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2021 Edition

Medical Malpractice in Connecticut

A Guide to Resources in the Law Library

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Prepared by Connecticut Judicial Branch, Superior Court Operations, Judge Support Services, Law Library Services Unit

lawlibrarians@jud.ct.gov

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This guide links to advance release opinions on the Connecticut Judicial Branch website and to case law hosted on Google Scholar and Harvard's Case Law Access Project. The online versions are for informational purposes only.

References to online legal research databases refer to in-library use of these databases. Remote access is not available.

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https://www.jud.ct.gov/policies.htm

- "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a **reasonable inquiry** as permitted by the circumstances to determine that there are **grounds for a good faith belief** that there has been negligence in the care or treatment of the claimant." Conn. Gen. Stat. § 52-190a(a) (2021). [Emphasis added.]

- **Certificate: "**The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant." Conn. Gen. Stat. § 52-190a(a) (2021).

- **Written Opinion Letter:** "To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." Conn. Gen. Stat. § 52-190a(a) (2021).

- **Automatic Ninety-Day Extension:** "Upon petition to the clerk of any superior court or any federal district court to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods." Conn. Gen. Stat. § 52-190a(b) (2021).

- **Dismissal of Action:** "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." Conn. Gen. Stat. § 52-190a(c) (2021).

- "Our Supreme Court has held that the filing of a good faith certificate may be viewed as essential to the legal sufficiency of the plaintiff's complaint. [*LeConche v. Elligers*, 215 Conn. 701, 579 A.2d 1 (1990)]." Yale University School of Medicine v. McCarthy, 26 Conn. App. 497, 502, 602 A.2d 1040 (1992).

- **Purpose of good faith certificate**: "The purpose of this precomplaint inquiry is to discourage would-be plaintiffs from filing unfounded lawsuits against health care providers and to assure the defendant that the plaintiff has a good faith belief in the defendant's negligence. LeConche v. Elligers, 215 Conn. 701, 710-11, 579 A.2d 1 (1990)." Yale University School of Medicine v. McCarthy, 26 Conn. App. 497, 501-502, 602 A.2d 1040 (1992).

- "Regardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52–190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to § 52–592." Peters v. United Community and Family Services, Inc., 182 Conn. App. 688, 705, 191 A.3d 195 (2018).

- "[T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Internal quotation marks omitted.) Boone v. William W. Backus Hospital, supra, 272 Conn. 551 at 562–63, 864 A.2d 1; see also Trimel v. Lawrence & Memorial Hospital Rehabilitation Center, 61 Conn. App. 353, 358, 764 A.2d 203, appeal dismissed, 258 Conn. 711, 784 A.2d 889 (2001)." Lapierre v. Mandell and Blau, M.D.'s, P.C., 202 Conn. App. 44, 49-50, 243 A.3d 816 (2020).

- "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury.... Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) Gold v. Greenwich Hospital Assn., 262 Conn. 248, 254–55, 811 A.2d 1266 (2002)." Doe v. Cochran, 332 Conn. 325, 335, 210 A.3d 469 (2019).

Section 1: Certificate of Good Faith, Reasonable Inquiry or Merit & Written Opinion Letter

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to the certificate of good faith, reasonable inquiry or merit and the written opinion letter required in negligence actions against health care providers.

SEE ALSO: Section 2: Automatic ninety-day extension of statute of limitations.

DEFINITIONS:

- **Good Faith Certificate**: "The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant." Conn. Gen. Stat. § 52-190a(a) (2021).
- **Written Opinion of Health Care Provider**: "To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith." Conn. Gen. Stat. § 52-190a(a) (2021).
- **Consequences of filing a false certificate**: "If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal

discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate." Conn. Gen. Stat. § 52-190a(a) (2021).

- **Health Care Provider**: "means any person, corporation, facility or institution licensed by this state to provide health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment." Conn. Gen. Stat. § 52-184b(a) (2021).
- "If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim." Conn. Gen. Stat. § 52-184c(b) (2021).
- "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider.'" Conn. Gen. Stat. § 52-184c(c) (2021).
- **Dismissal**: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." Conn. Gen. Stat. § 52-190a(c) (2021).
- "'The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with [General Statutes] § 52−190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court ... The jurisdiction that is found lacking ... is jurisdiction over

the person ...' (Citation omitted; internal quotation marks omitted.) Morgan v. Hartford Hospital, [301 Conn. 388, 401–02, 21 A. 3d 451 (2011).] '[A] motion to dismiss pursuant to § 52– 190a(c) is the only proper procedural vehicle for challenging deficiencies with the opinion letter, and ... dismissal of a letter that does not comply with § 52–190a(c) is mandatory ...' Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 29, 12 A.3d 865 (2011). General Statutes § 52–190a(c) provides that '[t]he failure to obtain and file the written opinion ... shall be grounds for the dismissal of the action.'" Torres v. Dolan, Superior Court, Judicial District of New Britain, No. CV15-6028219-S (Aug. 24, 2015) (2015 WL 5626415).

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website.

- Conn. Gen. Stat. (2021)
  § 4-160(b). Authorization of actions against the state.
  § 52-184c. Standard of care in negligence action against health care provider. Qualifications of expert witness.
  § 52-190a. Prior reasonable inquiry and certificate of good faith required in negligence action against a health care provider. Ninety-day extension of statute of limitations.

COURT RULES:

Amendments to the Practice Book (Court Rules) are published in the Connecticut Law Journal and posted online.

- **Scope of Discovery; In General** "Written opinions of health care providers concerning evidence of medical negligence, as provided by General Statutes § 52-190a, shall not be subject to discovery except as provided in that section." Connecticut Practice Book § 13-2 (2021).

FORMS:

- 2 Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  Form 101.13. *Certificate of Reasonable Inquiry* (2020-2021 supplement only).

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Form 16.03.2. *Certificate of Good Faith*.

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Form 16.03.3. *Opinion Letter from a Similar Health Care Provider*.

- *Library of Connecticut Personal Injury Forms*, 2d ed., by Joshua D. Koskoff and Sean K. McElligott, editors, Connecticut Law Tribune, 2014.
  Form 2-015. *Certificate for Complaint – Medical Malpractice – Birth Injury – Asphyxia*, p. 138

Form 2-016. *Certificate for Complaint – Medical Malpractice – Birth Injury – Shoulder Dystocia*, pp. 153 – 154
Form 2-017. *Certificate for Complaint – Medical Malpractice – Death/Failure to Diagnose Carotid Artery Dissection*, p. 161
Form 2-018. *Certificate for Complaint – Medical Malpractice – Apportionment Against Party Brought in by Defendant*, p. 165

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.

Who Can Draft

- Carpenter v. Daar, 199 Conn. App. 367, 369-370, 236 A. 3d 239 (2020), cert. granted 335 Conn. 962 (2020). "The defendants counter that the certificate of good faith and its accompanying opinion letter did not demonstrate that Solomon was a similar health care provider under the definitions set forth in § 52-184c. They further assert, as alternative grounds for affirmance of the trial court's judgment, that the supplemental affidavit should not have been considered by the trial court because (1) it was procedurally improper for the plaintiff to have attempted to cure a § 52-190a (a) defect in an opinion letter attached to the complaint with information contained in a supplemental affidavit of the author of the opinion without amending the complaint;... and (3) without the supplemental affidavit, the opinion letter attached to the complaint did not contain sufficient information to demonstrate that Solomon is a similar health care provider to Daar under either definition of a similar health care provider set forth in § 52-184c."

- Labissoniere v. Gaylord Hospital, Inc., 199 Conn. App. 265, 267-268, 235 A.3d 589 (2020). "The plaintiffs' central claim on appeal is that the court erred in concluding that the physicians were internists acting within their specialty when they treated the decedent. The plaintiffs therefore assert that the trial court erred in concluding that the opinion letter attached to their complaint, which was written by a surgeon, failed to meet the personal jurisdictional requirement of § 52-190a and the allegations of the complaint did not satisfy the personal jurisdictional exception provided by General Statutes § 52-184c (c) ."

- Caron v. Connecticut Pathology Group, P.C., 187 Conn. App. 555, 556-557, 202 A.3d 1024 (2019). "This appeal arises out of a medical malpractice action... after a false positive cancer diagnosis. The plaintiffs appeal from the judgment of the trial court dismissing their complaint against the defendant for failure to attach to their complaint a legally sufficient opinion letter authored by a similar health care provider as required by General Statutes § 52-190a (a). On appeal, the plaintiffs, who attached to their complaint an opinion letter authored by a board certified clinical

pathologist, claim that the court found that anatomic pathology is a medical specialty distinct from clinical pathology and, on the basis of that finding and the allegations in the complaint, improperly determined that the plaintiffs were required to submit an opinion letter authored by a board certified anatomic pathologist. We disagree…"

- Peters v. United Community and Family Services, Inc., 182 Conn. App. 688, 705, 191 A.3d 195 (2018). "Regardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52–190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to § 52–592."

- Doyle v. Aspen Dental of S. CT, PC, PC, 179 Conn. App. 485, 494–95, 179 A.3d 249 (2018). "Despite the defendant's training and experience in oral and maxillofacial surgery, the plaintiff maintains that an opinion letter from a general dentist was sufficient in the present case because 'there was no authentic public record by which to determine or verify that [the defendant] had training as an oral and maxillofacial surgeon' and she could verify only that the defendant was a licensed general dentist. More specifically, the plaintiff argues that because the defendant's profile on the website of the Department of Public Health (department) did not indicate that he was a board certified oral and maxillofacial surgeon, she was not required to obtain an opinion letter from a board certified oral and maxillofacial surgeon. In response, the defendant argues that 'there is no statutory requirement that the defendant's specialty training be verifiable on the website of a public health authority.' We agree with the defendant."

- Wilkins v. Connecticut Childbirth and Women's Center, 314 Conn. 709, 727 and 733, 104 A3d 671 (2014). "We conclude that the text of the statute accommodates a circumstance in which two different types of medical professionals are board certified in the same medical specialty. To the extent that the statute is ambiguous as to this question, we agree with the plaintiff that a construction that deems a medical professional who is board certified in the same specialty but has greater training and experience, satisfies the purpose of the requirement of the opinion letter. Under this construction, a board certified obstetrician and gynecologist is a similar health care provider for purposes of § 52-184c (c). … The statutory requirement that a nurse-midwife work in conjunction with an obstetrician and gynecologist, combined with the explicit representation in the good faith opinion certification that the obstetrician in the present case had experience supervising

nurse-midwives, demonstrates that the obstetrician satisfied the requirements for a 'similar health care provider' under § 52-184c (c)."

- Bennett v. New Milford Hospital, 300 Conn 1, 21, 12 A3d 865, 878 (2011). "Specifically, the text of the related statutes and the legislative history support the Appellate Court's determination that, unlike § 52-184c (d), which allows for some subjectivity as it gives the trial court discretion in determining whether an expert may testify, '§ 52-190a establishes objective criteria, not subject to the exercise of discretion, making the prelitigation requirements more definitive and uniform' and, therefore, not as dependent on an attorney or self-represented party's subjective assessment of an expert's opinion and qualifications…. Accordingly, we conclude that, in cases of specialists, the author of an opinion letter pursuant to § 52-190a (a) must be a similar health care provider as that term is defined by § 52-184c (c), regardless of his or her potential qualifications to testify at trial pursuant to § 52-184c (d)."

- Bennett v. New Milford Hospital, 300 Conn 1, 30-31, 12 A3d 865 (2011). "We agree that the remedy of dismissal may, standing alone, have harsh results for plaintiffs, particularly when the problems with the opinion letter are as relatively insignificant as they present in this case, given the apparently high and relevant qualifications of its author. Thus, we emphasize that, given the purpose of § 52-190a, which is to screen out frivolous medical malpractice actions, plaintiffs are not without recourse when facing dismissal occasioned by an otherwise minor procedural lapse, like that in this case. First, the legislature envisioned the dismissal as being without prejudice … and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute, General Statutes § 52-592. For additional discussion of this particular relief, see the discussion in the companion case also released today, Plante v. Charlotte Hungerford Hospital, 300 Conn. 33, 12 A.3d 885 (2011)."

