

Table of Contents

Chapter 1: Duties of Health Care Providers	1
I DUTY OF CARE	1
1-1 THE GENERALLY ACCEPTED STANDARD OF CARE.....	1
1-1:1 Introduction	1
1-1:1.1 The Existence of a Duty	3
1-1:2 “Generally Accepted” and “Reasonably Prudent” Standards Distinguished	8
1-1:3 Not All Deviations From the Standard of Care Constitute Malpractice	10
1-2 THE ROLE OF THE PHYSICIAN’S JUDGMENT.....	13
1-2:1 Physician’s Exercise of Reasonable Judgment Is Not Malpractice.....	13
1-2:2 Evolution of the Judgment Charge	16
1-2:3 Limitations on Applicability of the Judgment Charge.....	21
1-2:4 Specific Cases Addressing the Judgment Charge.....	26
1-2:5 Need for Informed Consent Charge When Judgment Charge Is Given.....	35
1-3 PERSONAL STANDARDS DO NOT ESTABLISH THE STANDARD OF CARE	35
1-4 DUTIES OF SPECIFIC MEDICAL PROVIDERS	39
1-4:1 Duty of Examining or Consulting Physician Acting for Third Party	39
1-4:1.1 General Duty of Care.....	39
1-4:1.2 Duty to Report Findings to Patient	44
1-4:1.2a Duty of Examining Physician ...	44
1-4:1.2b Duty of Consulting Physician Not Examining Patient	48
1-4:1.2c Duty of Third Party to Disclose Test Results.....	50
1-4:1.3 Duty to Persons Other Than Patient.....	51
1-4:2 Duty of a Specialist	51
1-4:3 Standard of Care for Hospital Resident Physician.....	55

Table of Contents

1-4:4	Duty of a Supervisor	57
1-4:5	Duty of a Supervisor of Physician Assistants	61
1-4:6	Duty of a Supervisor of Nurses	66
1-4:7	The Scope of Chiropractic Care	68
1-4:8	Duty of Emergency Department	72
1-4:9	Duty of Nursing Home	72
1-4:10	Non-Delegable Duty of Jail or Prison	86
1-5	DUTIES IN SPECIFIC CIRCUMSTANCES	87
1-5:1	Duty Regarding Treatment of the Deceased's Body....	87
1-5:2	Duty to Elderly and Infirm Patient	89
1-5:3	Duty to Suicidal Patient.....	90
1-6	LIABILITY OF THIRD PARTIES FOR PHYSICIAN'S BREACH OF DUTY OF CARE.....	95
1-6:1	Duty of a Credentialer.....	95
1-6:2	Duty of Employer and Respondeat Superior.....	98
1-6:2.1	Employment Relationship Required	98
1-6:2.2	Employee Need Not Be Party.....	99
1-6:2.3	Employer Not Liable for Employee Conduct Outside Scope of Employment... 101	
1-6:2.4	Limitation of Liability.....	104
1-6:3	Apparent Employment of Medical Professionals.....	104
1-6:4	Liability of Referring Physician	110
1-6:5	Liability of Workers' Compensation Carrier for Examining Physician's Negligence	110
1-7	TERMINATION OF THE DUTY OF CARE.....	113
II	OTHER RELATED DUTIES	114
1-8	THE DUTY OF CONFIDENTIALITY	114
1-8:1	Generally	114
1-8:2	Exceptions to/Waiver of Confidentiality	116
1-8:2.1	Personal Injury Claim Waives Confidentiality.....	116
1-8:2.2	Use and Misuse of a Subpoena	119
1-8:3	Duty to Keep HIV/AIDS Diagnosis Confidential....	123
1-8:4	Duty to Keep Psychiatric Records Confidential.....	124
1-8:4.1	Privilege Akin to Attorney-Client Privilege.....	124
1-8:4.2	Exceptions to Confidentiality of Psychiatric Records	129
1-8:4.2a	Defense to Crime, Mental State at Issue or Best Interests of Children	129
1-8:4.2b	Persons at Risk of Harm	131

1-8:4.3 Improper Use of Subpoena for
Psychiatric Records 132

1-9 THE DUTY TO PROVIDE GENETIC COUNSELING..... 133

1-10 THE DUTY TO TERMINATE CARE 136

1-11 THE DUTY OF TREATING PHYSICIAN TO
TESTIFY OR PROVIDE LITIGATION SUPPORT 137

1-12 THE DUTY TO MAINTAIN INSURANCE 140

1-13 PRACTICE POINTERS..... 143

Chapter 2: Doctrines of Informed Consent and Refusal 147

I DUTY TO OBTAIN INFORMED
CONSENT OR REFUSAL 147

2-1 THE FULLY INFORMED PATIENT 147

2-1:1 Physician’s Common Law Duty
to Provide Information 147

2-1:2 Code Provisions Require Written Informed Consent.... 151

2-2 ACTIONS FOR BREACH OF DUTY TO OBTAIN
INFORMED CONSENT OR REFUSAL..... 151

2-2:1 Elements of Cause of Action for Breach
of Duty to Obtain Informed Consent 151

