

**UNIVERSITY OF SWAZILAND**

**FACULTY OF SOCIAL SCIENCE**

**DEPARTMENT OF LAW**

**MAIN EXAMINATION PAPER, MAY 2009**

**TITLE OF PAPER: ASPECTS OF LAW AND HEALTH**

**COURSE CODE: LH305**

**TIME ALLOWED: 3 HOURS**

**INSTRUCTIONS:**

- (1) ANSWER QUESTION ONE (1) WHICH IS COMPULSORY AND ANY OTHER TWO (2) QUESTIONS OF YOUR CHOICE.**
  
- (2) MARKS FOR QUESTIONS OR PARTS THEREOF ARE INDICATED IN BRACKETS**

**THIS PAPER MAY NOT BE OPENED UNTIL PERMISSION HAS BEEN GRANTED BY THE INVIGILATOR**

## QUESTION 1

(a) Below follows a list of clauses from Testators' Wills, which have a direct bearing with the concept of legal personality. In each instance, C was already conceived at the time of the testators' death, but was only born after the testators' death. Indicate in which one of the following instances C would not be able to inherit.

(i). "I bequeath my estate to my children". At the time of his death, the testator had two children namely: A and B, and his wife was expecting a third child, C.

(ii). "I bequeath my estate to my children A and B, and any other child (ren) that my wife expects at the time of my death". At the time of his death the testator had two children, A and B, and his wife was expecting a third child, C.

(iii). "I bequeath my estate to my children who are alive at the time of my death".

(iv). "I bequeath my estate to my children A and B". At the time of his death, the testator had two children, A and B, and his wife was expecting a third child, C. (5)

(b) Briefly discuss the general rule relating to the concept of legal personality. (5)

(c) What are the requirements for the application of the *nasciturus* fiction?. (15)

TOTAL: [25 MARKS]

## QUESTION 2

Mrs Buthelezi, who is approaching her mid- thirties, works for an emergency paramedics company in town. Sometime in 2006 she received an emergency call that there has been an accident at the foot of the Malagwane hill and, as per duty, she instantly set out to attend to same. Together with her colleagues they rescued some of the victims of the accident and rushed them to the Mbabane Clinic for treatment. On their way back to the office, the paramedics company vehicle got involved in a near- fatal accident just before reaching town. Mrs Buthelezi was rushed back to the Mbabane Clinic. Upon her arrival she was attended to by Dr Otto who knew her very well as she often brought patients to the clinic. Dr Otto examined her and advised her that she would need an operation on her right hip bone to which she acceded. The doctor further assured Mrs Buthelezi that the operation would be carried out successfully and it would yield a successful treatment so much that Mrs Buthelezi's hip bone would function perfectly thereafter and without any side effects and/ or niggling pain. It was this undertaking, among others, that influenced Mrs Buthelezi to agree to undergo the operation. Three years after the operation, Mrs Buthelezi has never been able to walk without the assistance of a walking stick and she is constantly limping and appears to be in enormous pain. Her right hip bone is constantly swollen.

(a) Can a medical practitioner guarantee the success of treatment? If she/ he cannot, what can she/ he undertake to do?

(15)

(b) Where he has guaranteed the results of a treatment and they do not live up to his word as in Mrs Buthelezi's case, can the doctor be liable for damages or breach of contract?

(10)

TOTAL: [25 MARKS]

### **QUESTION 3**

Generally there is no legal duty or obligation upon a medical practitioner to treat a patient. Equally, a medical practitioner has no right to treat patients without their consent, which means that the medical practitioner's duty to treat or operate a patient is based entirely on the patient's consent.

Discuss the legal requirements for consent to treatment.

[25 MARKS]

### **QUESTION 4**

“A doctor whose advise is sought about an operation to which certain dangers are attached...is in a dilemma. If he fails to disclose the risks he may render himself liable to an action for assault, where as if he discloses them he might well frighten the patient into not having the operation when the doctor knows fully well that it would be in the patient's interests to have it” *Ritcher & another vs Estate Hamman 1974 (4) SA 226*.

- (a) What must the doctor do in such circumstances? In other words, what is the objective standard? (5)
- (b) Briefly discuss the four (4) exceptions to the duty to disclose by a medical practitioner? (20)

[25 MARKS]

### **QUESTION 5**

Write short notes on the following:

- (a) What is the standard of proving medical negligence? (5)
- (b) Who has the burden of proving that a medical practitioner was negligent and what is the standard of proof? (5)
- (c) Apart from proving negligence against a medical practitioner what else must be proved in a claim for damages arising from medical negligence? (5)
- (d) What is the greatest source of evidence in cases of medical negligence? (5)
- (e) What is meant by concurrent liability in the medical circles? (5)

TOTAL: [25 MARKS]