

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

FINAL EXAMINATION – APRIL 2020

LAW 434.001  
Medical Negligence Law

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**EXAMSOFT PASSWORD:**  
**EXAMSOFT RESUME CODE:**

**TOTAL MARKS: 100**

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

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Law 434, Section 1

**FACTS:**

Jack, a 50-year-old accountant living in Vancouver, had progressively worsening back problems, with shooting pain down his right leg.

He was referred to Dr. Hoff, a neurosurgeon at a large teaching hospital in Vancouver. Dr. Hoff performed an assessment of Jack and suspected a likely disc herniation in his lumbar spine, specifically on the right side at the level of L4/5. He told Jack that surgery would likely be necessary and described the risks of surgery which included “bleeding, infection, and injury to a blood vessel or nerve around the spine.” Dr. Hoff referred Jack for a CT scan of his spine, which was completed 6 months later. When Dr. Hoff reviewed the dictated CT scan report, the radiologist described a herniated disc on the left side at the level of L4/5. Dr. Hoff reviewed his notes of his assessment of Jack which indicated right sided pain, which did not correspond with a herniated disc on the left side (a left sided herniated disc would cause left sided symptoms). Dr. Hoff assumed he must have made an error in his notes. He accordingly used whiteout to remove the word “right” in his notes and replaced it with the word “left”. He then booked Jack for a surgical procedure to remove the portion of the herniated disc on the left side at level L4/5 that was causing pressure on the nerve root (a discectomy).

On the day of surgery, Jack does not recall being seen by Dr. Hoff before being anesthetised for surgery. During the surgery, Dr. Hoff was surprised that the left side of the disc, where he was operating, looked pretty good - better than had been described on the dictated CT scan report. He accordingly did a very minor surgery. He could not see the right side of the disc in his operative field of view.

Dr. Hoff saw Jack in his clinic in follow up 6 weeks later. Jack stated that he still had shooting pain on the right side and that it had not improved. During this visit, Dr. Hoff reviewed his office notes from his initial assessment of Jack and recalled he had changed his description of Jack’s pain from the right side to the left side to correspond to the dictated CT scan report. He reviewed his operative report which described surgery on the left side of the disc. He then accessed the actual images from the CT scan for the first time and noticed the radiologist had made an error in reporting the disc herniation as being on the left side rather than the right side of the disc. The herniation was clearly on the right side of the disc. Dr. Hoff did not disclose any of this information to Jack; however, he told Jack that he could do a further repair using a different type of technique which he felt confident would relieve his pain. Fortunately, he had a cancellation that would allow him to perform the surgery the following day. Jack was grateful for the early surgical date and the prospect of different type of surgery which gave him hope of relieving his pain. Dr. Hoff described the risks of surgery in the same way as he had for the first surgery. Jack was in extreme pain and was desperate to get rid of the pain, so he agreed to proceed.

The following day, Dr. Hoff performed the same type of surgical procedure that he had performed 6 weeks earlier, but this time on the right side. He could see this disc on the right was causing significant compression on the nerve root, which would explain Jack’s significant pain. Dr. Hoff proceeded to remove the portion of the disc which was compressing the nerve root. In the course of doing so, a vessel supplying blood to the spinal cord was severed, causing significant bleeding and injury to the spinal cord causing paralysis. When he awoke from surgery, Jack could not move his legs and he was later told he would likely be confined to a wheelchair for the rest of his life.

During the course of his subsequent hospitalization, Jack learned from one his care providers that his initial surgery had been performed on the incorrect side. Jack was very angry when he learned of this and felt misled about the second surgery. Jack consulted a lawyer and commenced a medical malpractice action.

The following evidence was led at trial:

- Jack testified that he was very clear that his back pain was causing sharp pain down his right leg and that he has never had pain in his left leg. His recovery from the first surgery was very painful and required hours of physiotherapy until he could walk again, which was all for nothing. He also felt that if his surgeon was so careless in performing the initial surgery on the wrong side, it was likely this carelessness that caused the severed blood vessel and spinal cord injury during the second surgery – this, he told the judge, was simply a matter of common sense. Had he known about Dr. Hoff's mistake in performing the initial surgery on the wrong side, he never would have consented to him performing the second surgery; rather he would have sought out another neurosurgeon to do the procedure, even if it meant him suffering in pain for a few extra months. During cross-examination, Jack agreed that back problems could be caused by having a sedentary lifestyle and being overweight – both of which applied to him. He also agreed that he was quite desperate to find relief from the pain, and that he trusted Dr. Hoff at the time (although not anymore). Jack agreed that he had been told about the risk of the surgery which included bleeding, infection, and injury to a blood vessel or nerve around the spine, but he explained that he did not know that injury to a blood vessel could cause paralysis. He thought if a blood vessel was injured, the surgeon would simply repair it. He agreed that he did not ask Dr. Hoff any questions about the risks. Had he known of the consequence of this risk, he would never have consented to either surgery – he would rather have lifelong pain than paralysis.
- An expert neurosurgeon testified on behalf of Jack. This expert had been educated and trained in Canada, and had been appointed as a clinical associate professor in the department of neurosurgery at UBC Medical School before being recruited by Harvard Medical School to lead their neurosurgery program. This expert opined that where there is a discrepancy between the patient's symptoms and the dictated CT scan report, the standard of care required that the neurosurgeon resolve this discrepancy by either reassessing the patient or looking at the CT scan images, instead of just the dictated CT scan report. She also opined that all reasonably competent neurosurgeons would assess their patient again immediately prior to surgery, especially when 6 months had passed since the initial consultation, to determine if there had been any change in the patient's condition. In fact, there are clinical guidelines published by the American Academy of Neurosurgeons which state that this should be done. She conceded when cross examined by defence counsel that the Canadian Academy of Neurosurgeons has not included this requirement in its guidelines. She told the court that had Dr. Hoff either viewed the CT scan images, or re-assessed his patient before the surgery, the wrong-sided surgery would not have occurred.

