

# Table of Contents

---

---

<b>Chapter 1: Duties of Health Care Providers</b> .....	<b>1</b>
I DUTY OF CARE .....	1
1-1 GENERALLY ACCEPTED STANDARD OF CARE .....	1
1-1:1 Introduction .....	1
1-1:1.1 Existence of a Duty .....	2
1-1:2 “Generally Accepted” and “Reasonably Prudent” Standards Distinguished .....	6
1-1:3 Not All Deviations From the Standard of Care Constitute Malpractice .....	8
1-2 THE ROLE OF THE PHYSICIAN’S JUDGMENT.....	10
1-2:1 Physician’s Exercise of Reasonable Judgment Is Not Malpractice.....	10
1-2:2 Evolution of the Judgment Charge.....	12
1-2:3 Limitations on Applicability of the Judgment Charge.....	16
1-2:4 Specific Cases Addressing the Judgment Charge.....	21
1-2:5 Need for Informed Consent Charge When Judgment Charge Is Given.....	28
1-3 PERSONAL STANDARDS DO NOT ESTABLISH THE STANDARD OF CARE .....	28
1-4 DUTIES OF SPECIFIC MEDICAL PROVIDERS .....	31
1-4:1 Duty of Examining or Consulting Physician Acting for Third Party .....	31
1-4:1.1 General Duty of Care.....	31
1-4:1.2 Duty to Report Findings to Patient .....	36
1-4:1.2a Duty of Examining Physician ...	36
1-4:1.2b Duty of Consulting Physician Not Examining Patient .....	40
1-4:1.2c Duty of Third Party to Disclose Test Results.....	41
1-4:1.3 Duty to Persons Other Than Patient.....	43
1-4:2 Duty of a Specialist .....	43
1-4:3 Standard of Care for Hospital Resident Physician.....	46

## Table of Contents

1-4:4	Duty of a Supervisor .....	47
1-4:5	Duty of a Supervisor of Physician Assistants .....	50
1-4:6	Duty of a Supervisor of Nurses .....	55
1-4:7	Scope of Chiropractic Care .....	57
1-4:8	Duty of Emergency Department .....	59
1-4:9	Duty of Nursing Home .....	60
1-4:10	Non-Delegable Duty of Jail or Prison .....	69
1-5	DUTIES IN SPECIFIC CIRCUMSTANCES .....	70
1-5:1	Duty Regarding Treatment of the Deceased's Body ....	70
1-5:2	Duty to Elderly and Infirm Patient .....	72
1-5:3	Duty to Suicidal Patient.....	73
1-6	LIABILITY OF THIRD PARTIES FOR PHYSICIAN'S BREACH OF DUTY OF CARE.....	78
1-6:1	Duty of a Credentialer.....	78
1-6:2	Duty of Employer and Respondeat Superior.....	81
1-6:2.1	Employment Relationship Required .....	81
1-6:2.2	Employee Need Not Be Party.....	81
1-6:2.3	Employer Not Liable for Employee Conduct Outside Scope of Employment.....	83
1-6:2.4	Limitation of Liability.....	85
1-6:3	Apparent Employment of Medical Professionals.....	85
1-6:4	Liability of Referring Physician .....	90
1-6:5	Liability of Workers' Compensation Carrier for Examining Physician's Negligence .....	91
1-7	TERMINATION OF THE DUTY OF CARE.....	93
II	OTHER RELATED DUTIES .....	94
1-8	DUTY OF CONFIDENTIALITY .....	94
1-8:1	Generally .....	94
1-8:2	Exceptions to and Waiver of Confidentiality .....	95
1-8:2.1	Personal Injury Claim Waives Confidentiality.....	95
1-8:2.2	Use and Misuse of a Subpoena .....	97
1-8:3	Duty to Keep HIV/AIDS Diagnosis Confidential.....	101
1-8:4	Duty to Keep Psychiatric Records Confidential.....	102
1-8:4.1	Privilege Akin to Attorney-Client Privilege.....	102
1-8:4.2	Exceptions to Confidentiality of Psychiatric Records .....	107
1-8:4.2a	Defense to Crime, Mental State at Issue or Best Interests of Children .....	107
1-8:4.2b	Persons at Risk of Harm .....	108

1-8:4.3 Improper Use of Subpoena for  
Psychiatric Records ..... 109

1-9 DUTY TO PROVIDE GENETIC COUNSELING..... 111

1-10 DUTY TO TERMINATE CARE..... 113

1-11 DUTY OF TREATING PHYSICIAN TO  
TESTIFY OR PROVIDE LITIGATION SUPPORT ..... 114

1-12 DUTY TO MAINTAIN INSURANCE ..... 117

1-13 PRACTICE POINTERS..... 120

**Chapter 2: Doctrines of Informed Consent and Refusal ..... 125**

I DUTY TO OBTAIN INFORMED  
CONSENT OR REFUSAL ..... 125

2-1 THE FULLY INFORMED PATIENT ..... 125

2-1:1 Physician’s Common Law Duty  
to Provide Information ..... 125

2-1:2 Code Provisions Require Written Informed Consent.... 128

2-2 ACTIONS FOR BREACH OF DUTY TO OBTAIN  
INFORMED CONSENT OR REFUSAL..... 129

2-2:1 Elements of Cause of Action for Breach  
of Duty to Obtain Informed Consent ..... 129

