

LCR4802

(471830)

October/November 2013

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 CONSIST 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 WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK.

Question 1

In *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) ...

- (1) the court gave recognition to the idea that the state has a justiciable duty to enact legislation which properly protects foetal life.
- (2) the court reduced the investigation into the constitutionality of the Choice on Termination of Pregnancy Act 92 of 1996 to the question whether the foetus is vested with the right to life.
- (3) it was held that life starts at conception.
- (4) it was held that a foetus is vested with the constitutional right to life.

Question 2

Section 35 of the Constitution provides that everyone who is detained, including every sentenced prisoner, is entitled to (*inter alia*) the provision of adequate medical treatment at state expense. In *Van Biljon v Minister of Correctional Services* 1997 (2) SACR 50 (C) the court held that ...

- (1) an HIV-positive prisoner is entitled to the same standard of care provided by the state to patients who are not incarcerated, and nothing more.
- (2) the court would readily order that a particular form of treatment be prescribed to a prisoner.
- (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 *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC), Mr Soobramoney's application for an order that the state hospital should provide him with ongoing dialysis was dismissed. Which one of the following statements is **INCORRECT**?

- (1) The court was of the opinion that the normal meaning of the words "emergency medical treatment" did not include ongoing treatment of chronic diseases in order to prolong life.
- (2) The court intimated that the application had to be considered in terms of the provisions of the Constitution dealing with the right to emergency medical treatment.
- (3) The court was of the opinion that the concept of "emergency medical treatment" entails some "suddenness and at times even an element of unexpectedness".
- (4) The judgment made it clear that a court would not readily interfere with rational decisions taken in good faith by political organs and health care authorities charged with the responsibility for budgeting for and prioritising health care services.

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Question 4

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 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.

Question 5

In *Clarke v Hurst* 1992 (4) SA 630 (D), the Court's finding was that discontinuance of medical treatment in the particular circumstances would not be unlawful because ...

- (1) it would merely give effect to Dr Clarke's "Living Will" in which he had expressed his wish not to be kept alive by artificial means
- (2) it would amount to Mrs Clarke's assisting her husband in an act of suicide and since suicide is not an offence in our law, such assistance can likewise not be regarded as unlawful
- (3) society's legal convictions dictated that the feeding of the patient does not serve the purpose of supporting human life as it is commonly known.
- (4) such discontinuance would not in law be regarded as the cause of Dr Clarke's death.

Question 6

Cloning may be defined as the technique whereby a genetically identical duplicate of an organism is produced through genetic manipulation. We can differentiate between reproductive cloning and therapeutic cloning. The National Health Act 61 of 2003...

- (1) prohibits embryo splitting for the purpose of reproductive cloning.
- (2) prohibits the manipulation of any genetic material for the purpose of either reproductive cloning or therapeutic cloning.
- (3) prohibits therapeutic cloning in absolute terms.
- (4) allows nucleus transfer for purposes of reproductive cloning.

Question 7

The Choice on Termination of Pregnancy Act 92 of 1996 makes certain acts punishable. Which one of the following instances **DEFINITELY** amounts to an offence?

- (1) A nurse terminates a 13 year old girl's pregnancy in the eight week of gestation without the consent of the girl's parents.
- (2) A medical practitioner terminates a woman's pregnancy in the seventh week of gestation at a place which has no telephonic means of communication.
- (3) A medical practitioner terminates a woman's pregnancy in the 37th week of gestation in the absence of any indication for the termination of pregnancy.
- (4) A midwife terminates a woman's pregnancy at the woman's request in the ninth week of gestation.

Question 8

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) The same test is applied in both criminal law and the law of delict to determine whether a doctor acted negligently.
- (2) A doctor can protect himself or herself against any criminal, contractual, and delictual liability by having the patient sign an indemnity clause.
- (3) If a patient died under the alleged **negligent** care of a medical practitioner, the medical practitioner may be charged with murder, and the court must inform the relevant professional board of *prima facie* proof of unprofessional conduct by the practitioner that comes to light during court proceedings.
- (4) 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.

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Question 9

Wrongful pregnancy refers to cases where the parents (or parent) of a healthy but unwanted child institute a claim against the party who allegedly is responsible for failing to prevent the conception of the child or the mother's pregnancy. When studying the judgments by our courts concerning this type of action, it is important to distinguish whether the claim was based on contract or delict. The basis for the action (contract or delict) also determines whether the judgment in the case is only relevant in cases where the request for sterilisation was made for socio-economic reasons, and the type of damages that can be recovered. Which one of the following statements is correct?

- (1) In *Administrator of Natal v Edouard* 1990 (3) SA 581 (A) the Appellate Division confirmed that both patrimonial and non-patrimonial loss may be recovered with an action for wrongful pregnancy based on breach of contract.
- (2) In *Raath and Another v Mukheiber* 1999 (3) SA 1065 (SCA) a wrongful pregnancy claim succeeded on the basis that the sterilisation upon which the doctor and the patient had agreed was never performed.
- (3) In a delictual action for wrongful pregnancy, the claim for damages is limited only to the situation where the request for sterilisation was made for socio-economic reasons.
- (4) In *Administrator of Natal v Edouard* 1990 (3) SA 581 (A) the Appellate Division per Van Heerden JA said that the birth of a normal child does not invariably constitute a blessing.

