

Table of Contents

CHAPTER 1. ACCEPTING A CASE

I. TEXT

- § 1:1 Introduction to case assessment—Systematic approach
- § 1:2 —Sample case assessment checklist
- § 1:3 —Aspects of case assessment guidelines—Statute of limitations
- § 1:4 — —Determination of provable facts
- § 1:5 — —Credibility of potential plaintiff
- § 1:6 — —Expertise and experience of counsel, need for assistance
- § 1:7 — —Determination of probable damages
- § 1:8 — —Evaluation of all possible defendants
- § 1:9 — —Evaluation of all possible defenses
- § 1:10 — —Burden of proof to put case before jury
- § 1:11 — —Client’s desired outcome
- § 1:12 — —Expected costs
- § 1:13 — —Other factors
- § 1:14 Client interview—Generally—Scheduling the initial interview
- § 1:15 — —Interview sheet
- § 1:16 — —Medical history
- § 1:17 — —During the interview
- § 1:18 — —Contingent fee contract
- § 1:19 Automobile accident case—Pre-interview preparation
- § 1:20 —Use of photographs in proving facts
- § 1:21 —Obtaining witness statements
- § 1:22 —Uninsured and underinsured motorist coverage
- § 1:23 Products liability case—Generally
- § 1:24 —Obtaining the injury-causing product
- § 1:25 —Retaining a product expert
- § 1:26 Medical malpractice
- § 1:27 —Emergency room visit
- § 1:28 —Ongoing treatment
- § 1:29 —Hospital
- § 1:30 —Contact with treating physicians
- § 1:31 Subrogation—Early determinations
- § 1:32 —Medicare
- § 1:33 —Medicaid
- § 1:34 —Bureau of Worker’s Compensation
- § 1:35 —ERISA (The Employee Retirement Income Security Act of 1974)
- § 1:36 Letter of nonrepresentation
- § 1:37 Evaluating the case—Viability of case
- § 1:38 —Existing case law and test cases
- § 1:39 The products liability case; gathering information

II. FORMS

- § 1:40 Intake—Automobile accident checklist form
- § 1:41 —Medical malpractice checklist form
- § 1:42 —Products liability checklist form
- § 1:43 Confidential client information form
- § 1:44 Contingent fee agreement form
- § 1:45 Closing statement form
- § 1:46 Sample non-representation letter
- § 1:47 Sample diary card form

CHAPTER 2. GATHERING INFORMATION BEFORE SUIT**I. TEXT**

- § 2:1 Introduction
- § 2:2 Proximate cause
- § 2:3 Products liability cases—Informal presuit information gathering
 - § 2:4 —Action for discovery under R.C. 2317.48
 - § 2:5 —Equitable bill of discovery
 - § 2:6 —Depositions prior to suit
 - § 2:7 Medical malpractice cases—Court docket check
 - § 2:8 —Sources for standard of conduct
 - § 2:9 —Medical records—How much to obtain
 - § 2:10 — —Which records to obtain
 - § 2:11 —Information found on medical records
 - § 2:12 —Medical reports of treating physicians and experts—
Treating physicians' reports
 - § 2:13 — —Experts' reports
 - § 2:14 —Peer review documents
 - § 2:15 Other sources of information—Employment history
 - § 2:16 —Workers' compensation file
 - § 2:17 —Lost wage information
 - § 2:18 —Client's personal physician
 - § 2:19 Review of facts before filing complaint—Minisummaries
 - § 2:20 —Refreshing the client's memory
 - § 2:21 Review of law before filing complaint—Importance of legal research
 - § 2:22 —Products liability cases
 - § 2:23 —Medical malpractice cases
 - § 2:24 —Senate Bill 80: Tort Reform
 - § 2:25 Physician-patient privilege—Authorizations, production motions, protective orders
 - § 2:26 —Statutory definition of privilege—Prior to 1988
 - § 2:27 — —Physician-patient privilege after 1988 amendments
 - § 2:28 Early settlement opportunities—Policy limits
 - § 2:29 —Underinsured or uninsured motorist considerations

II. FORMS

- § 2:30 Complaint for discovery with interrogatories form—
Complaint for discovery

TABLE OF CONTENTS

- § 2:31 —Interrogatories
- § 2:32 Request to enter land form
- § 2:33 Journal entry and order granting bill of discovery form
- § 2:34 Request for police accident report form
- § 2:35 Request for state highway patrol accident report form
- § 2:36 Authorization of representative of claimant form
- § 2:37 Authorization to release medical and/or hospital records form
- § 2:38 Request for wage information form
- § 2:39 Policy limits demand letter form
- § 2:40 Covenant not to sue or to cease suing form
- § 2:41 Litigation hold letter form

