

Syllabus for Health Law Survey Class, Spring 2020;

Room TU-II 119; Tuesday and Thursday 4:00-5:20

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(All page numbers refer to the 9th (latest) edition of Hall, Orentlicher, Bobinski, Bagley & Cohen *Health Care Law and Ethics*)

PLEASE NOTE THE FOLLOWING: (Required Wording for Syllabus)

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Date	Readings	Notes
<p>January 14, 2020</p> <p>(Go through as much of this material as you can; we will gradually catch up)</p>	<p>Greeting and introduction Hippocratic Oath, My Daughter's \$29,000 appendectomy (Some cases in the news)</p> <p>(Throughout the course, bring interesting current concerns regarding health law to the table to be discussed. We won't spend endless time on these, but just have a look at what is going on in health law at the present time).</p> <p>Chapter 1 in the Hall textbook (page 1-50)</p> <p>Amanda Bennett article (page 5) Fitzgerald (Page 15) Hall (Page 19) Eddy (page 26) Gewande (page 30) Merrill et al (page 35) Look at the graphs on page 41 and be prepared to discuss them in general terms.</p>	<p>We will start with the oath of Hippocrates just to get us going—read it to see what may still apply after many centuries!</p> <p>These readings in Chapter 1 provides an overview and gives you a bit of background that will be helpful throughout the class. I understand it is a lot of reading, but be sure to read, at least, the articles enumerated to the left.</p>

January 16, 2020	<p>Part 1, Chapter 2 Part A: “Duty to treat” on pages 54-93.</p> <p>Be prepared to discuss:</p> <p>Hurley page 54 (diagnosis not defined; probably an obstetrical emergency)</p> <p>Wilmington page 54 (Bronchial-pneumonia in a child)</p> <p>Wideman page 57 (Premature labor)</p> <p>Read the NOTES on page 65-67 “Moral and Constitutional Rights to Health care”</p> <p>Burditt page 67-71 (Active Labor)</p> <p>Be sure to read and understand the NOTES on pages 71-79</p>	<p>Consider these questions:</p> <p>Should there be a duty to treat? Has the duty to treat been expanded under modern law, and how?</p> <p>Has a balance been achieved in modern medical practice so that those who come with the expectation of being seen by a physician will not be denied medical care in cases of unmistakable emergency?</p> <p>Burditt is the EMTALA case that you should understand. Review what is required under EMTALA as far as screening and stabilization is concerned. (This is one of the most important cases that we will be discussing!!)</p>
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January 21, 2020	<p>We will finish our discussion of Burditt and EMTALA; read all of this material carefully. The notes following the case are important, and they mention the Baby K case that we will cover later, but you can read a summary on pages 610. We will look at some examples, and move on to:</p> <p>Walker page 79 (coerced sterilization)</p> <p>United States v. University Hospital (spina bifida; Page 82)</p>	<p>We will discuss some expansions of EMTALA in class, and these are important.</p> <p>Look at the guidance provided at the bottom of page 136 for guidance as to how to think about ADA violations citing the Pushkin case.</p> <p>Would the courts have come to the same conclusion in 2014 as they did in 1977? Think about disparate impact.</p>
January 23, 2020	<p>Bragdon v. Abbott (HIV; Page 87); this is not a full case, but read the abstract as it is important</p> <p>Glanz v. Vernick (Ear problem; Page 88)</p>	<p>Is HIV a disability? Could there have been accommodation? What about the risk to the dentist?</p> <p>Look at the algorithm (page 90) as to how to deal with perceived ADA allegations.</p>
January 28, 2020	<p>We go on to chapter 2-part B: “The structure of the treatment relationship” pages 93-119. Be prepared to discuss:</p>	<p>In the following cases we look at whether or not a physician-patient relationship was established. What is needed to establish such a relationship? Suggesting an over-the-counter medication used commonly—is it enough? Is the imbalance between the patient’s and physician’s knowledge enough for the present knowledge?</p>

