# NDEX

# [References are to page number]

ABORTION, 380 ADVANCE CARE PLANNING generally, 722 information and tools Canada, 743 USA, 743 ADVANCE DIRECTIVES advance care planning, 722 information and tools Canada, 743 USA, 743 Canadian advance directive registries, 741 definitions, 677 advance care directive, 681 advance directive, 677 capacity to consent, 678 instructional directive, 679 living will, 680 power of attorney for personal care, 680 proxy, 679 proxy directive, 679 public trustee, 681 substitute decision maker, 680 federal advance directive registries, 741 first generation directive: the living will, 682 forms, 727 Emanuel/Emanuel Medical Directive, 727 Heyland Personal Directive, 736 Molloy Directive, 734 samples, online, 741 generally, 675, 685 legislation, provincial and territorial, 712, 740 living will, 682 provincial and territorial legislation, 740 registries, Canadian, 741 second generation directive: advance directive, 685 status in Canada at common law, 710

legislation, 712, 740 federally, 712 provincially, 715 terms used in, chart, 720 terms used in Canadian advance directive legislation, chart, 720 third generation directive: advance care planning, 722

#### AFTERCARE, DUTY TO PROVIDE, 168

#### AGGRAVATED SEXUAL ASSAULT, 281

AMERICAN LAW life-prolonging treatment, terminating/withholding best interests test, 583 criteria for decision to terminate, 569 decline, right to, 603 do-not-resuscitate (DNR) order, 601 feeding-tube, removing, 598 futility and, 589 leading cases, 424, 502 medical indications for terminating, 564 mercy killing, 751 no-code order, 601 privacy, right to, refuse, right to, 571 right to decline, 603 right to privacy, 603 substituted judgment test, 574 maternal/fetal conflict, 388 obstetrical interventions, 393 physician-assisted suicide generally, 832 Oregon, 836 refusal of treatment, 562 substance abuse, in pregnancy, 398 AMNIOCENTESIS, 342

#### ANENCEPHALY, 465

## APPEALS, 15

ASSISTED HUMAN REPRODUCTION generally, 407 legislation, 407 surrogacy, 411

ASSISTED SUICIDE Belgium, 870

legislation, 870 constitutional challenges to, 810 physician assisted, the Carter case, 815 comment on, 819 physician assisted, the Sue Rodriguez case, 810 comment on, 813 counselling and aiding by laypersons, Canadian cases, 804 counselling and aiding by physicians, Canadian cases, 806 developments in the United States, 832 United States Supreme Court, 834 generally, 749 laypersons, counselling and aiding by, 804 legalization, 886 logic, 886 Luxembourg, 875 legislation, 875 Netherlands, 852 evolution of, 852 legislation, 859 offence of counselling and aiding suicide mental element of, 807 comment on cases, 808, 810 palliative care, 886 physicians, counselling and aiding by, 806 Carter case, 815 comment on, 819 Sue Rodriguez case, 810 comment on, 813 suffering, 886 Switzerland, 878 Penal Code and Narcotics law, 878 ATTEND TO PATIENT, DUTY TO, 154 BATTERY definition, 20 generally, 20 informed consent and, 58 medical treatment and, 21 negligence and, 23 nursing and, 183 BEST INTERESTS TEST life-prolonging treatment, terminating/withholding American cases, 583 minors, pre-adolescent, 662

#### BIRTH

defects, 308-309 wrongful - see also WRONGFUL LIFE; WRONGFUL PREGNANCY Canadian cases, 352 essential elements of, 344 causation, 345 damages, 347 duty, 344 generally, 338 leading American cases, 340 BRAIN DEATH, 421, 465 CAPACITY TO CONSENT, 21 CAUSATION informed consent and, 64 wrongful birth, 345 CIVIL LITIGATION Court of Appeal, 15 discovery, 6 generally, 1 pleadings, 4 preparation for trial, 8 preliminary considerations, 3 pre-trial conferences, 10 motions, 8 Supreme Court of Canada, 17 trial, 10 facts, 10 law, 12 COMMON LAW advance directives, 710 consent of minors immature minors, 43 infants, 40 mature minors, 43 death, 424 fetus, 389 minors, consent of, 40 immature minors, 43 infants, 40 mature minors, 43