CHAPTER 3. PLEADING THE COMPLAINT

I. TEXT

- § 3:1 Overview—Where to file suit: Jurisdiction and venue
- § 3:2 Bases for removal to federal court
- § 3:3 Overview—When to file suit: Limitation periods
- § 3:4 —Contents of complaint—Short and plain statement
- § 3:5 Pleading the prescription drug claim
- § 3:6 Overview—Contents of complaint—Jury demand
- § 3:7 — —Signature block
- § 3:8 — —Caption
- § 3:9 — —Separate counts, numbered paragraphs
- § 3:10 —Service of the complaint
- § 3:11 Parties plaintiff—Marital status
- § 3:12 —Wrongful death complaint
- § 3:13 —Minor child injury complaint
- § 3:14 Parties defendant
- § 3:15 Pleading damages—General and special damages
- § 3:16 —Wrongful death damages
- § 3:17 —Minor child damages
- § 3:18 —Punitive damages—Introduction
- § 3:19 — —Compensatory award prerequisite
- § 3:20 — —Cap on punitive damages
- § 3:21 — —Corporate liability in punitive damages
- § 3:22 — —Strategic considerations
- § 3:23 —Punitive damages; burden of proof for punitive damages
- § 3:24 —Restrictions on prayer in complaint
- § 3:25 —Collateral benefits
- § 3:26 When notice pleading insufficient—Introduction
- § 3:27 —Raising constitutional issues—Political subdivision immunity
- § 3:28 — —Consultation with client before filing complaint
- § 3:29 —Clarifying accrual date
- § 3:30 —Pleading statute of limitations
- § 3:31 —Accrual after discovery
- § 3:32 —Special pleading rules—Fraud or mistake
- § 3:33 — —Intentional tort by employer

- § 3:34 — —Assessing the employer intentional tort claim
- § 3:35 — —Waiver of affirmative defenses
- § 3:36 — —Supplementation
- § 3:37 —Medical malpractice complaint
- § 3:38 180-day letter in malpractice action
- § 3:39 Statute of Repose in malpractice action
- § 3:40 When notice pleading insufficient—UCC Claims
- § 3:41 Winning the discovery race; attachments to complaint
- § 3:42 Amendment of pleadings
- § 3:43 When an amended pleading can relate back to original complaint
- § 3:44 Striking a pleading or portion of a pleading
- § 3:45 Motion for judgment on the pleadings
- § 3:46 Admissions in pleadings
- § 3:47 Voluntary dismissal
- § 3:48 Dismissal or stay of trial proceedings pending arbitration

II. FORMS

- § 3:49 Medical malpractice complaint; minor plaintiff's medical expenses, parents' pain and suffering form
- § 3:50 Products liability complaint; minor plaintiff, parents' loss of consortium, parents' own injury claims form
- § 3:51 Complaint—Negligent operation of automobile form
- § 3:52 —Municipal liability form
- § 3:53 —Wrongful death form
- § 3:54 —Negligent operation of automobile, multiple parties form
- § 3:55 Negligence complaint with interrogatories attached form
- § 3:56 180-day notice letter form for medical, dental, optometric or chiropractic claims
- § 3:57 Notice of a lawsuit and request to waive service of summons form

CHAPTER 4. JOINDER OF PARTIES AND CLAIMS

- § 4:1 Introduction—Liberal joinder
- § 4:2 —Compulsory joinder
- § 4:3 —Splitting case into multiple causes of action prohibited
- § 4:4 Loss of services claim—Spousal consortium claim
- § 4:5 —Parental claim
- § 4:6 —Minor child's claim
- § 4:7 Wrongful death and survival claims
- § 4:8 —Wrongful death—Requirements for bringing a wrongful death action
- § 4:9 — —Who takes under the wrongful death statute
- § 4:10 — —Damages available under the wrongful death statute
- § 4:11 — —Statute of limitations
- § 4:12 — —Wrongful death and medical malpractice
- § 4:13 —Survivorship
- § 4:14 — —Conscious pain and suffering
- § 4:15 — —No recovery for loss of future earnings

TABLE OF CONTENTS

- § 4:16 — —Punitive damages
- § 4:17 — —Statute of limitations
- § 4:18 Subrogation
- § 4:19 Declaratory judgment
- § 4:20 Waiver of defense of compulsory or permissive joinder
- § 4:21 Joinder impractical: class actions

