there had been no delay in the use thereof.

Question 9

In your study guide aspects of disciplinary procedures, as well as contractual, criminal and delictual liability are discussed. Some similarities and differences are pointed out. Which one of the following statements is correct?

- (1) A doctor can protect himself or herself against any criminal, contractual, and delictual liability by having the patient sign an indemnity clause.
- (2) The same test is applied in both criminal law and the law of delict to determine whether a doctor acted negligently.
- (3) In both a criminal and a civil case, the party who alleges negligence must prove on a preponderance of probabilities that the doctor was negligent.
- (4) It is within the discretion of a court of law to decide whether to inform the relevant professional board of *prima facie* proof of unprofessional conduct by a practitioner that comes to light during court proceedings.

Question 10

The doctor's duty of confidentiality and the patient's right to privacy were considered in a case that eventually went to the Appellate Division, namely *Jansen van Vuuren NNO v Kruger* 1993 (4) SA 842 (A). This judgment confirmed that

- (1) the patient's right to privacy was infringed *in casu* by way of intrusion on the patient's private sphere.
- (2) a doctor would be justified to reveal a patient's HIV status where the doctor's duty to society is of greater weight than his/her duty to the patient.

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- (3) ethical viewpoints of a professional body will not be taken into consideration by our courts in a civil action for breach of privacy
- (4) the disclosure of the patient's HIV status to the dentist was justified in the particular circumstances of the case since it would ensure that the dentist would be protected against HIV infection and the patient would receive appropriate treatment

TOTAL PART A: [30]

PART B

IMPORTANT NOTICE: THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED IN THE EXAM SCRIPT.

Question 1

- (a) Section 11 of the Constitution provides that everyone has the right to life. In *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 113 (T) the court held that a foetus does not have a right to life, since the word "everyone" does not include a foetus. Should it therefore be accepted that a court could never find that any provision of the Choice on Termination of Pregnancy Act 92 of 1996 is in conflict with section 11 of the Constitution? Discuss briefly with reference to the opinion of legal scholars (3)
- (b) List the duties of the ombudsman appointed by the Health Professions Council of South Africa (3)
- (c) A number of young general practitioners wish to practice together. They are unsure whether they should form a partnership with this in mind, or whether they should merely enter into an association. Advise them (5)
- (d) You are visiting friends with young children. A friend of one of the children, known to you only as "Maya", sleeps over. A swarm of bees attacks her and she is stung quite badly. She is allergic to bee venom. Her throat swells up and she struggles to breathe. You rush her to hospital in your car. Antihistamines, adrenaline and corticosteroids do not help and she has to have a tracheotomy to help her breathe. You don't know any of her relatives, and treatment cannot be postponed.
- (i) Who has to be approached for consent? Discuss briefly with reference to the relevant statutory provision (4)
- (ii) Suppose there is no time to obtain anybody's consent to the performance of the tracheotomy. Dr Hector Powerball is ready to perform a tracheotomy on Maya, but he is unsure whether such an intervention would be lawful if performed without consent. Which common-law ground of justification can be invoked to justify the performance of a tracheotomy in the absence of any consent, and what are the requirements for a successful reliance on this ground of justification? (5)
- (e) Explain whether death due to the so-called "double effect" of analgesic substances administered during palliative treatment should be regarded as lawful or unlawful. (You must include in your answer an explanation of what is to be understood under "double effect of analgesic substances" in this context.) (5)

[25]

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Question 2

- (a) Name the seven different indications (grounds) for the lawful termination of a pregnancy between the 13th and 20th week of gestation (7)
- (b) Name five instances where a doctor may incur liability (whether direct or vicarious) for the negligent act performed by another health care practitioner (5)
- (c) Distinguish between wrongful **birth** and wrongful **life** as causes of action, in other words, explain the difference between the action for wrongful **birth** and the action for wrongful **life** (3)
- (d) Mr Virilios Papadopoulos, a divorced man, meets the real love of his life, Mrs Baby Poppins, after many years. She is a widow with six children who are still under her care. Mr Papadopoulos is not what one would call rich – his supermarket went bankrupt during the big recession. However, the love between the two is flourishing. Mr Papadopoulos makes some serious advances to Mrs Poppins, but Mrs Poppins wards him off. It is not as if she does not fancy him, she explains, but she certainly does not want any more children, and she stopped taking the pill years ago. Mr Papadopoulos assures her that he had a vasectomy, done by Dr Tube-Tucker, a urologist. Nine months and ten minutes later Mrs Poppins gives birth to a healthy baby boy, Poulos. Papadopoulos and Poppins want to institute a claim against Dr Tube-Tucker for financial support for Poulos.

Advise them on whether such a claim is recognised in our law. In your answer, you should identify the cause of action, define it, discuss the relevant case law, and apply the law to the scenario.

(10)
[25]

Question 3

PLEASE NOTE THAT QUESTION 3 IS BASED ON A SCENARIO. ALL SUBSECTIONS OF THIS QUESTION PERTAIN TO THE SCENARIO, ALTHOUGH THEY COVER DIFFERENT PARTS OF THE STUDY GUIDE.

