

CAPITAL UNIVERSITY LAW SCHOOL

CONTEMPORARY MEDICAL LIABILITY

FINAL EXAMINATION

Dr. Michael S. Lehv

Tuesday, April 17, 2001

Due 5PM Friday, May 11th

Course #730

Section #77300

Question I-40 points

[This question is to be answered as an ordinary essay question]

On December 28, 2001, Dr. Robert Corrigan, a 45 year-old board certified pediatric surgeon in AnyState is performing surgery for removal of a malignant abdominal tumor on sixteen-year-old Traci Evans (DOB, January 2, 1985). During the extremely difficult procedure, which is generally performed in a masterful manner, Corrigan nicks Traci's left ureter¹. Recognizing the problem, Corrigan speedily sutures (repairs) the ureter and completes the surgery as if nothing had happened. Because the ureter is deep in the pelvis, no one else in the operating room sees or is aware of the incident. Corrigan tells Traci's family that the operation went as well as could be expected, and that hopefully she will have no further problems with the tumor. He never mentions the nicked ureter, believing that his repair should be adequate.

Our surgeon, Corrigan is married and is having an affair with an attorney, Nicole Saunders. At a late afternoon 'business meeting,' in a motel room, Corrigan boasts to Nicole that he is 'so fast and sharp' that he accidentally cut and repaired a patient's ureter that morning without anyone else even knowing. Nicole replies "Oh, you men are such babies, one of these days you're going get into serious trouble doing that. But I'm certainly not telling anyone and I suggest you don't either. Remember, I'm going to be the next Mrs. Corrigan." Saunders has always been insured by Lucerne Lawyers' Liability Co. (Lucerne) under a claims-made policy. She has regularly renewed her policy each year and continues to do so.

A year later, Corrigan and Saunders divorce their first spouses and marry. Corrigan never notifies his malpractice insurer, Doctors Professional Liability Insurance Co. (DPLI) of the ureter incident nor does he mention it in Traci's operative report. He has been insured with DPLI for his entire career under an occurrence policy that he has renewed each year.

In January, 2003, Corrigan becomes Dean of his local medical school and retires from operative practice. He decides not to spend \$35,000 to renew his malpractice policy, knowing that an occurrence policy will cover all prior acts regardless of when a claim is made.

In December, 2003 a local television station reveals that Corrigan was listed in the appointment book of a high-end brothel that was recently raided. Although he convinces his wife to remain with him, he loses his deanship and prepares to reenter surgical practice. Unfortunately, DPLI has gone out of business due to bankruptcy and the AnyState Insurance Guaranty Association (AIGA) has taken over DPLI's claims. Corrigan thus purchases (and renews each year) a claims-made policy with National Casualty Company (National) but with no coverage for prior acts. He believes that AIGA will provide any prior acts coverage and that he needs no coverage for his year as dean.

In February, 2010, Traci Evans, now living in a different city in Anystate, begins to develop repeated kidney infections although she appears 'cured' of her cancer. An IVP² demonstrates a stricture (narrowing) of the left ureter. Surgery, by another surgeon, reveals no cancer but that the stricture is at the site of the cancer surgery. In fact, Dr. Corrigan's sutures in the ureter are still plainly visible³. The surgeon informs Traci of his findings. She is initially so grateful hearing that she has no recurrent cancer that she refuses to sue Corrigan despite the urgings of her family. Unfortunately for Corrigan, many months later she has a change of heart.

¹ The ureter is a tubular structure which connects each kidney with the bladder.

² An IVP is an x-ray utilizing an injected radio-opaque dye which can show the kidneys, ureters and bladder.

³ Corrigan just wasn't thinking and used non-absorbable suture when he furtively repaired the ureter

Anystate'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 Anystate). 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. The statutes of repose, however, which were enacted as part of a tort reform bill by the Anystate Legislature, were held to be unconstitutional by the Anystate Supreme Court in early 2008.