2-2:2 Standard for Duty to Disclose 152

2-2:2.1 “Professional” Standard Abandoned..... 152

2-2:2.2 Reasonable Patient Standard 153

2-2:2.3 Informed Consent Regarding
Prescription Drugs..... 157

2-2:2.4 Only Material Risks Need Be Disclosed ... 159

2-2:3 Duty to Disclose Applicable to Non-Invasive
Procedures or Non-Treatment..... 166

2-2:4 Duty Regarding Informed Refusal..... 168

2-2:5 Duty to Inform of Available Diagnostic Testing 169

2-2:6 Relationship Between Medical Judgment
and Informed Consent 172

2-2:7 No Duty to Disclose Unavailable Options 178

2-2:8 Distinguishing Negligent Treatment or Failure
to Diagnose from Failure to Disclose..... 179

2-2:8.1 Negligent Treatment or Diagnosis 179

2-2:8.2 Failure to Disclose Distinguished 185

2-2:8.3 Use of Informed Consent Form to
Negate Negligence Prohibited..... 187

2-2:9 Immunity/No Duty to Obtain Informed Consent
in Emergencies 189

2-2:10 Disclosure Regarding FDA Approvals..... 192

Table of Contents

2-2:11	Disclosures Regarding Physicians	194
2-2:11.1	Duty to Disclose Physician's HIV/AIDS....	194
2-2:11.2	Duty Regarding Disclosure of Credentials	196
2-2:11.3	Duty to Identify Specific Physician Performing Service	200
2-2:11.4	No Duty to Disclose Risks of Treatment by Other Physicians	201
2-2:12	Liability to Third Parties for Breach of Duty to Obtain Informed Consent.....	203
2-2:12.1	Child's Cause of Action for Breach of Duty to Disclose Risks to Mother	203
2-2:12.2	Duty to Advise of Test Results Affecting Patient and Third Parties.....	208
II	PROCEDURAL ISSUES.....	213
2-3	PLEADING INFORMED CONSENT	213
2-4	A DIRECTED VERDICT MAY BE WARRANTED WHERE DEFENDANT CONCEDES A MATERIAL RISK WAS NOT DISCLOSED	215
2-5	ROUTINE DISCLOSURE AS EVIDENCE OF INFORMATION DISCLOSED TO PATIENT	217
2-6	WHETHER PATIENT WOULD DECLINE TREATMENT IS ISSUE FOR THE JURY	218
2-7	JURY INTERROGATORIES IN INFORMED CONSENT CASE	220
III	ASSAULT AND BATTERY DISTINGUISHED.....	220
2-8	INTRODUCTION.....	220
2-9	"GHOST SURGERIES": PATIENT NOT INFORMED WHO WILL PERFORM SERVICES.....	220
2-10	PERFORMING DIFFERENT SURGERY THAN DESCRIBED	222
2-11	NO PROOF OF A DEVIATION FROM THE STANDARD OF CARE REQUIRED FOR BATTERY	228
2-12	EXCEEDING CONDITIONS OF CONSENT CONSTITUTES BATTERY	229
2-13	PRACTICE POINTERS.....	233
Chapter 3: Other Causes of Action		237
I	TORT CLAIMS	237
3-1	STRICT LIABILITY IN TORT	237
3-2	ABANDONMENT	237
II	FRAUD CLAIMS.....	240

Table of Contents

3-3 FRAUD..... 240
3-3:1 Elements of Cause of Action..... 240
3-3:2 Benefits and Burdens of Pleading Fraudulent
Concealment..... 240
3-3:3 Consumer Fraud..... 242
3-3:4 Misrepresentation of Credentials..... 243
3-3:5 Misrepresentations Concerning Treatment 246
III CONTRACT AND OTHER CLAIMS 250
3-4 BREACH OF CONTRACT..... 250
3-5 FALSE IMPRISONMENT..... 254
3-6 THE MISHANDLING OF A CORPSE..... 255
3-7 UNAUTHORIZED AUTOPSY 256
3-8 FALSE DIAGNOSIS OF DISEASE..... 257
3-9 ALTERATION OR DESTRUCTION
OF MEDICAL RECORDS 257
3-10 PUBLIC DISCLOSURE OF PRIVATE FACTS 262
3-11 SEXUAL MISCONDUCT 264
3-12 PRACTICE POINTERS..... 266