It is Monday morning, and Dr Hazel Nutt, an ear, nose and throat specialist, is doing a tonsillectomy (excision of the tonsils) on a child, Nndileni. Things go wrong in the operating theatre when the anaesthetist, Dr Di Quick, suddenly collapses due to a heart attack. In the confusion, the endotracheal tube becomes dislodged, and the child suffers lack of oxygen. Dr Nutt asks the sister to look for another available anaesthetist. The half-removed tonsil of the child bleeds profusely. Dr Nutt decides to focus on her task as ear, nose and throat surgeon, and to complete the removal of the tonsil in order to avoid further blood loss. Nndileni suffers a lack of oxygen as a result of not being properly intubated, and huge blood loss. When the anaesthetist arrives, Nndileni has already passed away.

Answer the following questions and substantiate your answers. Refer to authority where applicable.

- (a) Explain what needs to be done before a death certificate for Nndileni may be issued. (3)
- (b) Explain what **criterion** will be applied to determine whether Dr Nutt was **negligent**, and what **test** will be applied to determine whether Dr Nutt was negligent when faced with a charge of culpable homicide. Also explain whether there had been any special

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circumstances that ought to be taken into account in determining whether Dr Nutt was **negligent**. Refer to case law in your answer (10)

- (c) Dr Nutt is charged with culpable homicide. The court hears evidence on the ethical rules and guidelines of the Health Professions Council of South Africa. After hearing all the evidence, the court takes the view that there is *prima facie* proof of unprofessional conduct on the part of Dr Nutt.

Is the court under a duty to report such *prima facie* proof? (2)

- (d) What is the criterion to be used by the court when determining whether Dr Nutt's failure to reintubate the child was **unlawful**? Briefly explain whether the court may take into consideration the professional ethical prescripts of the Health Professions Council when enquiring into the **unlawfulness** of Dr Nutt's failure to reintubate the child (5)

[20]

TOTAL PART B: [70]
PAPER TOTAL: [100]

PART 1 (GENERAL/ALGEMEEN) DEEL 1

STUDY UNIT e.g. PSY100-X
STUDIE EENHEID by PSY100 X

1	2	3	4	5	6	7	8	9	0
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PAPER NUMBER
VRAESTELNOMMER

2

STUDENT NUMBER
STUDENTENOMMER

6	7	8	9	0	1	2	3	4	5	6	7	8	9	0
1	2	3	4	5	6	7	8	9	0	1	2	3	4	5
2	3	4	5	6	7	8	9	0	1	2	3	4	5	6
3	4	5	6	7	8	9	0	1	2	3	4	5	6	7
4	5	6	7	8	9	0	1	2	3	4	5	6	7	8
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7	8	9	0	1	2	3	4	5	6	7	8	9	0	1
8	9	0	1	2	3	4	5	6	7	8	9	0	1	2
9	0	1	2	3	4	5	6	7	8	9	0	1	2	3

INITIALS AND SURNAME
VOORLETTERS EN VAN

3

DATE OF EXAMINATION
DATUM VAN EKSAMEN

4

EXAMINATION CENTRE (E.G. PRETORIA)
EKSAMENSENTRUM (BY PRETORIA)

5

UNIQUE PAPER NO.
UNIEKE VRAESTEL NR

8

9

For use by examination invigilator
Vir gebruik deur eksamenopsiener

IMPORTANT

- USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
- MARK LIKE THIS
- CHECK THAT YOUR INITIALS AND SURNAME HAS BEEN FILLED IN CORRECTLY
- ENTER YOUR STUDENT NUMBER FROM LEFT TO RIGHT
- CHECK THAT YOUR STUDENT NUMBER HAS BEEN FILLED IN CORRECTLY
- CHECK THAT THE UNIQUE NUMBER HAS BEEN FILLED IN CORRECTLY
- CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED
- DO NOT FOLD

BELANGRIK

- GEBRUIK SLEGS 'N HB POTLOOD OM HIERDIE BLAD TE VOLTOOI
- MERK AS VOLG
- KONTROLEER DAT U VOORLETTERS EN VAN REG INGEVUL IS
- VUL U STUDENTENOMMER VAN LINKS NA REGS IN
- KONTROLEER DAT U DIE KORREKTE STUDENTENOMMER VERSTREK HET
- KONTROLEER DAT DIE UNIEKE NOMMER REG INGEVUL IS
- MAAK SEKER DAT NET EEN ALTERNATIEF PER VRAAG GEMERK IS
- MOENIE VOU NIE

PART 2 (ANSWERS/ANTWOORDE) DEEL 2

1	11	21	31	41	51	61	71	81	91	101	111	121	131	141	151
2	12	22	32	42	52	62	72	82	92	102	112	122	132	142	152
3	13	23	33	43	53	63	73	83	93	103	113	123	133	143	153
4	14	24	34	44	54	64	74	84	94	104	114	124	134	144	154
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7	17	27	37	47	57	67	77	87	97	107	117	127	137	147	157
8	18	28	38	48	58	68	78	88	98	108	118	128	138	148	158
9	19	29	39	49	59	69	79	89	99	109	119	129	139	149	159
10	20	30	40	50	60	70	80	90	100	110	120	130	140	150	160

Specimen only