

Table of Contents

Chapter 1: General Duty of Health Care Providers.....	1
1-1 INTRODUCTION	1
1-2 DUTY IN GENERAL.....	1
1-3 STANDARD OF CARE	3
1-4 DUTY TO NONPATIENTS.....	7
1-5 FIDUCIARY DUTY	9
1-6 SEXUAL EXPLOITATION CASES	10
1-7 RECKLESSNESS.....	12
1-8 VICARIOUS LIABILITY	13
1-8:1 Respondeat Superior	15
1-8:2 Borrowed Servant Doctrine	15
1-8:3 Successor Liability.....	16
1-8:4 Apparent Authority	17
1-9 CONTRIBUTORY NEGLIGENCE	17
1-10 THE WRONGFUL CONDUCT RULE.....	18
1-11 PRENATAL DUTY OF CARE.....	19
Chapter 2: Causation.....	21
2-1 CAUSATION GENERALLY	21
2-2 CAUSE IN FACT	23
2-3 PROXIMATE CAUSE.....	23
2-3:1 Substantial Factor Test.....	23
2-3:2 Case-by-Case	25
2-3:2.1 Emotional Distress.....	25
2-3:2.2 Risks of Psychiatric Medication	25
2-3:2.3 Removal of Life Support	25
2-3:2.4 Statistical or Epidemiological Evidence.....	25
2-4 MULTIPLE CAUSATION	26
2-5 SOLE PROXIMATE CAUSE.....	27
2-6 INTERVENING/SUPERSEDING CAUSE	28
2-7 SUBSEQUENT MEDICAL TREATMENT	28

Table of Contents

Chapter 3: Damages	31
3-1 DAMAGES GENERALLY	31
3-2 COMPENSATORY DAMAGES	33
3-2:1 Pain and Suffering	34
3-2:2 Physical.....	34
3-2:3 Mental	35
3-2:3.1 Bystander Emotional Distress.....	36
3-2:4 Loss of Consortium.....	40
3-2:4.1 Spousal Consortium.....	40
3-2:4.2 Parental Consortium	42
3-2:4.3 Filial Consortium	43
3-2:5 Loss of Chance and Increased Risk	43
3-2:5.1 Loss of Chance	43
3-2:5.2 Increased Risk.....	45
3-2:6 Loss of Life’s Enjoyment and “Death Itself”	45
3-3 NOMINAL DAMAGES	46
3-4 PUNITIVE DAMAGES	46
3-5 PRESENT VALUE	47
3-6 MITIGATION OF DAMAGES	48
3-7 COLLATERAL SOURCES	49
3-7:1 Legislation	50
3-7:2 Decisional Law	55
3-8 ADDITUR AND REMITTITUR.....	55
3-8:1 Remittitur Denied	57
3-8:2 Remittitur Granted	58
3-9 LIFE EXPECTANCY	59
Chapter 4: Certificate of Good Faith and Opinion Letter	61
4-1 INTRODUCTION	61
4-2 WHO IS A “HEALTH CARE PROVIDER”?	62
4-3 THE CERTIFICATE OF GOOD FAITH.....	62
4-4 THE 90-DAY EXTENSION.....	64
4-5 THE OPINION LETTER	65
4-5:1 Whether the Action Requires an Opinion Letter	67
4-5:1.1 Actions Not Sounding in Medical Malpractice	67
4-5:1.1a Miscellaneous Holdings That Cases Do Not Sound In Medical Malpractice and Therefore Do Not Require Letter.....	70