CHAPTER 5. DISCOVERY

I. TEXT

- § 5:1 Overview—Discovery methods
- § 5:2 —Discovery with a purpose
- § 5:3 Use of “Lone Pine” pretrial orders
- § 5:4 Conference for planning discovery under Civ. R. 26(F)
- § 5:5 Drafting and using interrogatories—Generally
- § 5:6 Using interrogatories—Products liability cases
- § 5:7 —Using information obtained in presuit investigation
- § 5:8 Organizing and focusing the deposition through written discovery
- § 5:9 Depositions upon oral examination—Scheduling a deposition—Scheduling deposition of a party
- § 5:10 — —Scheduling deposition of nonparty witness
- § 5:11 — —Payment to depose expert witness
- § 5:12 —Deponent’s signature
- § 5:13 —Deposition fees taxed as costs
- § 5:14 —Filing a deposition to use at trial
- § 5:15 Depositions as on cross-examination—Scope of cross-examination
- § 5:16 —Adverse parties
- § 5:17 —Privilege, protective order, sanctions
- § 5:18 Objections during depositions
- § 5:19 Spoliation of evidence
- § 5:20 Deposition strategy with a view to impeachment at trial
- § 5:21 Using deposition to acquire unknown facts—Open-ended questions
- § 5:22 —Sample deposition technique: Cross-examination of defendant ER doctor
- § 5:23 —Sample deposition technique: Cross-examination of products liability expert—Questions eliciting facts
- § 5:24 — —Questions not yielding information
- § 5:25 Identifying unsued defendants through deposition
- § 5:26 Obtaining admissions at deposition
- § 5:27 Instructing the deponent not to answer

II. FORMS

- § 5:28 Sample interrogatories in automobile negligence case form
- § 5:29 Sample interrogatories form
- § 5:30 Sample request for production of documents
- § 5:31 Sample request for admission
- § 5:32 Sample subpoena duces tecum

- § 5:33 Five things to remember when responding to discovery
- § 5:34 Failure to make discovery; sanctions under Civ. R. 37
- § 5:35 Conferences prior to filing motions on discovery disputes
- § 5:36 Discretion of trial court regarding discovery disputes
- § 5:37 Preparation for plaintiff's deposition

CHAPTER 6. EXPERT WITNESSES

- § 6:1 Overview—Expert witnesses
- § 6:2 —How to choose the right expert witness
- § 6:3 —Expert witness basis of opinion
- § 6:4 —Discovery of expert testimony
- § 6:5 Admissibility of expert testimony—Pretrial exchange of experts' reports
 - § 6:6 —Qualifications of expert
 - § 6:7 —Applying *Daubert*
 - § 6:8 —Basis for expert's opinion
 - § 6:9 —Expert witness methodology review
 - § 6:10 —Expert witness experiments
 - § 6:11 Expert testimony on the ultimate issue
 - § 6:12 Non-testifying expert—Discovery limited
 - § 6:13 Review of specific opinion questions with the physician expert
 - § 6:14 Pre-deposition conference with plaintiff's expert
 - § 6:15 Deposing the adverse party's expert witness—Generally
 - § 6:16 —Qualification of medical malpractice expert
 - § 6:17 —Sample questions at deposition of defendant's expert physician
 - § 6:18 —Establishing expert witness bias
 - § 6:19 —Expert witness medical examination of plaintiff under Civil Rule 35
 - § 6:20 —Use of medical literature
 - § 6:21 —Validating the plaintiff's subjective complaints
 - § 6:22 Cross-examination of adverse party's medical expert witness in a medical malpractice case
 - § 6:23 Trial testimony objections preserve error for appeal
 - § 6:24 Replacing or substituting an expert witness
 - § 6:25 Award of expert witness expenses
 - § 6:26 Sample deposition outline for defendant doctor or defense expert physician

CHAPTER 7. SUMMARY JUDGMENT—CIVIL RULE 56

- § 7:1 Introduction to Civil Rule 56
- § 7:2 Standards for a motion for summary judgment
- § 7:3 Timing of filing a motion for summary judgment—Party seeking affirmative relief
 - § 7:4 —Party defending a claim
 - § 7:5 —Leave of court required
- § 7:6 Evidence to support the motion for summary judgment—In general

TABLE OF CONTENTS

- § 7:7 —Admissions
- § 7:8 —Affidavits
- § 7:9 —Deposition testimony
- § 7:10 Responding to a defendant’s motion for summary judgment—Time to file an opposing brief
- § 7:11 —Seeking an extension for the purpose of discovery
- § 7:12 —The brief and evidence in opposition to the motion for summary judgment
- § 7:13 Treatment of a motion to dismiss as a motion for summary judgment
- § 7:14 Motions for summary judgment filed by a defendant in a negligence action
- § 7:15 —In general
- § 7:16 —Comparative negligence or other tortious conduct
- § 7:17 Burdens in toxic exposure cases
- § 7:18 Defense use of workers’ compensation findings
- § 7:19 Motions for summary judgment filed by a defendant in premises liability cases
- § 7:20 —Proving the premises liability claim
- § 7:21 —Independent contractor injuries
- § 7:22 —Injuries caused by independent contractors
- § 7:23 —Liability of store owners in slip and fall cases
- § 7:24 —Liability of landowners in slip and fall on ice and snow cases
- § 7:25 Motions for summary judgment filed by defendants in medical malpractice actions
- § 7:26 —Plaintiff’s failure to produce an expert
- § 7:27 —Expert witness testimony
- § 7:28 —Summary judgment alleging failure to comply with statute of limitations in medical malpractice
- § 7:29 Motion for summary judgment filed by defendant employer in an intentional tort case
- § 7:30 Motions for summary judgment in actions for infliction of emotional distress
- § 7:31 Motions for summary judgment—Political subdivision immunity
- § 7:32 —Negligence per se
- § 7:33 —Adjudication on the merits
- § 7:34 —Negligence and consumer expectations
- § 7:35 —Dram shop statute
- § 7:36 —Loss of consortium claims
- § 7:37 When an appealable order exists
- § 7:38 Language for motion for summary judgment standard of law form
- § 7:39 Language for memorandum in opposition to motion for summary judgment standard of law form
- § 7:40 Using artificial intelligence

