

New York Lawyers' Practical Skills Series

Representing the Personal Injury Plaintiff in New York

Patrick J. Higgins, Esq.

2018–2019

NEW YORK STATE BAR ASSOCIATION



New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: CLE Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2018
New York State Bar Association
All rights reserved
ISBN: 978-1-57969-546-0
Product Number: 4191919

CONTENTS

I.	Introduction	1
II.	Intake Up to Accepting the Case	1
	A. Why Represent an Injured Client?	1
	B. How to Evaluate the Case.....	2
	1. Initial Client Interview	2
	2. Client Issues.....	3
	3. After Meeting the Client.....	4
	4. Clients Who Raise Red Flags	7
	C. The Retainer Agreements and Required Records	7
	1. Contingency Fee Agreement	7
	2. Closing Statement.....	9
	3. Client Disbursements.....	9
	D. Referral Fee-Sharing Agreements	9
	1. The Law	9
	2. Scenario 1: “We Never Agreed to Share Fees”	10
	3. Scenario 2: “You Didn’t Do Enough Work or Share Responsibility”	11
	4. Scenario 3: “The Fee-Sharing Agreement Is Void Because It Violates the Model Rules”	11
	5. Scenario 4: “The Fee Is Not What You Say It Is”	12
	6. How to Avoid the Scenarios Described Above	12
	E. Investigating the Case.....	13
	1. Witnesses	13
	2. Adverse Party Witness	14
	3. Non-Party Witness.....	14
	4. Non-Party Damages Witness.....	15
	5. Investigating Your Client	15
	6. Evidence—Find and Preserve	17
III.	Substantive Law of Personal Injury	18
	A. What Is the Legal Basis for the Injured Plaintiff’s Recovery?.....	18
	B. Common Law Theories	18
	1. Negligence.....	18
	2. Comparative Negligence and Assumption of Risk	19
	3. Res Ipsa Loquitur	20
	C. Statutory Causes of Action.....	20
	1. Labor Law §§ 240(1), 241(6), and 200(1).....	20
	a. Labor Law § 240(1).....	20
	b. Labor Law § 240(1) Defenses	22
	c. Labor Law § 200(1).....	24
	d. Labor Law § 241(6).....	25
	2. N.Y. Vehicle and Traffic Law § 388(1) (VTL).....	25
	3. Dram Shop Act Claims—General Obligations Law § 11-101	26
	4. 42 U.S.C. § 1983 and § 1985 Claims	26
	5. Wrongful Death Causes of Action—N.Y. Estates, Powers, and Trusts Law § 5-4.1–5-4.6 (EPTL)	26

	6. Judiciary Law § 487	26
	7. N.Y. General Business Law §§ 349, 350 (GBL).....	26
	8. Informed Consent—N.Y. Public Health Law § 2805-d (PHL).....	27
	9. Navigation Law § 181	27
	D. Actions Based on Intent.....	27
IV.	Litigating the Medical Malpractice Case	27
	A. Substantive Framework and Recent Developments	27
	B. Vicarious Liability.....	28
	1. The Mdua Doctrine—Ostensible Agency Liability	29
	2. Ostensible Agency Liability Also Applies to Clinics and Medical Offices	29
	3. Master Servant Liability	30
	C. Medical Malpractice Procedure.....	31
	1. Statute of Limitations	31
	2. Continuous Treatment	32
	3. Certificate of Merit	34
	4. Mandatory Filing and Pre-Calendar Conferences	35
	D. Medical Malpractice Discovery	35
	1. HIPAA.....	35
	2. The Arons Doctrine	36
	a. The Content of Arons Authorizations.....	37
	b. Arons Authorizations Directed to Co-Defendants and Unknown Physicians	38
	c. Plaintiffs’ Right to Arons Authorizations for Defendants’ Physicians in Appropriate Case	39
	d. Arons and the Designated Trial Expert Under CPLR 3101(d)(1).....	39
	e. The Timing of Arons Authorizations	39
	3. Hospital Internal and Quality Assurance Records and Statements	40
	4. Non-Privileged Medical Malpractice Records	41
	a. Hospital ESI Audit Trails	41
	5. Prior Transcripts and Lawsuits of Defendant Physicians.....	42
	6. Physical Testing and Discovery	42
	7. Depositions in Medical Malpractice Actions	42
	8. Discovery Concerning the Defendant Physician.....	43
	9. Medical Malpractice Expert Disclosure	44
	10. Medical Privilege Issues for Plaintiffs	46
	E. Summary Judgment in Medical Malpractice Actions	46
	F. Medical Malpractice Trial Practice	47
	1. Evidence	48
	2. Frye and Medical Malpractice Actions	49
	G. Appellate Considerations in Medical Malpractice Actions.....	50
V.	Products Liability Action	51
	A. Summary Judgment in Product Defect Cases	53
VI.	Premises Liability Action.....	54
	A. Substantive Framework	54
	B. Defenses to Premises Liability Actions.....	55
	C. Investigating the Premises Liability Action	57