2-2:2 Standard for Duty to Disclose ..... 130

2-2:2.1 “Professional” Standard Abandoned..... 130

2-2:2.2 Reasonable Patient Standard ..... 130

2-2:2.3 Informed Consent Regarding  
Prescription Drugs..... 134

2-2:2.4 Only Material Risks Need Be Disclosed ... 136

2-2:3 Duty to Disclose Applicable to Non-Invasive  
Procedures or Non-Treatment..... 143

2-2:4 Duty Regarding Informed Refusal..... 144

2-2:5 Duty to Inform of Available Diagnostic Testing ..... 146

2-2:6 Relationship Between Medical Judgment  
and Informed Consent ..... 148

2-2:7 No Duty to Disclose Unavailable Options ..... 153

2-2:8 Distinguishing Negligent Treatment or Failure  
to Diagnose from Failure to Disclose..... 154

2-2:8.1 Negligent Treatment or Diagnosis ..... 154

2-2:8.2 Failure to Disclose Distinguished ..... 158

2-2:8.3 Use of Informed Consent Form to  
Negate Negligence Prohibited..... 161

2-2:9 Immunity/No Duty to Obtain Informed Consent  
in Emergencies..... 162

2-2:10 Disclosure Regarding FDA Approvals..... 165

## Table of Contents

2-2:11	Disclosures Regarding Physicians .....	167
2-2:11.1	Duty to Disclose Physician's HIV/AIDS Status .....	167
2-2:11.2	Duty Regarding Disclosure of Credentials .....	169
2-2:11.3	Duty to Identify Specific Physician Performing Service .....	172
2-2:11.4	No Duty to Disclose Risks of Treatment by Other Physicians .....	174
2-2:12	Liability to Third Parties for Breach of Duty to Obtain Informed Consent.....	176
2-2:12.1	Child's Cause of Action for Breach of Duty to Disclose Risks to Mother .....	176
2-2:12.2	Duty to Advise of Test Results Affecting Patient and Third Parties.....	180
II	PROCEDURAL ISSUES.....	184
2-3	PLEADING INFORMED CONSENT .....	184
2-4	A DIRECTED VERDICT MAY BE WARRANTED WHERE DEFENDANT CONCEDES A MATERIAL RISK WAS NOT DISCLOSED .....	186
2-5	ROUTINE DISCLOSURE AS EVIDENCE OF INFORMATION DISCLOSED TO PATIENT .....	188
2-6	WHETHER PATIENT WOULD DECLINE TREATMENT IS ISSUE FOR THE JURY .....	189
2-7	JURY INTERROGATORIES IN INFORMED CONSENT CASE .....	190
III	ASSAULT AND BATTERY DISTINGUISHED.....	191
2-8	INTRODUCTION.....	191
2-9	"GHOST SURGERIES": PATIENT NOT INFORMED WHO WILL PERFORM SERVICES.....	191
2-10	PERFORMING DIFFERENT SURGERY THAN DESCRIBED .....	193
2-11	NO PROOF OF A DEVIATION FROM THE STANDARD OF CARE REQUIRED FOR BATTERY .....	198
2-12	EXCEEDING CONDITIONS OF CONSENT CONSTITUTES BATTERY .....	199
2-13	PRACTICE POINTERS.....	202
<b>Chapter 3: Other Causes of Action .....</b>		<b>207</b>
I	TORT CLAIMS .....	207
3-1	STRICT LIABILITY IN TORT .....	207
3-2	ABANDONMENT .....	207

**Table of Contents**

II FRAUD CLAIMS..... 209

3-3 FRAUD..... 209

3-3:1 Elements of Cause of Action..... 209

3-3:2 Benefits and Burdens of Pleading Fraudulent  
Concealment..... 210

3-3:3 Consumer Fraud..... 212

3-3:4 Misrepresentation of Credentials..... 213

3-3:5 Misrepresentations Concerning Treatment ..... 216

III CONTRACT AND OTHER CLAIMS ..... 219

3-4 BREACH OF CONTRACT..... 219

3-5 FALSE IMPRISONMENT..... 222

3-6 MISHANDLING OF A CORPSE ..... 223

3-7 UNAUTHORIZED AUTOPSY ..... 224

3-8 FALSE DIAGNOSIS OF DISEASE..... 225

3-9 ALTERATION OR DESTRUCTION  
OF MEDICAL RECORDS ..... 226

3-10 PUBLIC DISCLOSURE OF PRIVATE FACTS ..... 231

3-11 SEXUAL MISCONDUCT ..... 232

3-12 PRACTICE POINTERS..... 235

  

