NOTE: 1. This is a closed book examination. An unannotated reading list can be referred to during the examination.
2. ANSWER ALL QUESTIONS

THIS EXAMINATION CONSISTS OF 2 QUESTIONS
Dr. Hans, a neurologist at a rural hospital, was visiting a patient, Ms. Potter. Ms. Potter had a longstanding history of migraines and had been treated by Dr. Hans in this respect. This visit was unrelated to the migraines; rather Dr. Hans was visiting Ms. Potter to end a longstanding romantic relationship he had been having with her. This relationship was becoming common knowledge—the hospital and Dr. Hans were becoming embarrassed as a result.

Mr. Potter, Ms. Potter's husband, was on his way to visit Ms. Potter and, arriving at the hospital, fainted and struck his head while in the parking lot. Mr. Potter made his way to the emergency room where he was seen by the on-call emergency room physician, Dr. Christian.

Dr. Christian, after conducting a neurologic assessment, was concerned that Mr. Potter had suffered a head injury. Dr. Christian, aware that Dr. Hans was in hospital, sought Dr. Hans out and asked him to attend in the emergency department explaining that he was in need of an urgent consult in respect of a patient who may have a serious head injury. Dr. Hans attended at the emergency department immediately but on arriving realized that it was Ms. Potter's husband and refused to treat Mr. Potter saying, "I am not on-call right now and I am just leaving the hospital."

Dr. Hans advised Dr. Christian to call Dr. Andersen, the on-call neurologist. He also advised Dr. Christian to do x-rays of the head. Dr. Christian replied, "I am not an idiot. Of course I am going to order x-rays."

Dr. Christian was reluctant to call Dr. Andersen as Dr. Christian was aware that Dr. Andersen had a serious drinking problem and in fact Dr. Andersen had confided in Dr. Christian in this regard. Dr. Andersen assured Dr. Christian that he was getting treatment for his alcohol problem but Dr. Christian had suspicions in this regard.

Dr. Christian, after some time, was able to locate Dr. Andersen. The delay arose as Dr. Andersen was at dinner with his wife and had turned off his phone. Dr. Andersen agreed that he would attend at hospital immediately to do an assessment of Mr. Potter. In the interim, Dr. Christian ordered the x-rays and also ordered blood thinner as he was concerned Mr. Potter had suffered a heart attack leading to the fall and thought that the cause of the heart attack may be a blood clot. Prior to providing the medication, Dr. Christian said to Mr. Potter, "I will be starting you on a medication. The purpose of the medication—" At this point, Mr. Potter interrupted Dr. Christian saying, "I really don't feel very well and I am having trouble following you. I don't want to talk anymore. Please just do what you feel is best."

Dr. Christian then started the medication and, recalling that Mr. Potter's wife was in hospital, attended on Ms. Potter and advised that her husband was in the hospital and that he had suffered a fall and struck his head. Dr. Christian went on to advise that Dr. Hans had refused to treat Mr. Potter and, accordingly, Dr. Christian had made arrangements for Dr. Andersen to attend. Ms. Potter, realizing the reason Dr. Hans refused to treat her husband was because of their ongoing relationship, became angry and upset.

At this point, Dr. Christian was advised that Dr. Andersen had arrived and Dr. Christian met with Dr. Andersen. Dr. Christian smelled alcohol on Dr. Andersen's breath and asked him directly if he had been drinking. Dr. Christian advised that he had had one glass of wine with dinner and assured Dr. Christian that he was not intoxicated and was in a position to treat Mr. Potter.
Realizing there were no other neurologists that could provide treatment, Dr. Christian acquiesced.

By this point, the x-rays had been completed and reviewed by the radiologist, Dr. Red. Dr. Red advised that there were no abnormalities on the head x-rays. There were in fact abnormalities to be seen and, in particular, there was a bleed in the brain. Dr. Andersen reviewed the x-ray report and consulted with Dr. Red. Relying on the information, Dr. Andersen concluded that the treatment being provided was appropriate and advised that he would return to see Mr. Potter the following day.

Dr. Christian’s shift was ending and he handed over care of Mr. Potter to Dr. Riding, his replacement in the emergency department. Dr. Riding was a very senior emergency room physician. He had worked at leading health centres across the globe and published extensively in respect of the field of head injuries. Dr. Riding had returned to town as he wished to slow down his practice. Dr. Riding attended on Mr. Potter and carried out an examination. Although Mr. Potter appeared to be fine, Dr. Riding found on physical examination a subtle finding of the brain bleed. Dr. Riding personally reviewed the x-rays and noted the bleed on the x-rays. Dr. Riding immediately called the general surgeon, Dr. Hood. Dr. Riding immediately stopped the medication as such medication is inappropriate in that it can exacerbate an ongoing bleed.

Dr. Hood arrived immediately. He spoke with Mr. Potter advising that the circumstances were dire. In this respect, he noted that the passage of time in diagnosing the bleed and the use of the medication had created a circumstance where the bleed was more extensive than it would have been had the medication not been employed and had things moved more quickly. Mr. Potter asked, “How much worse?” Dr. Hood replied, “I do not know. I just know that it made it worse.”

Dr. Hood advised Mr. Potter that he required immediate surgery to stop the bleed. Dr. Hood noted that given the circumstances, the traditional surgical methods would likely not be successful. However, Dr. Hood had recently read about a new surgical procedure that he thought might work in this case. He advised Mr. Potter that he had never done this procedure before, rather, he had only read about it, and that the procedure was still at the trial stage and had not yet been carried out on a human patient. He went on to advise Mr. Potter that the risks of this procedure include brain damage. He did not advise that the risk of brain damage was as high as 50%. He then told Mr. Potter, “If it were me, I would do it and I don’t really see that you have a lot of choice.” In the circumstances, Mr. Potter agreed.

