

Table of Contents

PART I. MEDICAL MALPRACTICE

CHAPTER 1. HISTORICAL BACKGROUND

§ 1.1 In general

CHAPTER 2. LEGAL GROUNDS FOR MALPRACTICE CLAIMS

- § 2.2 Negligence and duty of care
- § 2.4 Jurisdiction
- § 2.5 Who has a duty of care?
- § 2.6 To whom is a duty of care owed?
- § 2.8 Negligence claims relating to sterilization procedures and genetic counseling
- § 2.9 Sexual relations with patient
- § 2.10 Contract actions
- § 2.11 M.G.L.A. c. 93A
- § 2.12 Sample complaints in medical malpractice actions

CHAPTER 3. INFORMED CONSENT

- § 3.1 The development of the doctrine of informed consent
- § 3.2 Proof of an informed consent claim
- § 3.3 Who must disclose?
- § 3.4 What must be disclosed?
- § 3.5 The role of expert testimony
- § 3.6 The privilege of nondisclosure
- § 3.7 Consent forms
- § 3.8 Treatment without consent
- § 3.9 The emergency exception
- § 3.11 Who may give informed consent?

CHAPTER 4. CAUSATION

- § 4.1 Proximate cause
- § 4.1.50 Factual cause *[New]*
- § 4.2 “Loss of chance”
- § 4.4 Intervening and superseding causes
- § 4.6 Res ipsa loquitor
- § 4.7 Increased likelihood of future injury due to exposure to a known hazardous substance *[New]*

CHAPTER 4A. DISCLOSURE OF UNANTICIPATED OUTCOME, INADMISSIBILITY OF EXPRESSIONS OF APOLOGY AND NOTICE OF COMMENCEMENT OF ACTION *[New]*

- § 4A.1 Mandated disclosure to patient *[Retitled]*
- § 4A.1.50 Mandated disclosure to the Department of Public Health *[New]*
- § 4A.2 Inadmissibility of expressions of apology *[New]*
- § 4A.3 Notice *[New]*
- § 4A.4 Exemption to notice requirement *[New]*
- § 4A.5 Response to notice *[New]*
- § 4A.6 Provider's access to records *[New]*

CHAPTER 5. THE MEDICAL MALPRACTICE SCREENING TRIBUNAL

- § 5.1 Introduction
- § 5.2 What actions are subject to tribunal review?
- § 5.3 Waiver of hearing
- § 5.4 Necessity of hearing
- § 5.5 Timing of tribunal hearing
- § 5.6 Composition of the tribunal
- § 5.7 The offer of proof
- § 5.8 The tribunal standard
- § 5.9 Substantive requirements of the offer of proof
- § 5.11 The tribunal decision
- § 5.12 Appeal of tribunal decision
- § 5.13 Tribunal finding adverse to defendant
- § 5.14 Federal actions
- § 5.15 Standard of review
- § 5.16 The bond requirement
- § 5.18 Obtaining payment of bond
- § 5.19 Discovery prior to tribunal hearing

CHAPTER 6. DISCOVERY

- § 6.1 Before the commencement of litigation
- § 6.2 After commencement of the action—Peer review proceedings

CHAPTER 7. PROOF WITH AND WITHOUT EXPERT TESTIMONY

- § 7.1 Introduction
- § 7.2 Qualifying an expert
- § 7.3 Basis of expert opinion
- § 7.4 Disclosure of basis of opinion
- § 7.6 Proof without an expert
- § 7.7 Learned treatises
- § 7.8 Admissions

TABLE OF CONTENTS

CHAPTER 8. DEFENSES

- § 8.3 Limitations—Accrual, the discovery rule and statute of repose
- § 8.4 Limitations—Actions by minors
- § 8.5 Limitations—Actions by mentally ill persons
- § 8.7 Limitations—Conscious pain and suffering preceding wrongful death
- § 8.8 Limitations—Death of the tortfeasor
- § 8.12 Charitable immunity
- § 8.13 Qualifying as a charitable organization
- § 8.15 Governmental immunity
- § 8.16 Emergency and other exemptions from liability

