

Chapte	er 1: Duti	es of Heal	th Care Pro	viders	]
I	DUTY (	OF CARE	· · • • • • • • • • • • • • • • • • • •		1
1-1	THE GI	ENERALI	LY ACCEP	TED STANDARD OF CARE.	1
	1-1:1	Introduct	ion		]
		1-1:1.1	The Existe	nce of a Duty	3
	1-1:2	"Generall	ly Accepted	" and "Reasonably Prudent"	
		Standards	s Distinguis	hed	8
	1-1:3	Not All D	<b>D</b> eviations F	From the Standard of Care	
		Constitut	e Malpracti	ce	10
1-2				CIAN'S JUDGMENT	13
	1-2:1			of Reasonable Judgment	
	1-2:2			gment Charge	16
	1-2:3		ns on Appli		
				rge	
	1-2:4			ssing the Judgment Charge	26
	1-2:5	Need for	Informed C	Consent Charge	
		When Jud	lgment Cha	rge Is Given	35
1-3				DO NOT ESTABLISH	
				E	
1-4				DICAL PROVIDERS	39
	1-4:1			or Consulting Physician	
				ty	
		1-4:1.1		uty of Care	
		1-4:1.2	•	eport Findings to Patient	
			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	
		1-4:1.3		ersons Other Than Patient	
	1-4:2				
	1-4:3	Standard	of Care for	Hospital Resident Physician	55

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xvii









	1-4:4	Duty of a	a Superviso	r	57
	1-4:5			r of Physician Assistants	
	1-4:6			r of Nurses	
	1-4:7			oractic Care	
	1-4:8			Department	
	1-4:9			ome	
	1-4:10			y of Jail or Prison	
1-5	DUTIE			CUMSTANCES	
	1-5:1	Duty Reg	garding Tre	atment of the Deceased's Body	88
	1-5:2			Infirm Patient	
	1-5:3			ient	91
1-6	LIABII	LITY OF T	THIRD PA	RTIES FOR PHYSICIAN'S	
	BREAG	CH OF DU	JTY OF CA	ARE	96
	1-6:1	Duty of a	a Credentia	ler	96
	1-6:2	Duty of 1	Employer a	nd Respondeat Superior	99
		1-6:2.1	Employm	ent Relationship Required	99
		1-6:2.2	Employee	Need Not Be Party	100
		1-6:2.3	Employer	Not Liable for Employee	
			Conduct (	Outside Scope of Employment.	102
		1-6:2.4	Limitation	n of Liability	104
	1-6:3	Apparen	t Employme	ent of Medical Professionals	104
	1-6:4	Liability	of Referrin	g Physician	110
	1-6:5			Compensation Carrier for	
				n's Negligence	
1-7	TERM	INATION	OF THE I	OUTY OF CARE	114
II	OTHE	R RELATI	ED DUTIE	ES	115
1-8	THE D	UTY OF	CONFIDE	NTIALITY	115
	1-8:1	Generally	y		115
	1-8:2	Exception	ns to/Waive	er of Confidentiality	117
		1-8:2.1		Injury Claim Waives	
			Confident	iality	117
		1-8:2.2	Use and N	Misuse of a Subpoena	120
	1-8:3	Duty to 1	Keep HIV/A	AIDS Diagnosis Confidential	124
	1-8:4	Duty to 1	Keep Psych	iatric Records Confidential	125
		1-8:4.1	Privilege A	Akin to Attorney-Client	
					125
		1-8:4.2	Exception	s to Confidentiality of	
			Psychiatri	c Records	130
			1-8:4.2a	Defense to Crime, Mental	
				State at Issue or Best Interests	S
				of Children	
			1-8:4.2b	Persons at Risk of Harm	131