Dr. Hood immediately carried out the procedure. The bleeding was much more extensive than even he had anticipated. The procedure was successful in that Dr. Hood was able to stop the bleeding. Dr. Hood attended on Ms. Potter and advised her as to the outcome of the surgery.

The following day, Dr. Hans learned of events at the hospital and, feeling guilty for refusing to attend on Mr. Potter, went to hospital and spoke with him. Dr. Hans instructed Mr. Potter that he would provide neurologic care to Mr. Potter if Mr. Potter wished. Mr. Potter agreed to do so. Dr. Hans instructed Mr. Potter that he should try to ambulate and get moving as quickly as possible as this would speed his recovery. Mr. Potter, following his advice, got out of bed with the assistance of Dr. Hans. Unfortunately, Mr. Potter again fainted and struck his head.
Mr. Potter fainted for the same reason that he had previously fainted, that is that he had an undiagnosed cardiac condition.

Dr. Christian, who had returned to hospital by this point, immediately attended on Dr. Hans and Mr. Potter. Dr. Hans, his guilt compounded by the circumstances, berated Dr. Christian for failing to “make the obvious diagnosis of the cardiac condition” saying, “if I had known he had a heart condition, I would not have had him get out of bed.”

As a result of the fall, the bleed in Mr. Potter’s head started up again. Dr. Hood concluded that further surgery would be of no value. Mr. Potter was placed on life support.

Dr. Hood attended on Ms. Potter and advised Mr. Potter was unconscious and that it was extremely likely he would never regain consciousness. If he did regain consciousness, it was likely that he would have extensive brain injury such that he would be unable to care for himself and would be in constant pain. He further advised that there were simply no treatment options available. He went on to note that in the absence of life support, Mr. Potter would likely die but the death would be painless.

Ms. Potter, wracked with guilt, advised that all steps to keep Mr. Potter alive should be taken. Dr. Hood felt that this was not the appropriate course of action and explained that no person would want to live like Mr. Potter would be living if he ever became conscious. He further confronted Ms. Potter with a document that had been found in Mr. Potter’s wallet. The document stated that no “heroic measures” should be taken to sustain his life. Ms. Potter agreed that the document bore Mr. Potter’s signature but said that he had “changed his mind” recently following the birth of their grandchild. Dr. Hood was suspect of this advice and felt it was simply a grief response and based on her guilt in having the affair with Dr. Hans. In the circumstances, Dr. Hood terminated life support and Mr. Potter died shortly thereafter.

This was the last straw for Ms. Potter. She spiralled into a depression. She was treated by Dr. Wolf, a psychiatrist. Dr. Wolf had previously treated Ms. Potter when she was a teenager for a transient depression. This depression resolved and Dr. Wolf had not seen her for many years. By the time Ms. Potter saw Dr. Wolf, she vacillated between depression and anger at Drs. Hans and Hood. Ms. Potter advised that it was “their fault and they are going to pay if it is the last thing I do”. Dr. Wolf asked what she meant by this. Ms. Potter responded, “They killed my husband. I’m going to kill them.” Dr. Wolf inquired as to how she planned to do this, to which she replied, “Don’t you worry. I will take care of this.” Dr. Wolf instructed that Ms. Potter be placed in a psychiatric facility.

Ms. Potter was placed in a psychiatric facility and, within a few days, appeared to be improving. Dr. Wolf visited Ms. Potter after a few days and asked how she was doing. She advised that she “felt much better”. The visit was cut short as Dr. Wolf had to attend on an emergency. Prior to leaving, he gave Ms. Potter a day pass. Ms. Potter immediately left the hospital and returned home where she found Mr. Potter’s hunting rifle. Ms. Potter took the rifle and shot Dr. Hood. Fortunately, Dr. Hood was not killed; however, as a result of the gunshot wound, he was never able to practise surgery again.
LAW 382.001, Section 01

Question 1 (60 marks)

Please advise to:

(a) What potential causes of action arise from the above-noted facts?
(b) Who can bring those actions?
(c) On what would those actions be based?
(d) What defences, if any, are available to those actions?
(e) What is the likelihood of the actions succeeding or failing and why?
(f) What damages, if any, are likely to be awarded and why?

Question 2 (15 marks)

Discuss the genesis, development and application of the law of consent. In undertaking this discussion, please address the question as to whether the law of consent as it stands now serves the interest of both patient and doctor and, if not, what changes should be made to better serve the interest of patients and physicians.
CASES FOR UBC LAW IN MEDICINE (382)

23. Bentley v. Maplewood Seniors Care Society, 2014 BCSC 165 aff'd BCCA 91
Legislation

*Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996 C. 181 [HCCA], ss. 9, 18, 19.1-19.91, 33.4

*Health Care Consent Regulation*, B.C. Reg. 20/2000 [HCCR] r. 15

*Power of Attorney Act*, R.S.B.C. 1996, c 370 [PAA], ss. 14, 32

*Representation Agreement Act*, R.S.B.C. 1996, c. 405 [RAA], ss. 3-13, 15, 16, 19.1, 23, 27, 30

*Representation Agreement Regulation*, B.C. Reg. 199/2001 [RAR], r. 7

Textbooks (Optional)