**Chapter 4: Proximate Causation..... 237**

I INTRODUCTION..... 237

4-1 OVERVIEW ..... 237

4-2 REASONABLE DEGREE OF MEDICAL  
PROBABILITY ..... 238

II PRE-EXISTING CONDITIONS ..... 244

4-3 CAUSATION ISSUES RAISED BY PRE-EXISTING  
CONDITIONS..... 244

4-3:1 Introduction ..... 244

4-3:2 Defining What Constitutes a Pre-Existing  
Condition ..... 245

4-3:2.1 Condition That Could Evolve into  
Ultimate Condition Absent Negligence .... 245

4-3:2.2 Condition Being Treated to  
Delay Outcome..... 247

4-3:2.3 Addiction as Pre-Existing Condition ..... 249

4-3:3 Defendant’s Burden to Apportion Damages  
Caused by Pre-Existing Condition ..... 255

4-3:4 *Evers, Scafidi* and the “Increased Risk/Substantial  
Factor” Test ..... 257

4-3:4.1 Development of “Increased  
Risk/Substantial Factor” Test..... 258

## Table of Contents

4-3:4.2	Defining “Substantial Factor” .....	285
4-3:4.3	Application of <i>Scafidi</i> to Specific Cases....	288
4-3:4.4	Explaining Limitation of <i>Scafidi</i> Charge... 298	
4-3:4.5	Issuing Ultimate Outcome Jury Charge with <i>Scafidi</i> Charge.....	298
4-3:5	Failure to Perform Diagnostic Test Which Would Have Disclosed Pre-Existing Condition .....	299
4-3:6	Apportionment of Pain and Suffering .....	304
4-4	LOSS OF A CHANCE.....	305
4-5	AGGRAVATION OF A PRIOR INDEPENDENT TORT ...	309
4-6	PAIN AND SUFFERING.....	326
III	AVOIDABLE CONSEQUENCES AND COMPARATIVE NEGLIGENCE.....	329
4-7	EFFECT OF AVOIDABLE CONSEQUENCES AND COMPARATIVE NEGLIGENCE ON PROOF OF CAUSATION.....	329
4-7:1	Introduction .....	329
4-7:2	Distinction Between Patient’s Pre-Treatment and Post-Treatment Conduct .....	329
4-7:3	Distinguishing Avoidable Consequence and Superseding Cause.....	335
4-7:4	Cases Limiting Application of Avoidable Consequence or Comparative Negligence.....	337
4-7:5	Applicability to Informed Consent Cases .....	338
IV	CAUSATION IN INFORMED CONSENT CASES .....	339
4-8	PROOF OF PROXIMATE CAUSATION IN THE INFORMED CONSENT CASE .....	339
4-9	FAILURE TO WARN REGARDING PRESCRIPTION DRUG RISKS .....	341
4-10	FAILURE TO FULLY INFORM PATIENT REGARDING PROCEDURE AND ALTERNATIVES.....	346
4-11	PRACTICE POINTERS.....	352
	<b>Chapter 5: Damages in Medical Malpractice Cases .....</b>	<b>357</b>
I	TYPES OF DAMAGES.....	357
5-1	INTRODUCTION.....	357
5-2	DAMAGES FOR DELAY IN TREATMENT .....	358
5-3	PAIN AND SUFFERING.....	362
5-4	HEDONIC DAMAGES.....	368
5-5	DISABILITY .....	371
5-6	ECONOMIC LOSS.....	372
5-7	MEDICAL BILLS .....	378

## Table of Contents

5-8	EMOTIONAL DISTRESS DAMAGES .....	384
5-8:1	Generally .....	384
5-8:2	Emotional Distress of Relatives .....	389
5-8:2.1	<i>Portee</i> and Elements of Claim .....	389
5-8:2.2	Application of <i>Portee</i> in Medical Malpractice Cases .....	391
5-8:2.3	Claims for Mistreatment of Body or Corpse .....	395
5-8:2.4	Misdiagnosis Generally Does Not Satisfy <i>Portee</i> Factors .....	396
5-8:2.5	Emotional Distress of Parents for Loss of a Child .....	398
5-8:2.6	Relatives Must Connect Medical Malpractice to Injury to Recover Emotional Distress Damages.....	407
II	DAMAGES IN CASES INVOLVING A FETUS OR CHILD .....	410
5-9	DAMAGES INVOLVING A FETUS .....	410
5-9:1	Injuries to a Fetus and Preconception Injuries .....	410
5-9:2	Loss of a Fetus .....	414
5-10	INJURIES TO A CHILD .....	417
5-11	EFFECT OF SETTLEMENT WITH INFANT WITHOUT JUDICIAL APPROVAL .....	420
III	WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS.....	421
5-12	WRONGFUL BIRTH.....	421
5-12:1	Introduction .....	421
5-12:2	Distinguishing Wrongful Life Claims.....	421
5-12:3	Development of Wrongful Birth Claim.....	424
5-12:4	Measure of Damages for Wrongful Birth.....	426
5-12:4.1	Emotional Distress of Parents.....	426
5-12:4.2	Damages for Extraordinary Costs of Care.....	427
5-12:5	Distinguishing Wrongful Birth and Informed Consent Claims: Medical Causation Not Required ...	430
5-12:6	Preconception Negligence.....	434
5-12:7	Superseding Cause and Avoidable Consequences in Wrongful Birth Cases.....	436
5-12:8	Emotional Distress Damages for Wrongful Birth .....	439
5-12:9	Damages Not Reduced by Joy of Raising Child .....	442
5-12:10	No Claim for Grandparents or Siblings .....	444