Table of Contents

	4-5:1.1b Miscellaneous Holdings That Cases Are Medical Malpractice Cases Which Do Require Letter.....	71
	4-5:1.2 Informed Consent Cases	72
4-5:2	Remedy for Non-Compliance with the Opinion Letter Requirement	72
4-5:3	The “Detailed Basis” Requirement.....	75
4-5:4	Causation	77
4-5:5	Whether the Letter Should Indicate That the Author Is a Similar Health Care Provider	77
4-5:6	The Author Must Be a “Similar Health Care Provider”	78
	4-5:6.1 Cases Holding That Author Is a Similar Health Care Provider	80
	4-5:6.2 Cases Holding That Author Is Not a Similar Health Care Provider.....	81
4-5:7	Hospitals as Defendants.....	82
4-5:8	Multiple Defendants	83
4-5:9	Revival of Dismissed Claims Under the Accidental Failure of Suit Statute	83
4-5:10	Relationship Between Opinion Letter Statute And Practice Book Provisions Relating to Disclosure	84
 Chapter 5: Statute of Limitations.....		85
5-1	INTRODUCTION	85
5-2	MEDICAL MALPRACTICE NOT RESULTING IN DEATH	86
	5-2:1 The Two-Year Limitations Period.....	87
	5-2:2 The Three-Year Repose Period	88
5-3	MEDICAL MALPRACTICE RESULTING IN WRONGFUL DEATH.....	89
5-4	TOLLING DOCTRINES.....	90
	5-4:1 Continuing Course of Treatment	91
	5-4:2 Continuing Course of Conduct	92
	5-4:3 Fraudulent Concealment	95
	5-4:4 Equitable Tolling.....	96
5-5	BREACH OF CONTRACT THEORY	96
5-6	RELATION BACK.....	97
	5-6:1 Relation Back Applied.....	98
	5-6:2 Relation Back Not Applied.....	99
5-7	ACCIDENTAL FAILURE OF SUIT	101

Table of Contents

Chapter 6: Informed Consent	105
6-1 INTRODUCTION	105
6-2 REVOCATION OF CONSENT	108
6-3 BATTERY	108
6-4 THE NATURE OF THE DUTY TO INFORM	109
6-4:1 Common Law	109
6-4:2 Statutory Law.....	111
6-5 THE LAY STANDARD.....	111
6-6 EXPERT TESTIMONY	112
6-7 HOSPITALS' DUTY	113
6-8 CAUSATION.....	113
6-9 WHEN INFORMED CONSENT IS NOT REQUIRED	114
6-9:1 Therapeutic Privilege.....	115
6-9:2 Incompetence, Disability or Infancy.....	115
6-9:3 Emergency	117
6-10 CHANGE OF CIRCUMSTANCES MAY REQUIRE A NEW INFORMED CONSENT DISCLOSURE.....	117
6-11 STATUTE OF LIMITATIONS FOR INFORMED CONSENT ...	118
Chapter 7: Hospital Liability	121
7-1 INTRODUCTION	121
7-2 INSTITUTIONAL LIABILITY.....	122
7-2:1 Hospital-Acquired Infections.....	123
7-2:2 Negligent Credentialing.....	123
7-2:3 Responsibility to Accept Patients	125
7-3 RESPONDEAT SUPERIOR.....	125
7-4 APPARENT AUTHORITY	128
7-5 NON-DELEGABLE DUTY	130
7-6 ADVERSE EVENTS REPORTING REQUIREMENTS.....	132
7-7 NURSING HOME LIABILITY	133
Chapter 8: Expert Testimony	135
8-1 EXPERT TESTIMONY REQUIREMENT	135
8-2 THE PERMISSIBLE BASES FOR AN EXPERT'S OPINION	137
8-3 EXCEPTIONS TO THE EXPERT TESTIMONY REQUIREMENT	138
8-4 SIMILAR HEALTH CARE PROVIDER.....	139
8-5 RES IPSA LOQUITUR	141
8-6 EXPERT WITNESS DISCLOSURE REQUIREMENTS	144
8-7 MEDICAL LITERATURE	147
8-8 SCIENTIFIC EVIDENCE— <i>PORTER</i> HEARINGS	149

