

LCR404U

(478475)

May/June 2010

MEDICAL LAW

Duration 2 Hours

100 Marks

EXAMINERS .

FIRST

SECOND

ADV LC COETZEE

PROF C VAN DER BIJL

This examination question paper consists of 6 pages plus instructions for the completion of a mark reading sheet

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THE QUESTIONS IN THIS PAPER COUNT A HUNDRED (100) MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PARTS A AND B. PART A CONSISTS OF TEN (10) MULTIPLE CHOICE QUESTIONS. EACH QUESTION COUNTS THREE (3) MARKS, WHICH MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF THIRTY (30) MARKS. 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.

PART A (MULTIPLE CHOICE QUESTIONS)

IMPORTANT NOTICE: THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK. YOU HAVE TO READ THE INSTRUCTIONS IN CONNECTION WITH THE USE OF THE MARK READING SHEET CAREFULLY. FAILURE TO DO SO MAY MEAN THAT YOUR ANSWERS CANNOT BE MARKED BY THE COMPUTER.

Ten questions (marked 1-10) follow. Each question contains three statements (marked (a)-(c)). Some of the statements are correct and some are incorrect. You must decide which of these statements is/are correct. The three statements are followed by five allegations (marked (1)-(5)). Each of them alleges that a certain statement or combination of statements is correct. You must decide which allegation accurately reflects the conclusions to which you have come.

Also bear in mind that if a composite statement is partly correct and partly incorrect, then the statement as a whole, is incorrect.

[TURN OVER]

Question 1

- (a) Section 9 of the Constitution expressly prohibits discrimination on the ground of disability
 - (b) Section 27 of the Constitution guarantees everyone the right to have access to, *inter alia*, reproductive health care
 - (c) It is lawful for a medical practitioner to obtain commission from a pharmacist in connection with a prescription given by the medical practitioner
- (1) All the statements above are correct
 - (2) Only statements (a) and (b) are correct
 - (3) Only statements (a) and (c) are correct
 - (4) Only statements (b) and (c) are correct
 - (5) Only statement (a) is correct

Question 2

- (a) In terms of section 16 of the National Health Act 61 of 2003 a patient's authorisation is required if a doctor wishes to examine the patient's health records for the purposes of treating the patient
 - (b) Ordinarily the contract entered into between doctor and patient takes the form of a tacit agreement whereby the doctor undertakes to diagnose the patient's complaint and to treat him or her for the complaint in the accepted manner
 - (c) A covenant in restraint of trade is either enforceable in its entirety, or unenforceable in its entirety, and a court is not entitled to decide that only a part of such clause is enforceable
- (1) All of these statements are correct
 - (2) Only statement (b) is correct
 - (3) Only statement (c) is correct
 - (4) Only statements (a) and (b) are correct
 - (5) Only statements (b) and (c) are correct

Question 3

- (a) In case of an emergency, the superintendent of a hospital may under certain circumstances consent to an operation on a child without consulting the person legally competent to consent on behalf of the child
 - (b) In *Louwrens v Oldwage* [2006] 1 All SA 197 (SCA) the Supreme Court of Appeal expressly confirmed the correctness of the materiality test applied in *Castell v De Greef* by the full bench
 - (c) The National Health Act 61 of 2003 gives recognition to therapeutic privilege in not requiring the doctor to inform the patient of the risks associated with an intervention where there is substantial evidence that the disclosure thereof would be contrary to the best interests of the patient
- (1) Only statement (b) is correct
 - (2) Only statements (a) and (b) are correct
 - (3) Only statements (a) and (c) are correct
 - (4) Only statements (b) and (c) are correct
 - (5) Only statement (a) is correct

Question 4

- (a) In *S v De Bellocq* 1975 (3) SA 538 (T) the accused was convicted of murder for drowning her child, who suffered from toxoplasmosis, in a washbasin
- (b) Euthanasia at the request of the sufferer is unlawful
- (c) In *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D) it was held that discontinuance of medical treatment in the circumstances of the case would not be unlawful, **since Dr Clarke was already brain-dead**
- (1) All the above statements are correct
- (2) Only statements (a) and (b) are correct
- (3) Only statements (a) and (c) are correct
- (4) Only statements (b) and (c) are correct
- (5) Only statement (b) is correct

Question 5

- (a) The Human Tissue Act 65 of 1983 provides that, for the purpose of removing tissue, the death of the person concerned must be established by two doctors, one of whom must have been practising for at least five years
- (b) The Human Tissue Act 65 of 1983 does not contain any provision prohibiting genetic manipulation of gametes or zygotes outside the human body
- (c) The Sterilisation Act 44 of 1998 provides that a married person who seeks sterilisation may be sterilised provided he or she is capable of consenting, is 18 years or older, and has obtained the written consent of the other spouse
- (1) Only statement (a) is correct
- (2) Only statements (a) and (c) are correct
- (3) Only statement (b) is correct
- (4) Only statement (c) is correct
- (5) Only statements (a) and (b) are correct