- Plante v. Charlotte Hungerford Hospital, 300 Conn. 33, 46-47, 12 A3d 885 (2011). "The hospital defendants contend further that the matter of form provision of § 52-592(a) is intended to aid the 'diligent suitor' and excuses only 'mistake, inadvertence or excusable neglect.' We agree with the hospital defendants and conclude that, when a medical malpractice action has been dismissed pursuant to § 52-192a(c) for failure to supply an opinion letter by a similar health care provider required by § 52-190a(a), a plaintiff may commence an otherwise time barred new action pursuant to the matter of form provision of § 52-592(a) only if that failure was caused by a simple mistake or

omission, rather than egregious conduct or gross negligence attributable to the plaintiff or his attorney."

Content

- Nichols v. Milford Pediatric Group, P.C., 141 Conn App. 707, 715, 64 A.3d 770 (2013). "Further, whether the defendant acted unreasonably by allowing a medical assistant to collect blood samples unsupervised and in the manner utilized and whether it sufficiently trained its employee to ensure that any blood collection was completed in a safe manner, including imparting the knowledge necessary to recognize a 'syncopic reaction to blood sampling,' clearly involves the exercise of medical knowledge and judgment. Accordingly, we disagree with the plaintiff's assertion that any medical opinion would be unnecessary or superfluous."

- Wilcox v. Schwartz, 303 Conn. 630, 648, 37 A3d 133, 144 (2012). "We therefore disagree with the defendants . . . that a written opinion always must identify the precise manner in which the standard of care was breached to satisfy the requirements of § 52-190a(a)."

When Required

- Lapierre v. Mandell and Blau, M.D.'s, P.C., 202 Conn. App. 44, 49-50, 243 A.3d 816 (2020). "The plaintiff argues that § 52-190a does not apply to his claim. We disagree. "[Section 52-190a] applies ... when two criteria are met: the defendant must be a health care provider, and the claim must be one of medical malpractice and not another type of claim, such as ordinary negligence." Young v. Hartford Hospital , 196 Conn. App. 207 at 211–12, 229 A.3d 1112. "[T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Internal quotation marks omitted.) Boone v. William W. Backus Hospital, supra, 272 Conn. 551 at 562–63, 864 A.2d 1; see also Trimel v. Lawrence & Memorial Hospital Rehabilitation Center, 61 Conn. App. 353, 358, 764 A.2d 203, appeal dismissed, 258 Conn. 711, 784 A.2d 889 (2001)."

- Perry v. Valerio, 167 Conn.App. 734, 742-744, 143 A.3d 1202 (2016). "In the present case, the plaintiff does not dispute that she brought this action against the defendants in their capacities as medical professionals. Further, the plaintiff does not dispute that M's alleged injuries occurred during a physical therapy session that arose out of a

medical professional-patient relationship. Instead, she argues that V's failure to secure M's leg brace did not constitute negligence of a specialized medical nature, nor did it substantially relate to the diagnosis or treatment of M's condition or involve the exercise of medical judgment. As previously discussed, however, the alleged acts of negligence in the complaint went beyond the failure to properly secure M's leg brace. …
We agree with the trial court that the plaintiff's complaint alleges more than ordinary negligence; the complaint sounds in medical malpractice. …
On the basis of our consideration of the three prongs of the Trimel test to determine whether a claim sounds in medical malpractice, we conclude that the trial court properly characterized the plaintiff's complaint as a medical malpractice claim. We therefore reach the additional conclusion that the plaintiff was required to satisfy the requirements of § 52−190a (a) by filing a good faith certificate and an opinion by a similar health care provider when she initiated her action. Because she failed to comply with those requirements, we ultimately conclude that the court properly granted the defendants' motion to dismiss pursuant to § 52−190a (c)."

- Torres v. Dolan, Superior Court, Judicial District of New Britain, Docket No. CV15-6028219-S (Aug. 24, 2015) (2015 WL 5626415). "This case arises from an alleged burn suffered by the plaintiff . . . when the defendant dentist . . . made contact with her face in the midst of a dental procedure while his gloved hand had an acidic substance on it. … The plaintiff primarily argues that the third prong has not been satisfied because the negligence at issue was not related to diagnosis or treatment and did not involve medical judgment. … What is significant in *Nichols* is that the alleged negligence took place during a medical examination, which is treatment requiring the exercise of medical judgment. Cases since have followed this example, finding the third Trimel prong satisfied where the injury takes places in the context some type of treatment that itself involves medical judgment. Accordingly, based on *Nichols* and its ilk, the Trimel analysis is satisfied in the present case because the alleged injury took place during a procedure requiring medical judgment, and thus, the alleged conduct at issue constitutes medical malpractice subject to the pleading requirements of § 52−190a."

- Repoli v. Paul B. Murray, M.D., LLC., Superior Court, Judicial District of Hartford, Docket No. HHD-CV15-6058238-S (Aug. 6, 2015) (2015 WL 5315224). "The defendants . . . have moved to dismiss this medical malpractice action. They argue that the plaintiff . . . failed

to comply with the requirements of General Statutes § 52–190a by failing to attach to the complaint a written opinion of a similar healthcare provider that includes *a detailed basis* for the formation of an opinion that there appears to be evidence of medical negligence. The plaintiff disagrees, arguing that the opinion letter attached to her complaint satisfied the requirements of § 52–190a as construed by the Supreme Court in Wilcox v. Schwartz, 303 Conn. 630, 37 A.3d 133 (2012). The court agrees with the plaintiff, and, accordingly the motion to dismiss is denied." [Emphasis added]

- Briggs v. Winters, Superior Court, Judicial District of Windham, WWM-CV12-5005763-S (Nov. 17, 2014) (2014 WL 7272376). Re apportionment complaint: "There was no physician-patient relationship between the defendant dispensary and the plaintiff's decedent, and thus the three elements of a medical malpractice claim discussed in Votre and Multari have not been met. The defendant Winters was the recipient of care and services rendered by the defendant dispensary, not the plaintiff's decedent. Therefore, the plaintiff's claims do not sound in medical malpractice and § 52–190a does not apply to the alleged negligence claims. Therefore, an opinion letter from a similar healthcare provider is not necessary and counts four and five are not subject to dismissal in the absence of such a letter."

- Austin v. Connecticut CVS Pharmacy, LLC, Superior Court, Judicial District of Hartford at Hartford, No. CV13-6037871-S (June 6, 2013) (56 Conn. L. Rptr. 242) (2013 WL 3306639). "The plaintiff claims that her complaint alleges ordinary acts of negligence, where no medical judgment is required, and therefore the requirements of General Statutes § 52–190a do not apply. As Judge Licari noted in Burke v. CVS Pharmacy, Inc., Superior Court, judicial district of New Haven at New Haven, Docket No. CV0850247395 (2/9/09), there is a split of authority as to whether or not a pharmacist's misfilling of a prescription is medical malpractice or simple negligence…. Applying the Trimel criteria to this case it is clear that the complaint alleges medical negligence, not ordinary negligence. First, the defendants are being sued in their role as pharmacists. Second, what is alleged to have occurred here arose out of their relationship with the plaintiff as her pharmacist. Third, the alleged negligence relates to the medical judgment exercised by a pharmacist.")

- Dwyer v. Bio-Medical Application of CT, Inc., Superior Court, Judicial District of Waterbury at Waterbury, No. CV12-6015954-S (June 19, 2013) (56 Conn. L. Rptr. 256) (2013 WL 3388874). "Although the patient was at the defendant's facility for a medical procedure, dialysis treatment, the negligence is not alleged to have occurred during the

medical procedure, but beforehand, when the plaintiff was being led to and from the scale. Furthermore, knowing not to leave a person without their walker on a tripping hazard does not involve any medical knowledge or judgment. Therefore, the allegations sound in ordinary negligence, not medical malpractice. Thus, § 52-190a does not apply, and an opinion letter is not required."

WEST KEY NUMBERS:

- Health *# 804 – 805*
  - # 804. Affidavits of merit or meritorious defense; expert affidavits
  - # 805. Sanctions for failing to file affidavits; dismissal with or without prejudice

TEXTS & TREATISES:

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

- 2 & 3A Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  - Authors' Comments following Forms 101.13 and 804.4 (2020-2021 supplement only*)*

- *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019.
  - Chapter 4. Certificate of Good Faith and Opinion Letter
    - § 4-2. The Certificate of Good Faith
    - § 4-3. The 90-Day Extension
    - § 4-4. The Opinion Letter
      - § 4-4:1. Whether the Action Requires an Opinion Letter
        - § 4-4:1.1. Actions Not Sounding in Medical Malpractice
        - § 4-4:1.2. Informed Consent Cases
      - § 4-4:2. Remedy for Non-Compliance with the Opinion Letter Requirement
      - § 4-4:3. The "Detailed Basis" Requirement
      - § 4-4:4. Causation
      - § 4-4:5. Whether the Letter Should Indicate That the Author Is a Similar Health Care Provider
      - § 4-4:6. The Author Must Be a "Similar Health Care Provider"
      - § 4-4:7. Hospitals as Defendants
      - § 4-4:8. Multiple Defendants
      - § 4-4:9. Revival of Dismissed Claims Under the Accidental Failure of Suit Statute

- *Medical Malpractice*, by David W. Louisell and Harold Williams, Matthew Bender, 1960, with 2021 supplement (also available on Lexis).
  - Chapter 9. The Defense of Malpractice Cases
    - § 9.07. Failure of the Plaintiff to Comply with Statutory Requirements

[2] Certificate of Merit

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed., Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16:2. Authority; good faith certificate

- *Tort Remedies in Connecticut*, by Richard L. Newman and Jeffrey S. Wildstein, Michie, 1996, with 2014 supplement.
  Chapter 16. Professional Malpractice
  § 16-3. Medical Malpractice
  § 16-3(d). Good faith certificate (also 2014 supplement, pp. 144-148)

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Chapter 16. Professional Malpractice
  § 16.03. Bringing a Medical Malpractice Claim
  [7] Obtaining a Good-Faith Certificate
  [a] Overview of Conn. Gen. Stat. § 52-190a
  [b] What Is a "Similar Health Care Provider?"
  [c] What Must the Opinion Letter State?
  [d] Failure to Obtain and File Written Opinion is Grounds for Dismissal of Medical Malpractice Action
  [e] Strict Compliance with Conn. Gen. Stat. § 52-190a Is Required
  [f] Conn. Gen. Stat. § 52-190a Does Not Apply to Informed Consent Claims
  [g] Curing a Defective Opinion Letter

- 1 *West's Connecticut Rules of Court Annotated*, 2020 ed., Thompson West.
  § 13-2. Scope of Discovery; In General
  Notes of Decisions

LAW REVIEWS & LEGAL PERIODICALS:

Public access to law review databases is available on-site at each of our law libraries.

- David M. Studdert, *Medical Malpractice and the Elderly*, 28 Elder L. J. 73 (2020).

- Cecilia Plaza, *Miss Diagnosis: Gendered Injustice in Medical Malpractice Law*, 39 Colum. J. Gender & L. 91 (2020).

- Nadia N. Sawicki, *Choosing Medical Malpractice*, 93 Wash. L. Rev. 891 (2018).

- Christian Nolan, Article, *Supreme Court Gives Edge to Plaintiffs in Med-Mal Cases*, 40 Connecticut Law Tribune 7 (December 15, 2014) (No. 50).

- Brett J. Blank, *Symposium on Health Care Technology: Regulation and Reimbursement: Note: Medical Malpractice/Civil Procedure – Trap for the Unwary: the 2005*

Amendments to Connecticut's Certificate of Merit Statute, 31 Western New England Law Review 453 (2009).