Further, with respect to the second surgery, while severing a blood vessel to the spinal cord is a known risk, she had never severed a blood vessel during a discectomy. She explained that she uses a new technology which involves inserting a micro video camera into the operative

field which helps to visualise the structures, including the blood vessels better, thereby reducing the risk of injury to a blood vessel. She had recently published an article on this new approach in *Advances in Neurosurgery*, a medical journal, and this approach has been adopted by many neurosurgeons (mostly her former students). She explained to the judge that this type of injury is precisely why neurosurgeons should all adopt this new approach, especially since the consequences of severing a blood vessel near the spinal cord can be so devastating. During cross-examination, the expert conceded that there was no way of knowing whether or not using the micro video camera would have avoided the injury and that she was aware of this occurring during surgery using her micro video camera approach. The best that could be said is that using her approach would have given Jack a better chance of not suffering this injury, perhaps in the order of a 30% - 40% better chance.

- Dr. Hoff testified that on the basis of his notes and the CT scan report, it was reasonable for him to perform the surgery on the left side, as Jack's symptoms were on the left (according to his notes) and the dictated CT scan report showed a herniation on the left. He explained that the herniation on the right side must not have been causing problems to Jack 6 months earlier when he assessed him. He states that his diagnosis of the left sided disc herniation was a matter of clinical judgment which was appropriate at the time. He further testified that while he had read the Plaintiff's expert's article about her new approach using the micro video camera, he had not been trained in this approach, and that it takes many years for a new approach to be adopted by practicing neurosurgeons commenting that this expert "works in an ivory tower, not in the trenches like most of us."
- An expert neurosurgeon testified on behalf of Dr. Hoff. This expert worked in the same hospital as Dr. Hoff. He opined it was reasonable for a neurosurgeon to rely on the interpretation of the CT scan provided by the radiologist because that is what he does. He also commented that he had known Dr. Hoff for many years and was certain Dr. Hoff would tell the truth about what side Jack's leg pain was on during the initial visit. He also stated that when he informs patients about the risks, he routinely tells them that there is a very small risk of paralysis. In his 20 years of practice, a patient has never declined surgery because of this risk. With respect to the second surgery, the expert testified that severing a blood vessel is a known risk of the surgery which can occur as a result of anatomical variability in a patient. Dr. Hoff performed all of the correct steps in performing the surgery, using the appropriate instruments. There was nothing which Dr. Hoff did or failed to do that caused the injury. This injury was not surgeon related – in other words, it could have happened even if he (this expert) had been performing the surgery.

Law 434, Section 1

**QUESTIONS:**

**First Surgery**

1. Is Dr. Hoff liable in negligence to the Plaintiff in relation to the first surgery? Please answer the questions set out below including the relevant law, your analysis and your conclusion.
  - (a) Did Dr. Hoff meet the standard of care expected of him in relation to the first surgery? [15 marks]
  - (b) Assuming there was a breach of the standard of care in relation to the first surgery, did it cause or contribute to his injury? [15 marks]

**Second Surgery**

2. Is Dr. Hoff liable in negligence to the Plaintiff in relation to the second surgery? Please answer the questions set out below including the relevant law, your analysis and your conclusion.
  - (a) Did Dr. Hoff meet the standard of care expected of him in relation to the second surgery? [15 marks]
  - (b) Assuming there was a breach of the standard of care in relation to the second surgery, did it cause or contribute to his injury? [15 marks]

**Informed Consent**

3. Can the Plaintiff succeed in a claim against Dr. Hoff for failure to obtain informed consent? Please answer the questions set out below including the relevant law, your analysis and your conclusion.
  - (a) Did Dr. Hoff obtain informed consent from Jack for the first surgery? [7 marks]
  - (b) Assuming Dr. Hoff did not obtain informed consent for the first surgery, did his failure to do so cause or contribute to an injury? [8 marks]
  - (c) Did Dr. Hoff obtain informed consent from Jack for the second surgery? [7 marks]

- (d) Assuming Dr. Hoff did not obtain informed consent for the second surgery, did his failure to do so cause or contribute to an injury? [8 marks]

**Contributory Negligence**

4. The defence has alleged that Jack was contributorily negligent for his injuries. The particulars of negligence were stated to be Jack's sedentary lifestyle and significant obesity, both of which are known to cause degenerative changes in the spine, including disc herniation. Is the defendant likely to succeed in establishing some degree of contributory negligence on the part of the Plaintiff? Please state the relevant law, your analysis and your conclusion. [10 marks]

**END OF EXAMINATION**