CHAPTER 8. FINAL PREPARATION FOR TRIAL

- § 8:1 Introduction—Eight to ten weeks before trial

- § 8:2 —Deposition summary
- § 8:3 Depositions—Filing
- § 8:4 —Use at trial—Admissibility
- § 8:5 — —Preparing techniques for using a deposition at trial
- § 8:6 — —Video depositions
- § 8:7 Subpoena all witnesses
- § 8:8 Trial exhibits—Preparation
- § 8:9 —Identification, authentication, and relevance of exhibit
- § 8:10 —Circumstantial evidence
- § 8:11 —Demonstrative evidence
- § 8:12 Trial brief
- § 8:13 Jury instructions
- § 8:14 Motions in limine
- § 8:15 Disclosure of settlements to the jury at trial
- § 8:16 Jury interrogatories and verdict forms
- § 8:17 Illustrative trial brief (selections) form
- § 8:18 Sample jury instructions and verdict form
- § 8:19 Sample verdict form
- § 8:20 Motion for judgment notwithstanding the verdict (JNOV)
- § 8:21 Motion for directed verdict
- § 8:22 Motion for new trial
- § 8:23 United States Life Table

CHAPTER 9. VOIR DIRE EXAMINATION OF JURORS IN CIVIL CASES

- § 9:1 Purpose of voir dire examination
- § 9:2 Types of challenges—Challenge for cause
- § 9:3 —Peremptory challenge
- § 9:4 The “best” juror or “unselecting” a jury—Generally—Jury profiles
 - § 9:5 — —Presenting negative aspects of the case
 - § 9:6 — —Identifying “bad” jurors—Occupations in general
 - § 9:7 — —Corporate executives and their spouses
 - § 9:8 — —Dominating personalities
 - § 9:9 — —Experts as jurors
 - § 9:10 — —Former plaintiffs or defendants as jurors
 - § 9:11 — —Jurors with medical conditions
 - § 9:12 — —Identifying “good” jurors—First-time jurors
 - § 9:13 — —People-oriented jurors
 - § 9:14 — —Age as a factor
 - § 9:15 — —Jurors similar to plaintiff
 - § 9:16 — —Trial “themes”—Generally
 - § 9:17 — —Organizing work flow
 - § 9:18 — —Quantity versus quality
 - § 9:19 — —Compliance with standards
 - § 9:20 — —Personal guidelines
- § 9:21 Conducting the voir dire examination
- § 9:22 Rehearsing voir dire questioning
- § 9:23 Voir dire motion in limine
- § 9:24 Exercising a challenge—How to challenge a juror for cause

TABLE OF CONTENTS

- § 9:25 —How to use a peremptory challenge
- § 9:26 Damage concepts through voir dire—Discussion of damages
- § 9:27 —Concept of “the whole man” made less by a serious injury
- § 9:28 —Treating each injury separately
- § 9:29 —Concept of damages expressed by expert witness
- § 9:30 Voir dire in bad faith cases against insurers
- § 9:31 Settlement after voir dire
- § 9:32 Motion for new trial—Juror misconduct during voir dire
- § 9:33 Jury instructions
- § 9:34 Sample voir dire examination in a medical malpractice case—Questions for the entire panel
- § 9:35 —Questions for individual jurors

CHAPTER 10. ANATOMY OF AN OPENING STATEMENT

- § 10:1 Opening statement preparation
- § 10:2 Trial checklist
- § 10:3 Purpose of opening statement
- § 10:4 Admissions made in opening statements
- § 10:5 Techniques for an effective opening statement
- § 10:6 Stating the evidence
- § 10:7 Avoid making improper arguments in the opening statement
- § 10:8 Avoid the post-opening statement directed verdict