## Table of Contents

IV	DAMAGES IN WRONGFUL DEATH CASES .....	445
5-13	WRONGFUL DEATH CLAIMS.....	445
5-13:1	Generally .....	445
5-13:2	Wrongful Death of a Child .....	448
5-13:3	Wrongful Death After a Prior Medical Malpractice Suit .....	452
V	OTHER DAMAGES ISSUES.....	456
5-14	PUNITIVE DAMAGES .....	456
5-15	PER QUOD .....	463
5-16	ADDITUR AND REMITTITUR OF DAMAGES .....	464
5-17	HIGH-LOW AGREEMENTS.....	469
5-17:1	High-Low Agreements and Workers’ Compensation Liens under N.J.S.A. 34:15-40 .....	471
5-17:2	High-Low Agreements and Physician Reporting Requirements .....	473
5-18	OFFER TO TAKE JUDGMENT .....	474
5-19	PRACTICE POINTERS.....	477
<b>Chapter 6: Pre-Suit Investigation of Medical Malpractice Claim .....</b>		<b>483</b>
I	MEDICAL RECORDS .....	483
6-1	DUTY TO MAINTAIN ACCURATE AND TRUE MEDICAL RECORDS .....	483
6-2	STATUTORY AND ADMINISTRATIVE CODE REGULATIONS REGARDING MEDICAL RECORDS.....	484
6-3	LEGIBILITY REQUIREMENTS FOR MEDICAL RECORDS.....	488
II	INCIDENT, INVESTIGATION AND OTHER REPORTS .....	489
6-4	INCIDENT REPORTS.....	489
6-5	THE PATIENT SAFETY ACT, N.J.S.A. 26:2H-12.23 .....	489
6-6	PATIENT SAFETY ACT’S IMPACT ON DOCUMENT DISCOVERY .....	492
6-7	DISCOVERABILITY OF FACTS PERMITTED BY THE PATIENT SAFETY ACT .....	508
6-8	PEER REVIEW/COMMITTEE REPORTS.....	514
6-9	SENTINEL EVENT REPORTS.....	524
6-10	INTERVIEWS OF HEALTH CARE PROFESSIONALS.....	531
III	DECLINING A MEDICAL MALPRACTICE CASE .....	533
6-11	ADVISING THE CLIENT .....	533
6-12	PRACTICE POINTERS.....	534

**Chapter 7: Expert Testimony and Learned Treatises ..... 541**

**I EXPERT TESTIMONY IN MEDICAL MALPRACTICE**

**CASES ..... 541**

7-1 INTRODUCTION..... 541

7-2 REQUIREMENTS FOR EXPERT TESTIMONY ..... 543

7-2:1 Expert Establishes Standard of Care  
and Deviation Therefrom ..... 543

7-2:2 Content of Expert Testimony and Expert Report ..... 548

7-2:2.1 Introduction ..... 548

7-2:2.2 Clear, Specific Opinions..... 548

7-2:2.3 Reasonable Medical Probability ..... 550

7-2:3 Importance of Expert Testimony ..... 553

**II QUALIFICATION OF EXPERTS  
AND THE PATIENTS FIRST ACT ..... 554**

7-3 QUALIFICATION OF EXPERT WITNESSES..... 554

7-3:1 Introduction ..... 554

7-3:2 Qualification of Expert Witnesses Prior  
to New Jersey Medical Care Access and  
Responsibility and Patients First Act..... 554

7-3:2.1 Continuing Applicability of Pre-Act  
Common Law for Cases Arising  
Prior to 2004..... 554

7-3:2.2 Expert in Different Specialty May  
Qualify in Pre-2004 Cases..... 555

7-3:2.3 Examples of Qualified Experts in  
Pre-2004 Cases..... 556

7-3:2.4 Examples of Experts Not Qualified in  
Pre-2004 Cases..... 563

7-3:3 Qualification of Expert Witnesses After  
the New Jersey Medical Care Access and  
Responsibility and Patients First Act..... 565

7-3:3.1 Same Specialty Required for Expert ..... 565

7-3:3.2 Applicability of Same Specialty  
Requirement ..... 566

7-3:3.3 Specialties and Sub-specialties  
Recognized by the American Board of  
Medical Specialties or the American  
Osteopathic Association ..... 568

7-3:3.3a Current List of Recognized  
Specialties ..... 568

7-3:3.3b Scope of Practice for  
Specialties ..... 569

7-3:3.3c Overlap Between Specialties.... 569

**Table of Contents**

7-3:3.4 Constitutionality Challenged..... 570

7-3:3.5 The Patients First Act Amends the Affidavit of Merit Statute ..... 571

7-3:3.6 Equivalently Qualified ..... 572

7-3:3.7 Determining the Qualifications of Medical Malpractice Liability Experts..... 574