- Thomas B. Scheffey, Article, *Defense: 'Guillotine' Law Needs Sharpening*, 30 Connecticut Law Tribune 1 (April 19, 2004) (No. 16).

- Thomas B. Scheffey, Article, *Med-Mal Lawsuit Change Defeated: Plaintiffs Bar Dealt Setback Over Who Can Write 'Similar' Provider Letter*, 38 Connecticut Law Tribune 1 (May 7, 2012) (No. 19).

Section 2: Automatic Ninety-Day Extension of Statute of Limitations

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to the automatic ninety-day extension of statute of limitations granted to allow reasonable inquiry in negligence actions against health care providers.

SEE ALSO: Section 1: Certificate of Good Faith

DEFINITION:

- **Ninety-day extension of statute of limitations**: "Upon petition to the clerk of any superior court or any federal district court to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods." Conn. Gen. Stat. § 52-190a(b) (2021).
- **Statute of Limitations:** "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by **malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, advanced practice registered nurse, hospital or sanatorium**, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed." Conn. Gen. Stat. § 52-584 (2021). [Emphasis added.]

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.

- Conn. Gen. Stat. (2021)
  - § 52-102b. Addition of person as defendant for apportionment of liability purposes.
  - § 52-190a(b). Prior reasonable inquiry and certificate of good faith required in negligence action against a health care provider. Ninety-day extension of statute of limitations.
  - § 52-584. Limitation of action for injury to person or property caused by negligence, misconduct or malpractice.
  - § 52-555. Actions for injuries resulting in death.

COURT RULES:

Amendments to the Practice Book (Court Rules) are published in the Connecticut Law Journal and posted online.

- **Scope of Discovery; In General** "Written opinions of health care providers concerning evidence of medical negligence, as provided by General Statutes § 52-190a, shall not be subject to discovery except as provided in that section." CT Practice Book § 13-2 (2021).

FORMS:

- Petition to Clerk for Automatic Ninety Day Extension. Figure 1.

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Form 16.03.1. Petition for Automatic 90-Day Extension of Limitations Period – Conn. Gen. Stat. § 52-190A

RECORDS & BRIEFS:

- Conn. Appellate Court Record and Briefs (March/April 1996), Girard v. Weiss, 43 Conn. App. 397, 682 A.2d 1078 (1996).

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.

- Ligouri v. Sabbarese, Superior Court, Judicial District of Danbury at Danbury, No. DBD-CV18-6026710-S (October 1, 2020) (70 Conn. L. Rptr. 356) (2020 WL 6338218). "The plaintiff cites Pafka v. Gibson, 2008 WL 3307297, as providing a guiding principle in a court's dealing with informed consent and potential statute of limitations issues. In Pafka, the defendants alleged that the ninety-day extension of the statute of limitations to allow for a reasonable inquiry into a claim of medical malpractice did not apply to the plaintiff's count alleging lack of informed consent. The Pafka court had previously ruled that '[t]he requirements of General Statutes § 52-190a(a) regarding the necessity for a good faith certificate and letter by a similar health care provider did not apply to the plaintiff's informed consent claim.' Id. at *1. 'The purpose of the subsection providing for a ninety-day extension, by its very words, is to allow a reasonable inquiry into whether there has been medical negligence. The ninety-day extension is automatically *granted* ... based *upon a factual scenario that potentially may result in a claim of medical negligence*. To foreclose a plaintiff who makes such an inquiry during the ninety-day period from filing a claim based upon lack of informed consent rather than medical negligence after conducting the inquiry would contradict the whole purpose of that subsection providing for the extension. The defendants have cited no authority that indicates that a court may retroactively revoke an automatic extension of the statute of limitations when the action that is ultimately filed within the ninety-day extension period does not contain a medical negligence claim. To interpret the extension provision to require a plaintiff to file an action based upon any theory other than medical negligence within two years and then allow a plaintiff an extra ninety days only to file a medical negligence claim not only negates the purpose of providing the extension but potentially results in multiple, piecemeal filings of actions based upon the same set of factual circumstances. The defendants are not entitled to summary judgment on the ground that the plaintiff's claim is barred by the statute of limitations, as her claim, regardless of its nature, was filed within the ninety-day extension period provided in General Statutes § 52-190a(b).' Pafka at *2. Here the plaintiff did file a claim for medical malpractice, which was dismissed based on an insufficient opinion letter, but it did

meet the Pafka determination that the "ninety-day extension is automatically granted ... based upon a factual scenario that potentially may result in a claim of medical negligence," as it actually did result in a medical negligence claim, that was dismissed for other reasons."

- Riccio v. Bristol Hospital, Inc., Superior Court, Judicial District of New Britain at New Britain, No. HHB-CV18-6048099-S (October 4, 2019) (69 Conn. L. Rptr. 303) (2019 WL 5543036). "The adequacy of a 'similar health care provider' opinion letter is one of the most frequently litigated pretrial issues in medical malpractice actions. Given the law in Connecticut at the time Riccio I was commenced, the plaintiff's counsel reasonably could not have believed that the opinion letters they supplied complied with § 52-190a. Counsel's admitted failure to read and comply with controlling appellate precedent, decided more than six years before Riccio I was filed, is egregious, inexplicable, and inexcusable conduct." (p. 305)

  "On the evidence before it, the court cannot find that the dismissal of Riccio I was the result of mistake, inadvertence, or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or her attorneys. Having failed to meet her burden of demonstrating that the dismissal of Riccio I was a matter of form, the plaintiff cannot avail herself of the accidental failure of suit statute. Riccio II was commenced five months after the statute of limitations expired. Thus, the action is time barred by § 52-555, and the court lacks subject matter jurisdiction over the plaintiff's medical malpractice claim. The defendant's motion to dismiss is therefore GRANTED." (p. 306)

- McCann v. Babiarz, Superior Court, Judicial District of Hartford at Hartford, No. HHD-CV14-6049819-S (September 14, 2017) (65 Conn. L. Rptr. 274) (2017 WL 5015214). "The defendants, Joseph Babiarz, M.D. and ProHealth Physicians, Inc., object to the plaintiff's, Robert McCann, July 27, 2017 request to amend his complaint to allege two new specifications of negligence by Dr. Babiarz. The defendants claim that the amended allegations do not relate back to the current allegations of the complaint and are therefore time-barred." (p. 274)

  "'Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims ... [I]n the cases in which we have determined that an amendment does

not relate back to an earlier pleading, the amendment presented different issues or depended on different factual circumstances rather than merely amplifying or expanding upon previous allegations ...

"'More specifically, where the proposed allegations promote a change in or an addition to a ground of negligence arising out of a single group of facts we have allowed use of the relation back doctrine ... On the other hand, where new allegations directly contradict those in the operative complaint we have held that they do not relate back to those in the operative complaint ...'" [Quoted from Briere v. Greater Hartford Orthopedic Group, P.C., 325 Conn. 198, 207-209, 157 A.3d 70 (2017)] (p. 275-276)

- Burns v. Stamford Health System, Inc., Superior Court, Judicial District of Stamford/Norwalk at Stamford, No. FST-CV14-6021550-S (June 30, 2015) (60 Conn. L. Rptr. 578) (2015 WL 4571307). "From the language of the relevant statutes then, it is plain that it was the intention of the legislature to extend the 120−day period [52-102b] by an extra 90 days where the reasonable inquiry of a malpractice complaint, direct or apportionment, is required.

  In light of the foregoing, the court concludes that apportionment claimants are entitled to the time extension provided by § 52−190a(b)...."

- Gonzales v. Langdon, 161 Conn. App. 497, 517, 519 (2015). "Section 52-190a (a) contains no express language prohibiting a plaintiff from amending an opinion letter after the action is commenced. The statute clearly and unambiguously states that an opinion letter must be attached to the certificate of good faith, but makes no reference as to whether the complaint may be amended to attach an amended or new opinion letter if the original opinion letter is defective. In the absence of such an explicit statutory prohibition against amending the complaint and opinion letter, we can divine no legislative intent to override the general applicability of General Statutes § 52-128 and Practice Book §§ 10-59 and 10-60."

  "The legislative purpose of § 52-190a (a) is not undermined by allowing a plaintiff leave to amend his or her opinion letter or to substitute in a new opinion letter if the plaintiff did file, in good faith, an opinion letter with the original complaint, and later seeks to cure a defect in that letter within the statute of limitations. Amending within this time frame typically will not prejudice the defendant or unduly delay the action. The plaintiff is still required to prove that his or her claims are meritorious at the beginning of the action and meritless claims can be weeded out quickly."

"Allowing amendments filed after the thirty days to amend as of right but before the statute of limitations period has run favors judicial economy for the following reasons. If a medical malpractice case is dismissed for lack of a legally sufficient opinion letter, the dismissal is without prejudice, 'and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute, General Statutes § 52-592. Bennett v. New Milford Hospital, supra, 300 Conn. 1 at 31. Thus, if a plaintiff is unable to amend the original opinion letter during this time frame, the action would be dismissed without prejudice and could be filed anew, either within the statute of limitations or pursuant to the accidental failure of suit statute. Thus, an unduly restrictive reading of § 52-190a would only serve to generate multiple proceedings arising from the same case due to the unnecessary refiling of valid medical malpractice claims. Additionally, it would create further litigation regarding whether the plaintiff's action was within the ambit of the accidental failure of suit statute. See, e.g., Plante v. Charlotte Hungerford Hospital, supra, 300 Conn. 33. In our view, there is no need to require a plaintiff to file an entirely new action if an amendment can cure a defect in the initial opinion letter within a relatively short span of time after the filing of the initial complaint."

- Rockwell v. Quintner, 96 Conn. App. 221, 232, 899 A.2d 738 (2006). "To demonstrate his entitlement to summary judgment on timeliness grounds, the defendant, through his affidavit, needed to establish that there was no viable question of fact concerning the plaintiff's obligation to have brought her action within two years and ninety days of discovering the injuries allegedly caused by the defendant's treatment or, in any event, no later than three years and ninety days from the negligent treatment itself. See General Statutes §§ 52-584, 52-190a (b); Barrett v. Montesano, 269 Conn. 787, 796, 849 A.2d 839 (2004) (holding automatic ninety day extension provided by § 52-190a [b] applicable to both two year discovery and three year repose provisions of § 52-584)."

- Barrett v. Montesano, 269 Conn. 787, 790, 849 A.2d 839 (2004). "On appeal, the plaintiffs claim that the trial court improperly held that the ninety day extension provided by § 52-190a (b) did not apply to the repose section of § 52-584, but, rather, applied only to the two year discovery provision of the statute. They contend that the three year repose section is part of the statute of limitations and is therefore extended by § 52-190a. The defendants argue in response that the exception provided by § 52-190a should be strictly construed in favor of protecting defendants from stale claims and that the term 'statute of limitations' excludes the statute of repose contained in § 52-584. We agree with the plaintiffs."

- Bruttomesso v. Northeastern Connecticut Sexual Assault Crisis Services, Inc., 242 Conn. 1, 2-3, 698 A.2d 795, 796 (1997). "The dispositive issue in this appeal is whether a sexual assault crisis center that provides counseling to victims of sexual assault or abuse is a 'health care provider' within the meaning of General Statutes § 52-190a. We conclude that because neither the defendant, Northeastern Connecticut Sexual Assault Crisis Services, Inc., a corporation organized and existing under the laws of the state of Connecticut, nor its employees is licensed or certified by the department of public health, the defendant does not fall within the statutory definition and, consequently, the plaintiffs cannot rely upon the extension of the statute of limitations provided by § 52-190a (b) to save their action, which was brought beyond the two year limitation of General Statutes § 52-584, from being time barred."