	<p>Adams page 93 (Ectopic [tubal] pregnancy)</p> <p>Estate of Kundert v. Illinois Valley Community Hospital (Infant with fever; page 96)</p> <p>Reynolds (Spinal cord injury; Page 98)</p> <p>Lyons page (Vaginal infection; Page 100)</p>	<p>Compare Kundert with Adams Do you agree with the courts as to whether or not a doctor-patient relationship was established?</p> <p>More on establishing a physician-patient relationship.</p> <p>Why did the court feel that a finding for the plaintiff would have an impact on the practice of medicine?</p> <p>Think about the Lyons case as having established the doctor-patient relationship, was the patient abandoned?</p>
January 30, 2019	<p>Schloendorff, page 427 (NOTE THAT THIS CASE IS OUT OF ORDER, BUT REVIEW IT NOW FOR DISCUSSION)</p> <p>Tunkl page 107 (can't avoid potential liability with contract of adhesion)</p> <p>Ricks (infected right hand; Page 112)</p> <p>Payton (Page 161)</p>	<p>The Schloendorff case shows what protections were afforded to the hospital a century ago. Note that justice J. Cardozo wrote this opinion!!</p> <p>Compare Schloendorff with Tunkl, a 1963 case; later in the semester we will look at institutional liability in the modern setting. (We will look at Franka later, that seems to show that the pendulum is swinging back to provide more</p> <p>In thinking about this case focus on when the doctor – patient relationship was established, if it was ended by the patient, and if it was re-established. Look up the dissent if you have a chance (not in the book, but look it up anyway).</p> <p>In Payton we see that if a patient makes an appointment</p>

<p>February 6, 2020</p>	<p>Bradshaw v. Daniel page 143 (Rocky Mountain spotted fever)</p> <p>We may start on our discussion of informed consent (CHAPTER 3 PART C; PAGES 152-208)</p> <p>Be sure to read (and be prepared to discuss) the two articles: "Patient-centered Medicine" on page 152 and "Rethinking Informed Consent" on page 153.</p> <p>Canterbury v. Spence page 162 (Back pain, laminectomy)</p>	<p>them in view of the HIPAA material.</p> <p>Is this in conflict with HIV disclosure? Is special confidentiality for HIV reasonable?</p> <p>Think of the competing (different) standards of informed consent. Competing Disclosure Standards. Which do you like best as an attorney? Which would you like as a patient?</p> <p>This is a very important case that helped to establish the "material risk / rational patient" standard for informed consent. Think of the balance between very bad things that rarely happen and less severe things that may happen more frequently. Simply saying that the operation is risky and was told "not any more than any other operation" is not sufficient to disclose risks. This is defined on page 166-7. Also note footnote 15 on page 163.</p> <p>Read the obituary of Jerry Canterbury from The New York Times May 16, 2017 (TO BE DISTRIBUTED)</p>
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<p>February 11, 2020</p>	<p>We will move ahead with our discussion of informed consent.</p> <p>Culbertson v. Mernitz page 209 (Urine leakage)</p> <p>Read the NOTES (pages 170-175) on “Competing Disclosure Standards” and “The Other Elements of a Nondisclosure Claim”</p> <p>Rizzo page 175 (Forceps Delivery)</p> <p>Read the NOTE on pat 178-185</p> <p>Moore v. The Regents (Hairy-call leukemia; Page 187—don’t skip the dissent.</p>	<p>Here the standard for disclosure is different than in Canterbury; it is what “the reasonably careful skillful and prudent physician would disclose under the same or similar circumstances.”</p> <p>Consent simply too broad, therefore not valid. Look at the general limitations to the duty to disclose (page 219-20).</p> <p>Please also review those sections of the Moore opinion that are printed on pages 667-672, and look at the questions on page 207-208. Be prepared to discuss your answers.</p>
<p>February 13, 2020</p>	<p>Howard v. University of Medicine (Back injury; Page 193) We move on to Section “D” of chapter 3.</p>	<p>We will finish up with Moore, and move on to Howard.</p> <p>Keep in mind that the court looks at this from the patient’s perspective. Everyone who practices either law or medicine has to have a first case. How should we deal with the fact that everyone wants to have the best and most experienced (not always the same) physician.</p>