Question 6

In *Edouard v Administrator of Natal* 1990 (3) SA 581 (A) the Appellate Division

- (a) held that the father's claim for the cost of maintaining the child until she attains the age of 18 years had rightly been allowed by the court *a quo*
- (b) confirmed the judgment of the trial court that general damages for the discomfort, pain and suffering, and loss of amenities suffered by the plaintiff's wife cannot be recovered in contract
- (c) pointed out that the case was unique in the sense that it was based upon a complete failure to perform a sterilisation procedure as agreed upon
- (1) All the above statements are correct
- (2) Only statements (a) and (b) are correct
- (3) Only statements (a) and (c) are correct
- (4) Only statements (b) and (c) are correct
- (5) Only statement (a) is correct

Question 7

- (a) A registered midwife may perform a termination of pregnancy in the eleventh week thereof on request of the pregnant woman.
 - (b) A pregnant eleven-year-old needs her parents' consent to undergo a termination of pregnancy
 - (c) A registered midwife commits an offence if she terminates a pregnancy that has resulted from rape in the thirteenth week thereof
- (1) All the above statements are correct
 - (2) Only statements (a) and (b) are correct
 - (3) Only statements (a) and (c) are correct
 - (4) Only statements (b) and (c) are correct
 - (5) Only statement (a) is correct

Question 8

- (a) Artificial insemination may lawfully be performed on married women only
 - (b) The use of recombinant technology in selecting foetal sex is currently regarded as **not** ethical
 - (c) A doctor cannot be convicted of culpable homicide for causing the death of a patient unless he or she is guilty of **gross** negligence
- (1) Only statement (a) is correct
 - (2) Only statement (b) is correct
 - (3) Only statement (c) is correct
 - (4) Only statements (a) and (b) are correct
 - (5) Only statements (b) and (c) are correct

Question 9

- (a) A doctor supplied a substance to a patient. At the time, the doctor had reconciled himself or herself to the possibility that the patient might use this substance to commit suicide. **The doctor may be found guilty of murder if this patient subsequently uses the substance to commit suicide.**
 - (b) Medical treatment without the informed consent of the patient *prima facie* constitutes an assault and will be wrongful unless justified by some other ground of justification, such as *negotiorum gestio* or statutory authority
 - (c) In *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T) the court reaffirmed the principle that the standard of care required of a medical practitioner is reasonable skill and care, and not the highest possible degree of professional skill
- (1) All the above statements are correct
 - (2) Only statements (a) and (b) are correct
 - (3) Only statements (a) and (c) are correct
 - (4) Only statements (b) and (c) are correct
 - (5) Only statement (a) is correct

Question 10

- (a) In *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W) the court relied on the evidentiary principle of *res ipsa loquitur* for its finding that the defendant had been negligent in tearing the patient's superior vena cava
- (b) It is generally accepted that one partner is vicariously liable for the wrongful act of another if such act falls within the scope of partnership business
- (c) In *Afrox Healthcare Bpk v Strydom* 2002 (5) SA 21 (SCA) the Supreme Court of Appeal stated that an indemnity clause would possibly not constitute a defence against gross negligence of hospital staff, although no allegation of such a degree of negligence had been made by the patient in this case
- (1) All the above statements are correct
 (2) Only statement (b) is correct
 (3) Only statements (a) and (c) are correct
 (4) Only statements (a) and (b) are correct
 (5) Only statements (b) and (c) are correct

[30]**SECTION B**

THIS PART CONSISTS OF THREE (3) QUESTIONS. EACH QUESTION IS SUBDIVIDED INTO A NUMBER OF SUBQUESTIONS. YOU MUST ANSWER ALL THREE (3) QUESTIONS. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE APPLICABLE. IN DECIDING UPON THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Y was a patient of Dr X. Y alleges that Dr X disclosed her HIV-positive status to Z, her lover, without her consent. Y wishes to institute a civil claim against Dr X and, in addition, wants the necessary disciplinary proceedings to be taken against Dr X. She consults you to gain advice. Advise Y with regards to the following matters:
- (i) Is doctor-patient confidentiality protected by the Constitution, and, if so, under the aegis of which right? (1)
- (ii) What does the National Health Act 61 of 2003 stipulate regarding the patient's right to confidentiality, and the circumstances under which such information may be divulged? (4)
- (iii) Dr X alleges that he informed Z of Y's HIV-positive status in order to prevent Z from being infected. In *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 482 (A) the medical practitioner (Dr K) invoked a similar defence. Explain to Y the similarities/differences between the circumstances in which Dr X invoked the defence, and the circumstances in which Dr K invoked the defence. Also explain to Y what the Appellate Division held in respect of Dr K's defence in *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 482 (A). (4)
- (iv) Do the ethical rules of conduct made by the Health Professions Council of South Africa make express provision for the protection of confidential information concerning patients and the circumstances under which such information may be divulged? (1)
- (v) Assume Dr X is found guilty of unprofessional conduct by the professional board. Does the Health Professions Act 56 of 1974 make provision for appeal? (2)

