
CONTENTS

<i>Preface</i>	xvii
CHAPTER 1	
Introduction	1
A. The Nature of Medical Practice	1
1. Patients, Doctors, and Hospitals	2
Health Care Past and Present	2
End-of-Life Warning at \$618, 616 Makes Me Wonder Was It Worth It	3
Doctors, Patients, and Health Insurance: The Organization and Financing of Medical Care	7
Competing Solutions: American Health Care Proposals and International Experience	8
Doctors, Patients, and Health Insurance: The Organization and Financing of Medical Care	11
Clinical Decision Making: From Theory to Practice	12
Notes: Doctors and Hospitals	12
2. Medicine, Illness, and Healing	13
Magic or Medicine? An Investigation of Healing and Healers	13
The Tyranny of Health	13
Making Medical Spending Decisions	14
Notes: The Phenomenology of Sickness and Healing	15
3. The Nature of Medical Judgment	16
Clinical Decision Making: From Theory to Practice	16
Complications: A Surgeon's Notes on an Imperfect Science	20
Notes: Medical Decisionmaking	24
B. The "Crisis" in Access, Cost, and Quality	24
Health and Medical Care Reform in the United States: Ethical Questions and Concerns	24
Notes: The Crisis in American Medicine	29
CHAPTER 2	
The Treatment Relationship: Formation and Termination	33
A. The Duty to Treat	33
1. The Duty to Accept Patients	33
<i>Hurley v. Eddingfield</i>	33
<i>Wilmington General Hospital v. Manlove</i>	34
Notes: The Differing Obligations of Physicians and Hospitals; Hospitals as Quasi-Public Facilities	38
Notes: Moral and Constitutional Rights to Health Care	43

	<i>Burditt v. U.S. Department of Health and Human Services</i>	45
	Notes: The Federal Patient Dumping Statute	49
2.	Wrongful Reasons to Reject Patients	54
	<i>Walker v. Pierce</i>	55
	Notes: Discriminatory Denials of Care	56
	<i>United States v. University Hospital</i>	58
	<i>Glanz v. Vernick</i>	63
	Notes: Because-of-Disability Denials of Care	65
B.	The Structure of the Treatment Relationship	67
1.	Forming a Patient-Physician Relationship	67
	<i>Adams v. Via Christi Regional Medical Center</i>	68
	<i>Estate of Kundert v. Illinois Valley Community Hospital</i>	70
	<i>Reynolds v. Decatur Memorial Hospital</i>	72
	<i>Lyons v. Grethe</i>	74
	Notes: Creating the Patient-Physician Relationship	75
2.	Limiting the Scope of the Treatment Relationship	79
	<i>Tunkl v. Regents of the University of California</i>	79
	Notes: Limiting the Standard of Care and Scope of Practice	81
3.	Terminating the Treatment Relationship	84
	<i>Ricks v. Budge</i>	84
	<i>Payton v. Weaver</i>	86
	Notes: Abandonment Liability	88
C.	Regulating the Treatment Relationship	90
1.	Professional Licensure	90
	<i>State v. Miller</i>	90
	Character, Competence, and the Principles of Medical Discipline	92
	Notes: Professional Licensure	96
2.	Facility Licensure and Accreditation	100
	Patient Power: Solving America's Health Care Crisis	100
	Notes: Facility Licensing, Accreditation, and Certification	102
	<i>Estate of Smith v. Heckler</i>	103
	<i>Cospito v. Heckler</i>	104
	Notes: Facility Regulation and Accreditation	106
3.	The FDA, Pharmaceutical Regulation, and the Constitution	109
	<i>Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach</i>	109
	Notes: The Scope and Constitutionality of Pharmaceutical Regulation	115
 CHAPTER 3		
The Treatment Relationship: Confidentiality, Consent, and Conflicts of Interest		123
A.	The Fiduciary Nature of the Treatment Relationship	123
B.	Confidentiality of Medical Information	125
1.	The Federal Duty to Maintain Medical Privacy: Federal Privacy Regulations (HIPAA)	125
	<i>In the Matter of Miguel M. v. Barron</i>	128
	Notes: HIPAA Privacy Protections	131
	Notes: Beyond HIPAA — Constitutional, Common Law, and Statutory Duties to Maintain Confidentiality	137
2.	The Duty to Breach Confidentiality	141
	Notes: Statutory Disclosure Obligations	142

<i>Bradshaw v. Daniel</i>	144
Notes: Common-Law Duty to Warn	146
Discussion Problems	151
C. Informed Consent	152
1. Goals, Aspirations, and Policies	152
Patient-Centered Medicine: A Professional Evolution	153
Rethinking Informed Consent	153
Notes: The Theory and Practice of Informed Consent	155
Notes: Informed Consent and the First Amendment	158
2. The Competing Disclosure Standards	162
<i>Canterbury v. Spence</i>	162
<i>Culbertson v. Mernitz</i>	166
Notes: Competing Disclosure Standards	169
Notes: The Other Elements of a Nondisclosure Claim	172
3. Limiting Liability for Failure to Disclose	173
<i>Rizzo v. Schiller</i>	173
Notes: Limiting Liability for Failure to Disclose	175
Problem: Informed Refusals?	181
4. Fiduciary Obligations, Conflicts of Interest, and Novel Disclosure Obligations	181
Autonomy and Privacy: Protecting Patients from Their Physicians	182
<i>Moore v. The Regents of the University of California</i>	183
<i>Howard v. University of Medicine & Dentistry of New Jersey</i>	188
Notes: Fiduciary Principles and the Disclosure of	
Provider-Associated Risks	192
Notes: Financial Conflicts of Interest	193
Notes: Nonfinancial Provider-Associated Risks	197
Problem: <i>Moore</i> Liability?	200
D. Human Experimentation and Research	201
Why Informed Consent? Human Experimentation and the Ethics of	
Autonomy	203
<i>Grimes v. Kennedy Krieger Institute, Inc.</i>	206
Federal Policy for the Protection of Human Subjects	219
Notes: Human Subjects Research	222
Problem: The Support Trial	235
Problem: Compensation for Research-Related Injuries	236
Problem: Medical Research, Biobanks, and the Privacy Rule	236
Problem: DNA Research and Indigenous Communities	238
CHAPTER 4	
Medical Malpractice and Tort Liability	241
Bibliography	241
A. Quality of Care and Legal Responses	242
1. The Nature and Extent of Medical Error	242
Health and Medical Care Reform in the United States: Ethical	
Questions and Concerns	242
Complications: A Surgeon's Notes on an Imperfect Science	242
Notes: Medical Error	247
2. Critiquing the Malpractice System and Considering Alternatives	250
Suits for Alleged Malpractice	250
The Medical Malpractice Myth	251