xviii NEW JERSEY MEDICAL MALPRACTICE LAW 2024



		1-8:4.3 Improper Use of Subpoena for	
		Psychiatric Records	133
1-9	THE D	OUTY TO PROVIDE GENETIC COUNSELING	134
1-10	THE D	OUTY TO TERMINATE CARE	136
1-11		UTY OF TREATING PHYSICIAN TO	
		FY OR PROVIDE LITIGATION SUPPORT	137
1-12	THE D	UTY TO MAINTAIN INSURANCE	141
1-13	PRACT	ΓICE POINTERS	144
Chapt	ter 2: Doc	etrines of Informed Consent and Refusal	149
I	DUTY	TO OBTAIN INFORMED	
		ENT OR REFUSAL	
2-1	THE F	ULLY INFORMED PATIENT	149
	2-1:1	Physician's Common Law Duty	
		to Provide Information	
	2-1:2	Code Provisions Require Written Informed Consent	153
2-2	ACTIO	NS FOR BREACH OF DUTY TO OBTAIN	
	INFOR	RMED CONSENT OR REFUSAL	153
	2-2:1	Elements of Cause of Action for Breach	
		of Duty to Obtain Informed Consent	153
	2-2:2	Standard for Duty to Disclose	
		2-2:2.1 "Professional" Standard Abandoned	
		2-2:2.2 Reasonable Patient Standard	155
		2-2:2.3 Informed Consent Regarding	
		Prescription Drugs	
		2-2:2.4 Only Material Risks Need Be Disclosed	160
	2-2:3	Duty to Disclose Applicable to Non-Invasive	
		Procedures or Non-Treatment	
	2-2:4	Duty Regarding Informed Refusal	
	2-2:5	Duty to Inform of Available Diagnostic Testing	171
	2-2:6	The Relationship Between Medical Judgment	
		and Informed Consent	
	2-2:7	No Duty to Disclose Unavailable Options	180
	2-2:8	Distinguishing Negligent Treatment/Failure	
		to Diagnose from Failure to Disclose	
		2-2:8.1 Negligent Treatment/Diagnosis	
		2-2:8.2 Failure to Disclose Distinguished	186
		2-2:8.3 Use of Informed Consent Form to	4.0
		Negate Negligence Prohibited	189
	2-2:9	Immunity/No Duty to Obtain Informed Consent	4.0
		in Emergencies	
	2-2:10	Disclosure Regarding FDA Approvals	194

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xi











	2-2:11	Disclosur	es Regarding Physicians	.196
		2-2:11.1	Duty to Disclose Physician's HIV/AIDS	. 196
		2-2:11.2	Duty Regarding Disclosure of	
			Credentials	.198
		2-2:11.3	Duty to Identify Specific Physician	
			Performing Service	.202
		2-2:11.4	No Duty to Disclose Risks of Treatment	
			by Other Physicians	.203
	2-2:12		o Third Parties for Breach of Duty to	
		Obtain In	formed Consent	.205
		2-2:12.1	Child's Cause of Action for Breach of	
			Duty to Disclose Risks to Mother	.205
		2-2:12.2	Duty to Advise of Test Results Affecting	
			Patient and Third Parties	.210
II	<b>PROCE</b>	DURAL I	SSUES	.214
2-3	<b>PLEAD</b>	ING INF	ORMED CONSENT	.214
2-4	A DIRE	ECTED VE	ERDICT MAY BE WARRANTED	
	WHER	E DEFEN	DANT CONCEDES A MATERIAL	
	RISK W	AS NOT	DISCLOSED	.216
2-5	ROUTI	NE DISCI	OSURE AS EVIDENCE OF	
	<b>INFOR</b>	MATION	DISCLOSED TO PATIENT	.219
2-6			ENT WOULD DECLINE	
	TREAT	MENT IS	ISSUE FOR THE JURY	.220
2-7	JURY I	NTERRO	GATORIES IN INFORMED	
	CONSE	NT CASE		.222
III	ASSAU	LT AND I	BATTERY DISTINGUISHED	.222
2-8	INTRO	DUCTION	V	.222
2-9	"GHOS	T SURGE	RIES": PATIENT NOT INFORMED	
	WHO W	VILL PER	FORM SERVICES	. 222
2-10	PERFO	RMING I	DIFFERENT SURGERY	
	THAN	DESCRIB	ED	.224
2-11			DEVIATION FROM THE	
	STAND	ARD OF	CARE REQUIRED FOR BATTERY	.230
2-12	<b>EXCEE</b>	DING CO	NDITIONS OF CONSENT	
	CONST	TTUTES I	BATTERY	.231
2-13	PRACT	ICE POIN	TERS	.235
Chapt	er 3: Oth	er Causes o	of Action	.239
Ι	TORT (	CLAIMS		.239
3-1	STRICT	Γ LIABILI	TY IN TORT	.239
3-2	ABANI	OONMEN	Т	.239
II			5	

XX NEW JERSEY MEDICAL MALPRACTICE LAW 2024







3-3	FKAU	D		242
	3-3:1	Elements	s of Cause of Action	242
	3-3:2	Benefits	and Burdens of Pleading Fraudulent	
		Conceali	nent	242
	3-3:3	Consum	er Fraud	244
	3-3:4	Misrepre	sentation of Credentials	245
	3-3:5	Misrepre	sentations Concerning Treatment	248
III	CONT		D OTHER CLAIMS	
3-4	BREA	CH OF CO	ONTRACT	252
3-5			ONMENT	
3-6	THE M	<b>IISHAND</b>	LING OF A CORPSE	256
3-7	UNAU	THORIZE	ED AUTOPSY	258
3-8	FALSE	E DIAGNO	OSIS OF DISEASE	259
3-9			OR DESTRUCTION	
	OF MI	EDICAL R	ECORDS	259
3-10	PUBLI	IC DISCLO	OSURE OF PRIVATE FACTS	264
3-11	SEXU	AL MISCO	ONDUCT	266
3-12	PRAC	TICE POI	NTERS	268
Chapt	ter 4: Pro	oximate Ca	usation	271
I	INTRO	DUCTIO	N	271
4-1				271
4-2	REASO	ONABLE 1	DEGREE OF MEDICAL	
II			CONDITIONS	278
4-3			SUES RAISED BY PRE-EXISTING	
	COND	ITIONS		278
	4-3:1		tion	278
	4-3:2		What Constitutes a Pre-Existing	
		Conditio	n	280
		4-3:2.1	Condition That Could Evolve into	
			Ultimate Condition Absent Negligence	e280
		4-3:2.2		
			Delay Outcome	
		4-3:2.3	Addiction as Pre-Existing Condition	284
	4-3:3		nt's Burden to Apportion Damages	
		Caused b	by Pre-Existing Condition	292
	4-3:4		afidi and the "Increased Risk/Substantia	
		Factor"	Test	295
		4-3:4.1	Development of "Increased	
			Risk/Substantial Factor" Test	
		4-3:4.2	Defining "Substantial Factor"	326