Chapter 4: Proximate Causation..... 269
I INTRODUCTION..... 269
4-1 OVERVIEW 269
4-2 REASONABLE DEGREE OF MEDICAL
PROBABILITY 270
II PRE-EXISTING CONDITIONS 276
4-3 CAUSATION ISSUES RAISED BY PRE-EXISTING
CONDITIONS..... 276
4-3:1 Introduction 276
4-3:2 Defining What Constitutes a Pre-Existing
Condition 278
4-3:2.1 Condition That Could Evolve into
Ultimate Condition Absent Negligence 278
4-3:2.2 Condition Being Treated to
Delay Outcome..... 280
4-3:2.3 Addiction as Pre-Existing Condition 282
4-3:3 Defendant’s Burden to Apportion Damages
Caused by Pre-Existing Condition..... 290
4-3:4 *Evers, Scafidi* and the “Increased Risk/Substantial
Factor” Test 293
4-3:4.1 Development of “Increased
Risk/Substantial Factor” Test..... 294
4-3:4.2 Defining “Substantial Factor” 324

Table of Contents

4-3:4.3	Retroactive Application of <i>Scafidi</i>	327
4-3:4.4	Application of <i>Scafidi</i> to Specific Cases....	329
4-3:4.5	Explaining Limitation of <i>Scafidi</i> Charge... 340	
4-3:4.6	Issuing Ultimate Outcome Jury Charge with <i>Scafidi</i> Charge.....	341
4-3:5	Failure to Perform Diagnostic Test Which Would Have Disclosed Pre-Existing Condition	341
4-3:6	Apportionment of Pain and Suffering	347
4-4	LOSS OF A CHANCE.....	349
4-5	AGGRAVATION OF A PRIOR INDEPENDENT TORT ...	353
4-6	PAIN AND SUFFERING.....	373
III	AVOIDABLE CONSEQUENCES/COMPARATIVE NEGLIGENCE	375
4-7	EFFECT OF AVOIDABLE CONSEQUENCES/ COMPARATIVE NEGLIGENCE ON PROOF OF CAUSATION.....	375
4-7:1	Introduction	375
4-7:2	Distinction Between Patient's Pre-Treatment and Post-Treatment Conduct.....	376
4-7:3	Distinguishing Avoidable Consequence and Superceding Cause.....	382
4-7:4	Cases Limiting Application of Avoidable Consequence/Comparative Negligence	385
4-7:5	Applicability to Informed Consent Cases	386
IV	CAUSATION IN INFORMED CONSENT CASES	387
4-8	PROOF OF PROXIMATE CAUSATION IN THE INFORMED CONSENT CASE	387
4-9	FAILURE TO WARN REGARDING PRESCRIPTION DRUG RISKS	389
4-10	FAILURE TO FULLY INFORM PATIENT REGARDING PROCEDURE AND ALTERNATIVES.....	394
4-11	PRACTICE POINTERS.....	402
Chapter 5: Damages in Medical Malpractice Cases		407
I	TYPES OF DAMAGES.....	407
5-1	INTRODUCTION.....	407
5-2	DAMAGES FOR DELAY IN TREATMENT	408
5-3	PAIN AND SUFFERING.....	412
5-4	HEDONIC DAMAGES.....	419
5-5	DISABILITY	422
5-6	ECONOMIC LOSS.....	423
5-7	MEDICAL BILLS	430

Table of Contents

5-8	EMOTIONAL DISTRESS DAMAGES	437
5-8:1	Generally	437
5-8:2	Emotional Distress of Relatives	442
5-8:2.1	<i>Portee</i> and Elements of Claim	442
5-8:2.2	Application of <i>Portee</i> in Medical Malpractice Cases	444
5-8:2.3	Claims for Mistreatment of Body or Corpse	449
5-8:2.4	Misdiagnosis Generally Does Not Satisfy <i>Portee</i> Factors	450
5-8:2.5	Emotional Distress of Parents for Loss of a Child	453
5-8:2.6	Relatives Must Connect Medical Malpractice to Injury to Recover Emotional Distress Damages.....	463
II	DAMAGES IN CASES INVOLVING A FETUS OR CHILD	466
5-9	DAMAGES INVOLVING A FETUS	466
5-9:1	Injuries to a Fetus and Preconception Injuries	466
5-9:2	Loss of a Fetus	472
5-10	INJURIES TO A CHILD	475
5-11	EFFECT OF SETTLEMENT WITH INFANT WITHOUT JUDICIAL APPROVAL	478
III	WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS.....	479
5-12	WRONGFUL BIRTH.....	479
5-12:1	Introduction	479
5-12:2	Distinguishing Wrongful Life Claims.....	480
5-12:3	Development of Wrongful Birth Claim.....	483
5-12:4	Measure of Damages for Wrongful Birth.....	486
5-12:4.1	Emotional Distress of Parents.....	486
5-12:4.2	Damages for Extraordinary Costs of Care.....	486
5-12:5	Distinguishing Wrongful Birth and Informed Consent Claims: Medical Causation Not Required ...	489
5-12:6	Preconception Negligence.....	493
5-12:7	Superseding Cause and Avoidable Consequences in Wrongful Birth Cases.....	495
5-12:8	Emotional Distress Damages for Wrongful Birth	499
5-12:9	Damages Not Reduced by Joy of Raising Child	502
5-12:10	No Claim for Grandparents or Siblings	504