- Girard v. Weiss, 43 Conn. App. 397, 418, 682 A.2d 1078, 1088-1089 (1996). "Section 52-190a(b) grants an automatic ninety day extension of the statute, making it clear that the ninety days is in addition to other tolling periods."

TEXTS & TREATISES:

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

- 2 & 3A Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  - Authors' Comments following Forms 101.13 (Certificate of reasonable inquiry) and 804.4 (Against physician and professional corporation for malpractice complaint) (2020-2021 supplement only)

- *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019.
  - Chapter 4. Certificate of Good Faith and Opinion Letter
    - § 4-3. The 90-Day Extension

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  - Chapter 16. Medical Malpractice
    - § 16:9. Limitation of actions: Statute of limitations

- *Tort Remedies in Connecticut*, by Richard L. Newman and Jeffrey S. Wildstein, Michie, 1996, with 2014 supplement.
  - Chapter 16. Professional Malpractice
    - § 16-3. Medical Malpractice
      - § 16-3(d). Good faith certificate (also 2014 supplement, pp. 144 - 148)
      - § 16-3(g)(1)(iii). Tolling by Good Faith Certificate (also 2014 supplement, pp. pp. 160 - 161)

Chapter 24. Statute of Limitations
§ 24-4(c). Medical Malpractice Claims (Also 2014 supplement, p. 259)

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Chapter 16. Professional Malpractice
  § 16.03. Bringing a Medical Malpractice Claim
  [10] Defending a Medical Malpractice Claim
  [d] Petitioning for a 90-Day Toll to Comply With Conn. Gen. Stat. § 52-190a(a)

- 1 *West's Connecticut Rules of Court Annotated*, 2020 ed., Thompson West.
  § 13-2. Scope of Discovery; In General
  Notes of Decisions

LEGAL PERIODICALS:

Public access to law review databases is available on-site at each of our law libraries.

- Carey Reilly, Article, *Techniques for Stopping the Statutes of Limitations Clock*, 37 Connecticut Law Tribune *18*, November 14, 2011, (No. 46).

Figure 1: Petition to Clerk for Automatic Ninety Day Extension

PETITION TO THE CLERK

Pursuant to Connecticut General Statutes Section 52-190a(b), the undersigned hereby petitions for the AUTOMATIC ninety (90) day extension of the Statute of Limitations regarding the course of treatment given to _____ and affecting _____ and any other plaintiffs yet to be identified on or about _____; to allow reasonable inquiry to determine that there was negligence in the care and treatment of _____ by _____ Hospital and/or its servants, agents, and/or employees ; PHYSICIANS _____ and/or their servants, agents and/or employees ; _____ , M.D. and/or her servants, agents and/or employees and other health care providers and other professional corporations of health care providers, and their servants, agents and/or employees as yet to be determined.

_____
Signed

* Source: Records and Briefs, *Barrett v. Danbury Hospital*, 232 Conn. 242 (1995).

Section 3: Elements of a Medical Malpractice Action

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to the elements of a medical malpractice action in Connecticut.

DEFINITIONS:

- "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury.... Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) Gold v. Greenwich Hospital Assn., 262 Conn. 248, 254–55, 811 A.2d 1266 (2002)." Doe v. Cochran, 332 Conn. 325, 335, 210 A.3d 469 (2019).

- "The fact that the plaintiff's operation was followed by an injury is not sufficient to establish negligence." Mozzer v. Bush, 11 Conn. App. 434, 438 n. 4, 527 A.2d 727 (1987).

- **Medical Malpractice v. Ordinary Negligence**: "The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. '[P]rofessional negligence or malpractice . . . [is] defined as the *failure of one rendering professional services* to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services.' (Emphasis added; internal quotation marks omitted.) Santopietro v. New Haven, 239 Conn. 207, 226, 682 A.2d 106 (1996). Furthermore, malpractice 'presupposes some *improper conduct in the treatment or operative skill* [or] . . . the failure to exercise requisite medical skill. . . .' (Citations omitted; emphasis added.) Camposano v. Claiborn, 2 Conn. Cir. Ct. 135, 136-37, 196 A.2d 129 (1963). From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment. See Spatafora v. St. John's Episcopal Hospital, 209 App.Div.2d 608, 609, 619 N.Y.S.2d 118 (1994)." Trimel v.

Lawrence & Memorial Hospital Rehabilitation Center, 61 Conn. App. 353, 357-358, 764 A.2d 203 (2001).

- "**Standard of care in negligence action against health care provider. Qualifications of expert witness.** "In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. ***The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.***" (Emphasis added.) Conn. Gen. Stat § 52-184c(a) (2021).
- **Agency for purposes of imposing vicarious liability in tort claims.** "…we adopt the following alternative standards for establishing apparent agency in tort cases…. Specifically, the plaintiff may prevail by establishing that: (1) the principal held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plaintiff knew of these acts by the principal, and actually and reasonably believed that the agent or employee or apparent agent or employee possessed the necessary authority; see Fireman's Fund Indemnity Co. v. Longshore Beach & Country Club, Inc.; and (3) the plaintiff detrimentally relied on the principal's acts, i.e., the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee. We emphasize that this standard is narrow, and we anticipate that it will be only in the rare tort action that the plaintiff will be able to establish the elements of apparent agency by proving detrimental reliance." Cefaratti v. Aranow, 321 Conn. 593, 624-625, 141 A.3d 752 (2016).

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.

- Conn. Gen. Stat. (2021)
  § 4-160(b). Authorization of actions against the state.
  § 52-184b**.** Failure to bill and advance payments inadmissible in malpractice cases.
  § 52-184d. Inadmissibility of apology made by health care provider to alleged victim of unanticipated outcome of medical care.
  § 52-184e. Admissibility of amount of damages awarded to plaintiff in separate action against different health care provider.

§ 52-190b. Designation of negligence action against health care provider as complex litigation case.
§ 52-190c. Mandatory mediation for negligence action against health care provider. Stipulation by mediator and parties. Rules.
§ 52-192a(b). Offer of compromise by plaintiff. Acceptance by defendant. Amount and computation of interest.

COURT RULES:

Amendments to the Practice Book (Court Rules) are published in the Connecticut Law Journal and posted online.

- **Sec. 17-14A. — Alleged Negligence of Health Care Provider** "In the case of any action to recover damages resulting from personal injury or wrongful death, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, an offer of compromise pursuant to Section 17-14 may be filed not earlier than 365 days after service of process is made on the defendant in such action and, if the offer of compromise is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled." Connecticut Practice Book § 17-14A (2021).

FORMS:

- *Library of Connecticut Personal Injury Forms*, 2d ed., by Joshua D. Koskoff and Sean K. McElligott, editors, Connecticut Law Tribune, 2014.
  Form 2-015. *Complaint – Medical Malpractice – Birth Injury – Asphyxia*, pp. 129 - 138
  Form 2-016. *Complaint – Medical Malpractice – Birth Injury – Shoulder Dystocia*, pp. 139 – 154
  Form 2-017. *Complaint – Medical Malpractice – Death – Failure to Diagnose Carotid Artery Dissection*, pp. 155 – 161
  Form 2-018. *Complaint – Medical Malpractice – Apportionment Against Party Brought in by Defendant*, pp. 162 – 165

- 3A Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  Form 804.4, Against Physician and Professional Corporation for Malpractice Complaint (2020-2021 supplement only)
  Form S-83, Negligence-Medical Malpractice Plaintiff's Interrogatories and Requests for Production to Defendant Doctor
  Form S-84, Negligence-Medical Malpractice Plaintiff's Interrogatories and Requests for Production to Defendant Hospital

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16:12. Sample trial court documents – *Sample complaint*

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Form 8.07.1. Complaint – Wrongful Death – Medical Malpractice
  Form 16.03.4. Complaint – Medical Malpractice – Wrongful Death

- 19B *Am Jur Pleading and Practice Forms*, Thompson West, 2018 (Also available on Westlaw).
  Physicians, Surgeons and Other Healers, §§ 82 – 103
  § 82. Checklist – Drafting a complaint in action for damages against a physician, dentist, or other healer for injuries caused by defendant's malpractice
  § 88. Complaint, petition, or declaration – For malpractice – General form
  § 89. Complaint, petition, or declaration – For malpractice – Specification of items of negligence
  § 90. Complaint, petition, or declaration – For negligence in permitting fall of aged patient – Wrongful death
  § 91. Complaint, petition, or declaration – Failure to warn patient against driving – Loss of control of car due to diabetic attack – Action for personal injuries by plaintiff struck by patient's car
  § 93. Complaint, petition, or declaration—Allegation—For medical malpractice—Failure of general practitioner to exercise or possess required degree of skill, care, and learning—National standard
  § 103. Complaint, petition, or declaration – By physician – To recover damages from patient and attorney for filing groundless and unfounded suit for medical malpractice

CASES:

- Wolfork v. Yale Medical Group, 335 Conn. 448, 239 A.3d 272 (2020). "In October, 2010, the decedent, Daeonte Wolfork-Pisani, the eleven year old son of Pisani and the plaintiff, Karla Wolfork, died while hospitalized at Yale-New Haven Hospital. The Probate Court appointed the plaintiff as the administratrix of the decedent's estate, and, in February, 2013, the plaintiff, in her representative capacity, filed a medical negligence action against the defendants on behalf of the decedent's estate. (p.452)

  "The trial court issued a memorandum of decision in

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.

compliance with the Appellate Court's order. The memorandum provided: 'As a threshold matter, the court hereby substitutes the movant, [Pisani], administrator of the estate of [the decedent], as the plaintiff in this matter. The court hereby grants the substituted plaintiff's January 27, 2017 motion to open and vacate the judgment of dismissal [rendered] in this matter on September 29, 2016, pursuant to Practice Book § 14-3 for failure to file a withdrawal within a specified period of time. In doing so, the court finds that the plaintiff was prevented from filing the withdrawal by reasonable cause, specifically, the proceeding in the Probate Court regarding removal of the predecessor fiduciary, which the court failed to consider when it [rendered] the judgment of dismissal.'"

"…On appeal, the defendants renew the claims they made in the trial court in opposition to Pisani's motions to open and vacate the judgment…" (p. 458)

- Young v. Hartford Hospital, 196 Conn.App. 207, 219-220, 229 A.3d 1112 (2020). "Our analysis is hampered by a paucity of facts… Depending on the factual circumstances, some of the allegations might support a conclusion of ordinary negligence (e.g., "failing to properly secure the camera so that it does not fall on patients") and some might support medical malpractice (e.g., "operating the robot in such a manner to cause the camera to fall"). Neither we nor the trial court are assisted by any facts regarding a description of the camera, where it was, how it was used, whether a medical provider was manipulating the camera at the time it "fell," to state but a few questions. A holistic and reasonable reading of the complaint as drafted does not necessarily foreclose the possibility that injuries were caused by ordinary negligence not involving the exercise of medical judgment.

  The specific factual scenario, then, is far from clear. We are left without guidance as to the precise circumstances claimed to have resulted in injury. In light of the duty to construe the allegations in the light most favorable to the pleader, we are constrained to reverse the judgment of dismissal and to remand the matter to the trial court for further proceedings. We, of course, express no opinion as to whether some or all of the allegations of negligence will be barred by the failure to file a certificate pursuant to § 52-190a."

- O'Neill v. Rockland, M.D., Superior Court, Judicial District of Hartford at Hartford, No.14-6052941-S (September 13, 2019) (69 Conn. L. Rptr. 282) (2019 WL 5172232). "Finally, the court notes that § 4-160 was amended effective October 1, 2019, and made applicable to any claim filed on or after that date, by providing an additional method for bringing a medical malpractice action against the state. As amended by No. 19-182 of the Public Acts of 2019, sub-section (b) of §

4-160 now permits a medical malpractice claimant to commence an action against the state and authorization for such action is to be deemed granted. Moreover, such medical malpractice actions are "deemed a suit otherwise authorized by law in accordance with subsection (a) of section 4-142." *Id.* Sec. 4, No. 19-182 of the Public Acts of 2019."

