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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2019

LAW 434/543C
Medical Negligence Law

Section 1
Osmond, Raab

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

- NOTE:
1. This is an “open book” examination, although no textbooks are allowed.
 2. ANSWER ALL QUESTIONS.

THIS EXAMINATION CONSISTS OF 6 QUESTIONS

FACT PATTERN #1

The Plaintiff, Jane Doe is a naturopathic doctor in a small rural community on Vancouver Island. On January 3, 2017 she suffered a hemorrhagic stroke (bleeding in her brain) caused by bleeding of an Arterio Venous Malformation (“AVM”) in her brain which has left her with brain damage.

An AVM is a rare and abnormal connection between arteries and veins in the brain, which can cause bleeding in the brain. If significant bleeding in the brain occurs, it can cause a permanent brain injury. Unless the AVM bleeds or causes a seizure, it is usually discovered incidentally in the course of investigations for other conditions.

If an AVM is detected and diagnosed before an injury occurs it can be treated, but depending on the location of the AVM, there are risks of brain injury that can occur from the surgical repair of the AVM.

Jane Doe began experiencing severe headaches in the fall of 2016. At first, she thought it was related to the fact that she was caring for her aging mother who was recovering from hip replacement surgery. This was very stressful and Jane was not sleeping much at night. She experienced mild headaches almost daily and an excruciating headache causing her to have to lie down in a dark room about once a week. These more severe headaches were often preceded by dizzy spells and feeling disoriented. Initially she tried to relieve her headache with natural remedies, specifically rubbing various essential oils on her temples. She also tried Tylenol and Ibuprofen on a few occasions but did not find these medications helped.

After a few weeks, Jane tried to make an appointment with her family physician to get some medication to help her cope with the debilitating headaches. Her family physician was not available for 2 weeks, so she went to a walk-in clinic. She saw Dr. Brown at the walk-in clinic and told him that she needed a stronger medication to deal with terrible headaches she was getting about once a week. She told him the headaches were caused by the fact that she was caring for her mother and not getting enough sleep, and that she just wanted something for the pain to get her through this difficult time. She also told him that she had tried Tylenol and Ibuprofen for her headaches but that these medications did not help. She did not tell him about the essential oils she was using because she did not want the doctor to think she was a quack. In her experience medical doctors had little regard for natural remedies such as essential oils. Dr. Brown wrote Jane a prescription for a stronger migraine medication and told her that if this did not help, or if the symptoms got worse, she should return to the clinic.

Jane began taking the medication whenever she felt the beginning of one of her excruciating headaches, but she did not feel that it helped much. After a couple weeks she stopped taking the medication and continued to try to relieve her headaches with various essential oils. These remedies did not help much either, and in fact the pain got worse, and she was now suffering debilitating headaches at least twice a week.

Approximately two months after her visit to the walk-in clinic, Jane suddenly felt dizzy and extremely unwell, and collapsed on the floor, unable to move or speak. Her husband called 911.

Jane was taken to the hospital and diagnosed with a massive hemorrhagic stroke caused by an AVM. She had suffered a significant and permanent brain injury and was unable to move or communicate.

At the hospital, Jane's treating neurologist told Jane's husband it was too bad she did not get referred to him when the headaches started because they were all caused by this AVM. Jane's husband consulted a lawyer.

Jane's case went to trial. At trial, the following evidence was adduced by the experts.

The Plaintiff's expert is the treating neurologist. He says he receives referrals from family physicians in these circumstances regularly and is accordingly familiar with how family physicians treat these patients. The Plaintiff's expert explained that most patients do not understand that the onset of severe headaches can be indicative of a life-threatening problem. In his experience, patients are primarily focussed on getting rid of the pain and typically attribute the cause of the headache to various stresses of life circumstances. He advised that he would have expected that Dr. Brown obtain a more thorough history. Had Jane described the recent onset and severity of her headaches, including the dizzy spells and disorientation, he would also have expected Dr. Brown to have referred Jane to a neurologist and to have ordered head imaging right away to rule out the possibility of a potentially life-threatening condition. The treating neurologist further gave expert evidence that had Jane been referred to him, and undergone a head CT, this would have revealed the AVM that was causing the headaches. While not all AVM are visible on CT (as it depends on their size and location) based on his experience approximately 60% are visible, and the detection rate continues to improve with improvement in the imaging technology. Once detected, the AVM can be surgically repaired.

