CAPITAL UNIVERSITY LAW SCHOOL

CONTEMPORARY MEDICAL LIABILITY

FINAL EXAMINATION

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Friday, May 2, 2003

Exam Due 5PM Friday, May 9th

Course #730

Section #77300

[For a variety reasons, there will only be one question on this exam although it obviously will be complex.]

You are an attorney who is in-house counsel for a small book publishing firm. Your company, Flattery Press, has received the following manuscript from an author who wishes to remain anonymous. Read it over (several times) and answer your Submissions Editor's questions at the end. His questions are to be answered in outline form as discussed below.

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

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Example:
Cindi Clampette
       Cindi v. Tracy
                Malpractice
                        Detail 1
                        Detail 2
                        Etc.
                NIED
                       Detail 1
                       Detail 2
                       Etc.
        Cindi v. Stoneyrock
                Malpractice
                        Detail 1
                       Detail 2
                        Etc.
                NIED
                        Detail 1
                       Detail 2
                        Etc.
       EMTALA Claim
                       Detail 1
                       Detail 2
                        Etc.
       Etc.
```

In this exam, 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 comprehension of medical liability law. I want to see how well you organize the legal issues when you are confronted with a large amount of information.

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The Suits – A Medical Novella in XIV Chapters

Chapter I

It's 1:30AM, July 7th, 1998. Tracy Nash, M.D. is awakened by a call from Stoneyrock Hospital in Littonia, a suburb of Metropolita, North State. She is Stoneyrock's "on-call" physician for July in Obstetrics & Gynecology and Olivia Brooks, R.N., Stoneyrock's E.R. supervisor, is calling about Cindi Clampette.

It seems Ms. Clampette, who claims to be seven months pregnant, is complaining of abdominal pain and vaginal bleeding. She thinks she is going into labor. Nurse Brooks tells Dr. Nash that Ms. Clampette is a single, unemployed, 23 y/o and has yet to see a doctor about her pregnancy. She relates that Dr. Carl Fretter, the E.R. physician examined Cindi and saw nothing to suggest labor although he thought admission for observation was advisable because he did see a small amount of vaginal bleeding.

Nurse Brooks is aware that Dr. Nash just joined the Stoneyrock staff on July 1, and comments:

Listen honey, this woman has been drinking and has no insurance. But she drove herself here so she can probably drive herself to NSU (North State University) Hospital (NSUH). They have an Ob-Gyn clinic and we'd like to keep these kind of patients out of Stoneyrock. Anyway, if it was up to Fretter, he'd admit everyone. He's so conservative, it's costing the hospital a fortune. Have you met Doug Tyson (the hospital's CFO) yet? Well, he asked me last week to see if I could cut down on some of Fretter's admissions. I'll tell Fretter that you said you'll see this gal in your office this morning but I'll tell her to get over to NSUH right now because we're all filled up.

Dr. Nash, not wishing to displease the E.R. supervisor during her first week at Stoneyrock, and having a severe headache, agrees to Brook's suggestions. In fact, the headache is due to Nash's drinking problem and she was informally asked to leave Freedonia Hospital in Clarenceville, South State two months ago. Stoneyrock accepted Nash's application for staff privileges effective July 1, but because of delays in the paperwork, actually hadn't fully checked her references.

Chapter II

Dave Short had just left Stubby's Place on Route 377 running south from Littonia to Metropolita. It was 2:00AM on July 7, and Short was not only tired, but had just downed three double vodka nightcaps. As he was pulling out from Stubby's parking lot onto 377, a speeding '89 Camaro barely struck his left bumper. The Camaro sped on but Short's Volkswagen spun around and Short struck his head and abdomen and was bleeding from his forehead. A North State Trooper pursuing the speeding Camaro stopped to aid Short.

This was Short's fifth accident in as many years. He had been drinking heavily on and off for twenty years and numerous doctors had warned him that he already had severe liver disease and that he was doomed if he continued to drink.

Chapter III

Tracy Nash was dreaming about a thousand bells in her head all ringing at once when she realized that she still had that awful headache and the phone was ringing. It was 3:00AM and the nurse on 4 West in Stoneyrock was calling about Nash's patient Rihab Assadi, a devout Muslim who recently emigrated from Syria. Assadi, who at one time headed Syria's women's temperance league, had been admitted on July 6th seven months pregnant with questionable labor pains. The nurse related to Nash that Rihab had several episodes of pain and that the nurse thought she felt some uterine contractions. Nash groggily replied that she would see as Rihab as soon as possible.