Table of Contents

8-8:1	Porter Law Generally	149
8-8:2	Porter Challenges in Medical Malpractice Cases in Connecticut	152
	8-8:2.1 Porter Claims Accepted	152
	8-8:2.2 Porter Claims Rejected	153
	8-8:2.3 Procedural Issues in Porter Cases	153
8-8:3	Selected Porter Issues in Other Jurisdictions	154
	8-8:3.1 Differential Etiology	154
	8-8:3.2 Epidemiology	156
8-9	CIRCUMSTANCES UNDER WHICH A TREATING PHYSICIAN’S MEDICAL RECORDS MAY BE ADMITTED AS EXPERT EVIDENCE OF CAUSATION	158
8-10	SCOPE OF CROSS EXAMINATION OF EXPERT	158
8-11	COMPELLING DEFENDANT OR NON-PARTY TREATERS TO PROVIDE EXPERT OPINION	159
8-12	REASONABLENESS OF EXPERT WITNESS FEES	161
8-13	DISQUALIFICATION OF EXPERT WHEN HE HAS CONSULTED WITH BOTH PARTIES	162
	 Chapter 9: Evidentiary Issues.....	 165
9-1	INTRODUCTION	165
9-2	EXPERT TESTIMONY	166
9-3	SIMILAR HEALTH CARE PROVIDER	166
9-4	MEDICAL LITERATURE	167
	9-4:1 Medical Records	168
	9-4:2 Instruction Manuals	168
9-5	DAUBERT/PORTER ISSUES	169
9-6	THE DEAD MAN’S STATUTE	169
9-7	INFORMED CONSENT ISSUES	169
	9-7:1 Expert Testimony in Informed Consent Cases	169
	9-7:2 The Admissibility of “What I Would Have Done” Evidence	170
	9-7:3 Admissibility of Informed Consent Evidence in a Medical Malpractice Case Without an Informed Consent Claim	171
9-8	STATEMENTS OF APOLOGY	171
9-9	INSURANCE-RELATED EVIDENCE	172
9-10	DAY IN THE LIFE FILM	172
9-11	SPOILIATION OF EVIDENCE	173
9-12	TESTIMONY OF ECONOMISTS	173
9-13	FAILURE TO BILL AND ADVANCE PAYMENTS	173
9-14	CUMULATIVE TESTIMONY	174

Table of Contents

9-15	THE NON-COMPLIANT PATIENT.....	174
9-16	ADMISSIBILITY OF SOCIAL MEDIA.....	175
9-17	HABIT AND PRACTICE EVIDENCE.....	176
9-18	THE REPTILE THEORY.....	176
9-19	CONFIDENTIALITY OF RECORDS MAINTAINED BY THE DEPARTMENT OF CHILDREN AND FAMILIES	177
9-20	EVIDENCE OF A RELEASE OR AGREEMENT NOT TO SUE WITH ANOTHER TORTFEASOR.....	177
9-21	HARMESS ERROR.....	178
9-22	HINDSIGHT.....	178
9-23	DISCOVERY SANCTIONS.....	179
Chapter 10: Trial Management Issues.....		181
10-1	BIFURCATION.....	181
10-2	ORDER OF DISCOVERY.....	182
10-3	CAUSATION EVIDENCE AS HARMFUL ERROR.....	182
10-4	CLOSING ARGUMENT.....	183
10-5	MEDIA COVERAGE.....	183
10-6	STANDARD OF REVIEW.....	184
10-7	APPEALABILITY OF DISCOVERY ORDER.....	184
Chapter 11: Apportionment.....		185
11-1	APPORTIONMENT IN MEDICAL MALPRACTICE.....	185
11-2	HISTORY OF APPORTIONMENT.....	185
	11-2:1 Tort Reform I.....	186
	11-2:2 Tort Reform II.....	186
11-3	PRACTICAL PROBLEMS.....	189
	11-3:1 Triggering Process.....	189
	11-3:2 Notice Requirement.....	189
	11-3:3 Expert Testimony.....	190
	11-3:4 Situations Allowing Apportionment.....	190
	11-3:5 Pre-Trial Settlements.....	190
11-4	PROPORTIONAL RECOVERY.....	191
11-5	APPORTIONMENT IN CASES INVOLVING ASSAULT/BATTERY OR SEXUAL MISCONDUCT.....	192
11-6	REALLOCATION OF DAMAGES.....	193
Chapter 12: Areas of Special Statutory Regulation.....		195
12-1	INTRODUCTION.....	195
12-2	OFFERS OF COMPROMISE.....	195
	12-2:1 Offers of Compromise by Plaintiff.....	195
	12-2:2 Offers of Compromise by Defendant.....	198