Question 10

The action for wrongful pregnancy/conception was recognised by the Appellate Division in *Administrator of Natal v Edouard* 1990 (3) SA 581 (A), and the action for wrongful birth was first recognised in our law in *Friedman v Glicksman* 1996 (1) SA 1134 (W). Our courts are unwilling to recognise the action for wrongful life. Is it not inconsistent to recognise the first two causes of action, but to reject the last? According to the Supreme Court of Appeal in *Stewart v Botha* 2008 (6) 310 (SCA), the reason for rejecting the action for wrongful life despite the recognition accorded to the other two causes of action is that...

- (1) recognition of the action for wrongful life would pave the way for a disabled child to sue his or her parents for not having him or her aborted as foetus.
- (2) it would be unfair to hold the doctor liable against both the parents and the child for the same damages
- (3) the action for wrongful life is the only one of these causes of action that can only succeed if the court finds that the child would have been better off never to have been born.
- (4) recognition of wrongful life would lead to a further escalation in the cost of obstetric services.

TOTAL FOR PART A: [30]

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PART B**Question 1**

- 1.1 Helga Fury lodges a complaint of unprofessional conduct against Dr Verity Edelstein with the Health Professions Council of SA (HPCSA). The registrar submits the complaint to a preliminary committee of inquiry. The preliminary committee of inquiry considers the complaint, the further information garnered and Dr Edelstein's explanation of the subject matter under dispute. The preliminary committee of inquiry now has to make a finding. List the three possible findings that the preliminary committee of inquiry may make. (3)
- 1.2 Dr Doodle is a clever man and excellent diagnostician, but he is extremely slow – he is always at least three hours late for appointments and sends his accounts out three or four months after having seen his patients (he is obliged to send accounts out within a reasonable time). The registrar of the Health Professions Council of South Africa (HPCSA) has received several complaints about his tardiness. How can the HPCSA ensure that Dr Doodle applies his considerable potential to the benefit of the community? (6)
- 1.3 The following clause is contained in a hospital's admission form.
- I absolve the hospital and/or its employees and/or its agents of any liability and I hereby indemnify them against any claim instituted by any person (including a dependent of the patient) as a result of damage or loss of any nature whatsoever (including consequential damages or special damages of any nature) directly or indirectly resulting from any injury (including a fatal injury) sustained by or harm done to the patient, whether or not such damage or loss is the result of intentional, negligent, or grossly negligent conduct on the part of the hospital, its employees or agents*
- The hospital's nursing staff act in a grossly negligent manner, causing injury and patrimonial loss to a patient who signed the admission form upon admission.
- (a) In terms of the judgment in *Afrox Health Care Bpk v Strydom* 2002 (5) SA 21 (SCA), can the hospital rely on the indemnity clause to escape liability for gross negligence? Explain.
- (b) What does the Consumer Protection Act 68 of 2008 stipulate in regard to the validity of an indemnity clause that purports to exclude liability for gross negligence? (4)
- 1.4 Ms Singh is a professional singer with dreams of international acclaim. She has a problem with her throat, and Dr Tremolo, an ear, nose and throat specialist, suggests an operation. It is a very delicate operation with many risks, some of them dangerous. There is also the risk of damage to the vocal chords, but this is so insignificant that most doctors don't tell their patients, and the reasonable person would also not even want to hear about it, especially as some of the bigger risks should rather be considered. Should Dr Tremolo inform Ms Singh about this risk to her vocal chords? (7)

[20]**[TURN OVER]**

Question 2

- 2.1 Discuss *negotiorum gestio* (spontaneous agency) as ground for justifying the provision of emergency medical treatment to a patient without the consent of either the patient or a person authorised to consent on behalf of the patient. (10)
- 2.2 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)
- 2.3 Why is stem cell research so controversial? (5)
- 2.4 Set out the specific indications (grounds) for and the conditions under which a pregnancy may lawfully be terminated after the 20th week of gestation. (5)

[25]**Question 3**

- 3.1 Although the negligence of a medical practitioner is always determined by considering the question whether the medical practitioner acted like a reasonable person (reasonable practitioner belonging to the particular branch of the health care profession concerned), negligence is nevertheless judged in the light of all relevant surrounding circumstances. Name four considerations regarding the surrounding circumstances that are of special importance to medical law, explain each in one sentence, and give an example of each.(8)
- 3.2 Name five instances where a doctor may incur liability (whether direct or vicarious) for the negligent act performed by another health care practitioner. (5)
- 3.3 Discuss a number of cases which illustrate how difficult it is to prove a causal connection between the doctor’s (negligent) act and the dreaded result (9)
- 3.4 List the typical factual situations (or conduct by a medical practitioner) which may lead to liability on the grounds of wrongful birth (half a mark each). (3)

[25]**TOTAL FOR PART B: [70]****TOTAL FOR PAPER: [100]**

PART 1 (GENERAL/ALGEMEEN) DEEL 1

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For use by examination invigilator
Vir gebruik deur eksamenopsiener

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- USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
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PART 2 (ANSWERS/ANTWOORDE) DEEL 2

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34) (1) (2) (3) (4) (5)	69) (1) (2) (3) (4) (5)	104) (1) (2) (3) (4) (5)	139) (1) (2) (3) (4) (5)
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