On December 30, 2010 Corrigan receives official notification of a law suit filed by Traci Evans alleging medical negligence and fraudulent concealment in performing her surgery. The hospital is also named a defendant on the same claims. Corrigan immediately sends a letter of notification to National which arrives on January 4, 2010. National assigns an attorney to Corrigan's case and they meet once. Corrigan tells his attorney that he doesn't recall the surgery but that his operative note says nothing about suturing the ureter. On April 2, 2010 National notifies Corrigan that it will not provide coverage for Traci's suit.

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

The Corrigan's are under enormous stress. Their marriage has always been a little shaky since the brothel incident. Saunders, on the other hand, is now cheating on Corrigan and her boyfriend has introduced her to cocaine. In fact, Saunders is under a one year suspension of her Bar registration following an investigation by the Anystate Supreme Court in response to an anonymous tip about her cocaine habit. As a result, she elected not to renew her Lucerne policy during the period of suspension nor did she purchase the "tail coverage" offered to her.

When Corrigan discovers his wife's affair, he's furious and threatens to leave. She replies "Why? I stayed with you despite your little tramps. And wouldn't Miss Traci just love to know how fast you fixed her ureter?" Corrigan screams back "Yeah, but I'm not a cokehead and what about the advice you gave me?"

Saunders is so mad that she calls Traci's attorney and informs her that before they were married Corrigan told her that he cut Traci's ureter. Traci then files suit against Saunders for legal malpractice claiming that as an attorney, she had a duty to her (Traci), to correctly advise her husband (Corrigan). Nicole promptly notifies Lucerne but they just as promptly deny coverage.

Discuss the legal issues concerning these matters.

There is an error in question #1. The last part of paragraph eight has incorrect dates (2010) and should read:

Corrigan immediately sends a letter of notification to National which arrives on January 4, 2011. National assigns an attorney to Corrigan's case and they meet once. Corrigan tells his attorney that he doesn't recall the surgery but that his operative note says nothing about suturing the ureter. On April 2, 2011 National notifies Corrigan that it will not provide coverage for Traci's suit.

Question II [60 Points]

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

Kathy Heller is a 17 year-old sexually active teenager living in Vista, Ohio, who is far more interested in MTV than in her school work, especially science, which she failed twice. Her parents are on a long weekend SCUBA diving trip in Cuba and have left her for three nights with her cousin Lisa, and her aunt and uncle, Perry and Judy Brown.

A year previously, Kathy had undergone laparoscopic surgery for treatment of chronic abdominal pain. As it turned out, the problem was an abscess from a sexually transmitted disease (*i.e.*, an infection) involving her left ovary and fallopian tube both of which, unfortunately, had to be removed. This was all accomplished through a small incision within her umbilicus. Kathy didn't understand too much about the surgery and had absolutely no interest in the details.

While at her cousin's house she felt ill, lost her appetite and developed mild right lower abdominal pain. The Browns, not wanting to take any chances with their niece, took Kathy to the emergency room at nearby Lakeside General Hospital. Mrs. Brown signed all the hospital's papers on behalf of Kathy and even presented Kathy's HMO (HCS Care One) card which the Hellers had thoughtfully left with the Browns. HCS Care One is an ERISA managed health care plan established as part of Mr. Heller's employee benefits.

An evaluation carried out by the emergency room physician, Dr. David Merriman and a pelvic examination performed by the gynecology resident, Dr. Cynthia Charles resulted in a joint diagnosis of probable early appendicitis. Kathy, however, in the company of Lisa, was entirely distracted by several handsome interns and neglected to tell either doctor about her previous surgery, and neither noted Kathy's well healed and perfectly concealed umbilical scar.

Dr. Merriman called Dr. Jason Darwin, the general surgeon 'on-call' for HCS, and explained the situation, informing Darwin that Kathy's parents would be back in town the next morning. Darwin said it didn't sound like appendicitis to him and that with Kathy's parents out of town there was no sense in seeing her anyway. Furthermore, Darwin said that HCS didn't have a contract with Lakeside so that in the absence of a life threatening emergency she would have to be transferred to HCS' primary hospital, St. Sinai.