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxi







		4-3:4.3	Retroactive Application of <i>Scafidi</i>	329
		4-3:4.4	Application of <i>Scafidi</i> to Specific Cases	
		4-3:4.5	Explaining Limitation of Scafidi Charge.	342
		4-3:4.6	Issuing Ultimate Outcome Jury Charge	
			with Scafidi Charge	343
	4-3:5	Failure to	o Perform Diagnostic Test Which Would	
			sclosed Pre-Existing Condition	344
	4-3:6		onment of Pain and Suffering	
4-4	LOSS		NCE	
4-5			OF A PRIOR INDEPENDENT TORT.	
4-6			FERING	
III			NSEQUENCES/COMPARATIVE	
				373
4-7			OIDABLE CONSEQUENCES/	
			NEGLIGENCE ON PROOF	
			<b>1</b>	373
	4-7:1		tion	
	4-7:2		on Between Patient's Pre-Treatment and	
		Post-Trea	atment Conduct	374
	4-7:3		ishing Avoidable Consequence and	
			ling Cause	379
	4-7:4		miting Application of Avoidable	
		Consequ	ence/Comparative Negligence	382
	4-7:5	Applicab	ility to Informed Consent Cases	384
IV	CAUSA		INFORMED CONSENT CASES	
4-8	PROOI	F OF PRO	XIMATE CAUSATION IN THE	
	INFOR	RMED CO	NSENT CASE	385
4-9			ARN REGARDING	
	PRESC	CRIPTION	DRUG RISKS	386
4-10	FAILU	RE TO FU	JLLY INFORM PATIENT	
	REGA	RDING P	ROCEDURE AND ALTERNATIVES	392
4-11	PRAC	FICE POI	NTERS	399
	er 5: Dai	mages in M	Iedical Malpractice Cases	405
I			[AGES	
5-1			N	
5-2			DELAY IN TREATMENT	
5-3			FERING	
5-4			IAGES	
5-5				
5-6			SS	
5-7	MEDIO	CAL BILL	S	428

xxii NEW JERSEY MEDICAL MALPRACTICE LAW 2024









5-8	EMOTI	ONAL D	ISTRESS DAMAGES	.435
	5-8:1	Generall	y	.435
	5-8:2		al Distress of Relatives	
		5-8:2.1	Portee and Elements of Claim	.44(
		5-8:2.2	Application of <i>Portee</i> in Medical	
			Malpractice Cases	.442
		5-8:2.3	Claims for Mistreatment of	
			Body or Corpse	.447
		5-8:2.4	Misdiagnosis Generally Does Not Satisfy <i>Portee</i> Factors	
			Not Satisfy Portee Factors	.448
		5-8:2.5	Emotional Distress of Parents for	
			Loss of a Child	.451
		5-8:2.6	Relatives Must Connect Medical	
			Malpractice to Injury to Recover	
			Emotional Distress Damages	.461
II	DAMA	GES IN C	ASES INVOLVING	
			HILD	
5-9	DAMA	GES INV	OLVING A FETUS	.464
	5-9:1	Injuries t	o a Fetus and Preconception Injuries	.464
	5-9:2		Fetus	
5-10			CHILD	.473
5-11			TLEMENT WITH INFANT	
			ICIAL APPROVAL	.476
III			RTH AND WRONGFUL	
5-12			RTH	
	5-12:1		tion	
	5-12:2		shing Wrongful Life Claims	
	5-12:3		ment of Wrongful Birth Claim	
	5-12:4		of Damages for Wrongful Birth	
		5-12:4.1		.484
		5-12:4.2		
			Costs of Care	. 484
	5-12:5		shing Wrongful Birth and Informed	
			Claims: Medical Causation Not Required	
	5-12:6		ption Negligence	
	5-12:7		ing Cause and Avoidable Consequences in	
			l Birth Cases	
	5-12:8		al Distress Damages for Wrongful Birth	
	5-12:9	_	Not Reduced by Joy of Raising Child	
	5 12.10	NIa Clair	a for Crandravanta or Ciblings	500