Table of Contents

IV	DAMAGES IN WRONGFUL DEATH CASES	505
5-13	WRONGFUL DEATH CLAIMS.....	505
5-13:1	Generally	505
5-13:2	Wrongful Death of a Child	509
5-13:3	Wrongful Death After a Prior Medical Malpractice Suit	514
V	OTHER DAMAGES ISSUES.....	518
5-14	PUNITIVE DAMAGES	518
5-15	PER QUOD	525
5-16	ADDITUR AND REMITTITUR OF DAMAGES	527
5-17	HIGH-LOW AGREEMENTS.....	532
5-17:1	High-Low Agreements and Workers’ Compensation Liens under N.J.S.A. 34:15-40	534
5-17:2	High-Low Agreements and Physician Reporting Requirements	536
5-18	OFFER TO TAKE JUDGMENT	538
5-19	PRACTICE POINTERS.....	541
Chapter 6: Pre-Suit Investigation of Medical Malpractice Claim		547
I	MEDICAL RECORDS	547
6-1	THE DUTY TO MAINTAIN ACCURATE AND TRUE MEDICAL RECORDS	547
6-2	STATUTORY AND ADMINISTRATIVE CODE REGULATIONS REGARDING MEDICAL RECORDS.....	548
6-3	LEGIBILITY REQUIREMENTS FOR MEDICAL RECORDS.....	553
II	INCIDENT, INVESTIGATION AND OTHER REPORTS	553
6-4	INCIDENT REPORTS.....	553
6-5	THE PATIENT SAFETY ACT, N.J.S.A. 26:2H-12.23	554
6-6	PATIENT SAFETY ACT’S IMPACT ON DOCUMENT DISCOVERY	557
6-7	DISCOVERABILITY OF FACTS CONTAINED IN PATIENT SAFETY ACT	577
6-8	PEER REVIEW/COMMITTEE REPORTS.....	580
6-9	SENTINEL EVENT REPORTS.....	591
6-10	INTERVIEWS OF HEALTH CARE PROFESSIONALS.....	595
III	DECLINING A MEDICAL MALPRACTICE CASE	597
6-11	ADVISING THE CLIENT	597
6-12	PRACTICE POINTERS.....	599

Chapter 7: Expert Testimony and Learned Treatises	605
I	EXPERT TESTIMONY IN MALPRACTICE CASES..... 605
7-1	INTRODUCTION..... 605
7-2	REQUIREMENTS FOR EXPERT TESTIMONY..... 607
7-2:1	Expert Establishes Standard of Care and Deviation Therefrom 607
7-2:2	Content of Expert Testimony and Expert Report 612
7-2:2.1	Introduction 612
7-2:2.2	Clear, Specific Opinions..... 613
7-2:2.3	Reasonable Medical Probability 614
7-2:3	Importance of Expert Testimony 617
II	QUALIFICATION OF EXPERTS AND THE PATIENTS FIRST ACT 618
7-3	QUALIFICATION OF EXPERT WITNESSES..... 618
7-3:1	Introduction 618
7-3:2	Qualification of Expert Witnesses Prior to New Jersey Medical Care Access and Responsibility and Patients First Act..... 619
7-3:2.1	Continuing Applicability of Pre-Act Common Law for Cases Arising Prior to 2004..... 619
7-3:2.2	Expert in Different Specialty May Qualify in Pre-2004 Cases..... 619
7-3:2.3	Examples of Qualified Experts in Pre-2004 Cases..... 621
7-3:2.4	Examples of Experts Not Qualified in Pre-2004 Cases..... 628
7-3:3	Qualification of Expert Witnesses After the New Jersey Medical Care Access and Responsibility and Patients First Act..... 631
7-3:3.1	Same Specialty Required for Expert 631
7-3:3.2	Applicability of Same Specialty Requirement 631
7-3:3.3	Specialties and Sub-specialties Recognized by the American Board of Medical Specialties or the American Osteopathic Association 634
7-3:3.3a	Recognized Specialties 634
7-3:3.3b	American Board of Medical Specialties Recognized Specialties 634