COMMON NUISANCE, 279 COMMUNICABLE DISEASE, see PUBLIC HEALTH LAW COMMUNICATE, DUTY TO, 170 COMMUNITY TREATMENT OPTIONS FOR THE MENTALLY ILL CTO effectiveness, 316 leaves of absence, 318 overview, 315 COMMUNITY TREATMENT ORDERS effectiveness of, 316 generally, 315 COMPENSATION FOR INJURIES accidents, 214 medical, 216 fault system and, 216 attack of, 219 defence of, 217 generally, 211 policy choices, 224 first party life and disability insurance, 228 New Zealand Model, 229 no-fault, 227 Swedish Model, 231 tort reform 225 report on liability and compensation in health care, 232 **CONDITIONAL CONSENT, 28** CONFIDENTIALITY duty to preserve, 238 exceptions, 246 consent, patient's, 257 court, in, 246 generally, 219-230 public interest, 252 statutory duty to disclose, 250 warn, duty to, 321 medical health practitioner's duty, 238 records, of patients' generally, 259 CONGENITAL condition, 343 disease, 340

CONSENT battery, 20 definition, 20 medical treatment and, 21 negligence and, 23 capacity to, 21 conditional, 28 emergency treatment and, 26 express, 23 extended procedures and, 26 generally, 19 implied, 23 informed battery or negligence, 58 causation, 64 cosmetic surgery and procedures, 66 innovative procedures, 69 inquisitive patients, 67 medical research, 68 reproductive choice, 71 right to know, waiver of, 67 therapeutic privilege, 68 disclosure requirements, 62 generally, 55 impact on role of physicians errors and blunders in the course of treatment, 74 physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 negligence model, 59 nursing and, 185 physicians, impact on role of errors and blunders in the course of treatment, 74 physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 special situations legislative initiatives British Columbia, 34 Ontario, 33 of mentally ill, 305

general principles, 306 exceptional, 314 non-psychiatric, 314 psychiatric, 307 of minors common law, 40 immature minors, 43 infants, 40 mature minors, 43 defensive practice, 51 generally, 38 legislative intervention, 49 proof of, 24 refusal of, 30 revocation of, 30 sterilization, 32 voluntary, 31 CONTACT NOTIFICATION duty, 272 generally, 272

## **CONTRACEPTIVE STERILIZATION, 370**

# COSMETIC SURGERY, 66

mediation, 273

#### CRIMINAL LAW

abortion and, 380 aggravated sexual assault, 281 assisted death and, 787 common nuisance, 279 criminal negligence, 280 death and, 434 mental disorder provisions, 324 negligence causing bodily harm, 280

# CRITERIA FOR THE DETERMINATION OF DEATH, 422

#### DAMAGES

medical negligence, 113 causation in fact, 114 proximate cause, 121 quantum, 126 remoteness of damage, 121 vicarious liability, 130 wrongful birth, 347

#### DEATH

```
at common law, 424
criminal law and, 434
defining, 422
uniform definition, proposal for, 435
legislation and, 431
parliament and, 434
```

## DIAGNOSE

```
duty to, 159
failure to, 123, 143
```

# DISCLOSE, DUTY TO confidentiality, 238 informed consent, 62 statutory, 250

# DISCOVERY, 6

## DISEASE

```
communicable, see PUBLIC HEALTH LAW congenital, 340
```

# DO-NOT-RESUSCITATE (DNR) ORDERS American cases, 603 Canadian cases, 617 refusal of treatment generally, 609

# DONATION OF ORGAN/TISSUE overview, 444 provincial legislation, 446 *inter vivos* gifts, 446

post mortem gifts, 457

# DOUBLE EFFECT, 793

```
DUTIES OF CARE
confidentiality, 238
exceptions to, 246
disclosure outside of court, 250
disclosure within court, 246
patient records and, 259
multiple aspects of, 154
to answer patient's questions, 67
to attend to patient, 154
to communicate with other involved professionals, 170
to diagnose, 159
to keep full and accurate records, 172
to know the patient, 72
```