	D. Tort Liability Based on Contract Obligations	57
	E. Snow and Ice Cases	58
	F. Summary Judgment Decisions in Premises Liability Cases.....	59
VII.	Automobile Negligence Case	60
	A. Checklists for Initial Action	60
	B. Investigating the Automobile Negligence Case	61
	C. No-Fault Coverage	62
	1. Generally	62
	2. First-Party Benefits (Basic Economic Loss)	63
	a. Entitlements and Offsets.....	63
	(1) Medical (Causally Related)	63
	(2) Wages	63
	(3) Prescriptions	64
	(4) Mileage	64
	(5) Home Assistance	64
	b. Stacking	64
	c. No-Fault Liens.....	64
	D. Uninsured—Motor Vehicle Accident Indemnification Corporation Act (MVAIC)	65
	1. Background.....	65
	2. Uninsured Tortfeasor—MVAIC	66
	3. Claimant Categories	66
	4. Uninsured Policy Coverage.....	66
	5. Policy Insured Claim Filing Procedures.....	67
	6. MVAIC Claim Filing	68
	a. No Insurance.....	68
	b. No Insurance—Identity of Wrongdoer Is Not Ascertainable (Hit and Run).....	68
	7. Insurance Initially Believed to Exist—No Insurance After Later Disclaimer by Carrier.....	69
	8. Failure to File or Late Filing	69
	9. Application to the Court.....	70
	10. Claim Resolution	70
	a. Insured Person	70
	b. Qualified Person	71
	E. Uninsured Tortfeasor—Supplemental Uninsured Coverage.....	72
	1. Time Limits for Making the SUM Claim.....	74
	2. Form of the Notice of Claim	75
	3. Conditions Precedent to Making a SUM Claim.....	75
	4. Interplay Between SUM and Serious Injury Threshold	77
	5. Offsets.....	77
	6. Conclusion.....	78
	F. The Serious Injury Threshold.....	78
	1. The Statutory Requirements.....	78
	a. Death.....	79
	b. Dismemberment.....	79

c.	Significant Disfigurement.....	79
d.	Fracture	80
e.	Loss of Fetus.....	80
f.	Permanent Loss of Use of a Body Organ, Member, Function or System	81
G.	Overview of the Most Litigated Threshold Categories	81
1.	The Court of Appeals on the Serious Injury Threshold	81
2.	The Current Proof Requirements.....	83
a.	Causation	83
b.	The Gap or Cessation in Treatment	85
(1)	Who Should Explain the Gap?	86
(2)	The Proof Needed to Satisfy a Gap	86
(3)	The Gap on 90/180 Claims	87
c.	What Constitutes Objective Medical Proof of Injury	87
(1)	Proof Required for Herniated and Bulging Disks.....	88
(2)	Proof Required for Radiculopathy	88
(3)	Proof Required for Spasms.....	89
(4)	Proof Required for Tendon Tears	89
(5)	Proof Required for Subjective Complaints of Pain and Headaches	89
d.	The Need to Identify the Objective Tests Used.....	89
e.	The Proof Needed to Show Objective Numeric Quantitative Assessment of Loss of Range of Motion.....	90
f.	The Proof Needed for an Objective Qualitative Assessment	91
g.	The Proof Needed for the 90/180-Day Case.....	92
3.	Summary Judgment Motions in the Automobile Negligence Case.....	92
a.	The Burden-Shifting Mechanism—The Defendant’s Burden.....	92
b.	Marshaling the Proof—The Plaintiff’s Opposition to the Motion	94
(1)	Unsworn Reports and Records	94
(a)	Inadmissible.....	94
(b)	Admissible	94
(2)	Competence of the Medical Witness to Render an Opinion.....	95
(3)	Plaintiff’s Expert Report.....	95
(4)	MRI Reports in the Plaintiff’s Opposing Papers	95
(5)	The Plaintiff’s Affidavit	95
c.	Checklist for Prevailing on the Serious Injury Threshold	96
H.	Pre-Judgment Interest on Liability Verdicts and Inquests Involving the Serious Injury Threshold	96
I.	Defenses to the Automobile Negligence Action	97
1.	Seat Belt Defense	97
a.	Seat Belt Defense Cannot Be Admitted on Liability.....	97
b.	Seat Belts Must Be Available for the Defense to Apply	98
c.	Seat Belt Defense Can Be Waived	99
d.	Seat Belt Defense Needs Competent Expert Proof.....	99
e.	Jury Can Disregard Defense Proof on Seat Belt Use	100
J.	The Emergency Doctrine in Automotive Cases	100
VIII.	The Municipal Liability Case	101