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxiii







IV	DAMA	GES IN WRONGFUL DEATH CASES	504
5-13	WRON	IGFUL DEATH CLAIMS	504
	5-13:1	Generally	504
	5-13:2	Wrongful Death of a Child	
	5-13:3		
		Malpractice Suit	512
V	OTHE	R DAMAGES ISSUES	516
5-14	<b>PUNIT</b>	TIVE DAMAGES	516
5-15	PER Q	UOD	523
5-16	ADDI	ΓUR AND REMITTITUR OF DAMAGES	525
5-17	HIGH-	LOW AGREEMENTS	531
	5-17:1	High-Low Agreements and Workers'	
		Compensation Liens under N.J.S.A. 34:15-40	532
	5-17:2	High-Low Agreements and Physician	
		Reporting Requirements	534
5-18	OFFEI	R TO TAKE JUDGMENT	536
5-19	PRAC	ΓICE POINTERS	539
Chap	ter 6: Pre	-Suit Investigation of Medical Malpractice Claim	545
I	MEDIO	CAL RECORDS	545
6-1	THE D	UTY TO MAINTAIN ACCURATE AND TRUE	
		CAL RECORDS	545
6-2	STATU	JTORY AND ADMINISTRATIVE CODE	
		LATIONS REGARDING MEDICAL	
		RDS	546
6-3	LEGIB	ILITY REQUIREMENTS FOR MEDICAL	
		RDS	551
II	INCID	ENT, INVESTIGATION AND OTHER	
		RTS	
6-4	INCID	ENT REPORTS	551
6-5	THE P.	ATIENT SAFETY ACT, N.J.S.A. 26:2H-12.23	552
6-6	PATIE	NT SAFETY ACT'S IMPACT ON DOCUMENT	
		VERY	555
6-7	DISCO	VERABILITY OF FACTS CONTAINED	
	IN PAT	TIENT SAFETY ACT	575
6-8	PEER 1	REVIEW/COMMITTEE REPORTS	579
6-9	SENTI	NEL EVENT REPORTS	590
6-10	INTER	VIEWS OF HEALTH CARE PROFESSIONALS	593
III	DECLI	INING A MEDICAL MALPRACTICE CASE	596
6-11	ADVIS	ING THE CLIENT	596
6-12	PRAC	ΓICE POINTERS	597

xxiv NEW JERSEY MEDICAL MALPRACTICE LAW 2024









				ed Treatises	
I				ALPRACTICE CASES	
7-1					
7-2	REQU	IREMEN'	TS FOR EXP	ERT TESTIMONY	605
	7-2:1		Establishes Star		
				om	
	7-2:2	Content	of Expert Test	timony and Expert Report	610
		7-2:2.1	Introduction	ıı	610
		7-2:2.2	Clear, Specif	ic Opinions	611
		7-2:2.3		Medical Probability	
	7-2:3	Importa	nce of Expert	Testimony	615
II	QUAL	IFICATIO	N OF EXPER	RTS	
				ACT	
7-3	QUAL	IFICATIO	N OF EXPER	RT WITNESSES	616
	7-3:1	Introduc	tion		616
	7-3:2	Qualifica	ation of Exper	t Witnesses Prior	
		to New J	fersey Medical	Care Access and	
		Respons	ibility and Pat	ients First Act	617
		7-3:2.1	Continuing A	Applicability of Pre-Act	
			Common La	w for Cases Arising	
			Prior to 2004	4	617
		7-3:2.2	Expert in Di	fferent Specialty May	
			Qualify in P	re-2004 Cases	617
		7-3:2.3	Examples of	Qualified Experts in	
			Pre-2004 Ca	ses	619
		7-3:2.4	Examples of	Experts Not Qualified in	
			Pre-2004 Ca	ses	626
	7-3:3	Qualifica	ation of Exper	t Witnesses After	
		the New	Jersey Medica	l Care Access and	
		Respons	ibility and Pat	ients First Act	628
		7-3:3.1	Same Specia	lty Required for Expert	628
		7-3:3.2	Applicability	of Same Specialty	
			Requiremen	t	629
		7-3:3.3	Specialties a	nd Sub-specialties	
				by the American Board of	
			Medical Spe	cialties or the American	
			Osteopathic	Association	631
			*	Recognized Specialties	
				American Board of Medical	
			S	pecialties Recognized	
				pecialties	632