- Briere v. Greater Hartford Orthopedic Group, P.C., 325 Conn. 198, 210-211, 147 A.3d 70 (2017). "We acknowledge that in our prior cases applying the relation back doctrine we perhaps have not provided as much clarity as necessary for the trial court to apply the doctrine consistently. After a careful review of our case law, it is apparent that in order to provide fair notice to the opposing party, the proposed new or changed allegation of negligence must fall within the scope of the original cause of action, which is the *transaction or occurrence* underpinning the plaintiff's legal claim against the defendant. Determination of what the original cause of action is requires a case-by-case inquiry by the trial court. In making such a determination, the trial court must not view the allegations so narrowly that any amendment changing or enhancing the original allegations would be deemed to constitute a different cause of action. But the trial court also must not generalize so far from the specific allegations that the cause of action ceases to pertain to a specific transaction or occurrence between the parties that was identified in the original complaint. While these guidelines are still broad, a bright line rule would not serve the purpose of promoting substantial justice for the parties."

  "If new allegations state a set of facts that contradict the original cause of action, which is the transaction or occurrence underpinning the plaintiff's legal claim against the defendant, then it is clear that the new allegations do not fall within the scope of the original cause of action and, therefore, do not relate back to the original pleading. But an absence of a direct contradiction must not end the trial court's inquiry. The trial court must still determine whether the new allegations support and amplify the original cause of action or state a new cause of action entirely. Relevant factors for this inquiry include, but are not limited to, whether the original and the new allegations involve the same actor or actors, allege events that occurred during the same period of time, occurred at the same location, resulted in the same injury, allege substantially similar types of behavior, and require the same types of evidence and experts."

- Dzialo v. Hospital of Saint Raphael, Superior Court, Judicial District of New Haven at New Haven, Docket No. CV10-6014703 (June 21, 2011) (2011 Conn. Super. LEXIS 1524). "The Appellate Court in Trimel, Votre and Selimoglu resolved

this issue by applying a three-part test to determine whether a claim sounds in medical malpractice or ordinary negligence. … If all of the factors are met, the cause of action properly sounds in medical malpractice and a written opinion letter is required pursuant to § 52-190a. Votre v. County Obstetrics & Gynecology Group, P.C., *supra*, 585."

WEST KEY NUMBERS:

- Health *# 610 – 643*
  - # 610. In general
  - # 611. Elements of malpractice or negligence in general
  - # 612. Duty
  - # 617. Standard of Care
  - # 622. Breach of Duty
  - # 630. Proximate Cause

ENCYCLOPEDIAS:

- Monique C.M. Leahy, "Litigation of Medical Malpractice in Conducting Colonoscopy", 157 *AmJur Trials* 469 (2019) (also available in Westlaw).
- Nancy Smith, "Discovery Date in Medical Malpractice Litigation", 26 *POF3d* 185 (1994) (also available in Westlaw).
- Monique C.M. Leahy, "Proof of Liability for Injury Caused by Compounded Drug", 174 *POF3d* 417 (2019) (also available on Westlaw).
- Beth Holliday, "Cause of Action in Medical Malpractice for Burns Resulting From Surgical Procedures", 79 *COA2d* 437 (2017) (also available on Westlaw).
- Theresa K. Porter, "Cause of Action Against Physician or Surgeon for Breach of the Duty of Attention and Care", 21 *COA* 1 (1990) (also available on Westlaw).

TEXTS & TREATISES:

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

- 3A Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  - Authors' Comments following Form 804.4 (Against physician and professional corporation for malpractice complaint (2020-2021 supplement only)
- *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019.
  - Chapter 1. General Duty of Health Care Providers
    - § 1-2. Duty in General
    - § 1-3. Standard of Care
    - § 1-4. Duty to NonPatients
    - § 1-5. Fiduciary Duty
    - § 1-6. Sexual Exploitation Cases
    - § 1-7. Recklessness

§ 1-8. Vicarious Liability
§ 1-9. Contributory Negligence
§ 1-10. The Wrongful Conduct Rule
§ 1-11. Prenatal Duty of Care
Chapter 2. Causation
§ 2-2. Cause in Fact
§ 2-3. Proximate Cause
§ 2-3:1. Substantial Factor Test
§ 2-3:2. Case-by-Case
§ 2-3:2.1. Emotional Distress
§ 2-3:2.2. Risks of Psychiatric Medication
§ 2-3:2.3. Removal of Life Support
§ 2-3:2.4. Statistical or Epidemiological Evidence
§ 2-4. Multiple Causation
§ 2-5. Sole Proximate Cause
§ 2-6. Intervening/Superseding Cause
§ 2-7. Subsequent Medical Treatment
Chapter 13. Claims Distinct From But Related to Medical Malpractice
§ 13-1. Contract Theory
§ 13-2. Ordinary Negligence
§ 13-3. Products Liability
§ 13-4. Constitutional Claims

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16:1. Elements of action
  § 16:2. Authority; good faith certificate
  § 16:4. Remedies − Compensatory damages
  § 16:5. Remedies − Noneconomic damages
  § 16:6. Remedies − Punitive or exemplary damages

- *Encyclopedia of Connecticut Causes of Action*, by Daniel J. Krisch and Michael Taylor, Connecticut Law Tribune, 2020.
  Medical Malpractice (Informed Consent),1M-2, pp. 67-68
  Medical Malpractice (Loss of Chance), 1M-3, pp. 68-70
  Medical Malpractice (Standard), 1M-4, pp. 70-71

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020
  Chapter 16. Professional Malpractice
  § 16.03. Bringing a Medical Malpractice Claim
  [1] Recognizing a Medical Malpractice Claim
  [2] Proving the Elements of a Medical Malpractice Claim
  [3] Establishing the Existence of a Physician-Patient Relationship
  [4] Defining the Physician's Standard of Care
  [5] Proving Causation in a Medical Malpractice Case

[6] Including an Informed Consent Claim
[8] Recovering Damages in Medical Malpractice Actions
[11] Medical Malpractice Checklist

- 5 Jury Verdict Research Series, *Personal Injury Valuation Handbook*, Thomson Reuters, 2020.
  Report # 5.90.8. Basic Injury Values for Claims of Suffering Resulting from Medical Malpractice

JURY INSTRUCTIONS:

- State of Connecticut, Judicial Branch, Civil Jury Instructions
  3.8-3. Medical Malpractice -
  http://www.jud.ct.gov/JI/Civil/Civil.pdf

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16:13. Sample trial court documents – Plaintiff's proposed instructions
  § 16:14. Sample trial court documents – Defendant's proposed jury instructions

- *Connecticut Jury Instructions (Civil),* 4th ed., by Douglass B. Wright and William L. Ankerman, Atlantic Law Book Co., 1993 with 2019 supplement.
  Chapter 9. Charitable Immunity – Medical Malpractice (see 2019 supplement)
  § 120. Malpractice of Physicians and Surgeons
  § 121. Care Required of Nurse
  § 122. Breach of Contract by Physician – Misrepresentation
  § 123. Unauthorized Operation – Assault and Battery
  § 123a. Malpractice against a Dentist
  § 124. Informed Consent
  § 125 Captain of the Ship
  § 126. Wrongful Birth … Wrongful Life

LAW REVIEWS

Public access to law review databases is available on-site at each of our law libraries.

- Brittany Norman, *Strategic Apologies in Medical Malpractice Mediation*, 20 Pepp. Disp. Resol. L. J. 60 (2020).

- Alysun Bulver, *Should Doctors Be Allowed to Apologize? : A Closer Look at Medical Malpractice Laws*, 69 Drake L. Rev. Discourse 101 (2020).

- W. Kip Viscusi, *Medical Malpractice Reform: What Works and What Doesn't*, 96 Denv. L. Rev. 775 (2019).

- Norman G. Tabler, *Sixteen Myths of Medicine and Medical Malpractice*, 13 Ind. Health L. Rev. 363 (2016).

SCOPE: Bibliographic resources relating to defenses in medical malpractice lawsuits.

TYPES OF DEFENSES:

- "Our Appellate Court has recognized comparative negligence as a viable defense `[i]n situations where the claim of malpractice sounds in negligence.' *Somma v. Gracey*, 15 Conn.App. 371, 378, 544 A.2d 668 (1988) (recognizing that other jurisdictions have long sanctioned this defense in medical malpractice actions); see also *Juchniewicz v. Bridgeport Hospital*, 281 Conn. 29, 34, 914 A.2d 511 (2007); *Bradford v. Herzig*, 33 Conn.App. 714, 716, 638 A.2d 608, cert. denied, 229 Conn. 920, 642 A.2d 1212 (1994). Where the comparative negligence of the plaintiff is alleged by the defendant, `[i]t shall be affirmatively pleaded by the defendant or defendants, and the burden of proving such [comparative] negligence shall rest upon the defendant or defendants.' General Statutes § 52-114; see *Bradford v. Herzig*, *supra*, 722, 638 A.2d 608; See also Practice Book § 10-53 (requiring the defense of contributory negligence to be specially pled)." Teixeira v. Yale New Haven Hospital, Superior Court, Judicial District of New Haven at New Haven, Docket No. CV09-503067-S (Mar. 5, 2010) (49 Conn. L. Rptr. 443 (2010 WL1375412).
- "Moreover, this court has already held that contributory negligence is a valid special defense in a medical malpractice action. See Poulin v. Yasner, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. 141928 (February 26, 1997, *Lewis, J.*) (denying a motion to strike a special defense of contributory negligence in a medical malpractice action)." Corello v. Whitney, Superior Court, Judicial District of Stamford-Norwalk at Stamford, Docket No. CV97-0156438 (Aug. 24, 1999) (1999 WL 701829).
- "The Institute claims that Saunders' injuries and damages were the result of his own negligence…. The plaintiff filed a motion to strike the special defense. In his view Saunders, as a custodial patient of the Institute, accepted into its service for the treatment and care of his suicidal ideations, and had no legal duty of care to exercise reasonable self-care to prevent injuries suffered as a consequence of acting on those impulses. The court agrees." McKeever v. Hartford Hospital, Superior Court, Judicial District of Hartford at Hartford, Docket No. HHD-CV17-6082922-S (July 10, 2018) (66 Conn. L. Rptr. 629) (2018 WL 3577476).
- **Pleading of contributory negligence.** "In any action to recover damages for negligently causing the death of a person, or for negligently causing personal injury or property damage, it shall be presumed that such person whose death

was caused or who was injured or who suffered property damage was, at the time of the commission of the alleged negligent act or acts, in the exercise of reasonable care. If contributory negligence is relied upon as a defense, it shall be affirmatively pleaded by the defendant or defendants, and the burden of proving such contributory negligence shall rest upon the defendant or defendants." Conn. Gen. Stats. § 52-114 (2021).

- **Negligence actions. Doctrines applicable. Liability of multiple tortfeasors for damages.** "In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons under subsection (n) of this section. The economic or noneconomic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering which percentage shall be determined pursuant to subsection (f) of this section." Conn. Gen. Stat. § 52-572h(b) (2021).

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website.

- Conn. Gen. Stat. (2021)
  § 52-114. Pleading of contributory negligence.
  § 52-557b. "Good samaritan law". Immunity from liability for emergency medical assistance, first aid or medication by injection. School personnel not required to administer or render. Immunity from liability re automatic external defibrillators.
  § 52-572h(b). Negligence actions. Doctrines applicable. Liability of multiple tortfeasors for damages.

FORMS:

- 3A Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  Form 905.1, Contributory Negligence, Under Statute

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  §16.13. Sample trial court documents – *Sample answer containing affirmative defenses*

CASES:

- Dziadowicz v. American Medical Response of Connecticut, Inc., Superior Court, Judicial District of New Britain, Docket No. CV11-6010944-S (January 23, 2012) (53 Conn. L. Rptr. 445) (2012 WL 527651). "With these principles in mind, in enacting § 52-557b, the legislature appears to have intended emergency medical personnel to be immune from suit in ordinary negligence. This was only intended to

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.

provide partial immunity because suit could still be maintained for conduct constituting 'gross, wilful or wanton negligence.'"