CHAPTER 11. CROSS-EXAMINATION AT TRIAL

- § 11:1 Techniques of cross-examination
- § 11:2 Credibility of the witnesses
- § 11:3 Purpose of cross-examination
- § 11:4 Experienced adverse witness
- § 11:5 Inexperienced witness
- § 11:6 Evasive witness
- § 11:7 Cross-examination between defendants
- § 11:8 Cross-examining the defendant doctor in plaintiff’s case in chief—Calling the witness
- § 11:9 —Controlling the witness
- § 11:10 —Cross-examination of defense examining physicians (Civil Rule 35)
- § 11:11 Sample cross-examination of defense examining physician
- § 11:12 Questioning by the judge
- § 11:13 Exclusion of evidence

CHAPTER 12. SUMMATION

- § 12:1 Summation of plaintiff’s case for trial
- § 12:2 Preparing for summation—Review of trial notes
- § 12:3 —Considerations—Order of argument
- § 12:4 — —Opening closing argument
- § 12:5 — —Reducing evidence to conclusion

- § 12:6 — —Defense attorney’s summation
- § 12:7 — —Organizing the summation—Introductory remarks to the jury
- § 12:8 — —Defining the issues
- § 12:9 — —Making the main point early
- § 12:10 — —Crucial witnesses, testimony, or documents
- § 12:11 — —Use of jury instructions
- § 12:12 — —Reasonable inferences
- § 12:13 — —Damages
- § 12:14 — —Wrongful death damages
- § 12:15 Juror concerns
- § 12:16 Use of demonstrative evidence in closing argument
- § 12:17 Final closing summation
- § 12:18 Polishing your argument

CHAPTER 13. PRODUCTS LIABILITY

I. INTRODUCTION

- § 13:1 Scope
- § 13:2 Comparisons to other personal injury cases

II. CATEGORIES

- § 13:3 Statutory changes to former warranty claims
- § 13:4 Legislative curtailment of “injury” claims
- § 13:5 The types of product liability personal injury claims
- § 13:6 Design defect claims
- § 13:7 — —Defining a “design”
- § 13:8 — —Differentiating design from other defects
- § 13:9 — —Plaintiff’s claims regarding design
- § 13:10 — —Choices among designs
- § 13:11 — —Defense of other causes
- § 13:12 — —Experts focus on the alternative design
- § 13:13 — —Burden of proof
- § 13:14 — —Defining “safe enough”
- § 13:15 — —Safety device omission as a design defect
- § 13:16 — —Product alteration lessens strict liability
- § 13:17 Identifying the injury-causing product
- § 13:18 Design defect claims—Foreseeability of the risks
- § 13:19 — —Pre-2005 consumer expectation test
- § 13:20 — —Misuse of the product affects risk/utility decisions
- § 13:21 — —Unavoidably unsafe prescription drugs
- § 13:22 Statutes of repose
- § 13:23 — —Applicability to claim based on defective equipment or tool
- § 13:24 — —Construction defects
- § 13:25 Food products
- § 13:26 Some medical device approvals preempt tort remedies
- § 13:27 Prescription drug cases
- § 13:28 Most claims of negligent product design were eliminated in 2005

TABLE OF CONTENTS

- § 13:29 Manufacturing defect claims are usually settled
- § 13:30 Manufacturing defect claims are less likely over time
- § 13:31 Warning defects
- § 13:32 —Statutory warning obligations
- § 13:33 —Proximate cause
- § 13:34 —Same effects of omission and inadequacy
- § 13:35 —When marketers determine warning contents
- § 13:36 —Warning and design defects may coincide
- § 13:37 —Inadequate instructions claims
- § 13:38 —Presumption warnings would be heeded
- § 13:39 —Classes of warning defects
- § 13:40 Warranty issues
- § 13:41 Warning defects—Sufficient attractiveness or visibility of warnings
- § 13:42 —When is no warning to consumers required?
- § 13:43 —Manufacturer knowledge of risks
- § 13:44 —Defining risk knowledge
- § 13:45 —Who has knowledge?
- § 13:46 Effect of proof that user ignored warning
- § 13:47 Warning defects—Extent of knowledge
- § 13:48 —Exceptions to knowledge
- § 13:49 Content of the warning
- § 13:50 Presentation and specificity of the warning
- § 13:51 —Intensity and description of risk
- § 13:52 —Diluted warnings
- § 13:53 —Vagueness
- § 13:54 —OSHA labeling
- § 13:55 —Overwarning
- § 13:56 The form of the warning
- § 13:57 —Factors in adequate warnings
- § 13:58 Examples of warning case outcomes
- § 13:59 The form of the warning—Consumer regulations model
- § 13:60 —OSHA model
- § 13:61 How warnings cases are presented
- § 13:62 —Use of expert witnesses
- § 13:63 —Regulated products
- § 13:64 —Provide defects in warnings
- § 13:65 —Intervening causes
- § 13:66 —Presumed knowledge
- § 13:67 —Burden of showing that exceptions apply
- § 13:68 —Historical records of labels
- § 13:69 —Preparation phases
- § 13:70 No warnings are needed for obvious dangers