Table of Contents

12-3	ATTORNEYS' FEES	199
12-3:1	Defendant's Attorneys' Fees	199
12-3:2	Plaintiff's Attorneys' Fees	199
12-4	MEDIATION	200
12-4:1	Mandatory Mediation	200
12-4:2	Malpractice Screening Panel	201
12-5	PATIENTS' BILL OF RIGHTS	202
12-5:1	Nursing Home Facilities and Chronic Disease Hospitals	202
12-5:2	Psychiatric Treatment Facilities	203
12-6	WORKERS' COMPENSATION LIENS	207
12-7	MEDICARE AND MEDICAID LIENS	208
12-8	CONNECTICUT UNFAIR TRADE PRACTICES ACT	209
12-8:1	CUTPA Claims Not Recognized	209
12-8:2	CUTPA Claims Recognized	210
12-9	NATIONAL PRACTITIONER DATA BANK	211
12-9:1	Overview of the Health Care Quality Improvement Act of 1986	211
12-9:2	Reporting Medical Malpractice Payments	213
12-9:3	Reporting Licensure Actions Taken By Boards of Medical Examiners	215
12-9:4	Reporting Adverse Actions on Clinical Privileges	215
12-9:5	Hospitals Are Required to Request Information From The NPDB	216
12-10	TAXATION OF COSTS	216
12-11	REGULATION OF CONFLICTS BETWEEN RELIGION AND MEDICINE	218
12-11:1	Physician's Freedom of Conscience Generally	218
12-11:2	Engaging in Practices Because of Religious Beliefs	220
12-11:3	Engaging in Practices Despite Religious Beliefs	220
12-12	COMPLEX LITIGATION DOCKET	220
12-13	THE AFFORDABLE CARE ACT (OBAMACARE)	221
12-14	THE LEGISLATIVE PROCESS GENERALLY	221

Chapter 13: Claims Distinct From But Related to

	Medical Malpractice	225
13-1	CONTRACT THEORY	225
13-2	ORDINARY NEGLIGENCE	227
13-2:1	Reasons for Distinguishing	227
13-2:2	Distinguishing Factors	228
13-2:3	Fact-Specific Application	228

Table of Contents

13-3	PRODUCTS LIABILITY	233
13-3:1	Learned Intermediary Doctrine.....	235
13-3:2	Blood Shield Statute	236
13-4	CONSTITUTIONAL CLAIMS.....	236
Chapter 14: Privileges and Immunities		237
14-1	INTRODUCTION	237
14-2	PRIVILEGES BELONGING TO PATIENTS	238
14-2:1	Physician-Patient Privilege.....	238
14-2:2	Psychiatrist-Patient Privilege.....	239
14-2:3	Psychologist-Patient Privilege.....	240
14-3	PRIVILEGES BELONGING TO HEALTH CARE PROVIDERS	241
14-3:1	Peer-Review Privilege	241
14-3:2	Medical Studies Privilege.....	245
14-4	PRIVILEGES BELONGING TO PATIENTS OR CARE PROVIDERS	246
14-4:1	Attorney-Client Privilege.....	246
14-5	IMMUNITIES OF HEALTH CARE PROVIDERS	247
14-5:1	Good Samaritan Immunity	247
14-5:1.1	The Good Samaritan Rule Generally.....	247
14-5:1.2	Partial Statutory Immunity	248
14-5:1.3	Elements Necessary to Obtain Immunity	249
14-5:1.3a	Emergency First Aid	249
14-5:1.3b	Voluntary and Gratuitous	251
14-5:1.3c	No Immunity for Gross Negligence.....	251
14-5:1.4	Defining Gross, Willful or Wanton Negligence.....	252
14-5:1.5	Bystander Emotional Distress Claims	252
14-5:2	Removal of Life Support Equipment.....	253
14-5:3	Reporting Child Abuse	253
14-5:4	Protection of Conscience Immunity	253
14-5:5	Service on Utilization Review Committee	253
14-5:6	Charitable Immunity.....	254
14-5:7	Peer-Review Immunity.....	254
14-5:8	Judicial Proceedings Immunity.....	254
Chapter 15: Disclosure of Patient Information.....		255
15-1	DISCLOSURE OF PATIENT INFORMATION GENERALLY	255
15-1:1	Duty to Maintain Patient Confidentiality.....	255