Table of Contents

	7-3:3.3c	American Osteopathic Association Recognized Specialties	639
	7-3:3.3d	Scope of Practice for Specialties	642
	7-3:3.3e	Overlap Between Specialties....	643
	7-3:3.4	Constitutionality Challenged.....	643
	7-3:3.5	Amendment to Affidavit of Merit.....	645
	7-3:3.6	Equivalently Qualified	646
	7-3:3.7	Determining the Qualifications of Medical Malpractice Liability Experts.....	648
	7-3:3.8	N.J.S.A. 2A:53A-41(a)(1).....	659
7-4		THE PATIENTS FIRST ACT'S IMPACT ON OTHER MEDICAL MALPRACTICE ISSUES.....	661
	7-4:1	Introduction	661
	7-4:2	Statute of Limitations Amended.....	661
	7-4:3	Affidavit of Noninvolvement	661
	7-4:4	Malpractice Premium Increase Barred if Case Dismissed Within 180 Days	662
	7-4:5	Remittitur and Additur.....	662
	7-4:6	Good Samaritan Immunity.....	663
	7-4:7	Reimbursement of Non-Economic Damages.....	663
	7-4:8	Malpractice Insurance Policies.....	664
	7-4:9	Applicability and Effective Date of the Patients First Act.....	665
	7-4:10	New Jersey Health Care Consumer Information Act.....	665
III		THE AFFIDAVIT OF MERIT.....	666
7-5		OVERVIEW	666
	7-5:1	Professions Covered.....	666
	7-5:1.1	Qualification of Dentists, Nurses and Other Medical Professionals	669
	7-5:2	Statutory Requirements	674
	7-5:2.1	Time for Service.....	674
	7-5:2.2	Failure to Produce Necessary Records or Other Information.....	675
	7-5:2.3	Minimum Requirements.....	675
	7-5:2.4	Qualifications of the Affiant	675
7-6		JUDICIAL INTERPRETATION OF AFFIDAVIT OF MERIT STATUTE	677
	7-6:1	Constitutionality.....	677

Table of Contents

7-6:2 Supreme Court’s Initial Construction:
Hall and *Cornblatt* 678
7-6:2.1 *In re Hall*: Purpose of Affidavit of
Merit Statute 678
7-6:2.2 *Cornblatt v. Barow*: Affidavit of Merit
Not Required for Malpractice Occurring
Pre-Statute..... 680

7-7 APPLICATION OF THE AFFIDAVIT OF MERIT
REQUIREMENTS 682
7-7:1 Introduction 682
7-7:2 Who is Entitled to an Affidavit of Merit?..... 684
7-7:2.1 Which Licensed Professionals are
Entitled to an Affidavit of Merit? 684
7-7:2.2 Is an Affidavit of Merit Needed
for Professional Corporations? 687
7-7:2.3 Is an Affidavit of Merit Needed for a
Claim Based on Entity’s Vicarious
Liability of a Non-licensed Employee? 694
7-7:3 Who is Qualified to Render the Affidavit of Merit?... 697
7-7:3.1 Same Specialty Requirement 697
7-7:3.2 Waiver of Same Specialty Requirement 699
7-7:4 What Information Must be Contained
in the Affidavit of Merit? 702
7-7:5 Does the Affidavit of Merit Statute Require
Identification of the Defendants Who Deviated
from the Standard of Care? 703
7-7:6 When Must the Affidavit of Merit be Filed? 706
7-7:7 What Constitutes Substantial Compliance
with the Affidavit of Merit Statute? 709
7-7:7.1 Substantial Compliance Concept
Explained 709
7-7:7.2 Applying the Substantial Compliance
Concept 711
7-7:7.3 The Affidavit of Merit Statute Should
Not Be Mechanically Applied..... 714
7-7:7.4 Dismissal with Prejudice Absent
Extraordinary Circumstances 717
7-7:7.5 Failure to Place Expert Under Oath
Renders Affidavit Non-Compliant..... 724
7-7:8 Do the Doctrines of Waiver or Estoppel
Apply to the Affidavit of Merit Statute? 725