III. OTHER FACTORS

- § 13:71 Plaintiff must prove proximate causation
- § 13:72 Proving toxics exposure in liability cases
- § 13:73 Economic loss claims
- § 13:74 Plaintiff must prove the “defect,” with some evidence
- § 13:75 Expert witness testimony on defects

- § 13:76 Effect of government findings
- § 13:77 Controversies on asbestos company shield legislation
- § 13:78 Effect of express or implied federal preemption
- § 13:79 Liability for misrepresentations about a product
- § 13:80 Negligence per se
- § 13:81 Liability of the product repairer remains in negligence
- § 13:82 Installation or assembly problems
- § 13:83 Suppliers are usually not liable
- § 13:84 Defendant can assert assumption of the risk
- § 13:85 Intentional tort claims
- § 13:86 Government contractor defense
- § 13:87 Statutory and common law remedies and retroactivity
- § 13:88 Defense use of collateral estoppel re causation
- § 13:89 Statutes of limitations in product liability
- § 13:90 Constitutionality upheld for 2005 Act
- § 13:91 Statutory asbestos protection from liability
- § 13:92 Effect of the 2005 Act on prior common law remedies
- § 13:93 Lender liabilities
- § 13:94 Successor liability
- § 13:95 Defective product claims of third parties
- § 13:96 Age of product undercuts design defect
- § 13:97 Has the product been marketed to consumers?
- § 13:98 Inter-connected products
- § 13:99 Use of circumstantial evidence
- § 13:100 Component and finished product liabilities
- § 13:101 Exclusions in bankruptcy
- § 13:102 False Claims Act cases
- § 13:103 Foreign defendants
- § 13:104 Home construction liabilities
- § 13:105 Installation as a source of defects
- § 13:106 Insurance and exclusions
- § 13:107 Class action issues
- § 13:108 Discerning latent defects
- § 13:109 Generic drug labeling issues
- § 13:110 Public nuisance resulting from sale of opioid products

CHAPTER 14. MEDICAL MALPRACTICE

I. EVALUATING THE MEDICAL MALPRACTICE ACTION

- § 14:1 Checklist for evaluating a medical malpractice action

II. MEDICAL MALPRACTICE ACTION IS A TORT ACTION ARISING OUT OF NEGLIGENCE

- § 14:2 Medical malpractice defined
- § 14:3 Admissibility of apology, expression of sympathy, etc., on part of health care provider
- § 14:4 Medical malpractice applies to more than physicians
- § 14:5 Hospital liability for nurses' acts

TABLE OF CONTENTS

- § 14:6 Liability of a physician group
- § 14:7 Hospital vicarious liability
- § 14:8 Liability of hospital-based therapists
- § 14:9 Claims of negligent credentialing of physician by hospital
- § 14:10 Negligent supervision of healthcare workers
- § 14:11 A duty of care must exist for liability to attach
- § 14:12 Affidavit of merit must be filed
- § 14:13 Standard of care must be established and breach of the standard must be established
- § 14:14 Establishing the standard of care by expert testimony—
Relevance/reliability test defined
- § 14:15 Expert testimony and burden of proof on causation
- § 14:16 Establishing the standard of care by expert testimony—
Expert testimony must be based on personal knowledge
or other admissible evidence
- § 14:17 —Preparing your expert witness and preparing for expert
witnesses
- § 14:18 Admitting expert testimony is a two-step process
- § 14:19 Establishing and defining proximate cause
- § 14:20 Burden of proof regarding standards of care
- § 14:21 *Res ipsa loquitur* claims
- § 14:22 Lost chance doctrine redefines proximate cause
- § 14:23 Determining the appropriate statute of limitations
- § 14:24 Bifurcation of medical malpractice trials
- § 14:25 Medical malpractice in the community health clinic
- § 14:26 Malpractice claims against state employed physicians
- § 14:27 Arbitration in medical cases
- § 14:28 Actions for lack of informed consent
- § 14:29 Nursing home claims for medical malpractice

III. DEFENSES IN A MEDICAL MALPRACTICE ACTION

- § 14:30 Checklist for defenses in medical malpractice actions
- § 14:31 Defenses in medical malpractice actions—Contributory
negligence as a defense in medical malpractice actions
- § 14:32 —“Two schools of thought doctrine” as a defense in medical
malpractice actions
- § 14:33 —Statutory procedures under the Medical Malpractice Act
as defenses in medical malpractice actions
- § 14:34 —Limitations
- § 14:35 Peer review defenses/privilege
- § 14:36 Statutory immunity
- § 14:37 Statute of repose
- § 14:38 Constitutional status of malpractice limitations
- § 14:39 Checklist for damages in medical malpractice actions
- § 14:40 Damages in medical malpractice actions—Non-economic
damages are limited
- § 14:41 —Non-economic damages defined
- § 14:42 —Punitive damages are recoverable
- § 14:43 —Required disclosure of collateral sources of recovery