	Grimes v. Kennedy Krieger (lead exposure; Page 213-229)	Look at “non-therapeutic research” as a concept. If you have time skim over the rest of this chapter as it contains much interesting material.
February 18, 2020	<p>We will go on to chapter 4,</p> <p>McCourt v. Abernathy (two conditions; Page 282) Also read the excerpt at page 340!!</p> <p>Locke v. Pachtman (broken needle) page 285</p> <p>Jones v. Chidester (two schools doctrine; Page 298)</p>	<p>The portions from page 229 to 251 will not be covered in class, and will not be material that you need to know for your final exam, but has lots of good material there, so read it if you have time.</p> <p>Malpractice starting on page 253. Read the introductory material (Section A of this chapter) from page 253-281. I will have a PowerPoint for you as well. Definitely read “The Medical Malpractice Myth” on page 267; understand the figure on page 271. Also read “Fostering Rational Regulation of Patient Safety” on page 272.</p> <p>Was the court too harsh in awarding punitive damages?</p> <p>Also read the material regarding Locke on page 317 (Res Ipsa); remember the smoking gun!</p> <p>Considerable number” or “sufficient number” to make two schools of thought. Reputable and respected was not the proper jury instruction.</p>

February 20, 2020	<p>Chappel v. Allison (broken leg; Page 300)</p> <p>Murray v. UNMC (expensive drug; page 310)</p> <p>(I will offer a presentation on “Rational Rationing”)</p>	<p>Chappel v. Allison Think about the “locality rule” that was abandoned in this case. Think about the evaporating difference between general practitioners and specialists.</p> <p>Is this rationing of care? This case looks some of the problems we have with insurance. Think about if it is ethical in instances where insurance declines to pay, for people to not get a treatment that might help them. Is it fair that for the chance to try the treatment they may need to declare bankruptcy?</p> <p>Think of how you feel about rationing. At what point in the continuum of care does the benefit become disproportionately small when compared with the cost in both dollars and human resources. Is rationing ever rational? There are no true or not true answers to</p>
February 25, 2020	<p>Helling v. Carey (The well-known glaucoma [eye-pressure] case) Page 321)</p> <p>Trees v. Ordonez (Stability plate; Page 333)</p>	<p>Physicians met the standards of care, but the court held the standard was not correct. Who should decide medical standards—courts or medical experts? NOTE that this case is a bit of an outlier, even though the standard of care did change as a result of it. Look at the material on pages 348 to 357.</p> <p>A case of who can provide expert opinion</p> <p>Who can be an expert witness?</p>

		This case holds that “a qualified expert, who has knowledge about the standard of care that is helpful to the trier of fact....” In <i>Thompson v. Carter</i> (mentioned on page 334) they held: “only if the witness possesses scientific, technical or specialized knowledge on a particular topic will he qualify as an expert on the topic.”
February 27, 2020	<p><i>Cruz-Vazquez v. Mennonite</i> (professional expert; page 335)</p> <p><i>Stang-Starr v. Byington</i> (cervical abnormality; page 341)</p> <p><i>Sullivan v. O’Connor</i> (nose operation; page 349)</p> <p><i>Franklin v. Gupta</i> (carpel tunnel syndrome; page 354)</p>	<p>The professional plaintiff’s expert witness case. Impeachment is OK; disqualification – not OK</p> <p>Case looks at expert citing at other’s writings/treatises as hearsay. Be sure to look at the notes on page 367-370. Guidelines are gaining importance and could be admitted</p> <p>Breach of contract Doctors shouldn’t promise what they can’t be sure to so. The objective claim that he would “enhance her beauty.”</p> <p>Should the surgeon be under “captain of the ship” or “borrowed servant” rule? This is a very important aspect of the course; be sure to look at the distinction carefully.”</p>
March 3, 2019	<i>Bruesewitz v. Wyeth</i> (vaccine complication; page 362)	This is a US Supreme Court case. Is a vaccine an unavoidably unsafe agent? Be sure to read the Sotomayor dissent starting at page 365. Pay attention to “comment K” (page 366). Also, review the various types of product liability that may be

