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## Book Review: Medical and Hospital Negligence

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# Medical and Hospital Negligence

MILES J. ZAREMSKI, J.D., AND  
LOUIS S. GOLDSTEIN, J.D., EDITORS,  
CALLAGHAN & COMPANY, 1988, 4 VOLUMES,  
WITH CUMULATIVE SUPPLEMENTS.

*Reviewed by*  
*Jay A. Gold* †

**MEDICAL AND HOSPITAL NEGLIGENCE** is a four-volume treatise on health care malpractice. It is a loose-leaf series which will undergo periodic updates. Its sixty-seven chapters constitute the most extensive discussion of medical malpractice available to date. The editors' preface justly describes the treatise as "an authoritative, up-to-date and balanced approach set forth in a reasoned, easy-to-read style." It should be valuable to law students, teachers and other interested individuals,<sup>1</sup> but will be indispensable for litigators in the field.

The treatise is co-edited by Miles J. Zaremski,<sup>2</sup> a defense attorney, and Louis S. Goldstein,<sup>3</sup> a plaintiff's attorney, both of whom have longstanding experience in health care liability litigation; their different orientations may account for the text's admirable balance between the plaintiff and defense viewpoints. Eighty-six authors of an impressive caliber contributed to the publication of this treatise. A number of the contributors are associated with the American College of Legal Medicine, including former past presidents: Don Harper Mills, Cyril H. Wecht, James G. Zimmerly and Harold L. Hirsh; fellows: Frank T. Flannery, Richard S. Goodman, Natalie K. Shemonsky, Edward E. Hollowell, as well as editor Miles J. Zaremski; and honorary fellows: Irving Ladimer and James E.

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1. It is already being used as an academic reference tool. See, e.g., Sharon W. Murphy, Note, *Contributory Negligence in Medical Malpractice: Are the Standards Changing to Reflect Society's Growing Health Care Consumerism?* 17 U. DAYTON L. REV. 151, 160 n.58 and various footnotes thereafter (1991).

2. FCLM, Senior Partner, Arnstein & Lehr, Chicago, Illinois.

3. Senior Partner, Goldstein & Fluxgold, Ltd., Chicago, Illinois.

Ludlam. Some contributors of introductory remarks, in addition to Don Harper Mills, are Oliver C. Schroeder, Jr., Director Emeritus of the Law-Medicine Center at Case Western Reserve University School of Law, and John A. Norris, founder of the *American Journal of Law & Medicine*. The renown of these writers, and others, is reflected in the quality of their contributions. The fact that many of the authors, as well as editors Zaremski and Goldstein, are from the Chicago area illustrates the high quality of medical malpractice litigators coming out of this city.

This treatise initially reviews the development and background of medical professional liability litigation, including its status, frequency, and trends. An economic analysis of medical malpractice is given as well as an examination of the causes of malpractice litigation. The treatise then develops the historical and common law aspects of the physician-patient relationship, confidentiality, privileges, and patients' rights. The authors then discuss general theories of liability, institutional liability, and liability of the federal government. The following chapters explain burden of proof, standards of care, and duties of health care entities, followed by the recovery of damages. An extensive analysis of defenses is undertaken, involving statutes of limitations, shifting the risk, and apportioning fault. The format of the treatise leads to the trial of a malpractice case—voir dire, opening and closing statements, and the case-in-chief. Numerous litigation preparation checklists are included in the text, as well as examples of trial strategies. Another eighteen chapters, written by physicians regarding their specialties, emphasize the malpractice issues within particular areas of specialization. The work deals at length with such current issues as AIDS, the liability of Health Maintenance Organizations, and the Health Care Quality Control Act of 1986. Finally, counsel may reference the section on pleadings for sample forms.

The ambitiousness of this treatise is admirable. The actual achievement of its goals is noteworthy. As happens with any work whose authors are so numerous and diverse, some chapters are better than others. Furthermore, as one might expect from any comprehensive work, there is some overlap between chapters—for example, the locality rule is discussed at length in four different places. Also, frequently there are uncited cases and authorities that would have enhanced the work's usefulness should they have been cited. One criticism is that a more extensive index would make the set considerably more useful. Still, in reading the discussions of issues one knows well, one is hard-pressed to find significant omis-

sions, distortions, or ambiguities. The 1991 Cumulative Supplement does a good job of citing the most recent changes and precedents.

The variety of issues dealt with—tort law, procedure, policy, and medicine—is so comprehensive that it is impossible to identify a “typical” chapter for examination purposes. For this reason, this reviewer will more or less arbitrarily choose a section for review. Part VI, entitled “Requisite Elements of Burden of Proof,” contains chapters on the issues of the establishment of standards of care, duties of physicians, duties of hospitals, and delegation of these duties. The chapter on the physician’s duties was written by Mark Rhodes, a practicing attorney. Its 67 pages discuss the requirements for a physician-patient relationship, distinguishing special cases where physicians are retained by employers and insurers, and the circumstances in which a duty to treat may exist. The author examines the duty to continue treatment and the liability for abandonment. This chapter sets forth the legal duty and standard of care, giving independent consideration to specialty, locality, national standards of care, expert testimony, and the “same school of medicine” requirement. It discusses liability for incorrect diagnosis, as well as the standard established for surgical procedures and other forms of medical treatment. It deals with the duties to refer, to disclose, and to obtain informed consent (with the author offering an independent discussion of the subjective and objective tests for informed consent). The author further explains the law of concealment and misrepresentation, the effect of warranties upon duties owed, confidentiality, errors in judgment, poor result, and vicarious liability. Finally, the chapter delineates the duties and liabilities arising out of the formation of partnerships and professional corporations. It should be noted that in addition to discussion in this chapter, many of these topics have separate chapters devoted to them.

Examining this chapter even more closely, one finds the subsection on “Duty of Care and Standard of Care,” to be 5 pages long (including citations), describing not only the basic rule on standard of care, but also discussing the many aspects of the rule—ordinary/reasonable diligence, burden of proof, need for expert testimony, errors in judgment, and foreseeability. The author quotes a statutory articulation of the standard, and proceeds to offer many illustrative examples of breach of that standard, fully cited. The 1991 Cumulative Supplement offers no additions to this discussion.

One should be impressed by this section’s thoroughness, its clarity, and the absence of tenuousness. Counsel for either plaintiff

or defendant should find the section enormously useful in case preparation. In this sense, it is indeed typical of *Medical and Hospital Negligence* as a whole.

There is little regarding the law of medical and hospital negligence that cannot be found somewhere in this monumental work. In addition, it focuses its discussions upon the most relevant medical and policy issues. This reviewer expects to rely frequently upon it, and would expect other readers to do so as well.