Table of Contents

	7-7:8.1	Failure to Promptly Seek Dismissal Estops Defendant	725
	7-7:8.2	The <i>Ferreira</i> Conference	727
7-7:9		Does the Failure to Hold a <i>Ferreira</i> Conference Extend the Time to Serve an Affidavit of Merit?.....	730
7-7:10		Can the <i>Ferreira</i> Conference be Waived?.....	731
7-7:11		Is the Affidavit of Merit Waived if the Defendant Withholds Medical Records Needed to Prepare the Affidavit?.....	732
	7-7:11.1	Records Having Substantial Bearing on Preparation of Affidavit of Merit.....	732
	7-7:11.2	Records Not Needed for Affidavit	735
7-7:12		The Affidavit of Merit Statute Is Not Tolled Due to the Minority of an Infant Plaintiff	738
7-7:13		Is an Affidavit of Merit Required in Common Knowledge or Res Ipsa Cases?.....	739
7-7:14		Is an Affidavit of Merit Required for Informed Consent Cases?	743
7-7:15		Does the Affidavit of Merit Statute Apply to Crossclaims or Counterclaims?	744
	7-7:15.1	Applicability to Crossclaims	744
	7-7:15.2	Applicability to Third-Party Malpractice Complaint.....	746
	7-7:15.3	Applicability to Counterclaim	747
7-7:16		Does the Affidavit of Merit Statute Apply to Non-Malpractice Claims, Such as Contract or Assault and Battery Claims?.....	749
7-7:17		Is an Affidavit of Merit Needed to Establish Causation or Damages?	751
7-7:18		Should the Affidavit of Merit Statute Ever be Permitted to be Used to Defeat Meritorious Claims?.....	751
IV		PRESENTING EXPERT TESTIMONY AND REPORTS... ..	753
7-8		THE FOUNDATION FOR EXPERT TESTIMONY	753
	7-8:1	Testimony Based on Knowledge, Training, Experience or Education.....	753
	7-8:2	Theories Not Yet Generally Accepted.....	757
	7-8:3	Rule 104 Hearing on Admissibility	761
	7-8:4	Use of Multiple Experts	762
	7-8:5	Failure To Call an Expert Witness at Trial	765
7-9		THE REQUIREMENTS OF THE EXPERT REPORT	765
7-10		THE NET OPINION RULE.....	771

Table of Contents

7-11 THE COMMON KNOWLEDGE DOCTRINE 786

7-11:1 Doctrine Established in Cases of Foreign Objects
Left Behind in Surgery..... 786

7-11:2 Cases in Which Common Knowledge Found..... 788

7-11:2.1 Generally..... 788

7-11:2.2 An Extreme Application of the Common
Knowledge Doctrine..... 796

7-11:2.3 Common Knowledge Regarding
Communication of Test Results..... 798

7-11:3 Cases in Which Common Knowledge Doctrine
Was Rejected..... 800

7-12 RES IPSA LOQUITUR..... 802

7-12:1 Required Elements..... 802

7-12:2 Expert Testimony May Still Be Required for
Res Ipsa Loquitur in Certain Situations..... 804

7-12:3 Examples Where Res Ipsa Loquitur Applied 807

7-12:4 Examples Where Res Ipsa Loquitur Not Applied 810

7-12:5 Conditional Application of Res Ipsa Doctrine 813

7-13 *ANDERSON v. SOMBERG* AND COLLECTIVE
JOINT RESPONSIBILITY 822

7-14 EXPERT TESTIMONY IN INFORMED
CONSENT CASES 832

7-15 COMPELLING EXPERT TESTIMONY 842

V LEARNED TREATISES AND OTHER SOURCES..... 854

7-16 THE *JACOBBER* RULE AND LEARNED TREATISES 854

7-16:1 Treatises..... 854

7-16:2 Manufacturers’ Technical Guides
and Package Inserts 862

7-17 THE PHYSICIANS’ DESK REFERENCE AND
PACKAGE INSERTS 865

7-18 HOSPITAL PROTOCOLS AND PROCEDURE
MANUALS..... 869

7-19 RECOMMENDATIONS OF PROFESSIONAL
MEDICAL BOARDS OR ORGANIZATIONS 873

7-20 RECOMMENDATIONS OF THE AMERICAN
MEDICAL ASSOCIATION..... 875

7-21 STATUTES AND ADMINISTRATIVE CODES 878

7-21:1 Generally 878

7-21:2 Statute as Evidence of Standard of Care 880

7-21:3 Examples of Statute Held Not
Evidence of Standard 886

7-22 DISCOVERY OF TREATISES TO BE UTILIZED AS
EVIDENCE OF THE STANDARD OF CARE..... 887

Table of Contents

VI	REFUSAL OR INABILITY OF EXPERT TO TESTIFY	888
7-23	REMEDIES FOR FAILURE OF EXPERT WITNESS TO TESTIFY	888
7-24	PRACTICE POINTERS.....	890

