

Table of Contents

CHAPTER 1. THEORIES OF LIABILITY

A. LIABILITY GENERALLY

- § 1:1 Health care liability claims
- § 1:2 Negligence, generally
- § 1:3 Physician-patient relationship
- § 1:4 Duty of care
- § 1:5 Delegation of duty
- § 1:6 Duty to consult
- § 1:7 Duty to warn
- § 1:8 Informed consent
- § 1:9 Informed consent for hysterectomy
- § 1:10 Implied consent
- § 1:11 Misrepresentation
- § 1:12 Abandonment
- § 1:13 Breach of contract/warranty
- § 1:14 Disclosure of patient information
- § 1:15 Sexual misconduct
- § 1:16 Deceptive Trade Practices Act (DTPA)
- § 1:17 Standard of care
- § 1:18 Res ipsa loquitur
- § 1:19 Captain of the ship doctrine
- § 1:20 Learned Intermediary Doctrine
- § 1:21 Borrowed Servant Doctrine
- § 1:22 Reasonable medical probability
- § 1:23 Physician as company employee
- § 1:24 Liability of physician professional associations

B. NURSE LIABILITY

- § 1:25 Negligence
- § 1:26 Standard of care

C. HOSPITAL/CORPORATE LIABILITY

- § 1:27 Generally
- § 1:28 Respondeat superior
- § 1:29 Negligent credentialing
- § 1:30 Negligent hiring and retention
- § 1:31 Negligent supervision
- § 1:32 Negligent policies and procedures

- § 1:33 Independent duty of care
- § 1:34 Denial of medical services/patient dumping
- § 1:35 Transfer policy required
- § 1:36 Standards related to hospital patient transfer agreements
- § 1:37 Strict liability
- § 1:38 Joint Commission standards
- § 1:39 Joint enterprise

D. PHYSICIAN ASSISTANT LIABILITY

- § 1:40 Practice governed by statute
- § 1:41 Physician supervision required
- § 1:42 Scope of practice
- § 1:43 Employment by health care facility
- § 1:44 Standard of care

E. NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS

- § 1:45 No general duty
- § 1:46 Bystander recovery

F. LOST CHANCE OF SURVIVAL

- § 1:47 No cause of action in Texas

G. CAUSATION

- § 1:48 Proof of proximate cause

H. AGENCY

- § 1:49 Actual agency
- § 1:50 Apparent/ostensible agency
- § 1:51 Agency by estoppel

I. MALICIOUS PROSECUTION

- § 1:52 Countersuit by physician
- § 1:53 Abuse of process required
- § 1:54 Other remedy available

J. VETERINARIAN LIABILITY

- § 1:55 Generally
- § 1:56 Liability for malpractice

K. PHARMACY LIABILITY

- § 1:57 Generally

TABLE OF CONTENTS

- § 1:58 Liability for malpractice
- § 1:59 Duty of care
- § 1:60 Duty to warn
- § 1:61 Classes of pharmacies
- § 1:62 TAC rules

L. DENTIST LIABILITY

- § 1:63 Generally
- § 1:64 Liability for malpractice

M. VOLUNTEER LIABILITY

- § 1:65 Generally

N. MENTAL HEALTH CLAIMS

- § 1:66 Generally

CHAPTER 2. MEDICAL MALPRACTICE UNDER THE FEDERAL TORT CLAIMS ACT

- § 2:1 Generally
- § 2:2 Administrative claim
- § 2:3 Jurisdiction and venue
- § 2:4 Service of process
- § 2:5 Statute of limitations
- § 2:6 Damages
- § 2:7 No jury
- § 2:8 *Feres* Doctrine
- § 2:9 Attorney's fees
- § 2:10 Final judgment
- § 2:11 Settlement
- § 2:12 Intentional acts
- § 2:13 Expert witnesses
- § 2:14 Application of FTCA to Community Health Centers

CHAPTER 3. MEDICAL MALPRACTICE CASES UNDER THE TEXAS TORT CLAIMS

- § 3:1 Generally
- § 3:2 Purpose of the act
- § 3:3 Notice Requirement: § 101.101
- § 3:4 Where to file suit: § 101.102
- § 3:5 When the governmental unit is liable: § 101.021
- § 3:6 Personal injury or death caused or contributed to by a
condition or use of tangible personal or real property