Despite a shower and her best makeup efforts, when Nash arrived at the hospital she still looked somewhat hung over. Nonetheless, she examined Rihab quite professionally and competently, and found no indications of imminent labor. She suggested to Rihab that an amniocentesis be performed to determine the maturity of the fetal lungs in event that she did go into labor. She spent considerable time explaining the amniocentesis procedure of inserting a needle into the uterus for fluid sampling and carefully explained the risks and benefits. Nash mentioned that amniocentesis carried a small risk (about 0.5%) of inducing labor.

Rihab was both by nature and religion rather reserved. She had only met Nash the day before after being seen in Stoneyrock's E.R. and not yet having a physician in the U.S. She spoke fluent English, however, and asked several intelligent questions before signing a Stoneyrock form entitled "Consent for Amniocentesis."

At 7:30AM, Nash, whose headache had somewhat subsided, seemingly performed the amniocentesis in an expert manner. Unfortunately, three hours later, Rihab went into labor delivering a viable, but significantly premature baby boy. Although Stoneyrock was equipped to care for premature infants on an emergency basis, baby Assadi was immediately transferred to NSUH for longer term care.

Chapter IV

Our Doctor Nash, having completed her care of the Assadis, begins to see her other patients at Stoneyrock. Marilyn Fletcher delivered a healthy baby boy, Finnegan, at 12:30AM on July 6th. Nash checks her chart and examines mother and baby. Finding both doing well, she tells Marilyn that she is ready for discharge. Marilyn, however, would like to stay another day saying, "This is my first baby, I was in labor for fourteen hours and my baby was delivered just barely 36 hours ago."

Nash looks at Marilyn's chart and notes that she is a member of Blue Care HMO. Blue Care's plan limits maternity care for normal vaginal deliveries to 36 hours. Nash tells Marilyn that, "I sympathize with you, everyone one would like to stay longer but your insurance company wants you out in 36 hours. If I keep you longer, I'll get into trouble with Blue Care. You can stay longer but it would be very expensive." She doesn't mention that Blue Care, with whom she has a contract, penalizes its physicians \$100.00 for longer than necessary admissions.

Marilyn reluctantly agrees to go home and is discharged at 1:00PM.

Chapter V

Tracy Nash finishes her rounds and joins Matt Carpenter for lunch at a popular Littonia bistro, Le Club. Matt is an attorney in a Littonia law firm, Smathers and Clark. Matt and Tracy met two weeks ago, shortly after Tracy moved to Littonia. They both are single, both in their late twenties and both rather attractive. Since their meeting at a group therapy session run by their mutual psychologist they have been constant companions and more.

After three glasses of wine, Tracy confides to Matt, "You know, and I probably shouldn't be telling you this, especially being that you're a lawyer, but I feel awful about it. Anyway, this morning I was doing an amniocentesis, you know, with a needle in the uterus." Matt nodded that he understood, and Tracy went on, "Anyway, I think I might have hit the placenta. I was a little hung over from last night with this really bad headache and I was sorta shaking although the nurse didn't see it. Then she ended up going into labor so I'm sure."

Matt hugged her for a moment and said, "Those things can happen sometimes without the doctor doing anything wrong. It probably wasn't your fault. Best to forget it." Tracy smiled, "Your so wonderful, but you won't ever tell?" Matt replied, "I'm your best friend and besides, I'm a lawyer."

Chapter VI

Stan Phillips and Judy Winston were enjoying a late lunch at Le Club and were all but staring at Matt and Tracy. Stan and Judy were members of North State's Senate and had stopped in Littonia on their way to the statehouse in Metropolita. Stan remarked, "They look like a happy couple. I know him, he's an attorney with Smathers and Clark. Who's she?" Judy replied, "I think she's a doctor because I thought I heard her saying something about doing an amniocentesis. They are a nice looking – could almost be models."

Stan then added, "Talking about doctors and lawyers, our new tort reform law that just went into effect the first of July was really a break for the doctors. Although we kept the one year limit on malpractice claims, the four year statute of repose is the strictest in the country, because it even applies to kids. Their parents have to file within four years after the injury. None of this waiting twenty-one years for majority anymore."

"I know, I wrote part of it," Judy playfully boasted, "there are also some subtle things in it, like changing the standard for informed consent from subjective to objective. It's now based on a reasonable patient standard. That was my brainchild."

Stan stretched his arms. "Well Judy, I'm an old trial lawyer myself and I'm not so sure that all of the provisions are going to hold up to judicial scrutiny or work out in practice the way the doctors want." Glancing at his watch, "Wow, I didn't realize it's almost three, we better head on to work."