NEW JERSEY MEDICAL MALPRACTICE LAW 2024







			7-3:3.3c	American Osteopathic	
				Association Recognized	
				Specialties	636
			7-3:3.3d	Scope of Practice for	
				Specialties	639
			7-3:3.3e	Overlap Between Specialties.	640
		7-3:3.4	Constitut	ionality Challenged	
		7-3:3.5	Amendm	ent to Affidavit of Merit	642
		7-3:3.6	Equivaler	ntly Qualified	644
		7-3:3.7	Determin	ing the Qualifications of	
				Malpractice Liability Experts	646
		7-3:3.8		2A:53A-41(a)(1)	
7-4	THE P	ATIENTS		T'S IMPACT ON OTHER	
	MEDIO	CAL MAL	PRACTIC	E ISSUES	658
	7-4:1	Introduc	tion		658
	7-4:2	Statute o	f Limitatio	ns Amended	659
	7-4:3	Affidavit	of Noninv	olvement	659
	7-4:4	Malprac	tice Premiu	m Increase Barred if Case	
		Dismisse	d Within 18	80 Days	660
	7-4:5	Remittitu	ar and Add	itur	660
	7-4:6	Good Sa	maritan Im	munity	661
	7-4:7	Reimbur	sement of 1	Non-Economic Damages	661
	7-4:8	Malprac	tice Insurar	nce Policies	662
	7-4:9	Applicab	ility and E	ffective Date	
		of the Pa	tients First	Act	663
	7-4:10	New Jers	ey Health	Care Consumer	
		Informat	ion Act		663
III	THE A	FFIDAVI	T OF MER	IT	664
7-5	<b>OVERV</b>	/IEW			664
	7-5:1	Professio		<b>[</b>	664
		7-5:1.1		tion of Dentists, Nurses	
			and Othe	r Medical Professionals	667
	7-5:2	Statutory	Requirem	ents	672
		7-5:2.1	Time for	Service	672
		7-5:2.2	Failure to	Produce Necessary Records	
			or Other	Information	673
		7-5:2.3	Minimun	Requirements	673
		7-5:2.4	Qualificat	tions of the Affiant	673
7-6	JUDIC	IAL INTE	ERPRETA	ΓΙΟΝ OF AFFIDAVIT OF	
	MERI	Γ STATUT	E		675
	7-6:1	Constitu	tionality		675

xxvi NEW JERSEY MEDICAL MALPRACTICE LAW 2024









7-6:2	Supreme Court's Initial Construction:	
	Hall and Cornblatt	576
	Merit Statute	576
	7-6:2.2 Cornblatt v. Barow: Affidavit of Merit	
	Not Required for Malpractice Occurring	
		578
APPLI		
		580
7-7:1	Introduction6	
7-7:2	Who is Entitled to an Affidavit of Merit?	582
	7-7:2.1 Which Licensed Professionals are	
	Entitled to an Affidavit of Merit?	582
	7-7:2.2 Is an Affidavit of Merit Needed	
	for Professional Corporations?	585
	7-7:2.3 Is an Affidavit of Merit Needed for a	
	Claim Based on Entity's Vicarious	
		591
7-7:3		
7-7:4	What Information Must be Contained	
	in the Affidavit of Merit?	599
7-7:5	Does the Affidavit of Merit Statute Require	
	Identification of the Defendants Who Deviated	
	from the Standard of Care?	700
7-7:6	When Must the Affidavit of Merit be Filed?	703
7-7:7	What Constitutes Substantial Compliance	
	with the Affidavit of Merit Statute?	706
	7-7:7.1 Substantial Compliance Concept	
	Explained	706
	7-7:7.2 Applying the Substantial Compliance	
	Concept	708
	7-7:7.3 The Affidavit of Merit Statute Should	
	Not Be Mechanically Applied	711
	7-7:7.4 Dismissal with Prejudice Absent	
	Extraordinary Circumstances	714
	7-7:7.5 Failure to Place Expert Under Oath	
	Renders Affidavit Non-Compliant	721
7-7:8	Do the Doctrines of Waiver or Estoppel	
	Apply to the Affidavit of Merit Statute?	722
	APPLIC REQUI 7-7:1 7-7:2 7-7:3 7-7:4 7-7:5 7-7:6 7-7:7	Hall and Cornblatt

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxvii









		7-7:8.1 Failure to Promptly Seek
		Dismissal Estops Defendant722
		7-7:8.2 The Ferreira Conference
	7-7:9	Does the Failure to Hold a Ferreira Conference
		Extend the Time to Serve an Affidavit of Merit?72
	7-7:10	Can the <i>Ferreira</i> Conference be Waived?728
	7-7:11	Is the Affidavit of Merit Waived if the Defendant
		Withholds Medical Records Needed to Prepare the
		Affidavit?
		7-7:11.1 Records Having Substantial Bearing on
		Preparation of Affidavit of Merit728
		7-7:11.2 Records Not Needed for Affidavit
	7-7:12	The Affidavit of Merit Statute Is Not Tolled Due
		to the Minority of an Infant Plaintiff734
	7-7:13	Is an Affidavit of Merit Required in Common
		Knowledge or Res Ipsa Cases?73:
	7-7:14	Is an Affidavit of Merit Required for Informed
		Consent Cases?
	7-7:15	Does the Affidavit of Merit Statute Apply to
		Crossclaims or Counterclaims?
		7-7:15.1 Applicability to Crossclaims740
		7-7:15.2 Applicability to Third-Party
		Malpractice Complaint742
		7-7:15.3 Applicability to Counterclaim74
	7-7:16	Does the Affidavit of Merit Statute Apply
		to Non-Malpractice Claims, Such as Contract
		or Assault and Battery Claims?74
	7-7:17	Is an Affidavit of Merit Needed to Establish
		Causation or Damages?
	7-7:18	Should the Affidavit of Merit Statute
		Ever be Permitted to be Used
		to Defeat Meritorious Claims?74
IV		NTING EXPERT TESTIMONY AND REPORTS750
7-8	THE F	OUNDATION FOR EXPERT TESTIMONY750
	7-8:1	Testimony Based on Knowledge, Training,
		Experience or Education
	7-8:2	Theories Not Yet Generally Accepted753
	7-8:3	Rule 104 Hearing on Admissibility758
	7-8:4	Use of Multiple Experts
	7-8:5	Failure To Call an Expert Witness at Trial76
7-9		EQUIREMENTS OF THE EXPERT REPORT762
7-10	THE N	ET OPINION RULE768