- § 3:7 Negligent use/condition of tangible property
- § 3:8 Negligent nonuse of tangible property
- § 3:9 Limitation of liability: § 101.023
- § 3:10 Per person cap
- § 3:11 Prejudgment interest
- § 3:12 Postjudgment interest
- § 3:13 Enforcement of judgments
- § 3:14 Exemplary damages: § 101.024
- § 3:15 Employees not liable after settlement or judgment:
§ 101.106
- § 3:16 Individual immunity: § 101.026
- § 3:17 Agency
- § 3:18 Waiver of immunity—Mental health claims
- § 3:19 Avoidance of Tort Claims Act defenses
- § 3:20 Emergency room physician as public servant
- § 3:21 Hospital district management contractors

CHAPTER 4. PLEADING AND PROVING THE MEDICAL NEGLIGENCE CASE

- § 4:1 Choosing the proper forum
- § 4:2 Notice
- § 4:3 Form 95
- § 4:4 Failure to give required notice is an affirmative
defense
- § 4:5 Petition and complaint
- § 4:6 Damage dollar amount prohibited
- § 4:7 Service of citation
- § 4:8 Medical records
- § 4:9 Spoliation of evidence
- § 4:10 Reliance on *res ipsa loquitur*
- § 4:11 Pleading and proving privileges
- § 4:12 Motion in limine
- § 4:13 Motion to shuffle
- § 4:14 Motion to equalize peremptory challenges
- § 4:15 *Batson* motion
- § 4:16 Rule 614 motion
- § 4:17 Expert report required—Statute
- § 4:18 Expert report required—Service
- § 4:19 Expert report required—Abatement
- § 4:20 Expert report required—Extension of time
- § 4:21 Expert report required—Remedies
- § 4:22 Expert report required—Interlocutory
appeals/mandamus
- § 4:23 Expert report required—Vicarious claims

TABLE OF CONTENTS

§ 4:24	Expert report required—FTCA claims
§ 4:25	Expert report required—EMTALA claims
§ 4:26	Expert report required—Informed consent
§ 4:27	Expert report required—Non-suit
§ 4:28	Expert report required—Discovery stayed
§ 4:29	Expert report required—Report not admissible
§ 4:30	Expert report required—Bankruptcy
§ 4:31	Form of expert report—Fair summary
§ 4:32	Form of expert report—Naming defendants
§ 4:33	Form of expert report—Standard of care
§ 4:34	Form of expert report—Conclusory reports
§ 4:35	Form of expert report—Causation
§ 4:36	Form of expert report—Qualifications of expert
§ 4:37	Form of expert report—Deposition excerpts as report
§ 4:38	Form of expert report—Heightened standard of care
§ 4:39	Form of expert report—Curriculum vitae as part of expert report
§ 4:40	Form of expert report—Materials outside the report
§ 4:41	Objections to and waiver of adequacy of expert report
§ 4:42	Exclusion of evidence
§ 4:43	Misidentification of parties
§ 4:44	Jury argument
§ 4:45	Superseded pleadings
§ 4:46	Standing and Capacity

CHAPTER 5. STATUTES OF LIMITATION

§ 5:1	Limitations, generally
§ 5:2	Later-added defendants
§ 5:3	Service of process; due diligence
§ 5:4	Limitations as an affirmative defense
§ 5:5	Continuing treatment rule
§ 5:6	Date of tort controls over continuing course of treatment
§ 5:7	Discovery rule
§ 5:8	Application of the discovery rule in personal injury cases
§ 5:9	Limitations in wrongful death and survival cases
§ 5:10	Notice of claim tolls statute of limitations
§ 5:11	Fraudulent concealment
§ 5:12	Incompetents
§ 5:13	Minors
§ 5:14	Federal Tort Claims Act
§ 5:15	Texas Tort Claims Act
§ 5:16	Medical devices and drug products