Chapter VII

The E.R. at NSUH was packed and it was just 3:15PM. Alvin Morris, one of two E.R. physicians, was busy suturing Dave Short's forehead. Short was brought to the E.R. by the Metropolita Rescue Squad (MRS) about 3:00AM, bleeding and intoxicated after an auto accident. Morris, working an 18 hour shift, had seen Short then and was told by a state trooper that he found Short obviously intoxicated but conscious just seconds after the accident. "He smacked his head pretty good but he walked out of the car on his own. Nothing else seemed wrong."

Morris, however, hadn't been able to get a medical history from Short. He was about to examine Short when another patient had a seizure. As he ran to the seizure patient, Morris told a nurse to "Get a CAT scan of the head and a hemoglobin. Also a blood alcohol and tell that trooper we're doing it."

Morris was placing the last suture when Short, who was now finally waking from his intoxicated state, suddenly turned cold and clammy. Morris snapped to the nurse assisting him, "What's his B.P.?" "It's only 80 over 50" she replied. Before Morris could utter another word, Short turned blue and despite resuscitative efforts, he officially expired at 3:49PM.

Morris was finishing his paper work on Short. The CAT scan was negative and Short's hemoglobin upon admission was just a little lower than normal. "I don't see my notes on his exam but I'm sure it was normal or I would have written it down," he thought to himself. On the chart under "Admission Physical Exam" he sketched a drawing of Short's forehead laceration and added normal findings for the rest of the exam. Under "History" he wrote what the trooper had told about the accident and then "Patient intoxicated – no other info."

Chapter VIII

The woman on bed 14 in the NSUH E.R. screamed, "I'm havin a baby, help!" Cindi Clampette had walked into the E.R. just 15 minutes earlier. She left her '89 Camaro with the engine still running at the E.R. entrance. She told the admitting nurse that she had been "thrown out" of a hospital in Littonia with instructions to drive to NSUH. Because she was tired, she stopped at a motel on Route 377 and hadn't awakened until well after 2PM. She had some breakfast and then drove to NSUH.

"Those bastards, I told them I was gonna deliver. They kicked me out," Cindi shouted. The nurse and Dr. Morris delivered a stillborn one pound baby girl. Morris estimated that Cindi had been probably been no more than five months pregnant.

Chapter IX

At 8:15PM Marilyn Fletcher is wheeled into NSUH's E.R. with severe postpartum vaginal bleeding. Four units of blood are required, in addition to an emergency hysterectomy. After completing the hysterectomy, Marilyn's surgeon is heard to comment to his nurse, "I don't know why these women are in such a hurry to get home after delivery. This all could have been controlled medically if she had stuck around."

Chapter X

It's December in Metropolita, December 31, 1998 to be exact. Alvin Morris has just returned from a well deserved week long Holiday vacation. Thumbing through the mail he's stacked on the desk in his home office, he notices a letter from NSUH. It's his 1999 staff membership application. A cover letter reviews some of the changes wrought by North State's new tort reform law. There is a paragraph underlined describing the law's provision that hospitals posting a special public notice explaining that E.R. physicians are independent contractors and not employees create an irrebuttable presumption that patients have been informed of the physicians' non-employee status. The letter notes that NSUH has complied and that the signs have been up since "early July."

Another letter welcomes him as a new insured to Physicians' Guaranty Company (PGC) commencing January 1, 1999 (with retroactive coverage to January 1, 1996). PGC, as the nation's largest physician insurer has begun selling professional liability in North State expecting some stabilization of the malpractice climate due to North State's recent tort reform law. On the other hand, Morris' current and soon to be previous insurer, Physicians and Surgeons Insurance Co. (PSICO) was leaving the market, citing continuing unfavorable market conditions.

Thumbing through a few more envelopes, Morris sees a letter marked "Metropolita Common Pleas Court." His heart sinks as reads that he has been named as a defendant along with NSUH in a medical malpractice suit filed by the Estate of David M Short for wrongful death. There was also a claim for fraud, alteration of records and unspecified punitive damages.

Morris spent New Years Day preparing a claim notification cover letter to PSICO along with copies of Short's medical records. He shook his head as he reviewed the results of Short's autopsy. "Cause of Death:

Massive traumatic laceration of the liver with hemorrhage; Secondary Cause of Death: Probable clotting disorder resulting from chronic alcoholic liver disease." Morris' letter is sent by Fedex on January 2 and arrives the following day.

A month later, PSICO notifies Morris that:

Your PSICO policy clearly states that it is a Claims Made Policy and provides coverage only for claims first made while the policy is force. We regret to inform you that your notification of a claim was mailed to PSICO on January 2, 1999 and received January 3, 1999, both subsequent to the expiration of your policy on 11:59PM December 31, 1998. PSICO hereby denies coverage for your Claim, Estate of Short v. Morris, et. al. posted January 2, 1999.

Chapter XI

On February 20, 1999, Rihab Assadi smiled as she wrapped her son Mohan Sayed in a blanket for a trip to NSUH's Premature Infant Clinic. She was hoping for good news but expecting the worst. Mohan had spent almost the entire first three months of his life in NSUH's Neonatal Care Unit. Now at age eight months he was still not sitting up or crawling and often choked on his food. He seemed to have less than normal curiosity for his age and spent most of his time on his back just gazing at the ceiling. Only occasionally would he smile at his increasingly anxious mother.

On that day, Rihab was crushed when a NSUH pediatric neurologist mentioned the possibility of some "psychomotor delay, something we sometimes see in extreme prematurity. But it's still too early to get very worried."

Chapter XII

On March 2, 199, Marilyn Fletcher filed suit in Metropolita Common Pleas Court against Blue Care HMO for medical malpractice in prematurely forcing her discharge following the birth of her son.

Chapter XIII

On March 18, 1999, Cindi Clampette filed suit against Tracy Nash, M.D., Olivia Brooks, R.N., and Stoneyrock General Hospital alleging, medical malpractice, and negligent and intentional infliction of emotional distress. In addition, Clampette filed a complaint with the U.S. Department of Health and Human Services alleging various violations of 42 U.S.C. § 1395dd (EMTALA).

Dr. Nash promptly notified her professional liability insurer, PSICO of the suit. PSICO provided coverage for the claim but on September 1, 1999 notified Nash by registered letter that it would no longer provide coverage to her at the expiration of her current claims made policy on December 31, 1999. PSICO cited her "adverse risk experience and physical or emotional health conditions that might adversely impinge upon your professional capabilities." PSICO offered to provide "twenty-four (24) months of non-renewable extended reporting ("tail") coverage for the cost of one year's premium. Nash purchased the tail coverage.

Dr. Nash was able to obtain claims made coverage for 2000 and subsequent years with the North State Physician Guarantee Association (NSPGA) under the provisions of an amendment to the North State Tort Reform Law. NSPGA, however, by it enabling language, "shall not provide any coverage for prior acts (retroactive coverage)."

Chapter XIV

On May 15, 2002, after just eighteen months of marriage, Matt Carpenter and Tracy Nash, M.D. filed papers with Metropolita Domestic Relations Court to terminate their marriage by dissolution.

On May 20, 2002 Tracy Nash received notification of a suit filed by "Rihab Assadi on behalf her Minor Son, Mohan Sayed Assadi, for medical malpractice and failure to provide informed consent." It is alleged that Mohan suffers from permanent brain damage due to his prematurity. Dr. Nash promptly notified both PSICO and NSPGA of the claim.

On June 22, 2002 Nash received a letter denying coverage for the Assadi claim by PSICO.

On June 28, 2002 Nash received a letter denying coverage for the Assadi claim by NSPGA.

Epilogue

On December 18, 2002 Tracy Nash, M.D., age 31, was found dead in her car parked in a run down apartment complex in Metropolita. The Coroner's Office ruled the death a suicide by carbon monoxide inhalation.

On the passenger seat of Tracy's car was a newspaper article from the legal section of the Metropolita Gazette dated December 17, 2002. The article noted that a medical malpractice case scheduled for trial the following week against Tracy Nash by Rihab Assadi had been settled. Kelman Clark, Esq., a partner with Smathers and Clark was listed as plaintiff's counsel.

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Submission Editor's Notes

This is an interesting story but the legal stuff is a mystery to me. You're an attorney - explain it all. Before I publish something like this I need to know who's going to win these suits and why. What would expert lawyers and doctors say about all this – who was committing malpractice? How can these suits be defended? Have the plaintiffs missed anything and exactly what would their claims be?

Also, while you're explaining things, be sure to give me the details on the following: What's this about altering records and punitive damages. Why won't these damn insurance companies cover anything – can they get away with it? Was there something special about that law suit or the plaintiff's attorney that Tracy killed herself? No one really said there was anything wrong with her amniocentesis thing. What was the evidence that made her settle and kill herself? Was there something with her ex-husband?

[Some additional medical information on David Short's injury. Despite a serious liver injury, the very early blood work may not be that abnormal. People with chronic chronic alcoholic liver disease may bleed more easily and so getting a history would be vital. Note also that he was in the E.R. for a considerable period of time. MSL]