	<p>We go on to section E of this chapter on page 376, Causation and affirmative defenses</p> <p><i>Herskovits v. Group Health Cooperative...</i> (lung cancer; page 376)</p> <p><i>Rathje v. Mercy Hospital</i> (alcohol abuse and drug reaction; page 386)</p> <p><i>Schneider v. Rivici</i> (page 394; breast cancer—alternate treatments)</p> <p>Madden, page 401 (Hepatitis from blood transfusion after perforated organ)</p>	<p>considered for drugs; “instructions for use” and the notes starting at page 367-396 and the review questions on page 376.</p> <p>Lost chance of survival. Look at the Pearson concurrence (page 379) and the Brachtenbach dissent (page 381). Look at the notes following the case and the problem at page 385.</p> <p>Statute of limitations; statute of repose is noted at page 393 (note 10 years for Texas). Should we have a broader system to take care of bad outcomes rather than the present tort system?</p> <p>Patient waived the benefits of standard treatment. Think about whether or not Rivici was inherently bad (a quack). The issue here is informed consent being an affirmative defense. What should Rivici have done to conduct research without the problems he encountered? Also read the obituary distributed in class.</p> <p>Arbitration clauses are not contracts of adhesion—or are they? Compare this case with the Tunkl case we discussed earlier. Look at the note on page 405.</p>
March 5, 2020	Fein v. Permanente Medical group (Heart attack, page 432)	The California Supreme Court upheld the non-economic

	<p>Roberts v. Stevens Clinic Hospital (Post-surgical death page 414)</p> <p>DISTRIBUTION OF THE MID-TERM EXERCISE; WORK IT THROUGH DURING THE SPRING BREAK IF YOU WANT TO PARTICIPATE; WE WILL GO OVER THE RESPONSES ON THE FIRST DAY FOLLOWING SPRING BREAK.</p>	<p>damages cap and the direct payment; note that in Texas presently the amounts would have to be paid out over time.</p> <p>Unfortunate death of a child resulted in a 10 million award that, perhaps, was influenced by a video “Day in the Life” and comments made in the closing argument. Should “Day in the life of... films” be admissible? How about a ten million award for wrongful death? Is it reasonable? Who ultimately pays for such an award?</p>
March 14, 2020	<p>We will start with a review of the take-home mid-term exercise.</p> <p>Bleday v. Oum Group (alleged foot injury and insurance settlement of claim) (Page 422)</p> <p>Diggs v. Novant (injury during anesthesia page 432)</p>	<p>This case is really an insurance issue rather than health law, but raises some interesting questions as the settlement may have serious implications for the physician. Insurance company has the right to settle within the limits of coverage if it is in their interest to do so even to the detriment of their client. Read the Notes at page 425-427.</p> <p>The hospital as agency. Was the assumption that anesthesia was provided by</p>

		the hospital reasonable? Read the notes on page 458-461. Think about signs in the emergency rooms noting that the services are not part of the hospital. Look over Ostensible Agency material.
March 16, 2020	<p>Darling v. Charleston Community (Injury from leg cast; page 438)</p> <p>Johnson v. Misericordia (Leg injury; page 441)</p> <p>Boyd v. Albert Einstein (two problems, but heart attack resulted in death) (Page 450)</p>	<p>How far should liability be extended to a hospital when a physician causes harm? Is the nurse culpable, and therefore her employer? The Darling case changed how the nurse is perceived, and ultimately gave nurses much more power and influence.</p> <p>Credentialing and privileging.</p> <p>Should the hospital carry 80% of liability for bad credentialing? They clearly should be liable to some extent.</p> <p>Does “capitation” by definition constitute a conflict of interest? Were physicians the ostensible agents of the HMO?</p>
March 21, 2020	<p>Wickline v State (leg circulation problem; page 454)</p> <p>Aetna Health Inc v. Davila Davila case (page 467)</p>	<p>Who is responsible for early discharge? Did she sue the wrong party? Read the section on managed care liability, pages 460-466 and the problem at page 466-467.</p> <p>Is pre-emption reasonable? We will spend some time on this subject—it won’t work if you are not prepared. Read the notes at page 494-496;</p> <p>REVIEW THE ERISA HANDOUT</p>