- § 5:17 Sexual misconduct
- § 5:18 Absence from state

CHAPTER 6. SUING AND DEFENDING HMOs

- § 6:1 Generally
- § 6:2 Liability of HMO for medical negligence
- § 6:3 Claims against HMOs
- § 6:4 ERISA and preemption of state law
- § 6:5 Claims that are preempted
- § 6:6 Application of ERISA's preemption clause
- § 6:7 Preemption and removal of medical negligence claims
- § 6:8 Waiver
- § 6:9 Counsel's strategy
- § 6:10 Liability for denial of care

CHAPTER 7. DISCOVERY

- § 7:1 Generally
- § 7:2 Interrogatories
- § 7:3 Requests for production
- § 7:4 Requests for admissions
- § 7:5 Requests for disclosure
- § 7:6 Standardized discovery in malpractice cases
- § 7:7 Depositions
- § 7:8 Physical and mental examinations
- § 7:9 Discovery of medical records
- § 7:10 Peer review records
- § 7:11 Privileges, generally
- § 7:12 Physician-patient privilege
- § 7:13 Attorney-client privilege
- § 7:14 Work product privilege
- § 7:15 Judicial communications privilege
- § 7:16 Communications to clergymen privilege
- § 7:17 Waiver of privilege

CHAPTER 8. DAMAGES

- § 8:1 Damages, generally
- § 8:2 Damage caps under Chapter 74
- § 8:3 Calculating the damage cap
- § 8:4 Calculating the damage cap when one or more defendants settle
- § 8:5 Credits for settlement
- § 8:6 Damage caps under the Texas Tort Claims Act

TABLE OF CONTENTS

§ 8:7	Damage caps under the Federal Tort Claims Act
§ 8:8	Medical expenses
§ 8:9	Paid or incurred
§ 8:10	Funeral expenses
§ 8:11	Pain and suffering
§ 8:12	Preexisting conditions
§ 8:13	Negligent infliction of emotional distress
§ 8:14	Mental anguish, generally
§ 8:15	Determining mental anguish damages
§ 8:16	Mental anguish damages in wrongful death cases
§ 8:17	Bystander damages
§ 8:18	Loss of earnings
§ 8:19	Impaired and destroyed wage earning capacity
§ 8:20	Loss of inheritance
§ 8:21	Loss of household services
§ 8:22	Disfigurement
§ 8:23	Exemplary damages
§ 8:24	Bifurcation of trial
§ 8:25	Constitutionality of punitive damages
§ 8:26	Hedonic damages/Loss of enjoyment of life
§ 8:27	Loss of parental consortium
§ 8:28	Loss of spousal consortium
§ 8:29	Loss of consortium in wrongful death cases
§ 8:30	Prejudgment interest
§ 8:31	Postjudgment interest
§ 8:32	Past personal care
§ 8:33	Physical impairment
§ 8:34	Sexual exploitation damages
§ 8:35	Wrongful death and survival actions
§ 8:36	Persons who may claim damages under the Wrongful Death Act
§ 8:37	Remarriage of surviving spouse
§ 8:38	Wrongful pregnancy
§ 8:39	Wrongful birth
§ 8:40	Wrongful life
§ 8:41	Wrongful death of a fetus
§ 8:42	Collateral source rule
§ 8:43	Gratuitous medical services
§ 8:44	Mitigation of damages
§ 8:45	Tax on recovery of damages
§ 8:46	Joint and several liability
§ 8:47	Damages for loss of a pet
§ 8:48	Future damages
§ 8:49	Hospital liens

CHAPTER 9. WRONGFUL DEATH OF A FETUS

- § 9:1 Wrongful death of a fetus—Generally
- § 9:2 Some jurisdictions undecided
- § 9:3 Majority rule—History and development
- § 9:4 Minority rule—History and development
- § 9:5 Texas cause of action
- § 9:6 Damages
- § 9:7 Constitutional equal protection
- § 9:8 Plaintiffs' strategy
- § 9:9 Defendants' strategy
- § 9:10 Wrongful death of a fetus after September 1, 2003