- Mulcahy v. Hartell, 140 Conn. App. 444, 450, 59 A.3d 313, 317 (2013). "The decisive issue is the distinction between cases in which the defendant asserts that the plaintiff has been comparatively negligent, and thus the defendant's conduct could also be a proximate cause, and those cases in which the defendant claims that his conduct did not cause the plaintiff's injuries at all. An assertion of comparative negligence is consistent with the plaintiff's rendition of the facts, and therefore must be raised as a special defense. On the other hand, the claim that an actor other than the defendant caused the plaintiff's injuries is inconsistent with a prima facie negligence case, and, thus, can be pursued under a general denial. The essence of the defense at issue in the present case was that the plaintiff was entirely responsible for her injuries; therefore, the court correctly admitted it without the assertion of a special defense."

- Preston v. Keith, 217 Conn. 12, 584 A.2d 439 (1991). "We have long adhered to the rule that 'one who has been injured by the negligence of another must use reasonable care to promote recovery and prevent any aggravation or increase of the injuries.' Morro v. Brockett, 109 Conn. 87, 92, 145 A. 659 (1929); Sette v. Dakis, 133 Conn. 55, 60, 48 A.2d 271 (1946); Lange v. Hoyt, 114 Conn. 590, 595, 159 A. 575 (1932). It is also settled law that when, as in this case, there 'are facts in evidence which indicate that a plaintiff may have failed to promote [her] recovery and do what a reasonably prudent person would be expected to do under the same circumstances, the court, when requested to do so, is obliged to charge on the duty to mitigate damages.' " Jancura v. Szwed, 176 Conn. 285, 288, 407 A.2d 961 (1978).

  In Morro v. Brockett, supra, this court discussed the relationship between mitigation of damages and proximate cause... Morro did not address, however, whether a jury *must* be instructed specifically on the relationship between mitigation of damages and proximate cause in a case where the evidence is sufficient to warrant a charge on mitigation, and it is to that question that we now turn.

  '[T]he test of a court's charge 'is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law.' Atlantic Richfield Co. v. Canaan Oil Co., 202 Conn. 234, 240, 520 A.2d 1008 (1987); Borsoi v. Sparico, 141 Conn. 366, 371, 106 A.2d 170 (1954).'

Holbrook v. Casazza, 204 Conn. 336, 351–52, 528 A.2d 774 (1987), cert. denied, 484 U.S. 1006, 108 S.Ct. 699, 98 L.Ed.2d 651 (1988). 'Jury instructions need 'not be exhaustive, perfect or technically accurate,' so long as they are 'correct in law, adapted to the issues and sufficient for the guidance of the jury.' Castaldo v. D'Eramo, 140 Conn. 88, 94, 98 A.2d 664 (1953)....' State v. Mason, 186 Conn. 574, 585, 442 A.2d 1335 (1982). Applying these standards to the trial court's instruction on mitigation of damages, we conclude that the court's charge was proper." (pp.15-17)

"... A defendant claiming that the plaintiff has failed to mitigate damages "'seeks to be benefited by a particular matter of fact, and he should, therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the onus must in all such cases be upon the defendant.' " 1 T. Sedgwick, Damages (9th Ed.1912) § 227, p. 448.

To claim successfully that the plaintiff failed to mitigate damages, the defendant "must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty." 2 M. Minzer, supra, § 16.10, p. 16-18." (p. 22)

WEST KEY NUMBERS:

- Health # *765 – 771*
  - # 765. In general
  - # 766. Contributory and comparative negligence
  - # 767. Assumption of risk
  - # 768. Immunity in general
  - # 769. Good Samaritan doctrine
  - # 770. Official or governmental immunity
  - # 771. Immunity or liability limitation granted to charities

ENCYCLOPEDIAS:

- H. H. Henry, "Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon", 81 *ALR 2nd* 597 (1962) (also available on Westlaw).

- James Sloane Higgins, "Defense of Medical Malpractice Cases", 16 *AmJur Trials* 471 (1969) (also available on Westlaw).

- Kurtis A. Kemper, "Contributory Negligence, Comparative Negligence, or Assumption of Risk, Other than Failing to Reveal Medical History or Follow Instructions, as Defense in

Action Against Physician or Surgeon for Medical Malpractice", 108 *ALR 5th* 385 (2003) (also available on Westlaw).

- Caroll J. Miller, "Patient's Failure to Reveal Medical History to Physician as Contributory Negligence or Assumption of Risk in Defense of Malpractice Action", 33 *ALR 4th* 790 (1984) (also available on Westlaw).

- Danny R. Veilleux, "Construction and Application of 'Good Samaritan' Statutes", 68 *ALR 4th* 294 (1989) (also available on Westlaw).

- Theresa K. Porter, "Cause of Action Against Physician or Surgeon for Breach of the Duty of Attention and Care", 21 *COA* 1 (1990) (also available on Westlaw).

- Beth Holliday, "Cause of Action for Medical Malpractice Based on Loss of Chance or Opportunity for Cure", 73 *COA2d* 559 (2016) (also available on Westlaw).

- 61 *Am.Jur. 2d* Physicians, Surgeons, Etc. (2012)
  § 279-284 Special Defenses (also available on Westlaw).

- 70 *CJS* Physicians and Surgeons (2018)
  § 156 Defenses (also available on Westlaw).

TEXTS & TREATISES:

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

- *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019.
  Chapter 1. General Duty of Health Care Providers
  § 1-9. Contributory Negligence
  Chapter 5. Statute of Limitations
  § 5-2. Medical Malpractice Not Resulting in Death
  § 5-2:1. The Two-Year Limitations Period
  § 5-2:2. The Three-Year Repose Period
  § 5-3. Medical Malpractice Resulting in Wrongful Death
  § 5-4. Tolling Doctrines
  § 5-4:1. Continuing Treatment
  § 5-4:2. Continuing Course of Conduct
  § 5-4.3. Fraudulent Concealment
  § 5-4.4. Equitable Tolling
  § 5-5. Breach of Contract Theory
  § 5-6. Relation Back
  § 5-7. Accidental Failure of Suit
  Chapter 14. Privileges and Immunities
  § 14-2. Privileges Belonging to Patients
  § 14-3. Privileges Belonging to Health Care Providers
  § 14-4. Immunities of Health Care Providers

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.

Chapter 16. Professional Malpractice
§ 16.03. Bringing a Medical Malpractice Claim
[10] Defending a Medical Malpractice Claim
[a] Ascertaining the Applicable Statute of Limitations
[b] Applying Conn. Gen. Stat. § 52-584's Statutory Discovery Rule
[c] Does the "Continuous Treatment" or "Continuing Course of Conduct" Exception Save an Otherwise-Untimely Medical Malpractice Case?
[d] Petitioning for a 90-Day Toll to Comply with Conn. Gen. Stat. § 52-190a(a)
[e] Plaintiff's Duty to Mitigate Medical Malpractice Damages
[f] Asserting Immunity under the "Good Samaritan" Statute
[g] Asserting Comparative Negligence in Medical Malpractice Cases

- 1 *Medical Malpractice*, by David W. Louisell and Harold Williams, Matthew Bender, 1960, with 2021 supplement (also available on Lexis).
Chapter 9. The Defense of Malpractice Cases
§ 9.02. Assumption of the Risk
[1] In General
[2] Express Assumption of the Risk
[3] Implied Assumption of the Risk
§ 9.03. Contributory Negligence and Related Concepts
[1] Contributory Negligence in General
[2] Avoidable Consequences Rule and the Particularly Susceptible Victim Doctrine
[3] Failure to Follow Therapeutic Regimen
[4] Failure to Give an Accurate Medical History
[5] Failure to Seek Timely Treatment
§ 9.04. Causation
[1] In General
[2] Causation in Fact
[3] Legal Causation
[4] Loss of Chance of Survival or Successful Treatment
[5] Superseding Cause
[6] Causation in Informed Consent Actions
[7] "Sole" Proximate Cause
§ 9.05. Standard of Care
[1] In General
[2] Honest Errors of Judgment
[3] Respectable Minority Rule
§ 9.06. The Emergency Rule
§ 9.07. Failure of the Plaintiff to Comply with Statutory Requirements
[1] In General
[2] Certificate of Merit

[3] Notice of Claim
§ 9.08. Screening Panels and Arbitration
[1] Screening Panels
[2] Arbitration
§ 9.09. Defenses in FTCA Actions
[1] In General
[2] The *Feres* Doctrine and Military Service
[3] Claims Arising in Foreign Countries
[4] Discretionary Functions
[5] Assault and Battery
§ 9.10. Plaintiff's Violation of Criminal Statute
§ 9.11. Collateral Estoppel
§ 9.12. Co-Employee Physicians; Workers' Compensation Exclusive Remedy Rule

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16.9. Limitation of actions: Statute of Limitations
  § 16:10. Defenses: Limitations

- 2 *American Law of Medical Malpractice 3d*, by Steven E. Pegalis, Thomson West, 2005, with 2020 supplement.
  Chapter 7. Defenses of Medical Malpractice Actions
  Part A. Generally
  § 7:2. Contributory and Comparative Negligence
  § 7:3. Contribution, indemnity, and set-off
  § 7:4. Release
  § 7:5. Arbitration agreement
  § 7:6. Worker's compensation defense
  Part B. Statute of Limitations
  § 7:8. Statutory codifications
  § 7:9. Discovery as basis for accrual
  § 7:10. Continuous treatment
  § 7:11. Foreign object
  § 7:12. Fraud and estoppel
  Part C. Good Samaritan Defense
  § 7:14. Medical emergency defined
  § 7:15. Good Samaritan defined
  § 7:16. Scene of emergency defined
  § 7:17. Good faith requirement

LAW REVIEWS & LEGAL PERIODICALS:

Public access to law review databases is available on-site at each of our law libraries.

- Frank Griffin, *Jury Trial Outcomes for Medical Malpractice Claims Involving Pulmonary Embolism*, 19 DePaul J. Health Care L. 1 (2017).

- Erika L. Amarante and Lori A. Kmec, Article, *Apparent Agency Not a Viable Ground in Tort Cases*, 39 Connecticut Law Tribune 18 (November 18, 2013) (No. 46). But see Cefaratti v. Aranow, 321 Conn. 593, 624-625, 141 A.3d 752 (2016).

Section 5: Evidence

A Guide to Resources in the Law Library

SCOPE: Bibliographic resources relating to evidence in medical malpractice lawsuits.

DEFINITION:

- **Health Care Provider**: "means any person, corporation, facility or institution licensed by this state to provide health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment." Conn. Gen. Stat. § 52-184b(a) (2021).

STATUTES:

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.

- Conn. Gen. Stat. (2021)
  § 52-184a**.** Evidence obtained illegally by electronic device inadmissible.
  § 52-184b**.** Failure to bill and advance payments inadmissible in malpractice cases.
  § 52-184c. Standard of care in negligence action against health care provider. Qualifications of expert witness.
  § 52-184d. Inadmissibility of apology made by health care provider to alleged victim of unanticipated outcome of medical care.
  § 52-184e. Admissibility of amount of damages awarded to plaintiff in separate action against different health care provider.
  § 52-190a. Prior reasonable inquiry and certificate of good faith required in negligence action against a health care provider. Ninety-day extension of statute of limitations.

COURT RULES:

Amendments to the Practice Book (Court Rules) are published in the Connecticut Law Journal and posted online.