	<p>Mc Call v. United States (FI 2014; page 474)</p>	<p>(ERISA is not covered in the book as well as I would like—therefore the PowerPoint that will be distributed</p> <p>Looks at caps in Florida. Was there a rational basis for the cap? How do you feel about the balance?</p> <p>Think about tort reform. Who pays for medical misadventure, and who should pay for it? Should patients assume some risk when they seek medical care?</p> <p>Read the remaining pages of this chapter to page 493 Court accepts “substituted judgment” and no criminal or civil liability will attach.</p>
<p>March 28, 2019</p> <p>Class cancelled</p>		<p>Read the introductory material for Chapter 5 The right and “duty” to die on pages 494-505.</p>
<p>April 2 and 4, 2019</p> <p>Profs. Chandler and Mantel covered</p>	<p><i>In the matter of Karen Quinlan</i> (Removal from life support; page 505)</p>	<p>Advance directives and end-of-life issues. Father sought to remove life support; court gave this right to father, but Karen survived another 10</p>

		years. Who wants to be the next Karen Quinlan? Read the Advance Planning note at page 582
	<p>In re Conroy; page 508 Also look at the material on page 537, as this case is in two parts in your book.</p>	<p>Patient not competent to refuse, right ultimately might have been given to the Nephew but patient died before the case was adjudicated. The court discusses “limited objective” and “pure objective.” Think about “some trustworthy evidence that the patient would have refused treatment...”</p>
	<p><i>In re Jobes</i> (removal of life-sustaining treatment) Page 542</p>	<p>Court takes a rational approach for substituted judgement; look over this in section VII on page 546. When there no controversy among the stakeholders, substituted judgement is OK. Do you agree with this approach?</p>
	<p>Cruzan v. Director...(auto accident, page 511; also be sure to read the excerpt at page 547—both to be discussed</p>	<p>The standard for Missouri is “clear and convincing” and US Supreme Court said that it was OK for Missouri to have that standard. There was a rational basis for the standard.</p>
	<p><i>Washington v. Glucksberg</i> (assisted death; US Supreme Court page 582)</p>	<p>The US Supreme Court holds that bans on assisted suicide do not violate the constitution, as a rational basis exists.</p>
	<p>Vacco v. Quill (page 588)</p>	<p>New York’s prohibition of assisted suicide does not violate the Constitution. Also read note at page 609-626</p> <p>“Physician Aid in Dying”</p>

		<p>(Look up how many states now allow physician-assisted suicide for terminally ill patients?)</p> <p>Read the section on Ethics Committees at pages 579-81</p>
April 9, 2019	<p>Review of cases covered on April 2 and 4</p> <p>In re Baby K (page 610) Futility case?</p> <p>Causey v. St. Francis Medical Center (end-stage disease; page 631)</p> <p>Lane v. Candura (gangrene of leg, page 531)</p> <p><i>Department of Human Services v Northern</i> (gangrene of leg, page 532)</p> <p>PowerPoint on Ethics Committees</p> <p>prepared to discuss how you feel about this.</p> <p>Read the Notes on Brain Death page 621-7</p>	<p>Anencephalic infant. Also consider the EMTALA issue here. Do you think EMTALA was intended to provide ongoing care to an anencephalic infant? Was this an ADA case, why or why not? Was the fact that this child survived 2 ½ years a “medical miracle?”</p> <p>Family wants aggressive care in the face of (perceived) futility. Case settled→unknown details.</p> <p>Patient was “lucid and sane” contrast this case with the Department of Human Services case.</p> <p>Patient delusional about cause of gangrene, unable to make informed consent or refusal.</p> <p>For our class, brain death must have three determinations at least 24 hours apart without brain activity.</p>