Merriman replied that both he and Dr. Charles thought that in-patient observation was necessary. Darwin then mumbled something about 'all these observations were costing HCS and its doctors a small fortune.' "Give her something for pain and send her home. I'll see her in my office at 9:30." Although the two doctors, the ER nurse and aunt Judy all had their reservations, it was already 1:30AM and Kathy was discharged from the ER to return to the Browns' home.

During the night, Kathy became much more ill and by morning she could barely stand. All three Browns accompanied Kathy to Dr. Darwin's office by which time Kathy was feeling somewhat better. Darwin was unsure of the diagnosis and told the Browns that Kathy needed an ultrasound exam. Unfortunately, the ultrasound unit in his building that was run by HCS wasn't functioning so Darwin sent them to another imaging center across town that HCS also owned. When Mrs. Brown asked if St. Sinai located across the street from Darwin's office had an ultrasound, Darwin replied that it wasn't an ultrasound facility covered under Kathy's HCS health care plan.

It wasn't until 3:30PM that Kathy and the Browns returned to Darwin's office from the ultrasound. By that time, Kathy had a high fever and was extremely weak although her pain was improved. After reviewing the ultrasound results and reexamining Kathy, Darwin concluded that Kathy had appendicitis and told Kathy and the Browns that she needed immediate surgery.

Kathy began to cry and said that she wanted to speak to her parents. The Browns had been trying unsuccessfully all night and then all day to contact the Hellers in Cuba. From Dr. Darwin's office they finally reached Mr. Heller's cell phone. He said they had been detained by Cuban authorities who wanted to check their SCUBA equipment for contraband and he didn't know when they would be home. Dr. Darwin then spoke to Mr. Heller and explained Kathy's condition. He said that if it was OK with the Hellers, he would use a new minimally invasive surgical technique to minimize the scar. Mr. Heller said that sounded

“fine.” What Darwin didn’t mention was that he had never used the technique for appendicitis and it was only his second use of the technique for any condition.

It was nearly 9:00PM when Kathy arrived at St. Sinai’s operating room. Mrs. Brown had signed all the surgical consent forms for the hospital clerks and nurses, filling in any spaces that said “Relationship to Patient” with the word “Aunt.”

In his rush to get Kathy to surgery, Dr. Darwin did not note Kathy’s tiny umbilical scar and never obtained a history of Kathy’s previous surgery from Kathy, Mr. Heller or Mrs. Brown., At surgery, he found a ruptured appendix⁴ and significant inflammation of Kathy’s remaining right ovary and fallopian tube. He removed the appendix, and as he later explained, half of the ovary and the fallopian tube “just to be on the safe side.” Because of the minimally invasive technique he used, he was unable to evaluate the left side of the abdomen and was unaware of the missing left fallopian tube and ovary.

Kathy recovered slowly and her parents were furious when they returned and realized that Darwin’s new technique and incomplete medical history taking had probably resulted in Kathy needlessly having part of her right ovary and the fallopian tube removed . Additionally, the ruptured appendix required special drainage tubes creating an unsightly scar and obviating any advantage of the new technique. Furthermore, believing that she was now “sterile,” Kathy spent many months in counseling. Now, eleven and a half months after Kathy’s last visit to Darwin, the Heller’s and a considerably matured Kathy consult with you regarding a possible “law suit.” You tell them that this is very complex case and you will get back to them in a few days.

Create an outline of what you might tell them regarding possible legal action against each individual or entity mentioned. Also indicate what information you might wish to obtain from a medical expert and generally how you would proceed. Finally, indicate the defenses the potential defendants might utilize.

⁴ A medical expert will likely testify that the long delay in getting Kathy to surgery caused the appendix to rupture.

***** HINTS *****

In answering this question, if you know of specific Ohio statutes that are relevant, you may apply them. You may also assume that while loss of both fallopian tubes ordinarily would result in a woman being unable to conceive, new procedures have changed that situation.

In creating your outline, the idea is to categorize your thoughts in 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 ?

Basis ?

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 ...

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.