

CAPITAL UNIVERSITY LAW SCHOOL

CONTEMPORARY MEDICAL LIABILITY

Dr. Michael S. Lehv

TAKE-HOME FINAL EXAMINATION

Tuesday, April 20, 1999

DUE 5PM Friday, May 7th

Course #730

Section #77300

Question I [40 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.]

On October 31, 1999, Dr. Scott Schneider, a 62 year-old board certified pediatric surgeon in Sunny State is performing a routine bilateral inguinal hernia operation on two-year-old Jeffrey Jefferson (whose birthday is the same day). During the procedure, Schneider negligently cuts the vas deferens on both sides. The operating room nurses don't notice the blunders (nor would they be normally expected to notice) and the anesthesiologist doesn't have a view of the operative site. To avoid the embarrassment and delay of having to call in a microsurgeon to repair things, Schneider doesn't tell the operating room personnel and completes the surgery as if nothing happened. He tells Jeff's parents that the operation went "just fine."

A week later, Schneider speaks with his business attorney, Emily Foster. After some discussion, Foster advises Scott that, "By the time the negligence is ever discovered, you'll probably be dead and buried. At this point it's probably better to just let sleeping dogs lie." Schneider again says nothing to the parents and does not notify his malpractice insurer, AllStates Professional Liability Insurance Co. (APLI), or anyone else including his wife.

Schneider had been insured with APLI for his entire career under an occurrence policy. He retires from practice in 2009 and passes away from a heart attack in 2011. APLI goes bankrupt in 2013. Schneider's wife, who is the administratrix and also did the administrative work for his surgical practice, ignores a notice sent out by the Sunny State Insurance Guarantee Association (SSIGA) in 2014 soliciting for any claims against APLI.

Foster, in 1999 is insured by Geneva Lawyers' Liability Co. under a claims-made policy with a retroactive date of 1996. She switches insurers in 2002 to Columbia Protective without any coverage lapse and with the same retroactive date. She retires from practice in 2012 but chooses a Columbia Protective tail coverage option (Extended Reporting Endorsement) that extends to a retroactive date five years previous (2007).

Sunny State's controlling 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). 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.

In early 2016, a somewhat precocious Jeffrey discovers that he is sterile and undergoes exploratory surgery which identifies bilaterally surgically interrupted vas deferens but which fails to correct the sterility. He files suit on October 10, 2016 against Schneider's estate and SSIGA. During discovery a copy of a bill for legal services from Foster is found in Jeffrey's chart which had been archived to a CDROM containing all of Schneider's patients records. The suit is then amended by permission of a Sunny State Common Pleas Court on May 15, 2017 to include Foster.

Discuss the legal issues concerning these matters.

Question II [60 Points]

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

Martin Syms, a 29 year-old, is concerned about pain in his left lower jaw and visits Hopedale (Ohio) Hospital's (HH) Center for Maxillofacial Excellence (HHCME). This is a heavily advertised facility connected with HH that claims to provide superior care for jaw, dental and facial bone problems. A large bone cyst seriously weakening the jaw is identified and surgery is recommended by Melody Lee, a dentist on HH's Medical Staff who works for HHCME as an independent contractor. Lee explains the surgery and the fact that lip numbness occasionally occurs on a temporary basis.

The surgery is performed on an outpatient basis and seems to go perfectly. That evening, however, Syms has profuse bleeding from the operative incision inside the mouth. He goes to HH's Emergency Room where Elizabeth Pearson the ER physician examines him and is able to control the bleeding with pressure. Pearson is unable to reach Dr. Lee but does contact Wayne Stephens, M.D. a member of West Side Medical, an IPA that contracts with Health Plus to provide gatekeeper and general practice services. Health Plus is a health insurance plan that provides coverage for Syms through his employer's ERISA qualified employee benefit plan. Stephens tells Pearson to send Syms home with instructions to see Lee the next morning. Pearson replies that she thinks Syms should be admitted for observation to be sure the bleeding doesn't resume. Stephens responds, "No, it's an unnecessary expense for the plan." The ER is very busy and because Pearson doesn't have time to argue with Stephens she hangs up and tells an ER nurse to send Syms home. The nurse has some reservations when she notices that Syms is still having some bleeding but nonetheless complies.

Syms leaves the hospital with his fiancée, Lisa. In the hospital parking lot, Syms again starts to bleed profusely from his mouth. Lisa screams for help and Mark Patton a pediatrician on HH's staff who is walking from his car to the hospital runs over to Syms who now is lying on the ground choking on the blood. He opens Syms' mouth and begins to clear the blood with his fingers. At this point a cracking sound is heard, Syms coughs, and then screams out in pain, clearing the blood. By this time Pearson, who had been notified by an HH security guard of the situation in the parking lot, reaches Syms and again stops the bleeding with pressure.

Syms is admitted and Lee, who is now able to be reached by phone, immediately returns to the hospital. She performs emergency surgery on Syms. Unfortunately, Patton's emergency treatment has resulted in a fracture of Sym's jaw which was very weak both from the cyst and the first surgery. After several months with his jaw wired shut, Syms heals but is left with permanent numbness of his lower lip. This also results in drooling when he eats or drinks causing both he and Lisa (now his wife) significant embarrassment and makes kissing less enjoyable [these problems can really occur with a completely numb lip – MSL].

Syms consults you for legal advice concerning his medical problems. You tell him that you will need to research the matter. What steps should you take and what will be your advice?

***** HINTS *****

In answering this question, if you know of specific Ohio statutes that are relevant, you may apply them.

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 β

Breached when xxx happened

Causation present?

Controlling statutes?

Possible damages [this is just an example of conditional statements and they don't necessarily have anything to do with damages but they could]

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

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.

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