Chapter 8: Pleadings, Defenses and Voir Dire in

	Medical Malpractice Cases	903
I	INTRODUCTION.....	903
8-1	OVERVIEW	903
II	PARTIES.....	903
8-2	IDENTIFYING ALL CLAIMS AS TO ALL PARTIES.....	903
	8-2:1 The Entire Controversy Doctrine.....	903
	8-2:2 Fictitious Defendant Rule.....	906
8-3	SERVICE ON ABSENT DEFENDANTS.....	911
III	DEFENSES	911
8-4	COMPARATIVE NEGLIGENCE AND AVOIDABLE CONSEQUENCES	911
8-5	AFFIDAVIT OF NONINVOLVEMENT	919
8-6	STATUTE OF LIMITATIONS	921
	8-6:1 Generally	921
	8-6:2 The Discovery Rule.....	924
	8-6:2.1 Development of the Discovery Rule	924
	8-6:2.2 Filing within Two Years from the Date of Discovery.....	930
	8-6:2.3 Discovery Rule Triggered by Knowledge of Fault	933
	8-6:2.4 Fact of Injury, Not Injury's Extent, Triggers Statute of Limitations.....	941
	8-6:2.5 Increased Risk of Harm, Latent Disease, Cancer Recurrence: Statute of Limitations Begins to Run Only After Harm Occurs ...	944
	8-6:2.6 Discovery of Proper Defendant.....	946
	8-6:2.6a Amended Complaint Relates Back	946
	8-6:2.6b Due Diligence Required	957
	8-6:2.7 Application of Discovery Rule to Cases, Generally	959
8-6:3	Statute of Limitations in Informed Consent Cases....	977
8-6:4	Failure to Advise, Concealment of Malpractice and the Statute of Limitations	981
8-6:5	Continuing Treatment and the Statute of Limitations.....	986

Table of Contents

8-6:6 Incompetency/Insanity and the Statute
of Limitations..... 988

8-6:7 Infancy or Parents’ Claim for Injuries to a Child
and the Statute of Limitations 989

8-6:8 Statute of Limitations for Wrongful Death..... 992

8-6:9 Statute of Limitations for Public Disclosure of
Patient’s Medical Records 1005

8-7 CHARITABLE AND OTHER IMMUNITIES 1006

8-7:1 Introduction 1006

8-7:2 Hospitals and Charitable Immunity..... 1007

8-7:2.1 Limitations on Hospital Liability 1007

8-7:2.2 Limitations on Hospital Liability Not
Applicable to Hospital Employees..... 1011

8-7:2.3 Determining Whether Defendant is a
Charity Subject to Immunity 1012

8-7:2.4 Charitable Immunity Inapplicable in
Products Liability 1016

8-7:2.5 Jury Charges on Charitable Immunity.... 1017

8-7:3 Immunity for Emergency Squads and Personnel.... 1020

8-7:4 Good Samaritan Act Immunity 1024

8-8 TORT CLAIMS ACT AND PUBLIC
ENTITY IMMUNITY 1026

8-8:1 Introduction 1026

8-8:2 Notice of Tort Claim 1027

8-8:3 Requirement of Notice of Tort Claim
for Public Employees 1029

8-8:4 Time to Serve Notice of Claim in Medical
Malpractice Cases..... 1030

8-8:4.1 *Eagan* and *Lowe* Opinions 1030

8-8:4.1a *Eagan v. Boyarsky*: Public
Employee Status Unclear 1030

8-8:4.1b *Lowe v. Zarghami*:
Extraordinary Circumstances... 1032

8-8:4.2 Cases Applying *Eagan* and *Lowe* 1035

8-8:4.2a *Ventola* and Confusion
about Federal or State Status
of Institution 1035

8-8:4.2b *D.D. v. UMDNJ* and
Emotional Distress as
Extraordinary Circumstances... 1037

Table of Contents

8-8:4.2c *McNellis-Wallace v. Hoffman*
Distinguishes the Date of
Accrual and Extraordinary
Circumstances..... 1040