CHAPTER 9. INSTITUTIONAL AND VICARIOUS LIABILITY FOR MEDICAL MALPRACTICE

- § 9.2 Health maintenance organizations and similar managed care organizations
- § 9.4.50 Liability of Directors *[New]*
- § 9.7 Apparent (or ostensible) authority
- § 9.8 Corporate negligence
- § 9.11 EMTALA

CHAPTER 10. TRIALS

- § 10.3 Introducing substantive evidence under M.G.L.A. c. 233 § 79G
- § 10.5 Spoliation
- § 10.10 Use of treatise in cross-examination of expert witness
- § 10.11 Common trial issues
- § 10.14 Recommended jury instructions
- § 10.15 Arbitration *[New]*
- § 10.16 High-low agreements *[New]*

CHAPTER 11. VERDICT REQUIREMENTS AND LIMITATIONS ON VERDICTS AND ATTORNEY FEES

- § 11.2 Itemization of verdict
- § 11.5 Interest on medical malpractice verdicts
- § 11.6 Reduction of award—Collateral benefits
- § 11.9 Limitations in the event of the insolvency of an insurer *[New]*

CHAPTER 12. OTHER MEDICAL PROFESSIONALS

- § 12.2 Dentists
- § 12.5 Nurses—Duty of care
- § 12.13 Psychiatrists and psychologists
- § 12.18 Nursing homes
- § 12.19 Veterinarians
- § 12.20 Medical examiners *[New]*

CHAPTER 13. MEDICAL PRODUCTS LIABILITY

- § 13.2 The learned intermediary doctrine
- § 13.3 Federal preemption
- § 13.3.50 Liability immunity—The Public Readiness and Emergency Preparedness Act *[New]*
- § 13.6 Res Ipsa Loquitor *[New]*
- § 13.7 Off-Label use *[New]*

PART II. LEGAL MALPRACTICE

CHAPTER 14. THE UNAVOIDABLE MALPRACTICE RISK

- § 14.1 Introduction
- § 14.2 Structural causes of risk—Introduction
- § 14.4 Structural causes of risk—Human weakness
- § 14.5 Structural causes of risk—The law's complexity
- § 14.6 Structural causes of risk—The complexity of the lawyer's role
- § 14.7 Structural causes of risk—Beginners' mistakes
- § 14.8 Structural causes of risk—Emotional turmoil
- § 14.10 Recent causes of enhanced malpractice risk—Introduction
- § 14.11 Recent causes of enhanced malpractice risk—Changes in society and culture
- § 14.12 Recent causes of enhanced malpractice risk—Changes in our technology
- § 14.13 Recent causes of enhanced malpractice risk—Changes in the law
- § 14.14 Recent causes of enhanced malpractice risk—Changes in the legal profession
- § 14.15 Looking back and forward

CHAPTER 15. AN OVERVIEW OF LEGAL MALPRACTICE LIABILITY

- § 15.1 Basic concepts
- § 15.2 The many varieties of malpractice claims
- § 15.7 A survey of legal malpractice cases—*Fishman v. Brooks*
- § 15.10 A survey of legal malpractice cases—*Miller v. Mooney*

CHAPTER 16. AN ANNOTATED PRIMER OF LEGAL MALPRACTICE LAW IN MASSACHUSETTS

- § 16.1 Some definitional distinctions
- § 16.3 The attorney–client relationship—Express contract
- § 16.5 The attorney–client relationship—Implied contract with prospective clients
- § 16.6 The attorney–client relationship—Scope of representation
- § 16.8 The attorney–client relationship—Who is the client—Business entities