xxviii NEW JERSEY MEDICAL MALPRACTICE LAW 2024





/ <b>-</b> 11	THEC	OMMON KNOWLEDGE DOCTRINE	/82
	7-11:1	Doctrine Established in Cases of Foreign Objects	
		Left Behind in Surgery	
	7-11:2	Cases in Which Common Knowledge Found	
		7-11:2.1 Generally	
		7-11:2.2 An Extreme Application of the Commo	n
		Knowledge Doctrine	793
		7-11:2.3 Common Knowledge Regarding	
		Communication of Test Results	795
	7-11:3	Cases in Which Common Knowledge Doctrine	
		Was Rejected	797
7-12	RES IP	PSA LOQUITUR	799
	7-12:1	Required Elements	799
	7-12:2	Expert Testimony May Still Be Required for	
		Res Ipsa Loquitur in Certain Situations	801
	7-12:3	Examples Where Res Ipsa Loquitur Applied	803
	7-12:4		
	7-12:5	Conditional Application of Res Ipsa Doctrine	
7-13	ANDE	RSON v. SOMBERG AND COLLECTIVE	
		RESPONSIBILITY	819
7-14		RT TESTIMONY IN INFORMED	
	CONSI	ENT CASES	828
7-15		ELLING EXPERT TESTIMONY	
V	LEAR	NED TREATISES AND OTHER SOURCES	850
7-16		ACOBER RULE AND LEARNED TREATISES	
	7-16:1	Treatises	
	7-16:2		
		Manufacturers' Technical Guides and Package Inserts	859
7-17	THE P	HYSICIANS' DESK REFERENCE AND	
	PACK A	AGE INSERTS	862
7-18		TAL PROTOCOLS AND PROCEDURE	
		JALS	865
7-19		MMENDATIONS OF PROFESSIONAL	
	MEDIO	CAL BOARDS OR ORGANIZATIONS	869
7-20	RECO	MMENDATIONS OF THE AMERICAN	
		CAL ASSOCIATION	872
7-21	STATU	JTES AND ADMINISTRATIVE CODES	875
	7-21:1	Generally	
	7-21:2	Statute as Evidence of Standard of Care	
	7-21:3		
	1.0	Evidence of Standard	882
7-22	DISCO	OVERY OF TREATISES TO BE UTILIZED AS	552
		ENCE OF THE STANDARD OF CARE	883
		area of the strictment of crite	

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxix







VI	REFU	SAL OR I	NABILITY OF EXPERT TO TESTIFY	884			
7-23	REME	DIES FO	R FAILURE OF EXPERT				
	WITN	ESS TO T	ESTIFY	884			
7-24	PRAC	ΓICE POI	NTERS	886			
Cham	40m O. Dla	adinas Da	forces and Vain Ding in				
Cnap			fenses and Voir Dire in oractice Cases	001			
I			N				
8-1			71				
0-1 II							
8-2			ALL CLAIMS AS TO ALL PARTIES				
0-2	8-2:1		ire Controversy Doctrine				
	8-2:2		is Defendant Rule				
8-3	~		BSENT DEFENDANTS				
III							
8-4			E NEGLIGENCE AND AVOIDABLE	, 0,			
			ES	909			
8-5	AFFID	DAVIT OF	NONINVOLVEMENT	917			
8-6			IMITATIONS				
	8-6:1	Generall	y	919			
	8-6:2		covery Rule				
		8-6:2.1	Development of the Discovery Rule	922			
		8-6:2.2	Filing within Two Years from				
			the Date of Discovery				
		8-6:2.3	Discovery Rule Triggered by Knowledge				
			of Fault	931			
		8-6:2.4	Fact of Injury, Not Injury's Extent,				
			Triggers Statute of Limitations	939			
		8-6:2.5	Increased Risk of Harm, Latent Disease,				
			Cancer Recurrence: Statute of Limitation				
		0.606	Begins to Run Only After Harm Occurs.				
		8-6:2.6	Discovery of Proper Defendant	944			
			8-6:2.6a Amended Complaint	0.4.4			
			Relates Back				
		9 6.2 7	8-6:2.6b Due Diligence Required	933			
		8-6:2.7	Application of Discovery Rule to	0.57			
	8-6:3	Statuta	Cases, Generally				
	8-6:3 8-6:4		of Limitations in Informed Consent Cases	9/3			
	0-0.4	Failure to Advise, Concealment of Malpractice and the Statute of Limitations					
	8-6:5		ing Treatment and the Statute	717			
	0-0.5		ations	08/			
		or Limit	QUO113	707			