8-8:4.2d Catastrophic, Life Altering
Injuries May Toll Accrual
Date..... 1044

8-8:5 Application of Tort Claim Act Immunity 1045

8-9 WORKERS' COMPENSATION DEFENSES 1046

8-10 LACK OF JURISDICTION..... 1051

IV MULTIPLE DEFENDANTS, DEFENSE CLAIMS
AGAINST OTHER PARTIES 1054

8-11 CROSSCLAIMS 1054

8-12 REPRESENTATION OF MULTIPLE DEFENDANTS.... 1074

8-13 COUNTERCLAIMS BY DEFENDANTS..... 1083

V VOIR DIRE 1085

8-14 VOIR DIRE IN MEDICAL MALPRACTICE CASES 1085

8-14:1 New Jersey Supreme Court Directive #04-07..... 1085

8-14:2 Requirements of Voir Dire..... 1086

8-14:3 Use of Standard and Open-Ended
Voir Dire Questions 1092

8-14:4 Peremptory Challenges 1093

VI ARBITRATION 1098

8-15 CONTRACTUAL LIMITATIONS UPON AND
COMPELLED ARBITRATION OF MALPRACTICE
CLAIMS 1098

8-16 IN LIMINE MOTIONS 1105

8-17 PRACTICE POINTERS..... 1107

Chapter 9: Pretrial Discovery in Medical Malpractice Cases..... 1115

I INTRODUCTION..... 1115

9-1 OVERVIEW 1115

9-2 PRIORITY OF DISCOVERY 1116

II MEDICAL RECORDS 1117

9-3 OBTAINING PLAINTIFF'S MEDICAL RECORDS,
INTERVIEWING PLAINTIFF'S TREATING
PHYSICIANS 1117

9-4 USE OF A SUBPOENA TO OBTAIN
MEDICAL RECORDS 1122

III INTERROGATORIES 1125

9-5 FORM INTERROGATORIES 1125

9-6 THE SCOPE OF INQUIRY BY INTERROGATORIES.... 1125

Table of Contents

9-7 DISCOVERY OF COMMUNICATIONS BETWEEN PLAINTIFF, COUNSEL AND EXPERTS..... 1134

9-8 PENALTY FOR FAILURE TO ANSWER INTERROGATORIES 1135

9-9 PRODUCTION OF EXPERT REPORTS 1136

IV USE OF ADVERSARY’S EXPERT 1141

9-10 USE OF AN ADVERSARY’S EXPERT GENERALLY PROHIBITED..... 1141

V DEPOSITIONS..... 1148

9-11 DEPOSITIONS OF PARTIES..... 1148

9-11:1 Raising Objections During Depositions..... 1148

9-11:2 Scope of Deposition Questions..... 1149

9-11:3 Deposition Questions Concerning Opinions..... 1154

9-11:4 Deposition Testimony Supporting Learned Treatises 1159

9-12 DEPOSITIONS OF EXPERTS 1160

9-13 MATERIAL CHANGE IN TESTIMONY BY A WITNESS 1165

VI TREATING PHYSICIANS’ OPINIONS, REPORTS AND TESTIMONY 1171

9-14 USE OF TREATING PHYSICIANS’ OPINIONS..... 1171

9-14:1 Value of Treating Physicians’ Testimony 1171

9-14:2 Discovery of Treating Physician’s Opinion..... 1172

9-14:3 Use of Subsequent Treating Physician as Witness... 1173

9-14:3.1 Subsequent Treating Physician as Witness Concerning Liability Issues 1173

9-14:3.2 Subsequent Treating Physician as Witness Regarding Causation..... 1176

9-14:4 Admissibility of Subsequent Treating Physician’s Reports 1183

9-14:5 Other Issues Concerning Treating Physician’s Testimony 1184

9-15 OPINIONS OF PSYCHIATRISTS OR MENTAL HEALTH CARE PROFESSIONALS..... 1186

VII OTHER DISCOVERY ISSUES 1190

9-16 OPINIONS IN MEDICAL RECORDS 1190

9-17 MEDICAL EXAMINER’S/AUTOPSY REPORTS 1196

9-18 RECORDS AND REPORTS OF BOARD OF HEALTH, BOARD OF MEDICAL EXAMINERS 1201

9-19 EVIDENCE OF A DECEDENT’S PRE-DEATH STATEMENTS..... 1203

VIII CROSS-EXAMINATION OF EXPERTS 1204

Table of Contents

9-20	SCOPE OF CROSS-EXAMINATION OF EXPERT WITNESSES	1204
9-20:1	Cross-Examination of Collateral Issues	1204
9-20:2	Cross-Examination Regarding Prior Service as Expert Witness	1207
9-20:3	Use of Hypothetical Questions in Cross-Examination	1209
9-20:4	Questions Concerning Experts’ Financial Arrangements	1210
9-21	PRACTICE POINTERS	1211
Chapter 10: Electronic Medical Records		1219
10-1	INTRODUCTION	1219
10-1:1	Federal Overview	1220
10-1:2	New Jersey Overview	1229
10-2	REQUIREMENTS	1233
10-2:1	Requirements for Eligible Medicare/Medicaid Providers	1233
10-2:1.1	Meaningful Use Stages and Objectives ...	1235
10-2:2	Requirements Under HIPAA for Electronic Medical Records	1236
10-2:2.1	HIPAA’s Security Requirements	1238
10-2:2.2	HIPAA’s Notification of Breach Requirement	1242
10-2:2.3	HIPAA’s Privacy Requirements	1242
10-2:3	Federal Incorporated Standards, Implementation Specifications, and Certification Criteria	1247
10-2:4	Requirements Under New Jersey Law	1249
10-3	CONTENTS OF ELECTRONIC MEDICAL RECORDS	1251
10-3:1	Metadata and Electronically Stored Information ...	1251
10-3:2	Types of Metadata	1253
10-3:3	Metadata, Audit Trails, and Electronic Medical Records	1255
10-3:3.1	Federal Requirements	1255
10-3:3.2	New Jersey Requirements	1265
10-4	AVAILABILITY OF ELECTRONIC MEDICAL RECORDS	1268
Appendix: Selected New Jersey Law Resources		1275
Table of Cases		1277
Index		1309