

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2020

LAW 382.001
Health Law

Adjunct Professor Penny Washington LL.B.

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 90

WRITING TIME ALLOWED: 3 HOURS
PREPARATION TIME ALLOWED: 10 MINUTES

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This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

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Overview of Examination Instructions

This examination has three parts (I, II and III). Parts I and II contain options.

- Part I (35 points) begins with a fact pattern raising a number of potential legal issues. You will select two options from a list for discussion and analysis. You may use point form in your response.
- Part II (40 points) presents four short essay topics from which you will select two for discussion and analysis. You may use point form in your response.
- Part III (15 points) is a mandatory short essay. You may use point form in your response.

PART I – Fact Pattern

MARKS

35 Dr. Alfred Ace is a general practitioner, duly licensed to practice medicine in BC. Wanting to expand the scope of his practice in order to pay down his enormous student loans more quickly, he took several weekend courses on cosmetic surgery offered by an American company at a motel in Washington State.

Dr. Ace had a patient (Betsy Brown aged 15 years) who, during the course of a regular check-up, complained to Dr. Ace that she was very unhappy with the shape of her nose, as she thought it ruined her selfies. She aspired to have a nose like Katy Perry's. Betsy told Dr. Ace that she had a small bequest from her grandmother which she could use to pay for the surgery, as she knew it was not covered by the provincial medical plan. However, when she had asked her girlfriends what their mothers had paid to have the surgery done by the local plastic surgeon, the amount was too high.

Dr. Ace told Betsy that he could do the surgery for a much lower price as he had recently taken some courses on the topic.

Dr. Ace explained the usual risks of surgery to Betsy and had her sign a consent form. He advised her that he could not guarantee the result but that he would do his very best. Dr. Ace was unaware that, about a year earlier, plastic surgeons in BC had become aware that this type of surgery on women under the age of 21 years carries a rare but significant risk of the patient permanently losing her sense of smell.

Dr. Ace had a friend who was the Operating Room manager at the local hospital who agreed to let him use the operating room when it was available on a weekend for a small fee. Dr. Ace was a member of the medical staff at the hospital as a GP but did not have surgical privileges there.

During the surgery, Dr. Ace started to experience some difficulties and sought advice from the representative of the American company who had taught him the technique. He sent him photos of the patient's face over the FaceTime app on his smartphone as well as texts discussing her appearance.

Unfortunately, although the surgery did result in the shape of nose desired by Betsy, she did lose her sense of smell. Betsy also complained of a small scar that developed a keloid or thickened appearance and, in her view, ruined selfies that were not taken from a specific angle.

The Chief of Staff at the Hospital became aware after the weekend that the surgery had taken place and immediately initiated an investigation. He interviewed the OR manager and a nurse who were present at the surgery and brought the matter to the Medical Advisory Committee which decided to revoke Dr. Ace's privileges immediately. Dr. Ace was not invited to the meeting because the Chief of Staff thought the facts were so egregious.

Dr. Ace prepared notes to himself after he became aware Betsy was unhappy about what he had done during the surgery. He also referred Betsy to Ms. Nancy Drew an aesthetician who rented office space from him and who sold Betsy a number of creams for the scar as well as offering her Botox injections which Ms. Drew did regularly for "special clientele" although she did not advertise this service, having had some difficulties over the years with the College of Physicians and Surgeons.

Betsy's parents are furious and looking to pursue any and all options for redress. Dr. Ace is also unhappy, having lost his privileges.

These facts raise a number of potential legal issues involving a number of different individuals and organizations, including the following options:

- (a) Licensure-related issues involving Dr. Ace and Nancy Drew;
- (b) Malpractice/informed consent/privacy issues; and
- (c) Credentialing/Medical staff disciplinary issues.

Select **two** of the options listed above (e.g., pick (a) + (b) or (b) + (c), etc). For each option that you select, discuss the legal implications arising from the facts. Be sure to identify, where appropriate, the nature of the possible legal claims or actions arising in the situation, the possible parties, the relevant legal rules, their application to the facts, and the likely or possible outcomes. Where you do not have sufficient facts to assess the claims or actions, indicate the types of information that would be relevant to your determination and why.

