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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 434.001
Medical Negligence Law

McGivern, Raab

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

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NOTE: 1. This is an open book examination, meaning you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

2. ANSWER ALL QUESTIONS.

THIS EXAMINATION CONSISTS OF 5 QUESTIONS

On the morning of Friday October 11, 2019, the plaintiff, John Smith, was involved in a single motor vehicle accident. That morning he was meant to be at work but on his way to work he made a stop at the pub, as he frequently did on Fridays. The server at the pub whom he had known for years, served him his usual whisky and commented, "Been seeing you here a lot on Friday mornings John". Mr. Smith chuckled and said "yeah, my boss thinks I have client meetings on Friday mornings. Eventually he will figure out that I don't but I don't care. I am retiring as soon as this new start-up venture I have invested in goes public – should be in the next year or two." Mr. Smith had another few drinks then headed off to work around 10:30am. On his way to work, a dog unexpectedly ran across the street and in his attempt to avoid hitting the dog, Mr. Smith veered right and the vehicle went off the highway and flipped upside down into a ditch. Mr. Smith was ejected from his vehicle. Mr. Smith was not wearing his seatbelt at the time of the accident. When the ambulance arrived at the scene, the paramedics placed a cervical collar around his neck to immobilize his head and neck. This was in accordance with the protocol for spinal precautions following a serious collision. He was taken by ambulance to Mountain Hospital, a local hospital in northern BC.

On arrival in the emergency room, Mr. Smith was described as conscious, in significant pain and smelling of alcohol. He was seen by an emergency room physician, Dr. E, who was only able to conduct a brief physical examination because Mr. Smith was behaving in a belligerent manner, was unable to remain still and would not cooperate with the examination. Dr. E. ordered pain medication as well as x-rays of his cervical spine and hips. The radiologist, Dr. R, reported that the x-rays showed a fractured right hip but no cervical spine fractures (ie. no fractures of the vertebrae of the cervical spine). He also noted the quality of the imaging was poor on account of patient movement.

After reading the x-ray report Dr. E removed Mr. Smith's cervical collar and told him he was in the clear because the x-ray of his cervical spine did not show any fractures. Mr. Smith was very relieved by this news because he had a high school friend who fractured his neck when he dove into a shallow pool, and sustained a spinal cord injury so he understood what a devastating injury this was. Dr. E also informed him that unfortunately the x-ray of his hip did show a

significant fracture and that he would be referring him to Dr. O, the on-call orthopedic surgeon, for surgical repair of his hip. Mr. Smith was now much calmer having received pain medication and was resting.

Later that afternoon, Dr. O came to see Mr. Smith. Dr. O tried to perform a full physical assessment of Mr. Smith but he was too drowsy from the pain medication to co-operate. Mr. Smith was also too drowsy to answer Dr. O's questions about his pain or any other symptoms he may be experiencing. Dr. O explained to Mr. Smith that he had a fractured right hip which required surgical repair. He informed Mr. Smith that he would have to undergo a general anesthesia for the procedure which carried with it a very small risk of death. He also advised him that there was a risk of bleeding and infection associated with the procedure and that there were no alternative treatments for the fracture other than surgical repair. Dr. O informed Mr. Smith that fortunately there was a cancellation on the surgical slate and he could fit him in for surgery later that afternoon. Mr. Smith consented to the surgery and signed the consent form. Dr. O also reviewed the x-ray report of the cervical spine and noted that the radiologist, Dr. R, described the imaging to be of poor quality. Dr. O had seen many reports commenting on the poor quality of the imaging in this hospital – it seemed to be a routine comment. However, Dr. O considered it would be prudent to repeat the x-ray the following day, and in the meantime, he told Mr. Smith that out of an abundance of caution he should wear a cervical collar for another 24 hours or so. He did not want to cause worry for Mr. Smith, so he did not explain that this was because he was concerned that they had not properly ruled out a cervical spine fracture which could displace and cause a spinal cord injury with movement. Mr. Smith had been so relieved when he had been told his cervical spine was clear, especially because of what happened to his high school friend. Dr. O did consider repeating the x-ray that afternoon. He knew that if there was a fracture in Mr. Smith's cervical spine it would be risky proceeding with the hip surgery before surgically stabilizing the fracture, but he considered the risk to be very low, and waiting to repeat the x-ray would push back the hip surgery to the following day which he did not think was in Mr. Smith's best interests, simply because the sooner the surgery is done the sooner the patient can begin the recovery process.