CHAPTER 15. DAMAGES

I. SCOPE OF DAMAGES CHAPTER

- § 15:1 Scope
- § 15:2 Checklist for damages

II. THE CONTEXT OF DAMAGES

- § 15:3 Checklist for damages proofs
- § 15:4 Joint and several liability for damages
- § 15:5 Comparative negligence
- § 15:6 Procedures for proving the plaintiff's damages
- § 15:7 Settlements
- § 15:8 Offsets & settlements
- § 15:9 Purposes of the damage award
- § 15:10 Background on damages caps
- § 15:11 Reducing the judge's discretion
- § 15:12 Silencing any awareness of damages caps
- § 15:13 Summary judgment on damages
- § 15:14 Appellate review is changed to favor defendants
- § 15:15 Plaintiff must present evidence of damage
- § 15:16 Collateral benefits can be described to jurors

III. ECONOMIC DAMAGES

- § 15:17 Checklist for economic damages
- § 15:18 Economic damages: damages with specific quantifiable value
- § 15:19 Economic damages virtually always consider plaintiff's earnings and capacity
- § 15:20 Economic damages include plaintiff's medical & rehabilitation cost
- § 15:21 Economic damages are lessened for preexisting conditions
- § 15:22 Economic damages include incidental property losses

IV. NON-ECONOMIC DAMAGES

- § 15:23 Checklist for non-economic damages
- § 15:24 Non-economic damages cover intangible elements
- § 15:25 Recovery of future non-economic damages can be sought
- § 15:26 Understanding the terminology
- § 15:27 Damages for pain and suffering
- § 15:28 Damages for life activities losses
- § 15:29 Damages for emotional harms
- § 15:30 Non-economic damages include derivative claims of losses
- § 15:31 Non-economic damages are now subject to the Ohio caps
- § 15:32 Non-economic damage caps have certain exceptions
- § 15:33 Non-economic damages are hard to quantify

V. PUNITIVE DAMAGES

- § 15:34 Checklist for punitive damages

TABLE OF CONTENTS

- § 15:35 Punitive damage awards have been rare in Ohio
- § 15:36 Punitive damages must fit the constitutional limitations
- § 15:37 Post-2005 case punitive damage procedures
- § 15:38 Procedures constrain punitive damage awards
- § 15:39 Punitive damage appeals procedures favor reversal
- § 15:40 Punitive damages are subject to Ohio caps
- § 15:41 Punitive damages are further limited for smaller businesses
- § 15:42 Punitive damages may be eliminated for many prescription drugs
- § 15:43 The failed effort to exclude fraudulent drug filings from punitive damages
- § 15:44 Punitive damages may be barred for some nonprescription drugs
- § 15:45 Punitive damages may be barred for federally regulated products
- § 15:46 Fraud on federal regulators in non-drug cases

VI. OTHER CHALLENGES

- § 15:47 Checklist for other challenges or reduction to damages
- § 15:48 Subrogation and damages awards are contract-derived
- § 15:49 Juries must be told of damages' tax-free status
- § 15:50 Damages may be paid through structured settlements
- § 15:51 Remedy of medical monitoring payments
- § 15:52 Governmental immunity from damage claims
- § 15:53 Indemnification for damages
- § 15:54 Contribution in damages
- § 15:55 Equitable subrogation claims
- § 15:56 Collateral sources
- § 15:57 Proof supporting attorney's fee awards

CHAPTER 16. PREMISES LIABILITY

- § 16:1 Bases for premises liability
- § 16:2 Commercial lessor exclusion
- § 16:3 Host obligations
- § 16:4 Invitee status
- § 16:5 Licensees
- § 16:6 Utility obligations
- § 16:7 Landlords and tenants
- § 16:8 Proof of a defect
- § 16:9 Negligence per se
- § 16:10 Trespass & premises liability
- § 16:11 Summary judgment
- § 16:12 Res ipsa loquitur
- § 16:13 Duty of the site owner
- § 16:14 Premises owner's standards of care
- § 16:15 Defense of open and obvious risks
- § 16:16 "Two-inch" measure of walkway risks
- § 16:17 Degree of owner's knowledge
- § 16:18 Obviousness of danger—No duty to protect