April 11, 2019	<p>Finish our discussion of Ethics Committees and two case reviews I</p> <p>We will start Chapter 6, Organ Transplantation. Read the introductory parts 645-650.</p> <p>Strunk v. Strunk (kidney failure, page 634.)</p> <p>In Re Pescinski (kidney failure; page 637)</p> <p>Read and be prepared to discuss the problem on page 640. How you feel about this.</p> <p>In Re T.A.C.P. Anencephalic newborn, (page 642)</p> <p>State v. Powel (removal of cornea at autopsy; page 649)</p> <p>Bortherton v. Cleveland (removal of cornea at autopsy; page 652)</p>	<p>Does the court have sufficient evidence to say that the donation would be of value to Jerry Strunk? Be sure to read the Steinfeld dissent</p> <p>Compare Strunk with Pescinski; Strunk suggested benefit to the incompetent donor, while Pescinski did not.</p> <p>Is the anencephalic newborn considered “brain dead” for purposes of organ donation? Read the comment “Redefining Death” at page 657. The idea that death could be re-defined so as to consider organ donation has been addressed when we discussed end-of-life. In TACP we look at another aspect of this problem</p> <p>How much freedom should the state have with regard to body parts? Florida says it is OK, but...</p> <p>Finally settled. Better to ask?</p>

	<p>McFall v. Shrimp (Bone Marrow transplant; page 655)</p> <p>(We discussed Moore previously, we will not revisit that case now)</p> <p>Greenberg v. Miami Children's Hospital (S.D. Fla 2003) Page 672</p> <p>The remainder of Chapter 6 looks at organ allocation. Read pages 680-697 regarding Criteria for Rationing Organs. Be prepared to discuss your views.</p>	<p>Can you be forced to donate renewable tissue? Why or why not?</p> <p>The Canavan disease case. Think about why this happened, and what should have been done from the onset. Compare the issues here with those of Moore</p>
April 16, 2019 (Chapter 7)	<p>Buck v. Bell (274 U.S. 200 (1927) Page 701)</p> <p>Skinner v. Oklahoma (316 U.S. 535 (1942) Page 703)</p> <p>Griswold v. Connecticut 381 U.S. 479 (1965) Page 714</p> <p>Roe v. Wade 410 U.S. 113 (1973) Page 722</p> <p>Planned Parenthood of Southeastern Pennsylvania v. Casey (abortion; page 728)</p> <p>Gonzalez v. Carhart (Partial birth abortion; page 736) 550 U.S. 124 (2007)</p>	<p>A very important eugenics case. Important also for the message that it gave about our country.</p> <p>Think about how this case, 15 years after Buck, was different. What happened?</p> <p>Read the Stewart dissent. He called the Connecticut law "uncommonly silly."</p> <p>The first abortion rights case</p> <p>Looks at the burdens imposed on those seeking abortion. Are they "undue burdens"?</p> <p>I will be showing some drawings; if any of the class might be offended, do not hesitate to step outside for the PowerPoint part of this class. Should it matter how it is done</p>

	<p>In RE A.C. (forced cesarean delivery of infant in a cancer patient; page 766)</p> <p>Whitner v. South Carolina (pregnant woman on drugs; page 777)</p> <p>Ferguson v. City of Charleston (drug testing during pregnancy; page 781)</p> <p>J.B. v M.B. & C.C. (disposition of embryos; page 828)</p>	<p>if the fetus winds up dead? Who should decide and why?</p> <p>Should the law impose an adversarial relationship between mother and fetus?</p> <p>Should the least able to procreate decide on the fate of embryos or either party wishing not to do so? (Note reference to Skinner on page 831)</p>
April 18, 2019	<p>R.R. v. M.H. (surrogacy dispute; page 839)</p> <p>Culliton v. Beth Israel (Legal name of surrogacy infants; page 844)</p> <p>Diamond v. Chakrabarty (can a bacteria be patented; page 871)</p> <p>Mayo collaborative services v. Prometheus Laboratories (US, 2012 page 876)</p>	<p>A very emotional story.</p> <p>Name should cause least disruption for the family and the child.</p> <p>Some things cannot be patented.</p>
April 23, 2019	<p>Catch up day, and if time, discussion of health care reform. If time permits I will provide a lecture on the good and bad of the affordable care act.</p> <p>Have questions ready for review!</p>	

April 25, 2019	<p>Tentative guest lecture: Professor Leonard Zwelling to present</p> <p>This should be fantastic—feel free to bring guests</p> <p>I will arrange snacks for our final session</p>	
Have a great summer!!!		