XXX NEW JERSEY MEDICAL MALPRACTICE LAW 2024







	8-6:6	Incompe	tency/Insan	ity and the Statute		
		of Limita	ations		986	
	8-6:7	Infancy of	or Parents' C	Claim for Injuries to a Child		
		and the S	tatute of Li	mitations9	987	
	8-6:8	Statute of Limitations for Wrongful Death990				
	8-6:9	Statute of Limitations for Public Disclosure of				
		Patient's	Medical Re	cords10	003	
8-7	CHAR			R IMMUNITIES 10		
	8-7:1	Introduction				
	8-7:2	Hospitals	and Chari	table Immunity10	005	
		8-7:2.1		ns on Hospital Liability10		
		8-7:2.2		ns on Hospital Liability Not		
				e to Hospital Employees 10	009	
		8-7:2.3		ng Whether Defendant is a		
				bject to Immunity10	010	
		8-7:2.4		Immunity Inapplicable in		
				Liability 10	)14	
		8-7:2.5		ges on Charitable Immunity 10		
	8-7:3	Immunity for Emergency Squads and Personnel 1018				
	8-7:4	Good Samaritan Act Immunity				
8-8	TORT (	CLAIMS ACT AND PUBLIC				
	<b>ENTIT</b>	Y IMMUI	NITY		)24	
	8-8:1	Introduct	tion		)24	
	8-8:2	Notice of Tort Claim			)25	
	8-8:3	Requirement of Notice of Tort Claim				
			s 10	)27		
	8-8:4		e of Claim in Medical			
		Malpract	ice Cases		)28	
		8-8:4.1	Eagan and	Lowe Opinions 10	)28	
			8-8:4.1a	Eagan v. Boyarsky: Public		
				Employee Status Unclear 10	)28	
			8-8:4.1b	Lowe v. Zarghami:		
				Extraordinary Circumstances 10	030	
		8-8:4.2	Cases App	olying <i>Eagan</i> and <i>Lowe</i>		
			8-8:4.2a	Ventola and Confusion		
				about Federal or State Status		
				of Institution10	)33	
			8-8:4.2b	D.D. v. UMDNJ and		
				Emotional Distress as		
				Extraordinary Circumstances 10	)35	

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxxi







		8	-8:4.2c	McNellis-Wallace v. Hoffma	n	
				Distinguishes the Date of		
				Accrual and Extraordinary		
				Circumstances	1038	
		8	-8:4.2d	Catastrophic, Life Altering		
				Injuries May Toll Accrual		
				Date	1043	
	8-8:5	Application	of Tort	Claim Act Immunity		
8-9	WORK	ERS' COME	PENSAT	ION DEFENSES	1045	
8-10	LACK	OF JURISD	ICTION		1050	
IV	MULTI	PLE DEFE	NDANT	S, DEFENSE CLAIMS		
				ES	1052	
8-11	CROSS	CLAIMS			1052	
8-12				ULTIPLE DEFENDANTS		
8-13	COUN	TERCLAIM	S BY DE	EFENDANTS	1078	
V	VOIR I	DIRE			1079	
8-14	VOIR I	DIRE IN ME	EDICAL	MALPRACTICE CASES	1079	
	8-14:1	New Jersey	Supreme	e Court Directive #04-07	1079	
	8-14:2			ir Dire		
	8-14:3			d Open-Ended		
		Voir Dire Q	uestions		1086	
	8-14:4	Peremptory	Challen	ges	1088	
VI	ARBIT					
8-15	CONTRACTUAL LIMITATIONS UPON AND					
	COMP	ELLED ARI	BITRAT	ION OF MALPRACTICE		
	CLAIM	IS			1092	
8-16	IN LIM	IINE MOTIO	ONS		1099	
8-17	PRACT	TICE POINT	ERS		1101	
Chapt	er 9: Pret	trial Discover	y in Med	ical Malpractice Cases	1109	
I				-		
9-1						
9-2	PRIOR	ITY OF DIS	COVER	Y	1110	
II	MEDIC	CAL RECOR	RDS		1111	
9-3	OBTAINING PLAINTIFF'S MEDICAL RECORDS,					
	INTER	VIEWING F	LAINT	FF'S TREATING		
	PHYSIC	CIANS			1111	
9-4	USE OF A SUBPOENA TO OBTAIN					
	MEDIC	CAL RECOR	RDS		1116	
III	INTER	ROGATOR	IES		1119	
9-5				ES		
9-6	THE SO	COPE OF IN	QUIRY	BY INTERROGATORIES	1119	

