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

FINAL EXAMINATION – APRIL 2021

LAW 434.001
Medical Negligence Law

Osmond, Raab

EXAM PASSWORD: 3uT8tR
RESUME CODE: B131E2

TOTAL MARKS: 100

(8:50 AM PDT) **PREPARATION TIME ALLOWED:** 10 MINUTES
(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED:** 3 HOURS

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Examplify, and to progress in Examplify until you see the **STOP SIGN,** where you will **WAIT until 9:00 AM**. **DO NOT proceed past the STOP SIGN**. **DO NOT begin typing your exam answers in Examplify until 9:00 AM!**

9:00 AM Exam Writing Time **– At 9:00 AM, you may proceed past the STOP SIGN in Examplify and begin typing your exam answers. Students are required to calculate and monitor their own time for writing exams.** All exam answer uploads will be monitored to ensure that typing of answers only occurred during the allotted Exam Writing Time.

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Your answer file should be named, and the coversheet of your answers should be titled with:
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i.e., **9999 LAW 100.001 Law of Exam Taking – Galileo**

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LAW 434, Section 1

The Plaintiff, Sarah White is a 50 year old woman living in the rural community of Cornfield BC. Ms. White loved to ride her Ducati motorcycle. On one sunny Sunday afternoon, Ms. White was out on a ride with a friend, and the two decided to have a friendly race on the quiet country road. The race ended badly with Ms. White taking a turn too fast and crashing into a tree.

Ms. White was taken by ambulance to Cornfield General Hospital where she was diagnosed with a fractured pelvis. She was seen by the on-call orthopedic surgeon who explained she would need to surgically repair her pelvis - a surgical procedure that would require the placement of some surgical screw and plates. The orthopedic surgeon advised her that while there were risks associated with the surgery, primarily injury to adjacent organs and the risk of infection, she told Ms. White that she expected she would have a good recovery and be back on her bike within 3 to 4 months with no residual pain or disability.

Prior to the surgery, Ms. White had a consultation with the on-call anesthetist, Dr. Painless. Dr. Painless explained that the surgical repair of her pelvis could be safely performed under either general anesthesia or spinal anesthesia. He explained that general anesthesia is when you are put to sleep during the surgery. He further explained that with general anesthesia there was a risk of nausea and vomiting, damage to the throat during the intubation and a 1 in 100,000 risk of death, which might be a somewhat higher for Ms. White because she had sleep apnea, was significantly overweight and was a life-long smoker.

On the other hand, spinal anesthesia is when a local anesthetic is injected directly into the cerebrospinal fluid around the spinal cord and which numbs you from the waist down so you do not experience pain during the surgery. You remain awake but sedated. Dr. Painless described this type of anesthesia as very safe and advised that he has never had any serious complications with this form of anesthesia. Dr. Painless recommended this approach as the safer approach in light of Ms. White's risk factors for general anesthesia. Ms. White did not like the idea of being put to sleep and recalled that her aunt had complained of having pain in her throat for months

after her general anesthesia, so she was happy to follow Dr. Painless' recommendation for spinal anesthesia.

The surgery was performed later that day. The surgery to repair her pelvis was successfully performed with no complications. Unfortunately, following the surgery, Ms. White did not regain feeling or movement in her legs and remained permanently paralyzed from the waist down. Dr. Painless assessed her and explained that this was a rare complication of spinal anesthesia and he did not know why it happened. He reiterated that he has never had any serious complications with any of his patients from spinal anesthesia before and shook his head saying, "I am so sorry this has happened to you".

Ms. White was advised by her orthopedic surgeon that she should undergo a 3 month period of rehabilitation at the rehabilitation center in Vancouver, BC. Her orthopedic surgeon told her that while she would never be able to ride her motorcycle again, there was the potential for some improvement in her function, for example gaining enough strength in her legs to assist with transfers from her bed onto a wheelchair and potentially even the ability to use a walker instead of a wheelchair. Ms. White was feeling very distrustful of her physicians and discouraged. She decided that what she stood to gain by going to the Vancouver rehabilitation center was so depressingly limited that it was not worth it, so she discharged herself against medical advice and left the hospital in her wheelchair, feeling angry and determined to find justice.