7-3:3.8 Distinction Between N.J.S.A. 2A:53A-41(a)(1) and (a)(2) ..... 586

7-4 THE PATIENTS FIRST ACT’S IMPACT ON OTHER MEDICAL MALPRACTICE ISSUES..... 587

7-4:1 Introduction ..... 587

7-4:2 Statute of Limitations Amended..... 587

7-4:3 Affidavit of Noninvolvement ..... 588

7-4:4 Malpractice Premium Increase Barred if Case Dismissed Within 180 Days ..... 588

7-4:5 Remittitur and Additur..... 589

7-4:6 Good Samaritan Immunity..... 589

7-4:7 Reimbursement of Non-Economic Damages..... 590

7-4:8 Malpractice Insurance Policies..... 591

7-4:9 Applicability and Effective Date of the Patients First Act..... 591

7-4:10 New Jersey Health Care Consumer Information Act..... 592

III THE AFFIDAVIT OF MERIT ..... 593

7-5 OVERVIEW ..... 593

7-5:1 Professions Covered..... 594

7-5:1.1 Qualification of Dentists, Nurses and Other Medical Professionals ..... 596

7-5:2 Statutory Requirements ..... 600

7-5:2.1 Time for Service..... 600

7-5:2.2 Failure to Produce Necessary Records or Other Information..... 601

7-5:2.3 Minimum Requirements..... 601

7-5:2.4 Qualifications of the Affiant ..... 602

7-6 JUDICIAL INTERPRETATION OF AFFIDAVIT OF MERIT STATUTE ..... 603

7-6:1 Constitutionality..... 603

7-6:2 New Jersey Supreme Court’s Initial Construction: *Hall* and *Cornblatt* ..... 604

7-6:2.1 *In re Hall*: Purpose of Affidavit of Merit Statute ..... 604

**Table of Contents**

7-6:2.2 *Cornblatt v. Barow*: Affidavit of Merit  
Not Required for Malpractice Occurring  
Pre-Statute..... 606

7-7 APPLICATION OF THE AFFIDAVIT OF MERIT  
REQUIREMENTS ..... 607

7-7:1 Introduction ..... 607

7-7:2 Who is Entitled to an Affidavit of Merit?..... 609

7-7:2.1 Which Licensed Professionals are  
Entitled to an Affidavit of Merit? ..... 609

7-7:2.2 Is an Affidavit of Merit Needed  
for Professional Corporations? ..... 612

7-7:2.3 Is an Affidavit of Merit Needed for a  
Claim Based on Entity’s Vicarious  
Liability of a Non-licensed Employee? ..... 615

7-7:3 Who is Qualified to Render the Affidavit of Merit?... 617

7-7:3.1 Same Specialty Requirement ..... 617

7-7:3.2 Waiver of Same Specialty Requirement .... 620

7-7:4 What Information Must be Contained  
in the Affidavit of Merit? ..... 622

7-7:5 Does the Affidavit of Merit Statute Require  
Identification of the Defendants Who Deviated  
from the Standard of Care? ..... 623

7-7:6 When Must the Affidavit of Merit be Filed? ..... 627

7-7:7 What Constitutes Substantial Compliance  
with the Affidavit of Merit Statute? ..... 631

7-7:7.1 Substantial Compliance Concept  
Explained ..... 631

7-7:7.2 Applying the Substantial Compliance  
Concept ..... 632

7-7:7.3 The Affidavit of Merit Statute Should  
Not Be Mechanically Applied..... 634

7-7:7.4 Dismissal with Prejudice Absent  
Extraordinary Circumstances ..... 638

7-7:7.5 Failure to Place Expert Under Oath  
Renders Affidavit Non-Compliant..... 647

7-7:8 Do the Doctrines of Waiver or Estoppel  
Apply to the Affidavit of Merit Statute? ..... 648

7-7:8.1 Failure to Promptly Seek  
Dismissal Estops Defendant ..... 648

7-7:8.2 The *Ferreira* Conference ..... 650

7-7:9 Does the Failure to Hold a *Ferreira* Conference  
Extend the Time to Serve an Affidavit of Merit?..... 653

**Table of Contents**

7-7:10 Can the *Ferreira* Conference be Waived?..... 654

7-7:11 Is the Affidavit of Merit Waived if the Defendant Withholds Medical Records Needed to Prepare the Affidavit?..... 654

7-7:11.1 Records Having Substantial Bearing on Preparation of Affidavit of Merit..... 654

7-7:11.2 Records Not Needed for Affidavit ..... 657

7-7:12 The Affidavit of Merit Statute Is Not Tolled Due to the Minority of an Infant Plaintiff ..... 659

7-7:13 Is an Affidavit of Merit Required in Common Knowledge or Res Ipsa Cases?..... 660

7-7:14 Is an Affidavit of Merit Required for Informed Consent Cases? ..... 664

7-7:15 Does the Affidavit of Merit Statute Apply to Crossclaims or Counterclaims? ..... 665