PART II – Short Essays: There are four possible topics – select **two** for discussion.

MARKS

40 **Option 1:** Commentators, including Picard and others, note that much criticism has been levelled against the present medical malpractice system, which requires patients to initiate a costly tort claim in order to obtain compensation for medical injuries. These claims are difficult to prove and stressful for both practitioners and patients. Others argue that tort litigation is society's best way of ensuring quality and accountability. Make an argument for either reforming the system into a type of "no-fault" compensation system (which would award substantially lower awards) or argue for the status quo as a means both to ensure quality and awards that reflect the true cost of errors. Provide reasons for your proposed approach and note the strengths and weaknesses of your proposal.

Option 2: We have reviewed a number of cases that have considered the fundamental Canadian and British constitutional law principles that support the argument that there is no free-standing right to health care in Canada. Consumers continue to turn to the courts, however, to seek to force governments to provide coverage for various treatments. Discuss the differences between the *Auton* and *Eldridge* cases and how the courts have applied the Canadian *Charter of Rights and Freedoms* in arriving at their results in considering the issue of what Medicare plans should fund and why. Do you agree with their approach to date? Why or why not? Is the suggestion of reforming the *Canada Health Act*, in particular to define "medical necessity" or to expand what is covered, a better option than leaving it to the courts?

Option 3: Minors and those with mental illness as a primary diagnosis will continue to be ineligible for medical assistance in dying, including under Bill C-7, the bill to reform the Criminal Code provisions dealing with this subject. In addition, advance directives to provide future instructions to access medical assistance in dying on behalf of incompetent adults, are not permitted. Many advocacy groups argue that these exclusions are unconstitutional. Provide an argument for either the inclusion of some or all of these categories or for none. Be sure to provide reasons why and suggest any additional procedural safeguards that in your view would be necessary to ensure that vulnerable individuals would be protected or suggest why such safeguards are not feasible.

Option 4: Describe some common features of health care systems both in Canada and around the world and how law plays a role in how a health care system develops. Discuss how forms of compensation drive behavior of both patients and health care providers. Commentators have suggested that systems which mix both private and public health care options deliver superior results in terms of timely access to care. The international comparisons we reviewed suggest that on other measures, private systems do not deliver as well as public systems. Others see the introduction of further private options as leading to the destruction of public health care. Make an argument for or against an expanded role for private health care in the Canadian system. Is updating the *Canada Health Act* or expanding what is covered a better option than turning to the private sector? Why or why not?

PART III – Mandatory Short EssayMARKS

- 15 World-wide, COVID-19 cases passed the million infections mark on April 2, 2020 with more than 50,000 deaths. Chinese authorities identified the new type of coronavirus three months ago. It took one and a half months for the first 100,000 cases to appear and the same time again to reach one million. Each jurisdiction around the world has had to determine its own approach to controlling the spread of this virus and the laws of each country have been significantly tested in response – in many cases for the first time in such a significant way. In particular, the situation in the United States arguably demonstrates the difficulties where there is no centralized public health response and each state takes an individual response. Discuss the approach to public health and how its fundamental principles differ from those that apply in the ordinary course to individual health care interactions. Contrast and compare “voluntary” social distancing and self-isolation of returning travelers with the measures taken in Wuhan, China. Consider whether, as some have argued, mandatory quarantine orders and provincial bans on inter-provincial travel violate the Canadian *Charter of Rights and Freedoms*. What about the use of technology that enables surveillance of a population to ensure compliance with protective mechanisms such as smartphone locator technology or drones? Discuss whether the scale of this pandemic supports the argument of the text authors that it is time for a “One World” approach to such public health issues which know no boundaries. Consider if the World Health Organization should have greater powers to institute travel bans and other measures, including the allocation of protective equipment and ventilators, to ensure the health of the world’s vulnerable populations. Finally, if a vaccine is found that is effective, how should it be distributed? Once a sufficient supply is available, should it be mandatory? Would your answer change if it was only 50% effective and had significant potential side-effects? In answering, refer back to the principles of public health and reflect on what limits on democratic freedoms, if any, are acceptable in these emergency situations.

– END OF EXAMINATION –