- **Scope of Discovery; In General** "Written opinions of health care providers concerning evidence of medical negligence, as provided by General Statutes § 52-190a, shall not be subject to discovery except as provided in that section." CT Practice Book § 13-2 (2021).
- **Experts** "If the witness to be disclosed hereunder is a health care provider who rendered care or treatment to the plaintiff, and the opinions to be offered hereunder are based upon that provider's care or treatment, then the disclosure obligations under this section may be satisfied by disclosure to the parties of the medical records and reports of such care or treatment." CT Practice Book § 13-4 (b)(2) (2021).
- Conn. Code of Evidence (2018 edition).
  § 4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time
  § 4-9. Payment of Medical and Similar Expenses
  § 4-10. Liability Insurance
  § 7-2. Testimony by Experts
  § 8-3. Hearsay Exception: Availability of Declarant Immaterial

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.

- Kos v. Lawrence + Memorial Hospital, 334 Conn. 832, 840-841, 225 A.3d 261 (2020). "It is the nature of medical malpractice cases that there often will be conflicting expert testimony regarding the standard of care. Wasfi makes clear that, similar to the schools of thought doctrine, the acceptable alternatives doctrine does not apply in every medical malpractice case but, rather, applies only when there is evidence of more than one acceptable method of inspection, diagnosis, or treatment. See Wasfi v. Chaddha, 218 Conn. 200 at 211, 588 A.2d 204 (1991) ("the defendant physician who claims that he employed one of several alternative methods accepted within his profession has no less a task than any defendant physician: to offer credible expert evidence that his conduct was accepted within the profession, and to persuade the jury to believe that evidence" (emphasis omitted)).

  Consequently, as with the schools of thought doctrine, competing expert testimony by itself is not sufficient to support the acceptable alternatives charge. For example, if expert A testifies that the standard of care requires diagnosis to be made using the X method, and expert B testifies that the standard of care requires diagnosis to be made using the Y method, the jury must decide between the two alternatives, with only one option satisfying the standard of care. There would be no evidence that both methods were acceptable alternatives because both experts testified that only one method would satisfy the standard of care. Rather, to justify the charge, a qualified expert must testify that there is more than one acceptable method of inspection, treatment, or diagnosis.

  The evidence in the present case played out like the hypothetical just described…"

- Doe v. Cochran, 332 Conn. 325, 335, 210 A.3d 469 (2019). "Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) Gold v. Greenwich Hospital Assn., 262 Conn. 248, 254–55, 811 A.2d 1266 (2002)."

- Barnes v. Connecticut Podiatry Group, P.C., 195 Conn. App. 212, 224 A.3d 916 (2020). "In the present case, it was well within Judge Robinson's wide discretion to preclude Barnes from disclosing additional experts where the parties were on the eve of trial, which had been rescheduled previously, in a case pending since February, 2012, and where the date by which Barnes had to disclose his experts had passed." (p. 229)

  "Judge Lager then concluded that, in light of Dr. Gorman's testimony during his deposition that he did not know the

standard of care in Connecticut, the 'conclusory statements in [the August 8, 2016 affidavit]' failed to provide the 'requisite foundation for establishing [Dr.] Gorman's knowledge of the prevailing professional standard of care in this case' and '[t]here is an inadequate factual basis before the court to find [Dr.] Gorman qualified to testify as to the standard of care.'" (p. 238)

"Concluding that "[Dr.] Gorman is insufficiently qualified to offer an opinion as to the actual and proximate cause of Barnes' amputations, that his opinions admittedly exceed the scope of his expertise and that his opinions are speculative," Judge Lager precluded Dr. Gorman's causation opinion." (p. 242-243)

- Laskowski v. Cherry Brook Health Care Center, Superior Court, Judicial District of Hartford at Hartford, Docket No. HHD-CV14-6053483-S (July 11, 2017) (64 Conn. L. Rptr. 755) (2017 WL 3470696). "The present issue is whether this court should order the plaintiff's expert witness to answer all questions that relate to prior reports she has prepared in connection with this case, including questions related to the opinion letter attached to the complaint." … "[T]his court agrees with the Batista [62 Conn. L. Rptr. 845 (2016)] and D'Uva [63 Conn. L. Rptr. 301 (2016] courts that the Practice Book § 13–4 requirement, which is applicable to all expert witnesses, is superseded by the statutory prohibition of information concerning the author of the opinion letter accompanying a malpractice complaint. Therefore, the expert witness may not be questioned nor documents provided which would lead to the discovery of whether Nurse Frederick is the author of the written opinion. Consistent with Batista and D'Uva, however, counsel may inquire as to the documents in the expert's file, as well as ask about the substance of the opinion letter so long as it does not lead to the disclosure of the author."

- Hanes, as Administrator v. Solgar, Inc., Superior Court, Judicial District of New Haven at New Haven, No. CV15-6054626-S (January 13, 2017) (63 Conn. L. Rptr. 728) (2017 WL 1238417). "The elements of a viable claim of lack of informed consent derive from the fact that the patient's decision-making rights can be exercised meaningfully only if the patient is adequately informed regarding the material risks and benefits of the treatment and the alternatives to it. Thus:

  We repeatedly have set forth the four elements that must be addressed in the physician's disclosure to the patient in order to obtain valid informed consent. [I]nformed consent involves four specific factors: (1) the nature of the procedure; (2) the risks and hazards of the procedure; (3) the alternatives to the procedure; and (4) the anticipated benefits of the procedure.

Levesque v. Bristol Hospital, Inc. (citations omitted; internal quotation marks omitted); see, e.g., Duffy v. Flag; Logan v. Greenwich Hospital Assn. supra, 191 conn. 282 at 292-93.

Materiality and causation are also essential elements of the cause of action. 'In order to prevail on a cause of action for lack of informed consent, a plaintiff must prove both that there was a failure to disclose a known material risk of a proposed procedure and that such failure was a proximate cause of his injury. Unlike a medical malpractice claim, a claim for lack of informed consent is determined by a lay standard of materiality, rather than an expert medical standard of care which guides the trier of fact in its determination.' Shortell v. Cavanagh, supra, 300 Conn. 383 at 388. Under this 'lay standard of disclosure,' a physician is obligated 'to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy.' Curran v. Kroll, 303 Conn. 845, 858, 37 A.3d 700 (2012), quoting Logan v. Greenwich Hospital Assn. supra, 191 Conn. at 292-93."

- Weaver v. McKnight, 313 Conn. 393, 405-406, 97 A3d 920 (2014). "If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party. Sullivan v. Metro-North Commuter Railroad Co., supra, [292 Conn. 150] at 158.

  We also note our standards for admitting expert testimony. 'Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion.'"

- Weaver v. McKnight, 313 Conn. 393, 408-409, 97 A3d 920 (2014). "The defendants assert that Jelsema and Bottiglieri cannot testify about the cause of stillbirth because they both deferred to pathologists on certain questions posed to them during their depositions. . . Even if we were to assume that these criticisms are true, we disagree that they render the testimony inadmissible.

  The defendants' criticisms go to the weight of the witnesses' testimony, not to its admissibility. '[I]f any reasonable qualifications can be established, the objection goes to the weight rather than to the admissibility of the evidence.' (Internal quotation marks omitted.) State v.

Palmer, 196 Conn. 157, 167, 491 A.2d 1075 (1985); Campbell v. Pommier, 5 Conn. App. 29, 37-38, 496 A.2d 975 (1985). An expert need not know *everything* about a topic to be an expert in that field. See, e.g., Mannino v. International Mfg. Co., 650 F.2d 846, 850 (6th Cir. 1981) ('[T]he expert need not have complete knowledge about the field in question, and need not be certain. He need only be able to aid the jury in resolving a relevant issue.'). . . . In addition, an expert need not be the best or most qualified witness for his testimony to be admissible. See, e.g., Davis v. Margolis, 215 Conn. 408, 413-17, 576 A.2d 489 (1990) (whether another expert is more qualified does not affect admissibility inquiry); see also Pineda v. Ford Motor Co. , 520 F.3d 237, 244 (3d Cir. 2008) ('[i]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate' [internal quotation marks omitted]). Here, the plaintiffs established Jelsema's and Bottiglieri's" 'reasonable qualifications' based on their practical experience. See State v. Palmer, supra, at 167. In light of the witnesses' qualifications, the defendants' concerns are a proper subject for cross-examination, but do not render their testimony inadmissible. Milliun v. New Milford Hospital, 310 Conn. 711, 733, 80 A.3d 887 (2013) ('[a]lthough there may be other possible causes that the physicians did not consider, such matters go to weight, not admissibility' of their opinions)."

- Doe v. Saint Francis Hospital and Medical Center, 309 Conn. 146, 206-207, 72 A.3d 929 (2013). "Furthermore, the testimony of Roe and Hunt also was relevant to this issue insofar as it buttressed the testimony of the plaintiff's mother regarding the length of time that the plaintiff was alone with Reardon and deprived of her supervision and protection…. Although, ordinarily, a court might exclude the kind of testimony that Roe and Hunt had given as unduly prejudicial, Reardon's sexual abuse of children over a long period of time was undisputed. Consequently, no prejudice could have flowed from Roe's and Hunt's testimony regarding their own experiences with Reardon because the hospital has not challenged the plaintiff's allegations concerning the nature or manner of Reardon's misconduct."

- Milliun v. New Milford Hospital, 310 Conn. 711, 714, 80 A.3d 887 (2013). "In the present case, we principally examine the circumstances under which a treating physician's medical records can be admitted as expert evidence of causation in a medical malpractice action."

- Mulcahy v. Hartell, 140 Conn. App. 444, 446, 59 A.3d 313 (2013). "The dispositive issue in this appeal is whether evidence of a plaintiff's posttreatment conduct may be

offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of her injuries."

- Pirreca v. Koltchine, Superior Court, Judicial District of New Haven at New Haven, No. CV09-5025754-S (October 10, 2012) (54 Conn. L. Rptr. 768) (2012 WL 5278707). "In this motion, Pirreca seeks a blanket exclusion of 'any and all evidence, reference to evidence, testimony or argument' related to his religious belief, specifically that he is a Jehovah's Witness, on the ground that any probative value of such evidence is outweighed by its prejudice."

- Drake v. Bingham, 131 Conn. App. 701, 703 & 710-711, 27 A.3d 76 (2011). "On appeal, the plaintiff claims that the court (1) abused its discretion by admitting evidence of Drake's missed physical therapy appointments. . . . The plaintiff claims that evidence of the missed therapy appointments was misleading, confusing and unfairly prejudicial because such evidence was 'meant to cast suspicion that the missed appointments were linked to the cause of [Drake's injury].' As we state previously, the evidence was admissible. The record does not compel the conclusion that such evidence was so unfairly prejudicial that its admission amounted to an abuse of discretion. Accordingly, we conclude that the court did not abuse its discretion by permitting evidence of Drake's missed physical therapy appointments."

- Contillo v. Doherty, Superior Court, Judicial District of New London at New London, CV10-6006138-S (March 17, 2011) (51 Conn. L. Rptr. 583) (2011 WL 1367076). "This is a medical malpractice action where the plaintiffs served notices of deposition on the defendant doctors at the time they filed their complaint. The defendants seek a protective order to prevent the depositions from occurring before they can complete discovery and depose the plaintiff. … In order to provide for an orderly and efficient progression of discovery, it is appropriate that the defendants have the opportunity to discover the factual foundation of the plaintiffs' claims, as opposed to the expert foundation, prior to having their depositions taken."

- Boone v. William W. Backus Hospital, 272 Conn. 551, 567, 864 A.2d 1 (2005). "Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons."

- State v. Porter, 241 Conn 57, 58-59, 698 A2d 739 (1997). "The issues in this certified appeal are: (1) whether Connecticut should adopt as the standard for the

admissibility of scientific evidence the standard set forth by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); and (2) whether Connecticut should abandon its traditional per se rule that polygraph evidence is inadmissible at trial. … We conclude that Daubert provides the proper threshold standard for the admissibility of scientific evidence in Connecticut. We also conclude, however, on the basis of our own independent examination of the extensive literature and case law regarding polygraph evidence, that polygraph evidence should remain per se inadmissible in Connecticut trials, and consequently that an evidentiary hearing was not necessary to evaluate the reliability of such evidence."