7-7:15.1 Applicability to Crossclaims ..... 665

7-7:15.2 Applicability to Third-Party Malpractice Complaint..... 666

7-7:15.3 Applicability to Counterclaim ..... 668

7-7:16 Does the Affidavit of Merit Statute Apply to Non-Malpractice Claims, Such as Contract or Assault and Battery Claims?..... 669

7-7:17 Is an Affidavit of Merit Needed to Establish Causation or Damages? ..... 671

7-7:18 Is an Affidavit of Merit Required in the Federal Courts?..... 671

7-7:19 Should the Affidavit of Merit Statute Ever be Permitted to be Used to Defeat Meritorious Claims?..... 672

IV PRESENTING EXPERT TESTIMONY AND REPORTS... 674

7-8 FOUNDATION FOR EXPERT TESTIMONY ..... 674

7-8:1 Testimony Based on Knowledge, Training, Experience or Education..... 674

7-8:2 Theories Not Yet Generally Accepted..... 677

7-8:3 Rule 104 Hearing on Admissibility ..... 681

7-8:4 Use of Multiple Experts ..... 682

7-8:5 Failure To Call an Expert Witness at Trial ..... 684

7-9 REQUIREMENTS OF THE EXPERT REPORT..... 685

7-10 NET OPINION RULE ..... 690

7-11 COMMON KNOWLEDGE DOCTRINE ..... 705

7-11:1 Doctrine Established in Cases of Foreign Objects Left Behind in Surgery..... 705

**Table of Contents**

7-11:2 Cases in Which Common Knowledge Found..... 706  
7-11:2.1 Generally..... 706  
7-11:2.2 An Extreme Application of the Common  
Knowledge Doctrine..... 713  
7-11:2.3 Common Knowledge Regarding  
Communication of Test Results..... 715  
7-11:3 Cases in Which Common Knowledge Doctrine  
Was Rejected..... 717  
7-12 RES IPSA LOQUITUR..... 720  
7-12:1 Required Elements..... 720  
7-12:2 Expert Testimony May Still Be Required for  
Res Ipsa Loquitur in Certain Situations..... 721  
7-12:3 Examples Where Res Ipsa Loquitur Applied ..... 723  
7-12:4 Examples Where Res Ipsa Loquitur Not Applied .... 726  
7-12:5 Conditional Application of Res Ipsa Doctrine ..... 729  
7-13 *ANDERSON v. SOMBERG* AND COLLECTIVE  
JOINT RESPONSIBILITY ..... 737  
7-14 EXPERT TESTIMONY IN INFORMED  
CONSENT CASES ..... 745  
7-15 COMPELLING EXPERT TESTIMONY ..... 755  
V LEARNED TREATISES AND OTHER SOURCES..... 765  
7-16 THE *JACOBBER* RULE AND LEARNED TREATISES ..... 765  
7-16:1 Treatises..... 765  
7-16:2 Manufacturers’ Technical Guides  
and Package Inserts ..... 773  
7-17 THE PHYSICIANS’ DESK REFERENCE AND  
PACKAGE INSERTS ..... 776  
7-18 HOSPITAL PROTOCOLS AND PROCEDURE  
MANUALS..... 779  
7-19 RECOMMENDATIONS OF PROFESSIONAL  
MEDICAL BOARDS OR ORGANIZATIONS ..... 782  
7-20 RECOMMENDATIONS OF THE AMERICAN  
MEDICAL ASSOCIATION..... 784  
7-21 STATUTES AND ADMINISTRATIVE CODES ..... 786  
7-21:1 Generally ..... 786  
7-21:2 Statute as Evidence of Standard of Care ..... 788  
7-21:3 Examples of Statute Held Not  
Evidence of Standard ..... 793  
7-22 DISCOVERY OF TREATISES TO BE UTILIZED AS  
EVIDENCE OF THE STANDARD OF CARE..... 794  
VI REFUSAL OR INABILITY OF EXPERT TO TESTIFY .... 795  
7-23 REMEDIES FOR FAILURE OF EXPERT  
WITNESS TO TESTIFY ..... 795

## Table of Contents

7-24	PRACTICE POINTERS.....	797
------	------------------------	-----

### Chapter 8: Pleadings, Defenses and Voir Dire in

	<b>Medical Malpractice Cases .....</b>	<b>811</b>
I	INTRODUCTION.....	811
8-1	OVERVIEW .....	811
II	PARTIES.....	811
8-2	IDENTIFYING ALL CLAIMS AS TO ALL PARTIES.....	811
	8-2:1 Entire Controversy Doctrine.....	811
	8-2:2 Fictitious Defendant Rule.....	814
8-3	SERVICE ON ABSENT DEFENDANTS.....	818
III	DEFENSES .....	819
8-4	COMPARATIVE NEGLIGENCE AND AVOIDABLE CONSEQUENCES .....	819
8-5	AFFIDAVIT OF NONINVOLVEMENT .....	826
8-6	STATUTE OF LIMITATIONS .....	828
	8-6:1 Generally .....	828
	8-6:2 The Discovery Rule.....	831
	8-6:2.1 Development of the Discovery Rule .....	831
	8-6:2.2 Filing within Two Years from the Date of Discovery.....	836
	8-6:2.3 Discovery Rule Triggered by Knowledge of Fault .....	839
	8-6:2.4 Fact of Injury, Not Injury's Extent, Triggers Statute of Limitations.....	845
	8-6:2.5 Increased Risk of Harm, Latent Disease, Cancer Recurrence: Statute of Limitations Begins to Run Only After Harm Occurs ...	847
	8-6:2.6 Discovery of Proper Defendant.....	850
	8-6:2.6a Amended Complaint Relates Back .....	850
	8-6:2.6b Due Diligence Required .....	858
	8-6:2.7 Application of Discovery Rule to Cases, Generally .....	860
8-6:3	Statute of Limitations in Informed Consent Cases....	877
8-6:4	Failure to Advise, Concealment of Malpractice and the Statute of Limitations .....	880
8-6:5	Continuing Treatment and the Statute of Limitations.....	885
8-6:6	Incompetency/Insanity and the Statute of Limitations.....	886