to mentally ill tort liability issues, 319 patients, 319 non-Tarasoff circumstances, 323 third parties duty to warn, 321 to provide aftercare, 168 to refer, 167 to supervise colleagues, 173 to treat, 168 DUTIES OF PHYSICIAN see also DUTIES OF CARE consent, impact of on role of physicians errors and blunders in the course of treatment, 74 physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 duty of confidentiality, 238 exceptions to, 246 disclosure outside of court, 250 disclosure within court, 246 patient records and, 259 duty to answer patient's questions, 67 duty to attend to patient, 154 duty to communicate with other involved professionals, 170 duty to diagnose, 159 duty to keep full and accurate records, 172 duty to know the patient, 72 duty to mentally ill tort liability issues, 319 patients, 319 non-Tarasoff circumstances, 323 third parties duty to warn, 321 duty to provide aftercare, 168 duty to refer, 167 duty to supervise colleagues, 173 duty to treat, 168 DUTY TO DIAGNOSE, 159 EMERGENCY TREATMENT, CONSENT AND, 26 ERRORS, 74 **EUGENIC STERILIZATION, 366** 

EUTHANASIA Belgium, 870 legislation, 870 by health professionals, 764 American cases, 776 Canadian cases, 764 English cases, 771 by laypersons, 754 constitutional challenges to, 810 physician assisted, the Carter case, 815 comment on, 819 developments in the United States, 832 United States Supreme Court, 834 double effect, 793 guidelines and ethico-legal considerations, 800 escape hatches, 787 frequency of, 751 generally, 471, 749 law, 787 legal developments, 787 legalization issues, 886 logic, 886 Luxembourg, 875 Nazi euthanasia program, 884 legislation, 875 Netherlands, 852 evolution of, 852 legislation, 859 overview, 754 palliative care, 886 palliative sedation, 797 guidelines and ethico-legal considerations, 800 physician attitudes, 751 suffering, 886 Switzerland, 878 Penal Code and Narcotics law, 878

# **EXPRESS CONSENT, 23**

### EXTENDED PROCEDURES, CONSENT AND, 26

FORENSIC PSYCHIATRY forensic review boards, role of, 326 mental disorders and the *Criminal Code*, 324

**GENETIC COUNSELLING, 338** 

**IMPLIED CONSENT, 23** INFORMED CONSENT battery or negligence, 58 causation, 64 disclosure requirements, 62 generally, 55 impact on role of physicians errors and blunders in the course of treatment, 74 physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 negligence model, 59 nursing and, 185 physicians, impact on role of errors and blunders in the course of treatment, 74 physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 special situations cosmetic surgery and procedures, 66 innovative procedures, 69 inquisitive patients, 67 medical research, 68 reproductive choice, 71 right to know, waiver of, 67 therapeutic privilege, 68 INJURIES, COMPENSATION FOR accidents, 214 medical, 216 fault system and, 216 attack of, 219 defence of, 217 generally, 211 policy choices, 224 first party life and disability insurance, 228 New Zealand Model, 229 no-fault, 227 Swedish Model, 231 tort reform 225 report on liability and compensation in health care, 232 **INNOVATIVE PROCEDURES**, 69

**INQUISITIVE PATIENTS, 67** 

**INSTRUCTIONAL DIRECTIVES, 679** 

INVOLUNTARY COMMITTAL advocacy of mentally ill patients, 328 community treatment options, 315 consent to treatment, 305 case study, 310 exceptional, 314 general principles, 306 non-psychiatric, 314 psychiatric, 307 forensic psychiatry mental disorder provisions in the Criminal Code, 324 role of forensic review boards, 326 generally, 297 procedural requirements, 298 rights of mentally ill patients, 328 substantive requirements, 300 tort liability, 319

#### KNOW THE PATIENT, DUTY TO, 72

#### LEGALIZATION OF ASSISTED SUICIDE, 886

LEGISLATIVE INITIATIVES consent British Columbia, 34 Ontario, 33

LIFE-PROLONGING TREATMENT refusal of, 471 termination of, 471

#### LIVING WILL, 682

# MATERNAL/FETAL CONFLICT coerced caesarean delivery, 393 fetus, status at common law, 389 overview, 386 substance abuse in pregnancy, 398 Supreme Court of Canada and *Dobson*, 406