[TURN OVER]

- (b) "An expert report says prisoners have complained about poor health care in jails and uncaring medical staff, with some inmates washing their fellow ailing detainees. Some prisoners, according to the report, died after suffering manageable conditions because there were no medical supplies. In such an environment, completely manageable conditions become life-threatening," said Lukas Muntingh, of the Civil Society Prison Reform Initiative, which compiled the report. "[T]he organisation's report on prisoner perceptions found that prisoners complained about the lack of medical care in prison as one of the most challenging aspects of prison life." *Pretona News* 27 January 2010 p 2

Briefly discuss the constitutional provisions that guarantee the provision of health care to prisoners (5)

- (c) Briefly discuss the question whether medical practitioners have the right to compound or dispense medicines (3)
[20]

Question 2

- (a) Discuss the question whether, in terms of South African law, a doctor may incur liability for an omission to act. You are required to discuss whether, and if so, under which circumstances, a doctor is under a legal duty to deliver health care to members of the public. Refer to relevant case law, and cite examples to illustrate your answer (15)
- (b) The Mental Health Care Act 17 of 2002 differentiates between "voluntary", "assisted" and "involuntary" care, treatment and rehabilitation (interventions). Define these concepts as set out in the Act (4)
- (c) The following statement is made in your study guide: "*Negotiorum gestio* is the ground of justification in our common law which is best suited to a situation related exclusively to the interests of a patient and not to the interests of society."
- (i) Name the three requirements of *negotiorum gestio* (3)
- (ii) Explain why necessity as a ground of justification should find application in a medical emergency only where the medical intervention is administered directly in the interests of society at large, but not where it is aimed merely to protect the patient's interests (3)
- (d) Differentiate between wrongful birth and wrongful life, and, with reference to case law, indicate whether either/both of these causes of action is/are recognised in our law (5)
[30]

Question 3

- (a) Discuss the case of *Castell v De Greef* 1994 (4) SA 408 (C) *inter alia* with reference to the issue of negligence and informed consent. (It is required that the facts of the case also be set out in some detail.) (10)
- (b) Discuss a number of cases referred to in your study guide to illustrate how difficult it may sometimes be to prove the existence of a causal connection between alleged negligent medical conduct and an alleged harmful effect (10)
[20]

TOTAL: [100]

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For use by examination invigilator
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IMPORTANT

- 1 USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
- 2 MARK LIKE THIS
- 3 CHECK THAT YOUR INITIALS AND SURNAME HAS BEEN FILLED IN CORRECTLY
- 4 ENTER YOUR STUDENT NUMBER FROM LEFT TO RIGHT
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BELANGRIK

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Specimen only

MARK READING SHEET INSTRUCTIONS

Your mark reading sheet is marked by computer and should therefore be filled in thoroughly and correctly

USE ONLY AN HB PENCIL TO COMPLETE YOUR MARK READING SHEET

PLEASE DO NOT FOLD OR DAMAGE YOUR MARK READING SHEET

Consult the illustration of a mark reading sheet on the reverse of this page and follow the instructions step by step when working on your sheet

Instruction numbers ① to ⑩ refer to spaces on your mark reading sheet which you should fill in as follows

- ① Write your paper code in these eight squares, for instance

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- ② The paper number pertains only to first-level courses consisting of two papers

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- ③ Fill in your initials and surname
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- ⑤ Fill in the name of the examination centre
- ⑥ WRITE the digits of your student number HORIZONTALLY (from left to right) Begin by filling in the first digit of your student number in the first square on the left, then fill in the other digits, each one in a separate square
- ⑦ In each vertical column mark the digit that corresponds to the digit in your student number as follows [-]
- ⑧ WRITE your unique paper number HORIZONTALLY
NB Your unique paper number appears at the top of your examination paper and consists only of digits (e.g. 403326)
- ⑨ In each vertical column mark the digit that corresponds to the digit number in your unique paper number as follows [-]
- ⑩ Question numbers 1 to 140 indicate corresponding question numbers in your examination paper. The five spaces with digits 1 to 5 next to each question number indicate an alternative answer to each question. The spaces of which the number correspond to the answer you have chosen for each question and should be marked as follows [-]
- ◆ For official use by the invigilator. Do not fill in any information here