CHAPTER 10. INSURANCE ISSUES

- § 10:1 Introduction
- § 10:2 Physician's insurance policy
- § 10:3 Malpractice insurance for nurses
- § 10:4 Duty to defend
- § 10:5 Qualified defense
- § 10:6 The Stowers doctrine
- § 10:7 *Stowers* doctrine—Statute of limitations
- § 10:8 *Stowers* doctrine—Assignment required
- § 10:9 Excess insurer's duty
- § 10:10 Bad faith
- § 10:11 Damages, generally
- § 10:12 Punitive damages
- § 10:13 Multiple claimants
- § 10:14 Multiple defendants and conflicts of interest
- § 10:15 Bifurcated trials
- § 10:16 Subrogation
- § 10:17 Insolvency of the health care provider
- § 10:18 Insolvency of the insurance company
- § 10:19 Liability of insurance agent/broker
- § 10:20 National Practitioners Data Bank
- § 10:21 Reporting requirements
- § 10:22 Time of reports
- § 10:23 Confidentiality of reported information
- § 10:24 Liability insurance at trial
- § 10:25 Insuror in receivership

CHAPTER 11. SETTLEMENTS

- § 11:1 Generally
- § 11:2 Authority to settle

TABLE OF CONTENTS

§ 11:3	<i>Stowers</i> considerations
§ 11:4	Attorney/carrier negotiations
§ 11:5	Attorney/attorney negotiations
§ 11:6	Mediation
§ 11:7	Premediation considerations
§ 11:8	Mediation tactics for the plaintiff
§ 11:9	Mediation tactics for the defendant
§ 11:10	Role of the mediator
§ 11:11	Structured settlements, generally
§ 11:12	Settlements for minors and incapacitated persons/ guardian ad litem
§ 11:13	Insurance annuity
§ 11:14	Treasury bond structure
§ 11:15	Tax considerations
§ 11:16	Section 142 trust
§ 11:17	Special needs trust
§ 11:18	Subrogation, generally
§ 11:19	Workers' compensation liens
§ 11:20	Medicare liens
§ 11:21	Medicaid liens
§ 11:22	Structuring attorney's fees
§ 11:23	High/low settlement agreements
§ 11:24	Settlement agreements discoverable
§ 11:25	Evidence of settlement offer inadmissible
§ 11:26	Mary Carter agreements
§ 11:27	Enforcement of settlement agreements
§ 11:28	Offsets
§ 11:29	Structured Settlement Protection Act
§ 11:30	Offer of settlement
§ 11:31	Settling persons

CHAPTER 12. EXPERT WITNESSES

§ 12:1	Generally
§ 12:2	Qualifications of expert witness
§ 12:3	Necessity of expert testimony
§ 12:4	Standard of care
§ 12:5	Admissibility of expert testimony
§ 12:6	<i>Daubert</i> test
§ 12:7	Proximate cause
§ 12:8	Discovery of experts
§ 12:9	Time of expert designation
§ 12:10	Supplementing discovery
§ 12:11	Compensation
§ 12:12	Consulting experts

- § 12:13 Ex parte communications
- § 12:14 Texts and treatises
- § 12:15 Ultimate issue
- § 12:16 Expert testimony by videotape
- § 12:17 Expert witness and the “rule”
- § 12:18 Expert reports necessary
- § 12:19 Judicial admissions

CHAPTER 13. DEFENSES

- § 13:1 Defenses, generally
- § 13:2 Good Samaritan Act
- § 13:3 Defenses in sexual exploitation cases
- § 13:4 Hearsay
- § 13:5 Affirmative defenses
- § 13:6 Contributory negligence
- § 13:7 Comparative negligence/proportionate responsibility
- § 13:8 Assumption of risk
- § 13:9 Statute of limitations
- § 13:10 Res judicata and collateral estoppel
- § 13:11 Inferential rebuttal defenses
- § 13:12 Sole proximate cause
- § 13:13 Unavoidable accident
- § 13:14 Sudden emergency
- § 13:15 New and independent cause/superseding cause
- § 13:16 Act of God
- § 13:17 Judicial estoppel
- § 13:18 Designation of responsible third parties