	A.	Notice-of-Claim Requirements	101
	B.	Service of Notice of Claim	102
	C.	Application for Leave to Serve a Late Notice	103
	D.	Provisions Governing Claims Against Municipalities	103
		1. Examination Provisions.....	103
		2. Lawsuit Provisions	103
		3. Municipalities and the Special Duty Rule—Governmental Propriety Continuum	103
IX.		Litigating a Tort Case Against New York State.....	104
	A.	The Right to Sue	104
	B.	Notice of Intention to File a Claim.....	104
	C.	The Claim	104
	D.	Filing Requirements	105
	E.	Verification of Claim.....	105
	F.	Practical Notes.....	106
X.		Pleadings and Serving Process	106
	A.	Generally	106
	B.	Summons	107
	C.	Complaint	107
		1. General Requirements	107
		2. Specific Pleading Requirements.....	107
		3. Suing an Unknown Party—The Jane Doe Designation	109
	D.	Demand for Relief (Wherefore Clause)	109
	E.	Responsive Pleadings	109
		1. Review	109
		2. Affirmative Defenses.....	109
		3. Moving to Dismiss Affirmative Defenses	110
	F.	Cross-Claims and Counterclaims	110
		1. Cross-Claims	110
		2. Counterclaims.....	110
	G.	Service of Process.....	111
		1. Personal Service	111
		a. Personal Service by Mail.....	111
		2. Substituted Service (Nonpersonal Service).....	112
		a. Delivery to a Person of Suitable Age and Discretion	112
		b. Service Upon an Agent for Service	112
		c. “Nail and Mail” Service	112
		d. Service by Publication	113
		e. Alternate Service	113
		4. Other Service Methods	113
		5. Service Under the Business Corporation Law (BCL)	114
		6. Service on Nonresident Motorists	114
		a. Service on Resident Motorists for Whom No Address Is Known.....	114
		7. Problems With Filing and Serving	114
XI.		Discovery.....	115
	A.	Introduction	115

B.	Scope and Standard	115
1.	Mental Health and Counseling Records	116
2.	Non-Party Medical Privilege Issues	117
3.	Defendant Medical Privilege Issues	117
C.	Electronic Discovery	118
1.	What Is ESI?.....	119
2.	How Is ESI Requested and Produced?.....	119
3.	The ESI Litigation Hold and Why It Matters—Spoliation	121
4.	Who Pays for a Party Producing ESI?.....	122
D.	Standard for a Protective Order.....	123
E.	Sanctions.....	124
F.	Spoliation.....	124
G.	Request for Production of Documents From a Party.....	125
1.	General Standards.....	125
2.	Objection and Waiver.....	125
3.	Educational Records.....	126
4.	Tax Returns	126
5.	Cell Phone Records	126
6.	Social Media.....	127
7.	Miscellaneous Documents Held Discoverable.....	129
H.	CPLR 3122(b)	130
I.	The Notice to Admit.....	130
J.	Discovery Against Non-Parties	130
1.	Request for Production From a Non-Party.....	131
K.	Right to Enter Land or Inspect Things	131
L.	Interrogatories.....	132
M.	Bill of Particulars.....	133
1.	General Requirements	133
2.	Procedure.....	134
3.	Specific Objections and Commonly Disputed Items.....	135
a.	Demands for Disclosure of Expert Information in a Bill of Particulars	135
b.	Bill of Particulars in a Medical Malpractice Case.....	135
c.	Demands for Statutes, Ordinances and Laws in a Bill of Particulars.....	137
d.	Demand for Evidentiary Information in a Bill of Particulars.....	137
e.	Demand for a Breakdown of Future or General Damages in a Bill of Particulars	138
f.	Overbroad and Burdensome Demands in a Demand.....	138
g.	Bill of Particulars in Personal Injury Actions.....	139
4.	Supplemental and Amended Bills of Particulars.....	139
N.	Depositions—Oral and Written Questions.....	140
1.	Objections and Directions Not to Answer at a Party Deposition	140
2.	Depositions of Non-Parties Under the Deposition Rules—The Role of the Non-Party Witness Counsel	142
3.	Is It Proper For a Party’s Attorney to Represent a Non-Party Witness at Deposition?.....	143
4.	Notice Requirements	143