TABLE OF CONTENTS

§ 16.9	The attorney–client relationship—Who is the client—Insurance defense
§ 16.14	The attorney–client relationship—Who is the client—Divorce proceedings
§ 16.15	The attorney–client relationship—Who is the client—Referrals
§ 16.16	The attorney–client relationship—Who is the client—Consultations
§ 16.17	The attorney–client relationship—Who is the client—Class actions
§ 16.20	The attorney–client relationship—Non-client third parties—Limits on the “third-party reliance” exception
§ 16.21	The attorney–client relationship—Non-client third parties—The “joint benefit” gloss on the “third-party reliance” exception
§ 16.22	The attorney–client relationship—Non-client third parties—Negligent misrepresentation
§ 16.24	The attorney–client relationship—Non-client third parties—Assignment
§ 16.26	The attorney’s standard of care
§ 16.30	The attorney’s standard of care—The “enhanced” standard of care for specialists
§ 16.32	The attorney’s standard of care—Can there be technological enhancement of the standard of care?
§ 16.34	The attorney’s standard of care—Establishing the standard of care in particular cases
§ 16.35	Breach of the duty of care—The variety of breaches
§ 16.36	Breach of the duty of care—The variety of breaches—Settlements
§ 16.37	Breach of the duty of care—Ethical violation as breach of the duty of care
§ 16.38	Breach of the duty of care—Proving breach of the duty of care—The need for expert testimony
§ 16.39	Causation—In general
§ 16.40	Causation—The “trial within a trial”
§ 16.41	Causation—The “trial within a trial”—Use of expert testimony
§ 16.42	Causation—The “trial within a trial”—Evidentiary issues
§ 16.46	Causation—The burden of proof—The plaintiff as criminal defendant below
§ 16.47	Causation—Collectibility
§ 16.48	Causation—A questionable alternative theory of causation—“Settlement value”
§ 16.52	Damages—Types of cases—Mishandling prosecution of the action
§ 16.54	Damages—Types of cases—Mishandling settlement
§ 16.66	Damages reduction—Attorney’s fees
§ 16.69	Defenses—Procedural defenses—Motions to dismiss
§ 16.70	Defenses—Procedural defenses—Summary judgment motions
§ 16.71	Defenses—Statute of limitations
§ 16.72	Defenses—Statute of limitations—Accrual
§ 16.73	Defenses—Statute of limitations—Tolling
§ 16.74	Defenses—Statute of limitations—Tolling—Continuing representation
§ 16.77	Defenses—Other defenses—In general

- § 16.79 Defenses—Other defenses—Failure of plaintiff to mitigate
- § 16.80 Defenses—Other defenses—“Judgmental immunity”
- § 16.81 Defenses—Other defenses—Judicial estoppel
- § 16.82 Defenses—Other defenses—*In pari delicto*
- § 16.83 Defenses—Other defenses—Release

CHAPTER 17. NON-MALPRACTICE BASES FOR ATTORNEY LIABILITY

- § 17.1 Fiduciary liability
- § 17.2 Vicarious liability
- § 17.3 Liability under M.G.L.A. c. 93A—In general
- § 17.4 Liability under M.G.L.A. c. 93A—Application to attorney
misconduct
- § 17.5 Liability under M.G.L.A. c. 93A—Other procedural aspects of c.
93A claims
- § 17.6 Liability under ethical standards

PART III. OTHER PROFESSIONS

CHAPTER 18. MALPRACTICE ISSUES AFFECTING OTHER, NON-MEDICAL, NON-LEGAL PROFESSIONS

- § 18.1 What is a “profession”?
- § 18.3 Similarities and differences compared to legal malpractice
- § 18.5 Accountants
- § 18.8 Accountants—As to clients—Damages issues
- § 18.9 Accountants—As to clients—Statute of limitations
- § 18.10 Accountants—As to clients—Other defenses
- § 18.13 Design professionals
- § 18.14 Design professionals—Statute of repose
- § 18.15 Design professionals—Contract limitations on the
professional’s duty
- § 18.18 Insurance brokers/agents
- § 18.19 Real estate brokers/agents
- § 18.20 Appraisers
- § 18.21 Stockbrokers
- § 18.23 Other “professions”

Appendices

Appendix A. Massachusetts Cases Citing to the Restatement (Third)
of the Law Governing Lawyers

Appendix B. Legal Malpractice Risk and Case Management *[New]*

Appendix C. A Baker’s Dozen (and More) Experiential Tips to Limit
Exposure to Legal Malpractice Claims *[New]*

Table of Laws and Rules

Table of Cases

TABLE OF CONTENTS

Index