After Dr. O left the room, Nurse D tried to place the cervical collar on Mr. Smith's neck. Mr. Smith refused to allow her to do so, complaining of increased discomfort, so the cervical collar was never put on. The nurse documented Mr. Smith's refusal in his medical chart. Mr. Smith also

complained of numbness in his fingers and significant pain in his shoulders and neck. The nurse also documented this in his chart and provided more pain medication. She did not notify Dr. O of these symptoms or of Mr. Smith's refusal to wear a cervical collar.

That afternoon, Mr. Smith was transferred to the Operating Room for surgery. Dr. O performed the hip surgery without incident. In order for the surgery to be performed, Mr. Smith had to be moved a number of times: from the stretcher to the operating table, from the operating table back to the stretcher, and then from the stretcher to the bed. He was not wearing a cervical collar during these movements and Dr. O was not present or aware of the fact that he was being moved without a cervical collar in place.

Following surgery, Nurse D documented that Mr. Smith was complaining that he was feeling like *"2000 watts of electricity are shooting through my body when trying to move."*

The following morning Mr. Smith was assessed by another nurse. He was found to have no sensation or movement from the waist down. Both feet were fixed in plantar flex position, his feet were cold and he had weakness and numbness in both hands. He was transferred to the Intensive Care Unit and the x-rays of the cervical spine were repeated. These x-rays now showed significant displacement of a fracture in the vertebrae in the cervical spine which was putting pressure on the spinal cord, causing a permanent spinal cord injury. By now, Mr. Smith was paralyzed.

Mr. Smith underwent intensive rehabilitation during which he recovered from his alcohol problem, but he remained permanently paralyzed from the waist down, confined to a wheelchair and in need of care for all of his day to day activities. On top of that, the start-up venture he had invested all of his retirement savings in went bankrupt. Mr. Smith was depressed and angry about the medical care he received at Mountain Hospital. When he was undergoing rehabilitation, one therapist commented that he could not believe they removed the cervical collar before they were certain there were no fractures in his cervical spine.

Mr. Smith contacted a medical malpractice lawyer who reviewed his medical records and obtained expert medical opinions. The lawyer spoke with an expert in radiology who reviewed

the initial x-ray taken of Mr. Smith's cervical spine. He agreed with the treating radiologist, Dr. R, that no fractures could be seen on the imaging and that the images were of poor quality. The radiology expert said that while this was in part due to patient movement, he noted the x-ray machine used at Mountain Hospital was very old and had not been updated with the most recent software which is likely why a subtle fracture in the cervical spine could not be seen. He was very critical of the hospital for having such an outdated machine. The radiology expert also explained that it was the responsibility of the treating physician to conduct an appropriate neurological examination and that when imaging was described as being of poor quality, the treating physician must maintain spinal precautions with a cervical collar until the physician has obtained repeat x-rays once the patient's pain was better managed and better quality images could be obtained. He could not find any fault with the way the radiologist had interpreted the x-ray. He also reviewed the subsequent x-rays done after Mr. Smith was found to be paralyzed and confirmed that Mr. Smith had likely sustained the fracture of his cervical spine in the motor vehicle accident but it did not displace and cause injury to the spinal cord at that time. It was only after the cervical collar was removed and Mr. Smith was transferred from stretcher to operating table that the fracture displaced, causing injury to his spinal cord. The expert also noted an additional finding that Mr. Smith had a degenerative spinal column condition called ankylosing spondylitis. This degenerative condition can cause pain and decreased mobility of the spine, and can also make the vertebrae more vulnerable to fracture with trauma.