CHAPTER 14. SUMMARY JUDGMENT PRACTICE

- § 14:1 Generally
- § 14:2 The motion
- § 14:3 Use of expert testimony
- § 14:4 Use of unfiled materials
- § 14:5 Affidavits
- § 14:6 Standard of care
- § 14:7 Medical records
- § 14:8 Depositions and pleadings as summary judgment proof
- § 14:9 Burden of proof
- § 14:10 Affirmative defenses
- § 14:11 Chapter 74 report as summary judgment evidence
- § 14:12 No-evidence summary judgment

TABLE OF CONTENTS

CHAPTER 15. MEDICAL PRODUCTS AND DEVICES

- § 15:1 Generally
- § 15:2 Negligence
- § 15:3 Strict liability
- § 15:4 Strict liability under § 402B
- § 15:5 Failure to warn
- § 15:6 Breach of warranty
- § 15:7 Proximate cause
- § 15:8 Subsequent remedial measures
- § 15:9 Recall letters and notification of defects

CHAPTER 16. INSTRUCTING THE JURY

- § 16:1 Jury instructions, generally
- § 16:2 Challenges to a venire member for cause
- § 16:3 Physician's/hospital's required degree of care/causation
- § 16:4 Degree of care when patient's condition creates a known or possible danger to the patient: definition
- § 16:5 Health care personnel's degree of care/causation: definition
- § 16:6 Inferential rebuttal instructions
- § 16:7 Unavoidable accident
- § 16:8 Act of God
- § 16:9 Sudden emergency
- § 16:10 Bad result: definition
- § 16:11 Sole proximate cause: definition
- § 16:12 Physician-patient relationship/termination of physician-patient relationship
- § 16:13 Submission of patient's contributory negligence
- § 16:14 Submission of settling person
- § 16:15 Comparative negligence
- § 16:16 Submission of contribution defendant
- § 16:17 Comparative negligence when contribution defendant is joined
- § 16:18 Comparative negligence—Derivative claimant
- § 16:19 Abandonment
- § 16:20 Res ipsa loquitur
- § 16:21 Informed consent
- § 16:22 Express warranty of cure
- § 16:23 Good Samaritan Act
- § 16:24 Medical battery
- § 16:25 Vicarious liability—Borrowed employee
- § 16:26 Ostensible agency

- § 16:27 Damages
- § 16:28 Exclusionary instructions for other aggravated conditions, preexisting conditions, and failure to mitigate
- § 16:29 Child's loss of consortium
- § 16:30 Wrongful death damages
- § 16:31 Survival damages
- § 16:32 Submission of negligent credentialing claim
- § 16:33 Submission of an EMTALA claim

CHAPTER 17. STANDARDS OF CARE

- § 17:1 Introduction
- § 17:2 Directories and encyclopedias
- § 17:3 Medline
- § 17:4 Standards of care, generally
- § 17:5 Standards of acute/critical-care nursing
- § 17:6 Standards of anesthesia care
- § 17:7 Standards of cardiac care
- § 17:8 Standards of college health care
- § 17:9 Standards for diagnostic testing and laboratories
- § 17:10 Standards of emergency care
- § 17:11 Standards of family practice
- § 17:12 Standards of gerontology/geriatric care
- § 17:13 Standards of health care in correctional facilities
- § 17:14 Standards of home health nursing care
- § 17:15 Standards of hospital care
- § 17:16 Standards for immunization practice
- § 17:17 Standards of infectious disease care
- § 17:18 Standards of life-support care
- § 17:19 Standards for medical assistants
- § 17:20 Standards of medication administration
- § 17:21 Standards of neonatal care
- § 17:22 Standards of neurology care
- § 17:23 Standards of neurosurgery care
- § 17:24 Standards for nurse anesthetists
- § 17:25 Standards for nurse practitioners
- § 17:26 Standards for nurses
- § 17:27 Standards of obstetric and gynecologic care
- § 17:28 Standards of oncology practice
- § 17:29 Standards of ophthalmology care
- § 17:30 Standards of orthopaedic care
- § 17:31 Standards of otolaryngology/otorhinolaryngology practice
- § 17:32 Standards of pediatric care