**Table of Contents**

8-6:7 Infancy or Parents’ Claim for Injuries to a Child  
and the Statute of Limitations ..... 887

8-6:8 Statute of Limitations for Wrongful Death..... 890

8-6:9 Statute of Limitations for Public Disclosure of  
Patient’s Medical Records ..... 901

8-7 CHARITABLE AND OTHER IMMUNITIES ..... 903

8-7:1 Introduction ..... 903

8-7:2 Hospitals and Charitable Immunity..... 903

8-7:2.1 Limitations on Hospital Liability ..... 903

8-7:2.2 Limitations on Hospital Liability Not  
Applicable to Hospital Employees..... 907

8-7:2.3 Determining Whether Defendant is a  
Charity Subject to Immunity ..... 908

8-7:2.4 Charitable Immunity Inapplicable in  
Products Liability ..... 912

8-7:2.5 Jury Charges on Charitable Immunity..... 913

8-7:3 Immunity for Emergency Squads and Personnel..... 915

8-7:4 Good Samaritan Act Immunity ..... 919

8-7:5 Immunity in Cases Involving COVID-19 ..... 921

8-7:6 Immunity for Mental Health Providers..... 922

8-8 TORT CLAIMS ACT AND PUBLIC  
ENTITY IMMUNITY ..... 925

8-8:1 Introduction ..... 925

8-8:2 Notice of Tort Claim ..... 925

8-8:3 Requirement of Notice of Tort Claim  
for Public Employees ..... 928

8-8:4 Time to Serve Notice of Claim in Medical  
Malpractice Cases..... 929

8-8:4.1 *Eagan* and *Lowe* Opinions ..... 929

8-8:4.1a *Eagan v. Boyarsky*: Public  
Employee Status Unclear ..... 929

8-8:4.1b *Lowe v. Zarghami*:  
Extraordinary Circumstances..... 931

8-8:4.2 Cases Applying *Eagan* and *Lowe* ..... 933

8-8:4.2a *Ventola* and Confusion  
about Federal or State Status  
of Institution ..... 933

8-8:4.2b *D.D. v. UMDNJ* and  
Emotional Distress as  
Extraordinary Circumstances..... 935

**Table of Contents**

8-8:4.2c *McNellis-Wallace v. Hoffman*  
Distinguishes the Date of  
Accrual and Extraordinary  
Circumstances..... 938

