CAPITAL UNIVERSITY LAW SCHOOL

CONTEMPORARY MEDICAL LIABILITY

Dr. Michael S. Lehv

TAKE-HOME FINAL EXAMINATION

Wednesday, April 19, 2000

DUE 5PM Thursday, May 11th

Course #730

Section #77300

Question I [50 points]

[This question is to be answered as an ordinary essay question. You may have to do some minimal 'medical research' to understand the question depending on the extent of your general medical knowledge.]

Doug Kessler, a 35 year-old, has chronic low back and leg pain and visits Fielding Hospital's (FH) Back Center (FHBC). This is a heavily advertised facility connected with FH that claims to provide superior care for back problems. A lumbar herniated disk is identified and surgery is recommended by Connie Cho, an orthopedic surgeon on FH's Medical Staff who works for FHBC as an independent contractor. Cho explains the surgery and includes in her discussion the common risks, benefits and alternatives to the surgery. She does not mention paralysis as a possible complication. Kessler is a computer programmer but is a weekend 'jock' and agrees to have the surgery as the pains are limiting his participation in a basketball league.

The surgery is performed on an inpatient basis and seems to go perfectly. Following discharge, however, Kessler has swelling of the operative incision on his back. He goes to FH's Emergency Room where Carl Peters the ER physician examines him and determines that there is a wound infection. Peters is unable to reach Dr. Cho but does contact Katherine Vogel, M.D. a general practitioner member of Fielding Physician Associates (FPA), an IPA that contracts with Choice Ohio to provide gatekeeper, general practice and specialty medical and surgical services. Choice Ohio is a health insurance plan that covers Kessler through his employer's ERISA qualified employee benefit plan. Dr. Cho is also a member of FPA.

Vogel tells Peters to send Kessler home with a prescription for antibiotics and instructions to see Cho the next morning. Peters replies that he thinks Kessler should be admitted for surgical drainage of the wound. Vogel responds, "No, the admission is too expensive – he can have the drainage done as an outpatient. I've already admitted my quota of patients this week." The ER is very busy and because Peters doesn't have time to argue with Vogel he hangs up, writes out the prescription, and tells an ER nurse to send Kessler home. The nurse has some reservations when she notices that the wound is beginning to drain, but nonetheless complies.

Kessler leaves the hospital with his wife, Valerie. While walking to his car in the hospital parking lot, Kessler's wound opens resulting in blood and pus draining onto his shirt. He has sudden weakness of his leg and foot and falls down. Valerie screams for help and Lawrence Golding a pediatrician on FH's staff, who is walking from his car to the hospital, runs over to Kessler who now is lying on the ground with blood soaking the back of his shirt. Golding pulls off Kessler's shirt and uses it to apply pressure to the wound. Kessler screams in pain and his legs go limp. Eventually, the ER staff calls the county rescue squad and Kessler is wheeled on a stretcher back into the ER.

Kessler is admitted, and Cho, who is now able to be reached by phone, immediately returns to the hospital. She performs emergency surgery on Kessler. Unfortunately, Golding's emergency treatment in combination with the infection has resulted in trauma to the spinal cord. Kessler is left with permanent weakness of the legs, urinary incontinence, and impotence.

The Kesslers consult you for legal advice concerning possible malpractice. You tell them that you will need to research the matter. What steps should you take and what will be your advice? Use the common-law in answering this question.

Question II [50 Points]

[This question is to be answered in outline form as discussed below.]

On January 3, 2000, Dr. Susan McNeal, a 41 year-old board certified pediatric neurosurgeon in Polyanna State is performing surgery for removal of a benign meningioma [a brain tumor] on twelve-year-old Jennifer Stevens (whose birthday is the same day). During the procedure, McNeal alone notices the tiny tip of the ultrasonic scalpel that she is using accidentally break off and fall into a rather inaccessible area of the operative site. Actually, at this point, the removal of the tumor was complete, leaving only another half hour for wound closure. McNeal, however, is tired after spending five hours performing the surgery, and has a romantic dinner date in just an hour. Rather than alerting the operating room personnel, ordering an intraoperative x-ray to locate the broken tip and removing it, she intentionally drops the expensive instrument so that it falls on the floor. The instrument tip splinters into more pieces and the nurses never notice that one tiny piece was never recovered. She then completes the surgery as if nothing had happened. McNeal tells Jennifer's family that the operation went "without a hitch," and that there is a high likelihood that she will have no further problems with the tumor. She never mentions the broken instrument tip.

While on her dinner date that evening, McNeal confesses to her date and personal attorney, Kevin Boardman that the broken instrument tip incident really bothers her. After some discussion, Kevin tells Susan to "Forget it. That little piece of metal is probably harmless, so why look for trouble?" Boardman is insured by Geneva Lawyers' Liability Co. (Geneva) under a claims-made policy. He has renewed his policy each year and continues to do so.

Eleven months later, McNeal and Boardman marry. McNeal never does not notify her malpractice insurer, United Professional Liability Insurance Co. (UPLI) of the broken instrument incident. She has been insured with UPLI for her entire career under an occurrence policy which she has renewed each year.

