

# OUTLINE

---

PREFACE .....	III
TABLE OF CASES .....	XI
TABLE OF STATUTES .....	XXVII
<b>Chapter One. Establishing the Professional Relationship .....</b>	<b>1</b>
I. In General: Negligence Theory .....	1
II. Duty .....	1
A. Emergency Circumstances.....	4
B. Consensual Relationships .....	6
C. Duty to Non-Patients .....	11
III. The Limits of Duty .....	19
A. Voluntary Termination .....	20
B. Refusal to Provide Treatment.....	26
IV. In General: Electronic Medical Records .....	28
V. In General: Contract-Based Claims.....	30
A. Contract for Specific Results.....	36
B. Specific Procedures.....	39
C. Contracts to Perform Services .....	40
<b>Chapter Two. Negligence-Based Claims .....</b>	<b>43</b>
I. In General: The Standard of Care .....	43
A. Respectable Minority Rule.....	45
B. School and Locality Rules .....	47
C. Best Judgment Rule .....	54
II. Proving the Professional Standard .....	57
A. Competency of Experts.....	59
B. Exceptions to the Need for Expert Testimony.....	63

1. Defendant's Own Testimony .....	63
2. Common Knowledge .....	66
3. Violation of a Statute .....	69
4. Medical Literature, Learned Treatises and Manufacturers' Instructions .....	72
5. <i>Res Ipsa Loquitur</i> .....	77
C. Apology Laws .....	87
<b>Chapter Three. Intentional Torts .....</b>	<b>89</b>
I. In General: Harm and Intent .....	89
A. Assault and Battery .....	91
B. Sexual Exploitation .....	93
C. Defamation.....	96
D. False Imprisonment .....	98
E. Invasion of Privacy .....	99
F. Disclosure of Confidential Information .....	101
G. Misrepresentation .....	104
II. Emotional Distress and Outrage .....	105
III. Violation of Civil Rights .....	111
<b>Chapter Four. Informed Decision Making ...</b>	<b>115</b>
I. In General: Battery vs. Negligence .....	115
II. Patient's Right to Information .....	118
A. Consent: A Basic Requirement .....	118
B. Scope of Consent .....	124
C. Implied or Substituted Consent .....	126
D. Informed Consent .....	130
III. Informed Refusal of Treatment.....	132
IV. The Duty of Disclosure .....	135
A. Standards for Disclosure .....	137
B. Exceptions to the Duty to Disclose .....	139
C. Duty to Disclose Economic Interests .....	143
D. Experimental Procedures.....	144

OUTLINE

VII

E. HIV and HBV Status of the Physician... 145  
F. After-Discovered Dangers ..... 147  
V. The Requirement of Causation ..... 147  
VI. Fraudulent Misrepresentation and  
Concealment..... 150  
VII. Health Insurance Portability and  
Accountability Act (HIPAA) ..... 151

**Chapter Five. Causation and Damages ..... 155**

I. In General: Establishing Causation ..... 155  
A. Contributing Factor..... 157  
B. Superseding Cause ..... 158  
C. Joint and Several Liability ..... 161  
D. Loss of a Chance ..... 163  
E. Establishing Proximate Cause ..... 167  
II. Damages ..... 171  
III. Specific Types of Damage Awards ..... 173  
A. Wrongful Life and Wrongful Birth ..... 173  
B. Dignitary Torts ..... 177  
C. Harm to Oneself ..... 178  
D. Punitive or Exemplary Damages..... 180  
IV. Damage Awards and Malpractice Reform... 181

**Chapter Six. Affirmative Defenses,**

**Limitations and Immunities ..... 185**

I. In General: Statutes of Limitations..... 185  
A. Standard Rules for Accrual of Actions ... 186  
B. Discovery Rules: Pure and Hybrid ..... 189  
C. The Continuing Treatment Rule and  
Fraudulent Concealment ..... 193  
D. Reforms ..... 194  
II. Good Samaritan Laws ..... 195  
III. Volunteer Immunity ..... 200

IV.	Other Affirmative Defenses.....	201
A.	Contributory Negligence.....	201
B.	Comparative Negligence.....	203
C.	Avoidable Consequences and Last Clear Chance.....	205
D.	Prior and Subsequent Tortfeasors.....	206
E.	Assumption of the Risk.....	207
V.	Limitations on Liability.....	209
A.	Releases.....	209
B.	Exculpatory Clauses.....	212
C.	Arbitration Provisions.....	214
VI.	Immunities.....	215
A.	Charitable Immunity.....	215
B.	Governmental Immunity.....	218
C.	Statutory Immunity.....	220

### **Chapter Seven. Vicarious Liability and Strict Liability..... 223**

I.	In General: Vicarious Tort Liability.....	223
A.	The “Borrowed Servant” Rule.....	225
B.	Physician Liability Under Respondeat Superior.....	231
C.	Physician Liability for Other Physicians.....	236
II.	Product Liability.....	243
III.	Strict Liability for Professional Services.....	249

### **Chapter Eight. Liability of Health Care Institutions..... 253**

I.	In General: The Evolution of Hospital Liability for Negligent Care.....	253
A.	Respondeat Superior.....	253
B.	Independent Contractors.....	258

OUTLINE

IX

II.	Vicarious Liability Doctrines.....	260
	A. Ostensible or Apparent Agency .....	260
	B. Non-Delegable Duties .....	263
III.	Hospital Liability Under EMTALA .....	270
	A. Emergency Treatment and Active Labor Act (EMTALA) .....	270
	1. Screening Requirements Under EMTALA .....	271
	2. Stabilization Requirement Under EMTALA .....	273
	3. Transfer Requirement Under EMTALA .....	276
	4. Hospital Immunity Under EMTALA .....	279
	B. Strict Liability .....	280
	C. Liability for Corporate Negligence .....	281
	1. General Duty of Care, Custody and Supervision .....	288
	2. Duty to Provide Equipment and Supplies .....	290
	D. Negligence <i>Per Se</i> .....	291
IV.	Liability of Managed Care Organizations ....	292
	A. Development of Managed Care Organizations.....	292
	B. MCO Liability .....	294
	1. Vicarious Liability .....	295
	2. Apparent or Ostensible Agency .....	298
	3. Negligent Credentialing.....	300
	4. Negligent Utilization Review.....	301
	5. Negligence Per Se .....	303
	C. Limits of MCO Liability: ERISA .....	304
	1. ERISA Generally .....	304

- 2. Preemption of State Law Claims Under ERISA ..... 306
- 3. The Fiduciary Duty Owed Under ERISA..... 310
- D. Conclusion..... 314

**Chapter Nine. Review of Care and Reform of Liability ..... 317**

- I. In General: Defining the Problem..... 317
  - A. Cost vs. Quality ..... 319
  - B. Utilization Review and Access to Care ..... 322
  - C. Peer Review and Medical Malpractice Litigation..... 325
- II. Accessibility, Quality, and Affordability ..... 333
  - A. Cost and Availability of Malpractice Insurance ..... 336
  - B. Insurer’s Duty to Defend, Indemnify and Settle ..... 337
  - C. Screening of Spurious Claims..... 341
- III. Changing the Litigation System ..... 348
  - A. Arbitration ..... 348
  - B. Mediation ..... 350
  - C. Caps on Malpractice Awards ..... 351
  - D. Caps on Attorney’s Fees ..... 355
  - E. Statutory Rate Freeze on Malpractice Premiums ..... 356
- IV. Countersuits ..... 357
- INDEX..... 361