	5.	Deposition Location	144
	6.	Preparing to Depose the Opposing Party.....	144
	7.	Preparing Your Client for Deposition	144
	8.	Conduct of the Deposition.....	145
	9.	Production of Documents at the Deposition.....	145
	O.	Statement of a Party.....	146
	P.	Insurance Information	146
	Q.	Accident Reports	146
	R.	Names of Witnesses	147
	S.	Videotapes, Audiotapes and Photographs	147
	T.	Medical Reports and Authorizations	148
	U.	Medical Examinations.....	149
	V.	Expert Witness Disclosure—Nonmedical Malpractice Action.....	150
	1.	Timeliness of Expert Disclosure	151
	2.	Sufficiency of Expert Disclosure.....	151
	3.	Expert Disclosure for Economists	152
	4.	Treating Physicians and Expert Disclosure.....	152
	5.	Third Judicial District Expert Disclosure Rule	154
	6.	Remedies for Deficient Expert Disclosure	154
	W.	Amending or Supplementing Disclosure.....	156
XII.		The Summary Judgment Motion	157
	A.	Summary Judgment Procedure.....	157
	1.	Introduction	157
	2.	Court’s Duty	157
	3.	Time of Motion.....	157
	4.	Burden	158
	a.	Movant.....	158
	b.	Opposing Party	160
	5.	The Reply Papers.....	161
XIII.		Resolving Common Settlement Issues	161
	A.	Mr. and Mrs. Jones—Living Adults With No Liens	161
	B.	Mr. and Mrs. Jones—Bankruptcy	162
	C.	Mr. and Mrs. Jones—Divorce	164
	D.	Authority to Settle the Case.....	164
	1.	Infant Settlement	165
	2.	Wrongful Death Case	165
	E.	Release.....	166
	F.	Taxation of Settlements and Lawsuits.....	166
	G.	Requirements for a Binding Settlement Agreement.....	166
	H.	Structures.....	168
	I.	Confidentiality and Sealing Orders	168
	J.	Indemnity by Plaintiff’s Counsel—Not Appropriate	168
XIV.		How to Resolve Liens and Claimed Rights of Reimbursement	169
	A.	Evaluating and Assessing Liens and Rights of Subrogation	169
	B.	Medical Benefits Carrier Intervention.....	171

C.	The Most Common Entities Seeking Repayment of Expenses in a Personal Injury Action	171
1.	Medicare	171
2.	Medicaid	171
3.	Health Insurance Contracts.....	171
4.	Self-Funded Private Employer Health Plans	172
5.	Medicare Advantage Policy (MAP)	172
6.	State Insurance Fund	173
7.	No-Fault Insurer Based on the Personal Injury Payment (APIP).....	173
8.	No-Fault Insurer by Lien Under Insurance Law § 5104(b).....	173
D.	Resolving Medicare Liens.....	173
1.	Medicare Liens and the Settlement Process	175
a.	Ambiguities About Liens in Settlements	175
b.	The Medicare Final Demand Letter.....	176
c.	Medicare as a Co-Payee on the Settlement Check	176
d.	Medicare Issues Impacting Settlement Enforcement	177
e.	New York Cases Involving Medicare Releases, Forms and W-9s.....	178
f.	Medicare and Wrongful Death/Conscious Pain and Suffering Allocations	180
g.	What Is a Related Medicare Conditional Medical Payment?.....	180
h.	How to Reach a Binding Settlement When Medicare Is Involved.....	181
(1)	The Preliminary Conference: Questions for the Plaintiff’s Attorney	182
(2)	Following Up on the Preliminary Conference.....	182
(3)	The Early Pre-trial Conference.....	182
(4)	Final Negotiations and Settlement.....	183
XV.	Common Medical Evidence Issues at Trial.....	184
A.	Medical Records, Reports and Images	184
1.	Admissibility of Medical Records.....	184
2.	Hospital Record	184
3.	Hospital Bills	186
4.	Treating Physician’s Office Records.....	186
5.	Medical Test and Imaging Reports Contained in a Treating Physician’s Office Record	187
6.	Narrative Medical Reports	188
7.	Imaging.....	189
8.	Medical Reports Interpreting Imaging or Other Tests	189
9.	The Examining Physician IME Report.....	190
B.	Experts	190
1.	Expert Opinions.....	190
2.	The <i>Hambusch</i> Professional Reliability Exception	191
3.	Establishing the Reliability of the Out of Court Material Under <i>Hambusch</i>	191
4.	Conduit Hearsay	192
5.	The Out of Court MRI Report and Conduit Hearsay	193
6.	The Open Question—Is the Out of Court Material Admitted Into Evidence or Simply Discussed as a Basis of the Expert’s Opinion?.....	195