xxxii NEW JERSEY MEDICAL MALPRACTICE LAW 2024





9-7	DISCO	VERY OF	COMMUNICATIONS BETWEEN		
	PLAIN	TIFF, CO	UNSEL AND EXPERTS	1128	
9-8			FAILURE TO ANSWER		
	INTER	ROGATO	RIES	1129	
9-9	PRODU	UCTION (	OF EXPERT REPORTS	1130	
IV	USE O	F ADVER	SARY'S EXPERT	1135	
9-10	USE O	F AN ADV	VERSARY'S EXPERT		
	GENE	RALLY PF	ROHIBITED	1135	
V	DEPOS	SITIONS		1140	
9-11	DEPOS		OF PARTIES		
	9-11:1	Raising C	Objections During Depositions	1140	
	9-11:2	Scope of	Deposition Questions	1141	
	9-11:3	Deposition	on Questions Concerning Opinions	1146	
	9-11:4	Deposition	on Testimony Supporting		
			Treatises		
9-12	DEPOS	SITIONS (	OF EXPERTS	1152	
9-13	MATERIAL CHANGE IN TESTIMONY				
	BY A V	VITNESS.		1157	
VI	TREAT	TING PHY	SICIANS' OPINIONS,		
			TESTIMONY		
9-14	USE O	F TREATI	NG PHYSICIANS' OPINIONS	1163	
	9-14:1		Treating Physicians' Testimony		
	9-14:2		y of Treating Physician's Opinion		
	9-14:3	Use of Su	absequent Treating Physician as Witness	1165	
		9-14:3.1			
			Witness Concerning Liability Issues	1165	
		9-14:3.2	Subsequent Treating Physician as		
			Witness Regarding Causation	1168	
	9-14:4		oility of Subsequent Treating		
			's Reports	1175	
	9-14:5		ues Concerning Treating		
		Physician	's Testimony	1176	
9-15	OPINIONS OF PSYCHIATRISTS OR MENTAL				
	HEAL	TH CARE	PROFESSIONALS	1178	
VII			TERY ISSUES		
9-16			EDICAL RECORDS		
9-17	MEDICAL EXAMINER'S/AUTOPSY REPORTS118				
9-18	RECORDS AND REPORTS OF BOARD OF HEALTH,				
			DICAL EXAMINERS	1193	
9-19	EVIDE	NCE OF A	A DECEDENT'S		
			ATEMENTS		
VIII	CROSS	-EXAMIN	JATION OF EXPERTS	1196	

NEW JERSEY MEDICAL MALPRACTICE LAW 2024 xxxiii









9-20	SCOPE OF CROSS-EXAMINATION				
	OF EX	PERT WITNESSES1196			
	9-20:1	Cross-Examination of Collateral Issues			
	9-20:2	Cross-Examination Regarding Prior Service			
		as Expert Witness			
	9-20:3	Use of Hypothetical Questions			
		in Cross-Examination 1200			
	9-20:4	Questions Concerning Experts'			
		Financial Arrangements			
9-21	PRAC	ΓICE POINTERS1203			
Chapt	ter 10: El	ectronic Medical Records1211			
10-1		DDUCTION1211			
10 1	10-1:1	Federal Overview			
	10-1:2	New Jersey Overview			
10-2		IREMENTS 1225			
- · ·	10-2:1	Requirements for Eligible Medicare/Medicaid			
	10 2.11	Providers 1225			
		10-2:1.1 Meaningful Use Stages and Objectives 1227			
	10-2:2	Requirements Under HIPAA for Electronic			
	10 2.2	Medical Records			
		10-2:2.1 HIPAA's Security Requirements			
		10-2:2.2 HIPAA's Notification of Breach			
		Requirement			
		10-2:2.3 HIPAA's Privacy Requirements			
	10-2:3	Federal Incorporated Standards, Implementation			
	10 2.5	Specifications, and Certification Criteria1239			
	10-2:4	Requirements Under New Jersey Law			
10-3		ENTS OF ELECTRONIC			
10 5		CAL RECORDS1243			
	10-3:1	Metadata and Electronically Stored Information 1243			
	10-3:2	Types of Metadata			
	10-3:3	Metadata, Audit Trails, and Electronic			
	10 5.5	Medical Records			
		10-3:3.1 Federal Requirements			
		10-3:3.2 New Jersey Requirements			
10-4	AVAII	ABILITY OF ELECTRONIC			
10 1		CAL RECORDS1259			
Apper		ected New Jersey Law Resources1267			
		1301			

xxxiv NEW JERSEY MEDICAL MALPRACTICE LAW 2024