Ms. White has consulted you to find out if she has a viable medical malpractice claim. You have reviewed her medical records and consulted two expert advisors. First, you consulted an anesthetist, Dr. X who works in a rural hospital in Ontario. Dr. X advised you that, like Dr. Painless, he has never had a patient suffer permanent paralysis following spinal anesthesia. However, he is aware that the medical literature describes a 1 in 200,000 risk of this occurring. He always tells his patients about this risk, but none of them have ever declined proceeding with spinal anesthesia if he has recommended it over general anesthesia. Dr. X also advised you that the literature described permanent paralysis occurring more frequently with obese patients because it is more difficult to identify the anatomical markers to place the needle in the correct

location. Dr. X reviewed the technique used to administer the spinal anesthesia and told you that this is how he was taught and how he routinely does it. He didn't see anything wrong with Dr. Painless' approach. He did, however, recommend you speak with a colleague of his at Yale University, Dr. Y, who he described as the leading expert in the field.

You approached Dr. Y and obtained her opinion. Dr. Y prefaced her opinion by telling you that she doesn't spend much time in the operating room anymore as she is very involved in research and lecturing at international conferences on anesthetic related issues. Dr. Y noted that Dr. Painless used the "blind" technique in inserting the needle into the cerebrospinal fluid, ie, simply feeling for anatomical markers but not being able to visualize the insertion of the needle into the cerebrospinal fluid. She acknowledged that many rural anesthetists use this method, but stated that if she had been the anesthetist, she would have used the ultrasound guided technique which allows the anesthetist to visualize the insertion of the needle as it enters the cerebrospinal fluid surrounding the spinal cord. Dr. Y explained that this is definitely the safer way to proceed – especially with an obese patient in whom it is more difficult to identify the anatomical markers to ensure proper placement of the needle. Using the ultrasound guided approach allows the anesthetist to make adjustments if they can see through the ultrasound images that they are in the incorrect location and at risk of coming into contact with the spinal cord. When asked if this approach likely would have avoided Ms. White's injury, Dr. Y said she could not say with any medical certainty because it is not clear what precisely caused the injury to Ms. White's spinal cord. It is possible that it occurred as a result of an allergic reaction to the medication causing swelling and compression on the spinal cord; however, there was no evidence of swelling seen on subsequent imaging. It is also possible that it occurred for completely unknown reasons. She agreed that considering the obesity of Ms. White and how difficult it would be to identify the anatomical markers, the most likely cause is that the needle was probably improperly placed and came into contact with the spinal cord causing the injury. She said use of an ultrasound guided technique would likely avoid such misplacement; however, Dr. Y stressed that one could not say for sure if it would have avoided Ms. White's injury because there is no definitive test to prove how the spinal cord was injured.

After speaking with Dr. Y, you make enquires of Cornfield General Hospital and learn that the hospital does not equip their operating rooms with ultrasound machines, and that the local anesthetists have accordingly not been trained in this technique, even though it is used in many other rural Canadian hospitals. This has been a great source of friction amongst the anesthetists who feel this equipment is important for safe patient care, and the hospital administration which has failed to make it a priority - not because of funding limitations but rather because of lack of organization. You have also learned that all of the anesthetists who work at Cornfield General Hospital, including Dr. Painless, are not employees of the hospital, rather they work as independent contractors and bill the Medical Service Plan for the medical services they provide to their patients.

Ms. White has asked you for your opinion on the merits of a medical malpractice action against Dr. Painless. Please provide your opinion in response to the questions set out below. <u>In doing so, please set out the relevant law, your analysis of the facts and your conclusion for each question.</u> You should assume that the results of your investigations set out above represent the evidence that would be led at trial.

1. Ms. White seeks your advice on whether or not she is likely to succeed in an action against Dr. Painless for lack of informed consent. **(30 marks)**

2. Ms. White seeks your advice on whether or not she is likely to succeed in an action against Dr. Painless for negligence in the technique used to administer the spinal anesthesia. **(40 marks)**

3. Ms. White is concerned that because she was racing and going above the speed limit when her motorcycle accidence happened that she might be found responsible for her injuries and might therefore not be entitled to compensation, even if negligence is proven. Please advise her. **(10 marks)**

4. Ms. White has asked you if Cornfield General Hospital should be included as a defendant in the lawsuit. **(10 marks)**

5. Ms. White is concerned that the fact that she did not attend at the Vancouver rehabilitation center to undergo the recommended therapy might cause problems with her claim. Please advise her. **(10 marks)**

END OF EXAMINATION