TABLE OF CONTENTS

- § 17:33 Standards of pediatric critical care
- § 17:34 Standards of perinatal care
- § 17:35 Standards of perioperative care
- § 17:36 Standards of psychiatric care
- § 17:37 Standards of radiology care
- § 17:38 Standards of respiratory/pulmonary care
- § 17:39 Standards of urology care
- § 17:40 Standards of allergy, asthma, and immunology care
- § 17:41 Standards of nursing home practice

CHAPTER 18. NURSING HOME LIABILITY

- § 18:1 Generally
- § 18:2 Negligent selection of staff
- § 18:3 Liability in tort based on breach of contract
- § 18:4 Admissibility of evidence
- § 18:5 Discovery
- § 18:6 Federal standards and regulations pertaining to nursing homes
- § 18:7 Texas standards and regulations pertaining to nursing homes
- § 18:8 Policies, procedures & quality assurance
- § 18:9 Administrators/directors
- § 18:10 Medical direction
- § 18:11 Governing body
- § 18:12 Quality of care
- § 18:13 Resident care plans
- § 18:14 Medical care
- § 18:15 Nursing care
- § 18:16 Transfer agreements
- § 18:17 Treatment
- § 18:18 Nutrition
- § 18:19 Safety
- § 18:20 Ancillary services
- § 18:21 Records
- § 18:22 Inspections
- § 18:23 Death of resident
- § 18:24 Advanced directives
- § 18:25 Investigating and reporting abuse
- § 18:26 Residents' rights
- § 18:27 Electronic monitoring
- § 18:28 Psychoactive drugs
- § 18:29 Medicaid issues
- § 18:30 Mental illness/mental retardation
- § 18:31 Prisoners in nursing homes

- § 18:32 Amelioration of violation
- § 18:33 Exemplary damages
- § 18:34 MDS and RAI
- § 18:35 Application of Texas Penal Code
- § 18:36 Arbitration
- § 18:37 Retaliation
- § 18:38 Investigative Reports and Records

CHAPTER 19. MEDICAL MALPRACTICE AND THE INTERNET

- § 19:1 Introduction
- § 19:2 Search engines
- § 19:3 Medical search engines
- § 19:4 Finding a medical expert using the Internet
- § 19:5 Internet phone books and e-mail directories
- § 19:6 Medical directories for physicians, nurses, and hospitals
- § 19:7 Disciplinary actions against physicians, nurses, and hospitals
- § 19:8 Web sites of official medical certification boards and medical societies
- § 19:9 Internet sites regarding patient safety and safety standards
- § 19:10 Medical articles
- § 19:11 Internet sites for prescription drugs and diagnosis information
- § 19:12 Governmental online resources
- § 19:13 Locating an attorney
- § 19:14 Corporate information
- § 19:15 Insurance information
- § 19:16 Physician and hospital billing codes

APPENDICES

Appendix A. Statutes

Volume 44A

- Appendix B. Discovery
- Appendix C. Pleadings, Motions & Orders
- Appendix D. Forms
- Appendix E. Medical Disclosure Texas Administrative Code
- Appendix F. Hospital Patient Transfer Policy Texas Administrative Code

TABLE OF CONTENTS

- Appendix G. Board of Nurse Examiners Texas Administrative Code
- Appendix H. Texas State Board of Medical Examiners—Rules and Regulations Relating to Physician Assistants Texas Administrative Code
- Appendix I. Standing Delegation Orders Texas Administrative Code
- Appendix J. Health Care Liability Vernon’s Texas Statutes and Code Annotated Civil Practice and Remedies Code
- Appendix K. Health and Human Services Texas Administrative Code
- Appendix L. Rights of Persons Receiving Mental Health Services Texas Administrative Code
- Appendix M. Structured Settlement Protection Act Vernon’s Texas Statutes and Codes Annotated Civil Practice and Remedies Code
- Appendix N. House Bill 658—Interest on Damages Subject to Medicare Subrogation

Table of Laws and Rules

Table of Cases

Index