The lawyer next spoke with an expert in orthopedic surgery who is head of the department of orthopedic surgery at Toronto's leading teaching hospital. This expert was very critical of the standard of care provided by both Dr. E and Dr. O. He opined that the cervical collar should not have been removed until good quality x-rays of the cervical spine confirmed there was no fracture and a careful physical examination showed there were no neurological deficits such as weakness, numbness or tingling. The expert further opined that while he couldn't be 100% sure, he believed that Mr. Smith likely sustained his spinal cord injury sometime during or after the hip surgery while he was being moved around without a cervical collar in place. The most likely time when he sustained his spinal cord injury was when the patient complained of 2000 watts of electricity going through his body. The expert emphasized that it was the injury to the spinal cord and not the spinal fracture that resulted in Mr. Smith's paralysis. He said that while it is possible for a

fracture of the cervical spine to displace and cause a spinal cord injury even with a cervical collar in place, this was unlikely because the use of the cervical collar immobilizes the head and neck significantly reducing the chances of the fracture displacing and injuring the spinal cord.

Mr. Smith commenced a lawsuit naming Dr. E (the emergency room physician), Dr. O (the orthopedic surgeon), Nurse D and the hospital as defendants.

Counsel for Dr. E argued that the diagnosis of a cervical spine fracture is a matter of clinical judgment and Dr. E could not be found negligent in the exercise of his clinical judgement. Further, defence counsel served a report from an expert in emergency room medicine, who worked in the same emergency department as Dr. E, who said it has been incredibly frustrating how many x-ray reports were described by the radiologist as being of poor quality and that he would have done the same thing as Dr. E did. Defence counsel argued that since Dr. E acted in accordance with an accepted school of thought Dr. E could not be found negligent. This expert in emergency medicine also opined that it was impossible to know exactly when the fracture displaced and caused the spinal cord injury – all there was to see was an x-ray done shortly after admission and an x-ray the following day. It was possible, for example, that because of Mr. Smith's degenerative spine condition and his weakened vertebrae, he could have fallen out of bed in the middle of the night after his hip surgery and caused both his fracture and spinal cord injury at that time. He explained that he once had an elderly post-operative patient on heavy pain medication fracture both wrists when she fell getting out of bed at night and no one discovered this until the following morning.

QUESTIONS:

1. Is Dr. E (the emergency room physician) likely to be found liable in negligence for removing the cervical collar? Please answer the questions set out below including the relevant law, your analysis and your conclusion.

   (a) Did Dr. E meet the standard of care expected of him in relation to removing the cervical collar? [20 marks]

   (b) Assuming there was a breach of the standard of care in relation to removing the cervical collar, did it cause or contribute to his injury? [20 marks]

2. Can Mr. Smith succeed in a claim against Dr. O for failure to obtain informed consent to the hip surgery? Please answer the questions set out below including the relevant law, your analysis and your conclusion.

   (a) Did Dr. O obtain informed consent from Mr. V for the hip surgery? [10 marks]

   (b) Assuming Dr. O did not obtain informed consent for the hip surgery, did his failure to do so cause or contribute to an injury? [10 marks]

3. The defence has alleged that Mr. Smith was contributorily negligent for his spinal cord injury. Are the defendants likely to succeed in establishing some degree of contributory negligence on the part of Mr. Smith? Please state the relevant law, your analysis and your conclusion. [15 marks]

4. Does Mountain Hospital have any exposure to liability? If so, state the relevant law, identify the potential areas of liability, and the nature of that liability. [10 marks]

5. Mr. Smith was 50 years old at the time of his accident. Because of his paralysis he is no longer able to work. Mr. Smith makes a claim for lost wages to age 65, the typical retirement age. Please set out the relevant law and facts in analyzing this claim. [15 marks]

END OF EXAMINATION