Notes: Malpractice in Action	252
Notes: Alternative Dispute Resolution	258
3. Approaches to Improving Quality of Care	260
Fostering Rational Regulation of Patient Safety	260
The Necessary and Proper Role of Regulation to Assure the Quality of Health Care	266
Notes: Quality Measurement and Control	266
B. Physician Liability	268
1. The Custom-Based Standard of Care	268
The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium	268
<i>McCourt v. Abernathy</i>	270
<i>Locke v. Pachtman</i>	272
Notes: The Custom-Based Standard of Care	277
2. Identifying Customary Standards	278
<i>Shilkret v. Annapolis Emergency Hospital Association</i>	279
Notes: Geographic Variations in the Standard of Care	280
<i>Jones v. Chidester</i>	282
Notes: Practice Variations and Modified Standards of Care	284
Problem: What Is the Standard of Care?	288
Notes: The Impact of Economic Constraints	292
Problem: Economic Malpractice	294
3. Beyond Custom	294
The Role of the Jury in Modern Malpractice Law	295
Notes: Declining Deference to Custom	297
<i>Helling v. Carey</i>	298
Notes: Judicial Assessments of Reasonableness	300
Problem: To Test or Not to Test	302
<i>Boyd v. Chakraborty</i>	303
Notes: The Common Knowledge Exception	305
<i>Stuck v. Miami Valley Hospital</i>	307
Notes: Negligence Per Se	308
4. Qualification and Examination of Medical Experts	309
<i>Hall v. Flannery</i>	309
<i>Woodard v. Custer</i>	312
Notes: Qualification of Experts	315
<i>Stang-Starr v. Byington</i>	317
Notes: Examination of Experts; Introduction of Treatises and Guidelines	319
Problem: Practice Guidelines	321
Notes: Discovery and Confidentiality	322
C. Alternative Theories of Liability	324
1. Breach of Fiduciary Duty	324
Why Physicians Are Fiduciaries for Their Patients	324
Ethical Malpractice	325
Notes: Fiduciary Duties in Court	326
2. Breach of Contract	327
<i>Sullivan v. O'Connor</i>	327
Notes: Liability Based on Contract or Fraud	329

3. Vicarious Liability	331
<i>Franklin v. Gupta</i>	331
Notes: Physicians' Vicarious Liability	335
D. Causation, Injury, and Damages	336
1. Loss of Chance	337
<i>Herskovits v. Group Health Cooperative of Puget Sound</i>	337
Notes: Loss of Chance	341
2. Compensable Injuries	345
<i>Hester v. Dwivedi</i>	345
Notes: Recognizing Life as an Injury	348
3. Calculation and Administration of Damages	349
<i>Fein v. Permanente Medical Group</i>	349
Notes: Damages Awards	352
Problem: Damages Settlement	354
E. Defenses	355
1. Statutes of Limitations	355
<i>Rathje v. Mercy Hospital</i>	355
Notes: Statutes of Limitations and Repose	360
2. Fault-Based and Consent-Based Defenses	362
<i>Schneider v. Revici</i>	362
Notes: Contractual Waivers, Assumption of Risk, and Comparative Negligence	365
F. Institutional Liability	370
1. Hospital Liability	370
<i>Schloendorff v. Society of New York Hospital</i>	370
Notes: Historical Approaches to Hospital Liability	372
<i>Diggs v. Novant Health, Inc</i>	373
Notes: Hospital Vicarious Liability	376
<i>Johnson v. Misericordia Community Hospital</i>	379
Notes: Direct Liability and Administrative Functions	381
<i>Darling v. Charleston Community Memorial Hospital</i>	383
Notes: Direct Liability and Clinical Oversight	385
2. Managed Care Liability	387
<i>Boyd v. Albert Einstein Medical Center</i>	387
Notes: Vicarious Liability; Direct Liability for Provider Selection and Oversight	390
<i>Wickline v. State</i>	393
Notes: Managed Care Liability for Payment Decisions	398
Problem: Reducing MCO Liability Risk	400
<i>Aetna Health Inc. v. Davila</i>	400
Notes: ERISA Preemption	404
3. Drugs, Devices, and Products Liability	407
<i>PLIVA, Inc. v. Mensing</i>	409
Notes: Products Liability for Defective Drugs and Medical Devices	412
Problem: Products Liability	416
G. Medical Malpractice Reform	416
Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped	417
Evaluation of Options for Medical Malpractice System Reform	418
Notes: Medical Malpractice Reform Statutes	425

Notes: Constitutional Challenges to Malpractice Reform	434
Problem: Malpractice Reform Legislation	434
<i>Glossary of Organizational Terms and Acronyms</i>	435
<i>Table of Cases</i>	437
<i>Index</i>	443