C.	Hearsay Medical Documents Associated With Expert Medical Proof	196
1.	Clinical Medical Practice Guidelines	196
2.	Authoritative Texts, Journals, Books, Studies.....	197
3.	Cross-Examination of an Expert on an Authoritative Text	197
4.	Algorithms.....	197
D.	Some Practical Considerations	198
XVI.	The Foundation for Expert Opinion on Summary Judgment and at Trial.....	199
A.	New York’s Traditional Evidentiary Requirements for Experts.....	199
1.	Qualification.....	199
2.	Foundation.....	200
3.	Custom and Practice Expert Opinions.....	201
B.	New York’s Frye Test for Novel Scientific or Other Expert Evidence	202
C.	Conduit Hearsay and the Expert.....	203
D.	The Professional Reliability Exception	204
1.	Criteria for Showing Professional Reliability	204
XVII.	Trial	205
A.	Decisions of Interest in Trial Practice	205
B.	Preparing for Trial—Some Threshold Advice	206
C.	Undisclosed Witnesses and Evidence at Trial.....	207
D.	Trial Theme	208
E.	Motions In Limine.....	208
F.	Voir Dire (Jury Selection)	209
1.	General Rules	209
2.	Purpose	210
3.	Procedure.....	210
4.	Selection Concepts	211
G.	Opening Statements.....	212
H.	Direct Examination.....	213
I.	Cross-Examination	213
J.	Demonstrative Evidence.....	214
K.	Trial Expert Testimony Rulings	215
L.	Jury Charges, Verdict Sheets, and Jury Notes.....	217
1.	Jury Charges	217
2.	Verdict Sheet	218
3.	Jury Notes.....	219
M.	Closing.....	219
XVIII.	Post-Trial and Appeal Process.....	221
A.	Post-Trial Matters.....	221
XIX.	Damages	222
Appendix A	Time Limitations Chart.....	223
Appendix B	Centers for Medicare & Medicaid Services Bulletin: New Common Working File (CWF) Medicare Secondary Payer (MSP) Type for Liability Medicare Set-Aside Arrangements (LMSAs) and No-Fault Medicare Set-Aside Arrangements (NFMSAs).....	227
Personal Injury Forms Index.....		233

Table of Authorities 455
About the Author 497

PATRICK J. HIGGINS, ESQ.

Mr. Higgins is the owner of the Law Offices of Patrick J. Higgins, PLLC in Albany, New York where he represents plaintiffs in complex personal injury and medical malpractice actions. He also represents select plaintiffs in commercial litigation.

Mr. Higgins is the Editor-in-Chief and contributing author to the New York State Bar Association's two-volume treatise *The Plaintiff's Personal Injury Action in New York*, and past state chair for the New York State Bar Association's seminar "Handling Tough Issues in Personal Injury Litigation." Mr. Higgins is board certified by the National Board of Trial Advocacy in Trial Practice and is a graduate of the National Institute of Trial Advocacy (NITA) Master Advocacy Program. He is a past President of the Albany County Bar Association, a past member of the New York State Bar Association House of Delegates, and a past member of the Independent Judicial Elections Qualification Commission for the Third Judicial District.

Mr. Higgins has frequently spoken to attorneys' groups on trial practice issues. He is listed in *Best Lawyers of America*TM and as AV preeminentTM in Martindale Hubbell.