In 2002, McNeal becomes pregnant and delivers a baby girl on December 26. She decides to take the entire year of 2003 off to spend with her new baby and to have an associate in her medical practice follow her patients. With advice from her husband, she decides not to spend \$50,000 to renew her malpractice policy, knowing that her occurrence policy will cover all prior acts regardless of when a claim is made.

In December, 2003 Susan prepares to reenter practice. Unfortunately, UPLI has gone out of business due to bankruptcy and the Polyanna Insurance Guaranty Association (PIGA) has taken over UPLI's claims. She purchases a claims-made policy with Guardian Doctors Company (Guardian) but with no coverage for prior acts. She believes that PIGA will provide any prior acts coverage and that she needs no coverage for her year of maternity leave.

On February 18, 2009, Jennifer Stevens, who now lives in a different city in Polyanna, is suffering from headaches unrelated to her previous surgery and her doctor recommends an MRI exam. The tiny piece of metal from the ultrasound tip is too small to be seen [there is no malpractice in not seeing it] on a preliminary ordinary skull x-ray. Thus, Jennifer undergoes the MRI exam. Unfortunately, the magnetic field from the MRI causes the metal piece to tear through a blood vessel leading to severe bleeding, emergency surgery and permanent weakness of the left side of her body [this is a known problem with MRIs, hence the preliminary x-ray]. The neurosurgeon operating on Jennifer serendipitously retrieves the tiny piece of the ultrasound scalpel tip although it is not identified as such – just as a small piece of metal.

Polyanna's Statutes of Limitations provide for a one year limitation on Medical Malpractice claims with a six year period of repose but only four years until repose upon attaining majority (age eighteen in Polyanna). Legal malpractice claims have a four year statute of limitations with a ten year period of repose but only one year until repose upon attaining majority. These statutes of repose, however, which were enacted as part of a tort reform bill by the Polyanna Legislature, were held to be unconstitutional by the Polyanna Supreme Court in early 2007.

On December 30, 2009 McNeal receives official notification of a law suit filed by Jennifer Stevens alleging medical negligence and fraudulent concealment in performing her surgery. The hospital is also named a defendant on the same claims. McNeal immediately sends a letter of notification to Guardian which arrives on January 4, 2010. Guardian assigns an attorney to McNeal's case and they meet once. McNeal tells her attorney that she has no idea as to the origin of the metal piece and that the surgery was performed perfectly. On April 2, 2010 Guardian notifies McNeal that it will not provide coverage for Jennifer's suit.

McNeal then notifies PIGA of Jennifer's suit. They inform her that they will provide coverage and PIGA's attorneys meet with McNeal to begin to prepare her defense. She maintains the same story as she did with Guardian's attorney. Simultaneously, however, PIGA seeks a declaratory judgement seeking to; a) void all coverage of Jennifer's suit due to the fact that notification was made beyond the 90 day notification period specified in both McNeal's original policy with UPLI and in PIGA's administrative rules; or in the alternative, b) hold McNeal personally responsible for any payments that might arise from any judgement for fraudulent concealment (based upon the UPLI policy's exclusion of coverage for intentional acts).

All of this has placed McNeal and Boardman under enormous stress. Their marriage had already been deteriorating due to Boardman's chronic drinking problem. In fact, his bar registration has been suspended for a year. As a result, he elected not to renew his Geneva policy during his period of suspension nor did he purchase the one year "tail coverage" offered to him.

Finally, during a heated argument, Susan walks out on Boardman. His last words are, "Wouldn't little Jennifer just love to know where that piece of metal came from?" Susan screams back "Yeah, and I'll bet the Bar would just love to hear about your professional advice on that subject."

Despite Susan's threat, Boardman calls Jennifer's attorney and informs her that before they were married he was McNeal's personal attorney and that she does know the origin of the piece of metal. Jennifer then files suit against Boardman for legal malpractice. Boardman promptly notifies Geneva but they just as promptly deny coverage.

Discuss the legal issues concerning these matters. There are many so many issues that an outline is most appropriate.

***** HINTS *****

In creating your outline, the idea is to categorize your thoughts into relatively brief statements under headings, subheadings, *etc.* You may also use conditional statements ("If - Then").

Example: [This is only an example of one of many ways of doing it]

Possible Defendant A

Possible Tort 1

Duty is to do This or That

Basis(es) of duty

Basis α

Basis B

Breached when xxx happened

Causation present?

Controlling statutes?

Standards of proof?

Possible damages [this is just an example of conditional statements and they

don't necessarily have anything to do with damages]

If This is so, or This happened Then

Damage a

Damage b ...

If That happened Then ...

Medical information needed

Info i

Info ii ...

How to get info

Malpractice Insurance coverage available

Company 1

Reasons for coverage

Reasons for non coverage

Company 2

More things under Tort 1 ...

In this answer, consideration is not given to your eloquence, whether you use complete sentences, or how you style your outline headings; my main interests are in your logical organization and basic comprehension of medical liability law and malpractice insurance law.

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