8-8:4.2d Catastrophic, Life Altering  
Injuries May Toll Accrual  
Date..... 942

8-8:5 Application of Tort Claim Act Immunity ..... 944

8-9 WORKERS' COMPENSATION DEFENSES ..... 945

8-10 LACK OF JURISDICTION..... 948

IV MULTIPLE DEFENDANTS, DEFENSE CLAIMS  
AGAINST OTHER PARTIES ..... 951

8-11 CROSSCLAIMS ..... 951

8-12 REPRESENTATION OF MULTIPLE DEFENDANTS..... 970

8-13 COUNTERCLAIMS BY DEFENDANTS..... 977

V VOIR DIRE ..... 979

8-14 VOIR DIRE IN MEDICAL MALPRACTICE CASES ..... 979

8-14:1 New Jersey Supreme Court Directive #04-07..... 979

8-14:2 Requirements of Voir Dire..... 980

8-14:3 Use of Standard and Open-Ended  
Voir Dire Questions ..... 984

8-14:4 Peremptory Challenges ..... 985

VI ARBITRATION ..... 988

8-15 CONTRACTUAL LIMITATIONS UPON AND  
COMPELLED ARBITRATION OF MALPRACTICE  
CLAIMS ..... 988

8-16 IN LIMINE MOTIONS ..... 994

8-17 PRACTICE POINTERS..... 995

**Chapter 9: Pretrial Discovery in Medical Malpractice Cases..... 1003**

I INTRODUCTION..... 1003

9-1 OVERVIEW ..... 1003

9-2 PRIORITY OF DISCOVERY ..... 1004

9-2:1 Time To Complete Discovery..... 1005

II MEDICAL RECORDS ..... 1006

9-3 OBTAINING PLAINTIFF'S MEDICAL RECORDS,  
INTERVIEWING PLAINTIFF'S TREATING  
PHYSICIANS ..... 1006

9-4 USE OF A SUBPOENA TO OBTAIN  
MEDICAL RECORDS ..... 1011

III INTERROGATORIES ..... 1013

9-5 FORM INTERROGATORIES ..... 1013

## Table of Contents

9-6	THE SCOPE OF INQUIRY BY INTERROGATORIES....	1014
9-7	DISCOVERY OF COMMUNICATIONS BETWEEN PLAINTIFF, COUNSEL AND EXPERTS.....	1022
9-8	PENALTY FOR FAILURE TO ANSWER INTERROGATORIES .....	1023
9-8:1	Penalty for the Fraudulent Concealment of Evidence - <i>Dondero v. Abdelhak</i> .....	1024
9-9	PRODUCTION OF EXPERT REPORTS.....	1029
IV	USE OF ADVERSARY’S EXPERT .....	1033
9-10	USE OF AN ADVERSARY’S EXPERT GENERALLY PROHIBITED.....	1033
V	DEPOSITIONS.....	1039
9-11	DEPOSITIONS OF PARTIES.....	1039
9-11:1	Raising Objections During Depositions.....	1039
9-11:2	Scope of Deposition Questions.....	1040
9-11:3	Deposition Questions Concerning Opinions.....	1044
9-11:4	Deposition Testimony Supporting Learned Treatises .....	1049
9-12	DEPOSITIONS OF EXPERTS .....	1050
9-13	MATERIAL CHANGE IN TESTIMONY BY A WITNESS .....	1054
VI	TREATING PHYSICIANS’ OPINIONS, REPORTS AND TESTIMONY .....	1060
9-14	USE OF TREATING PHYSICIANS’ OPINIONS.....	1060
9-14:1	Value of Treating Physicians’ Testimony.....	1060
9-14:2	Discovery of Treating Physician’s Opinion.....	1061
9-14:3	Use of Subsequent Treating Physician as Witness... ..	1062
9-14:3.1	Subsequent Treating Physician as Witness Concerning Liability Issues .....	1062
9-14:3.2	Subsequent Treating Physician as Witness Regarding Causation.....	1065
9-14:4	Admissibility of Subsequent Treating Physician’s Reports .....	1070
9-14:5	Other Issues Concerning Treating Physician’s Testimony .....	1072
9-15	OPINIONS OF PSYCHIATRISTS OR MENTAL HEALTH CARE PROFESSIONALS.....	1073
VII	OTHER DISCOVERY ISSUES .....	1077
9-16	OPINIONS IN MEDICAL RECORDS .....	1077
9-17	MEDICAL EXAMINER’S/AUTOPSY REPORTS .....	1082
9-18	RECORDS AND REPORTS OF BOARD OF HEALTH, BOARD OF MEDICAL EXAMINERS .....	1088

## Table of Contents

9-19	EVIDENCE OF A DECEDENT'S PRE-DEATH STATEMENTS.....	1089
VIII	CROSS-EXAMINATION OF EXPERTS .....	1091
9-20	SCOPE OF CROSS-EXAMINATION OF EXPERT WITNESSES.....	1091
9-20:1	Cross-Examination of Collateral Issues.....	1091
9-20:2	Cross-Examination Regarding Prior Service as Expert Witness .....	1093
9-20:3	Use of Hypothetical Questions in Cross-Examination .....	1095
9-20:4	Questions Concerning Experts' Financial Arrangements .....	1096
9-21	PRACTICE POINTERS.....	1097
<b>Chapter 10: Electronic Medical Records .....</b>		<b>1105</b>
10-1	INTRODUCTION.....	1105
10-1:1	Federal Overview .....	1106
10-1:2	New Jersey Overview .....	1115
10-2	REQUIREMENTS.....	1118
10-2:1	Requirements for Eligible Medicare/Medicaid Providers.....	1118
10-2:1.1	Meaningful Use Stages and Objectives ...	1121
10-2:2	Requirements Under HIPAA for Electronic Medical Records.....	1122
10-2:2.1	HIPAA's Security Requirements .....	1123
10-2:2.2	HIPAA's Notification of Breach Requirement .....	1127
10-2:2.3	HIPAA's Privacy Requirements .....	1127
10-2:3	Federal Incorporated Standards, Implementation Specifications, and Certification Criteria.....	1132
10-2:4	Requirements Under New Jersey Law.....	1135
10-3	CONTENTS OF ELECTRONIC MEDICAL RECORDS .....	1136
10-3:1	Metadata and Electronically Stored Information....	1136
10-3:2	Types of Metadata.....	1138
10-3:3	Metadata, Audit Trails, and Electronic Medical Records.....	1140
10-3:3.1	Federal Requirements.....	1140
10-3:3.2	New Jersey Requirements .....	1150
10-4	AVAILABILITY OF ELECTRONIC MEDICAL RECORDS .....	1153

**Table of Contents**

**Appendix: Selected New Jersey Law Resources ..... 1161**  
**Table of Cases..... 1163**  
**Index ..... 1195**