The defendant had an expert who was a family physician who also works in a rural community. He gave expert evidence that headaches are one of the most common complaints from patients, and based on what the Plaintiff asked for, namely medication to manage her headaches, Dr. Brown exercised his clinical judgment reasonably and accordingly met the standard of care. He said that if he was to order head imaging and refer every patient who wanted medication for headaches to a neurologist, our medical system would be overwhelmed. The better practice is simply to advise the patient to return if the problem gets worse. Once a physician has provided this advice, he is entitled to rely on the patient to follow the advice. The defendant also called an expert neuroradiologist from the United States who is a world leader in his field. This expert gave evidence that there are no studies on the detection rate of AVM and he could not say with certainty whether or not Jane's AVM would have been detected. He further gave evidence that based on the location of Jane's AVM, which was deep in the brain tissue in a difficult to access location, it is unlikely that it could have been repaired without causing the same type of brain injury that Jane ultimately suffered.

QUESTIONS FOR FACT PATTERN #1

(1) Did Dr. Brown owe a duty of care to Jane?

[5 marks]

(2) Did Dr. Brown breach the standard of care?

[20 marks]

(3) Was Jane's injury caused by Dr. Brown's negligence?

[20 marks]

(4) Was Jane contributorily negligent?

[20 marks]

FACT PATTERN #2

Bill Bryne was a pianist with the Vancouver Symphony Orchestra. He was suffering from a ganglion cyst (a fluid filled lump on a joint), which had formed under his wrist and which bothered him when he played piano. It had grown over the past several months, and was becoming painful, especially while he played piano. During a regular doctor's visit he asked his doctor whether anything could be done about it. His doctor referred him to a general surgeon. The general surgeon told Bill that it could be surgically removed during a day procedure, and was then unlikely to return. Bill asked him if there were any risks of the procedure he should know about and the surgeon responded that "there are risks with all surgeries but I have been doing this for 20 years and never had a problem." He also told him it would likely take 2-4 weeks to heal after the surgery. Bill agreed to proceed with the surgery, and asked if it could be done soon so that it would heal in time for his next concert series starting in 3 months.

Two weeks later Bill underwent the surgery for the removal of the ganglion cyst on his wrist. While the surgery was performed technically correctly, the ganglion cyst was tightly attached to

a tendon in the wrist. The removal of the ganglion cyst injured that tendon, causing weakness and numbness of Bill's index finger. While Bill could still play piano, he could no longer play as well as he used to and he lost his job with the Vancouver Symphony Orchestra.

Bill later learned that injury to a tendon resulting in weakness or numbness of one or more fingers was a known risk of the procedure, although it was extremely rare, occurring in only 0.5% of all cases. He also learned that there was an alternative to the surgery, namely aspiration of the fluid in the ganglion cyst. This did not carry with it the risk of injury to a tendon, but is not a permanent solution as often the ganglion cyst will return a few months later. The general surgeon also told him afterwards that he would not recommend this alternative because there is a 5% risk of infection, and because it is not a permanent solution. There was also an alternative of having a type of steroid injected into the ganglion cyst, but this was not yet available in Canada as it had not yet been approved. Bill would have to travel to the USA for this treatment.

QUESTIONS FOR FACT PATTERN #2

- (5) Please discuss whether or not Bill would succeed in an action based on lack of informed consent.

[25 marks]

- (6) For the purpose of Question (6), assume that Bill succeeds in his claim of lack of informed consent. Please describe the type of compensation he would likely be entitled to.

[10 marks]

[TOTAL 100 marks]

END OF EXAMINATION