WEST KEY NUMBERS:

- Health *# 815 – 823*
  - # 815. Evidence
  - # 816. In general
  - # 817. Presumptions
  - # 818. Res ipsa loquitur
  - # 819. Burden of proof
  - # 820. Admissibility
  - # 821. Necessity of expert testimony
  - # 822. Weight and sufficiency in general
  - # 823 Weight and sufficiency, particular cases

ENCYCLOPEDIAS:

- P.M.D., "Competency of Physician of Surgeon as an Expert Witness as Affected by the Fact that He is Not a Specialist", 54 *ALR* 860 (1928) (also available on Westlaw).
- David Polin, "Qualification of Medical Expert Witness", 33 *AmJur POF2d* 179 (1983) (also available on Westlaw).
- Beth Holliday, "Cause of Action for Liability of Physicians Based on "Captain of Ship" Theory, 72 *COA2d* 427 (2016) (also available on Westlaw).
- Daniel J. Penofsky,"Litigating LASIK Eye Surgery Malpractice Cases", 108 *AmJur Trials* 1 (2008) (also available on Westlaw).

TEXTS & TREATISES:

- *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019.
  - Chapter 8. Expert Testimony
    - § 8-1. Expert Testimony Requirement
    - § 8-2. The Permissible Bases For an Expert's Opinion
    - § 8-3. Exceptions to the Expert Testimony Requirement
    - § 8-4. Similar Health Care Provider
    - § 8-5. Res Ipsa Loquitur
    - § 8-6. Expert Witness Disclosure Requirements

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

§ 8-7. Medical Literature
§ 8-8. Scientific Evidence – *Porter* Hearings
§ 8-9. Circumstances Under Which a Treating Physician's Medical Records May Be Admitted As Expert Evidence of Causation
§ 8-10. Scope of Cross Examination of Expert
Chapter 9. Evidentiary Issues
§ 9-2. Expert Testimony
§ 9-3. Similar Health Care Provider
§ 9-4. Medical Literature
§ 9-5. *Daubert/Porter* Issues
§ 9-6. The Dead Man's Statute
§ 9-7. Informed Consent Issues
§ 9-8. Statements of Apology
§ 9-9. Insurance-Related Evidence
§ 9-10. Day in the Life Film
§ 9-11. Spoliation of Evidence
§ 9-12. Testimony of Economists
§ 9-13. Failure to Bill and Advance Payments
§ 9-14. Cumulative Testimony
§ 9-15. The Non-Compliant Patient
§ 9-16. Admissibility of Social Media
§ 9-17. Habit and Practice Evidence
§ 9-18. The Reptile Theory

- *Tait's Handbook of Connecticut Evidence, 6th ed.,* by Colin C. Tait and Hon. Eliot D. Prescott, Wolters Kluwer, 2019, with 2021 supplement.

- 1 *West's Connecticut Rules of Court Annotated*, 2020 ed., Thompson West.
  § 13-2. Scope of Discovery; In General
  Notes of Decisions

- 2 *American Law of Medical Malpractice 3d*, by Steven E. Pegalis, Thomson West, 2005, with 2020 supplement.
  Chapter 8. Expert Testimony
  A. Expert Testimony
  § 8:2. Res ipsa loquitur and expert testimony
  § 8:3. *Frye*; *Daubert*; federal standards for admissibility of expert testimony
  B. Direct Examination of Expert Witness
  § 8:4. Qualifying an expert witness
  § 8:5. Expert's knowledge of standard of care; the locality rule
  § 8:6. Hypothetical questions
  § 8:7. Basis of opinion; the "reasonable medical certainty" test
  C. Cross-Examination of Expert Witness
  § 8:9. Use of books, articles, and learned treatises
  § 8:10. "Cross-examination" of adverse party witness

LAW REVIEWS & LEGAL PERIODICALS:

Public access to law review databases is available on-site at each of our law libraries.

- Julie L. Campbell*, A Reliability Check on Expert Witness Testimony in Medical Malpractice Litigation: Mandatory Medical Simulation*, 31 Health Matrix 1 (2021).
- Alysun Bulver, *Should Doctors Be Allowed to Apologize? : A Closer Look at Medical Malpractice Laws*, 69 Drake L. Rev. Discourse 101 (2020).
- Bryston C. Gallegos, *A More Balanced Prescription: Reconciling Medical Malpractice Reform with Fundamental Principles of Tort Law*, 55 Gonz. L. Rev. 105 (2019).
- Frank Griffin, *Jury Trial Outcomes for Medical Malpractice Claims Involving Pulmonary Embolism*, 19 DePaul J. Health Care L. 1 (2017).
- Michael Flynn, *The Unwritten Rule of Sports and Medical Malpractice*, 19 J. Health Care L. Pol'y 73 (2016).
- Michael A. D'Amico and Brendan Faulkner, Article, *Eliminate Unnecessary Delays in Discovery*, 39 Connecticut Law Tribune 16 (November 18, 2013) (No. 46).
- Steven E. Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 Yale Journal of Health Policy, Law and Ethics 267 (2011).
- Marc D. Ginsberg, *Informed Consent: No Longer Just What the Doctor Ordered?*, 15 Michigan State University Journal of Medicine and Law, 17 (2010).

Table 1: Settlements and Verdicts in Connecticut Medical Malpractice Actions

STATUTES AND REGULATIONS: You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.	• **Remittitur when noneconomic damages in negligence action against health care provider determined to be excessive.** "Whenever in a civil action to recover damages resulting from personal injury or wrongful death, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, the jury renders a verdict specifying noneconomic damages, as defined in section 52-572h, in an amount exceeding one million dollars, the court shall review the evidence presented to the jury to determine if the amount of noneconomic damages specified in the verdict is excessive as a matter of law in that it so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption. If the court so concludes, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. For the purposes of this section, "health care provider" means a provider, as defined in subsection (b) of section 20-7b, or an institution, as defined in section 19a-490." Conn. Gen. Stat. § 52-228c (2021) • **Review of medical malpractice awards and certain settlements.** "Upon entry of any medical malpractice award or upon entering a settlement of a malpractice claim against an individual licensed pursuant to chapter 370 to 373, inclusive, 379 or 383, the entity making payment on behalf of a party or, if no such entity exists, the party, shall notify the Department of Public Health of the terms of the award or settlement and shall provide to the department a copy of the award or settlement and the underlying complaint and answer, if any. The department shall review all medical malpractice awards and all settlements to determine whether further investigation or disciplinary action against the providers involved is warranted. Any document received pursuant to this section shall not be considered a petition and shall not be subject to the provisions of section 1-210 unless the department determines, following completion of its review, that further investigation or disciplinary action is warranted." Conn. Gen. Stat. § 19a-17a (2021)

You can visit your local law library or search the most recent C.F.R. on the e-CFR website to confirm that you are accessing the most up-to-date regulations.	• **National Practitioner Databank, Subpart B – Reporting of Information – Reporting medical malpractice payments – Interpretation of information.** "A payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred." 45 C.F.R. § 60.7(d) (2021).
CASES: Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases. See Also: Recent Medical Malpractice Opinions on the Law Libraries' NewsLog.	• Ashmore v. Hartford Hospital, 331 Conn. 777, 779-780, 208 A.3d 256 (2019). "In this wrongful death action alleging medical malpractice, the named defendant, Hartford Hospital, appeals from the judgment of the trial court, which denied a motion for remittitur after a jury awarded $ 1.2 million in noneconomic damages to the named plaintiff, Marjorie Ashmore, as the administratrix of the estate of the decedent, her late husband William Ashmore, and $ 4.5 million to the plaintiff for her own loss of spousal consortium. The defendant contends that, in the absence of exceptional or unusual circumstances that are not applicable in this case, a loss of consortium award ordinarily should not substantially exceed the corresponding wrongful death award to the directly injured spouse. We agree and, accordingly, reverse the judgment of the trial court."
TEXTS & TREATISES: Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises. References to online databases refer to in-library use of these databases. Remote access is not available.	• *Connecticut Medical Malpractice: A Manual of Practice and Procedure*, 5th ed., by Joyce A. Lagnese et al., Connecticut Law Tribune, 2019. Chapter 3. Damages § 3-8. Additur and Remittitur Chapter 11. Apportionment § 11-3:5. Pre-Trial Settlements Chapter 12. Areas of Special Statutory Regulation § 12-2. Offers of Compromise § 12-9. National Practitioner Data Bank § 12-9:2. Reporting Medical Malpractice Payments Chapter 19. Insurance Issues § 19-3. Consent to Settle Clause § 19-3:1. Consent to Settle: Insurer § 19-3:2. Consent to Settle: Physician § 19-3:3. Hammer Clause • 1 *Medical Malpractice*, by David W. Louisell and Harold Williams, Matthew Bender, 1960, with 2021 supplement (also available on Lexis). Chapter 10. Settling the Medical Malpractice Case § 10.02. Preparation for Settlement Negotiations: Evaluating Damages § 10.03. Assignment of Damage Values § 10.04. Assessing Liability § 10.05. Limitations on Liability

§ 10.06. Client Discussions and Consent
§ 10.07. Medical Malpractice Panel Hearings
§ 10.08. Timing Settlement Negotiations
§ 10.09. Settlement Conference
§ 10.10. Lump Sum Settlements
§ 10.11. Structured Settlements
§ 10.12. Formalizing the Settlement
§ 10.13. Reporting Medical Malpractice Payments
§ 10.14. Evidence of Settlement in Litigation Against Codefendants
§ 10.100 Forms
[1] Sample Order of Compromise
[2] Sample Attorney's Affirmation
Chapter 40. Illustrative Awards

- 16A Connecticut Practice Series, *Connecticut Elements of an Action*, by Thomas B. Merritt, 2020 ed.,Thomson West (also available on Westlaw).
  Chapter 16. Medical Malpractice
  § 16:16. Jury verdict, bench trial, and settlement summaries

- *Art of Advocacy: Settlement*, by Henry G. Miller, Matthew Bender, 2015.
  Chapter 9A. Settlement of a Medical Malpractice Case
  § 9A.02. Preparation for Settlement Negotiations: Evaluating Damages
  § 9A.03. Assignment of Damage Values
  § 9A.04. Assessing Liability
  § 9A.05. Limitations on Liability
  § 9A.06. Client Discussions and Consent
  § 9A.07. Medical Malpractice Panel Hearings
  § 9A.08. Timing Settlement Negotiations
  § 9A.09. Settlement Conference
  § 9A.10. Types of Settlements

- 2 *Insurance Settlements*, by Ronald V. Miller, Jr. and Kevin M. Quinley, James Publishing, 2010.
  Chapter 31. Evaluating and Settling of Medical Malpractice Claims
  § 3100. Introduction
  § 3110. Preparing for Settlement Means Preparing Your Case for Trial
  § 3120. Negotiation Strategy
  § 3130. Factors to Consider in Making Your Settlement Evaluation
  § 3140. Evaluating Experts
  § 3150. Issues with Jury Appeal
  § 3160. The Settlement Package
  § 3170. Final Considerations

- 5 *Personal Injury Valuation Handbook*, Thomson Reuters, 2020.

	No. 5.90.8 Basic injury values for claims of suffering resulting from medical malpractice • *The Verdict Reporter: Monthly summaries of civil jury verdicts from MA, CT & RI., VerdictSearch New England*, VerdictSearch Publication. (Available with subscription database available in select law libraries) • *Connecticut Jury Verdicts and Settlements* (available on Westlaw) • *What's It Worth?: A Guide to Current Personal Injury Awards and Settlements*, 2020 ed., by Eileen Swarbrick, LexisNexis.