MATURE MINOR

refusal of treatment and Canadian cases, 522 English case, 549

generally, 521 life-prolonging treatment, 547 mature minor doctrine Canadian law and, 540 evolution of, 537 MEDICAL HEALTH OFFICERS duties of, 270 confidentiality, 271 to report, 271 powers of, 274 to close, 278 to detain, 276 to enter, 275 to examine, 274 to isolate, 277 MEDICAL NEGLIGENCE actionable negligence, 83 defences generally, 139 negligence, proof of, 141 essential elements of damages, 113 causation in fact, 114 proximate cause, 121 quantum, 126 remoteness of damage, 121 vicarious liability, 130 duty of care, 92 standard of care, 101 generally, 79 problems of proof generally, 139 negligence, proof of, 141 specific contexts, in generally, 153 multiple aspects of, 153 duty to attend to patient, 154 duty to communicate with other involved professionals, 170 duty to diagnose, 159 duty to keep full and accurate records, 172 duty to provide aftercare, 168 duty to refer, 167

duty to supervise colleagues, 173 duty to treat, 168 MEDICAL RECORDS confidentiality and, 259 nursing and, 197 physicians and, 172 MEDICAL RESEARCH, 68 MENTAL HEALTH LAW advocacy for the mentally ill, 328 community treatment options, 315 CTO effectiveness, 316 leaves of absence, 318 overview, 315 consent to treatment, 305 general principles, 306 exceptional, 314 non-psychiatric, 314 psychiatric, 307 euthanasia and, 473, 474 forensic psychiatry forensic review boards, role of, 326 mental disorders and the Criminal Code, 324 historical context, 295 involuntary committal, 297 procedural requirements, 298 substantive requirements, 300 overview, 293 rights of mentally ill, 328 social context, 295 tort liability issues, 319 duty to warn, 321 patients, 319 third parties duty to warn, 321 non-Tarasoff circumstances, 323 treatment, consent to, 305 general principles, 306 exceptional, 314 non-psychiatric, 314 psychiatric, 307 MENTALLY COMPETENT ADULT, REFUSAL OF TREATMENT AND Canadian law, 490

```
comment on the case law, 493
    Criminal Code considerations, 506
    generally, 485
    leading American cases, 486
    mental competency
        physician's responsibility re, 505
        to refuse, 495
    Nancy B. case, the, 490
        social policy implications of, 513
    outcome trap, 504
MENTALLY INCOMPETENT ADULT, REFUSAL OF TREATMENT AND
    American perspective, 555
        landmark cases, 556
             commentary on, 562
                 DNR order, 601
                 futility, 589
                 legal theory, 603
                 medical indications for terminating treatment, 564
                 no code order, 601
                 removal of a feeding tube, 598
                 standards of surrogate decision making, 571
                 who decides and by what criteria, 569
    case studies: caregiver-family conflict and withholding/withdrawing of
     treatment, 626
    case study: DNR of infant, 617
        commentary, 619
        overview, 617
    family, role of, 642
    generally, 609
    landmark UK cases, 614
        commentary on, 616
    role of family, 642
MINORS
    consent of
        common law, 40
             immature minors, 43
             infants, 40
             mature minors, 43
        defensive practice, 51
        generally, 38
        legislative intervention, 49
```

NEGLIGENCE battery, informed consent and, 23 causing bodily harm, 280 criminal, 280 medical, 91 NEONATES, REFUSAL OF TREATMENT AND best interests test, 662 parent as legal guardian, 666 uncertain prognosis, 668 Canadian cases, 652 Canadian Paediatric Society Guidelines, 670 conjoined twins case, 660 overview, 651 UK case, 660 NO-CODE ORDER, 601 NUISANCE, COMMON, 279 NURSING battery and, 183 informed consent and, 185 medical records and, 197 negligence and, 188 profession, changing face of, 179 responsibilities of, 203 OFFENCES criminal aggravated sexual assault, 281 common nuisance, 279 generally, 279 negligence causing bodily harm, 280 ORGAN DONATION overview, 444 provincial legislation, 446 inter vivos gifts, 446 post-mortem gifts, 457 PATIENT'S QUESTIONS, DUTY TO ANSWER, 67 PHYSICIAN as adviser, 71 assisted suicide, 474 as teacher, 73 consent, impact of on role of physicians errors and blunders in the course of treatment, 74