- § 16:19 Effect of legal duties
- § 16:20 Proof of negligence
- § 16:21 Premises liability—Exceptions
- § 16:22 Findings of no landowner obligations
- § 16:23 Ice & snow injury cases
- § 16:24 Liability for animals
- § 16:25 Liability for subcontractors
- § 16:26 Duty to frequenters
- § 16:27 Premises owner liability for third party criminal acts
- § 16:28 No liability for obvious hazards on the premises
- § 16:29 Inherently dangerous premises
- § 16:30 Attendant circumstances
- § 16:31 Pedestrian safety issues
- § 16:32 Observable hazards
- § 16:33 Obviousness of the hazard
- § 16:34 Premises liability under “negligence per se” doctrines
- § 16:35 Signage issues
- § 16:36 Property abutting sidewalks
- § 16:37 Evidence of prior accidents
- § 16:38 Contractors and premises liability
- § 16:39 Evidentiary issues in premises liability cases
- § 16:40 Public entity liabilities and immunities
- § 16:41 Municipal roadway immunity
- § 16:42 Knowledge of the dangerous condition
- § 16:43 Identification of hazards
- § 16:44 Tavern liability
- § 16:45 Recreational user exemptions
- § 16:46 Proof of proximate cause
- § 16:47 Burdens of proof
- § 16:48 Defense of assumption of risk
- § 16:49 Site-related nuisances
- § 16:50 Assault cases
- § 16:51 Exposures to toxic substances in a building
- § 16:52 Punitive damages
- § 16:53 Respondeat superior

CHAPTER 17. PREJUDGMENT INTEREST AND COSTS—POST-JUDGMENT REVIEW AND MOTIONS

- § 17:1 Overview of post-judgment awards
- § 17:2 Overview of prejudgment interest
- § 17:3 Procedural prerequisites to a prejudgment interest award—Motion for prejudgment interest; timeliness; request for hearing
- § 17:4 —Hearing on motion mandatory; burden of proof
- § 17:5 —Discovery issues; in camera inspection
- § 17:6 —Prejudgment interest award mandatory if conditions met
- § 17:7 —Appealability of discovery order; standard of review
- § 17:8 —Date of accrual of interest
- § 17:9 Effect of setoffs upon interest awards

TABLE OF CONTENTS

- § 17:10 Good faith—Definition of “lack of good faith effort to settle”
- § 17:11 —Factors that may be considered in measuring good faith
- § 17:12 Proof of elements of “lack of good faith effort to settle”—
Cooperation in discovery proceedings
- § 17:13 —Evaluation of risk—Defendant’s failure to rationally evaluate the case
- § 17:14 — —Insurance company in-house counsel as witness
- § 17:15 — —Claims manager or adjuster as witness
- § 17:16 — —Insurance company “peer review committees”
- § 17:17 — —Obtaining the committee’s report
- § 17:18 — —“Reserve” history
- § 17:19 — —Insurance re-evaluation immediately prior to trial
- § 17:20 — —Plaintiff’s counsel’s evaluation of the case
- § 17:21 —Delays of the proceedings
- § 17:22 —Monetary settlement efforts by plaintiff and defendant
- § 17:23 Review of prejudgment interest issues
- § 17:24 Preparing for hearing on prejudgment interest motion
- § 17:25 Checklist for examination of claims adjuster as witness
- § 17:26 Checklist for examination of defense counsel
- § 17:27 Motion for prejudgment interest with request for oral hearing form
- § 17:28 Duces tecum for prejudgment interest form
- § 17:29 Examination of witnesses at prejudgment interest hearing
- § 17:30 —Plaintiff’s examination of defense counsel
- § 17:31 —Plaintiff’s examination of claims manager
- § 17:32 Motion for costs—Overview
- § 17:33 Costs—Deposition fees
- § 17:34 —Attorney’s fees
- § 17:35 Offer of judgment or confession of judgment

CHAPTER 18. EVALUATING AND NEGOTIATING SETTLEMENT

I. TEXT

- § 18:1 Introduction to settlement—Systematic approach
- § 18:2 Introduction to settlement assessment—Aspects of case assessment and valuation
- § 18:3 —Determination of economic damages
- § 18:4 —Determination of non-economic damages
- § 18:5 —Jury verdicts and reported settlements
- § 18:6 —Cost of trial preparation and presentation
- § 18:7 —Insurance coverage
- § 18:8 Introduction to settlement negotiation—Authority
- § 18:9 —Initial Demand
- § 18:10 —Initial settlement offer
- § 18:11 —Lump sum payments, structured settlements, deferred settlements
- § 18:12 —Timing of settlement discussions
- § 18:13 —Accepting a settlement offer

- § 18:14 —Accepting settlement proceeds
- § 18:15 Settlement negotiation—Evid. R. 408
- § 18:16 —Mediation discussions privilege

II. FORMS

- § 18:17 Sample initial demand letter
- § 18:18 Sample letter confirming terms of settlement
- § 18:19 Sample settlement agreement for one individual's claims
- § 18:20 Sample closing statement to client

APPENDICES

- Appendix A. Table of Laws Affected By 2004 Am. Sub. Senate Bill
80
- Appendix B. Table of Statutes of Limitations With Commentary
- Appendix C. Ohio Revised Code (Selected Provisions)

Table of Laws and Rules

Table of Cases

Index