Table of Contents

15-1:2	Two Types of Claims	256
15-1:3	Statutory Sources	256
15-1:3.1	Physician-Patient Information	257
15-1:3.2	Psychiatrist-Patient Information	258
15-1:3.3	Psychologist-Patient Information	258
15-1:4	Common Law Sources.....	259
15-2	HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)	261
15-2:1	Basic Definitions.....	262
15-2:1.1	Covered Entities.....	262
15-2:1.2	Business Associates	262
15-2:1.3	Individually Identifiable Health Information.....	262
15-2:1.4	Protected Health Information	262
15-2:2	Business Associate Agreements.....	263
15-2:3	Authorizations for Collecting Medical Records	264
15-2:4	Safeguarding Protected Health Information	265
15-2:5	Disclosing Information to Agents or Subcontractors	265
15-2:6	Patient's Rights	266
15-2:7	Impact on Litigation Process	267
15-2:7.1	Depositions, Discovery Requests and Subpoenas.....	267
15-2:7.1a	Satisfactory Assurances.....	268
15-2:7.1b	Qualified Protective Order	268
15-2:7.1c	Covered Entity Exception	269
15-2:7.2	Preemption of State Law	269
15-2:8	No Private Cause of Action	269
15-2:9	Business Associate Liability	270
	Chapter 16: Duty of Mental Health Provider to Third Parties	271
16-1	INTRODUCTION	271
16-2	DUTY TO IDENTIFIABLE VICTIM (<i>TARASOF</i> CASES).....	271
16-3	NO INDEPENDENT DUTY TO SPOUSE.....	273
16-4	NO DUTY TO PERSON ACCUSED OF SEXUAL MISCONDUCT	273
16-5	PUBLIC DUTY	273
	Chapter 17: Actions Relating to the Creation or Sustaining of Life	275
17-1	INTRODUCTION	275
17-2	WRONGFUL BIRTH	276

Table of Contents

17-3	WRONGFUL LIFE.....	277
17-4	WRONGFUL LIVING	278
17-5	WRONGFUL DEATH OF UNBORN.....	281
17-6	ASSISTED SUICIDE.....	282
17-7	THE RIGHT TO REFUSE LIFE-SAVING MEDICAL TREATMENT.....	282
17-7:1	The Right of a Minor to Accept or Reject Treatment	282
Chapter 18: Actions Against the Government.....		285
18-1	INTRODUCTION	285
18-2	FEDERAL GOVERNMENT.....	286
18-3	STATE GOVERNMENT.....	287
18-4	MUNICIPAL GOVERNMENT.....	290
18-5	DELIBERATE INDIFFERENCE TO MEDICAL NEEDS.....	291
Chapter 19: Insurance Issues.....		293
19-1	THE ROLE OF MEDICAL PROFESSIONAL LIABILITY INSURANCE.....	293
19-2	POLICY TERMS AND ENDORSEMENTS.....	293
19-2:1	Limits of Liability.....	294
19-2:2	Per-Claim Aggregate Limit.....	294
19-2:3	Defense Costs Inside/Outside the Limits.....	294
19-3	CONSENT TO SETTLE CLAUSE.....	295
19-3:1	Consent to Settle: Insurer.....	296
19-3:2	Consent to Settle: Physician	296
19-3:3	Hammer Clause	296
19-4	ADMISSIBILITY OF EVIDENCE OF INSURANCE	297
19-5	INSURANCE COVERAGE ISSUES.....	297
19-5:1	Duty to Defend	299
19-5:2	Covered Claim.....	299
19-5:3	Bad Faith Claims	300
19-6	PROBLEMS ARISING WHEN THE JUDGMENT EXCEEDS THE AMOUNT OF INSURANCE.....	301
Chapter 20: Administrative Regulation of Health Care Providers.....		305
20-1	REGULATION OF THE HEALTH CARE PROFESSIONS.....	305
20-2	THE DEPARTMENT OF PUBLIC HEALTH.....	305
20-3	CONNECTICUT MEDICAL EXAMINING BOARD	306
20-4	REQUIREMENTS TO OBTAIN LICENSE	306
20-5	RESTRICTION, SUSPENSION OR REVOCATION OF LICENSE.....	307
20-5:1	Grounds.....	307

Table of Contents

20-5:2 Administrative Procedure for Discipline 309
 20-5:2.1 Complaint 309
 20-5:2.2 Investigation of Petition..... 310
 20-5:2.3 Hearings 310
 20-5:2.4 Appeal 315
20-5:3 Commencement of Disciplinary Action 316

Table of Cases 319

Table of Statutes 391

Index 397