physician as adviser, 73 physician as teacher, 71 physician's duty to know patient, 72 physician's personal and professional attributes, 74 duty to answer patient's questions, 67 duty to attend to patient, 154 duty to communicate with other involved professionals, 170 duty of confidentiality, 238 exceptions to, 246 disclosure outside of court, 250 disclosure within court, 246 patient records and, 259 duty to diagnose, 159 duty to keep full and accurate records, 172 duty to know the patient, 72 duty to mentally ill tort liability issues, 319 patients, 319 non-Tarasoff circumstances, 323 third parties duty to warn, 321 duty to provide aftercare, 168 duty to refer, 167 duty to supervise colleagues, 173 duty to treat, 168 suicide, assisted by physician, 474 PLEADINGS, 4 PRE-ADOLESCENTS, REFUSAL OF TREATMENT AND best interests test, 662 parent as legal guardian, 666 uncertain prognosis, 668 Canadian cases, 652 Canadian Paediatric Society Guidelines, 670 conjoined twins case, 660 overview, 651 UK case, 660 PREGNANCY, WRONGFUL, 358 PRELIMINARY CONSIDERATIONS, TRIAL, 3 PREPARATION FOR TRIAL, 8

PRE-TRIAL conferences, 10 motions, 8

**PROOF OF CONSENT, 24** PROXY DIRECTIVES, 679 PUBLIC HEALTH LAW generally, 269 medical health officers duties of, 270 confidentiality, 271 to report, 271 powers of, 274 to close, 278 to detain, 276 to enter, 275 to examine, 274 to isolate, 277 notification, 272 penalty provisions, 278 criminal law, 279 public health law, 278 REFER, DUTY TO, 167 **REFUSAL OF CONSENT, 30 REFUSAL OF LIFE-PROLONGING TREATMENT, 471** REFUSAL OF TREATMENT mature minor patient Canadian cases, 522 English case, 549 generally, 521 life-prolonging treatment, 547 mature minor doctrine Canadian law and, 540 evolution of, 537 mentally competent adult Canadian law, 490 comment on the case law, 493 Criminal Code considerations, 506 generally, 485 leading American cases, 486 mental competency physician's responsibility re, 505 to refuse, 495 Nancy B. case, the, 490 social policy implications of, 513 outcome trap, 504

mentally incompetent adult American perspective, 555 landmark cases, 556 commentary on, 562 DNR order, 601 futility, 589 legal theory, 603 medical indications for terminating treatment, 564 no code order, 601 removal of a feeding tube, 598 standards of surrogate decision making, 571 who decides and by what criteria, 569 case studies: caregiver-family conflict and withholding/withdrawing of treatment, 626 case study: DNR of infant, 617 commentary, 619 overview, 617 family, role of, 642 generally, 609 landmark UK cases, 614 commentary on, 616 role of family, 642 neonates best interests test, 662 parent as legal guardian, 666 uncertain prognosis, 668 Canadian cases, 652 Canadian Paediatric Society Guidelines, 670 conjoined twins case, 660 overview, 651 UK case, 660 pre-adolescents best interests test, 662 parent as legal guardian, 666 uncertain prognosis, 668 Canadian cases, 652 Canadian Paediatric Society Guidelines, 670 conjoined twins case, 660 overview, 651 UK case, 660 **REPORT CASES, DUTY TO, 271** REPRODUCTIVE CHOICE abortion, 380

assisted human reproduction, 407 legislation, 407 surrogacy, 411 informed consent and, 71 maternal/fetal conflict, 386 coerced caesarean delivery, 393 fetus, status at common law, 389 overview, 386 substance abuse in pregnancy, 398 Supreme Court of Canada and Dobson, 406 sterilization, 366 consent to, 32 contraceptive, 370 eugenic, 366 wrongful birth, 338 Canadian cases, 352 essential elements of, 344 causation, 345 damages, 347 duty, 344 generally, 338 leading American cases, 340 wrongful pregnancy, 358

# **REVOCATION OF CONSENT, 30**

## RIGHT TO KNOW, WAIVER OF, 67

STERILIZATION consent to, 32 contraceptive, 370 eugenic, 366

## SUPREME COURT OF CANADA, 17

## TERMINATION OF LIFE PROLONGING TREATMENT, 471

# THERAPEUTIC PRIVILEGE, 68

TISSUE DONATION overview, 444 provincial legislation, 446 *inter vivos* gifts, 446 post-mortem gifts, 457

# TRIAL

facts, 10 law, 12 preparation, 8

VOLUNTARY CONSENT, 31

WAIVER OF RIGHT TO KNOW, 67 WRONGFUL BIRTH Canadian cases, 352 essential elements of, 344 causation, 345 damages, 347 duty, 344 generally, 338 leading American cases, 340 WRONGFUL PREGNANCY, 358