ELI P. BERNZWEIG

NURSE'S NURSE'S LIABILITY F O R MALPRACTICE

a programmed course

SIXTH EDITION

The Nurse's Liability for Malpractice

A PROGRAMMED COURSE

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Member of the New York Bar

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In addition to his government service, Bernzweig has been a vice president of one of the country's major medical malpractice insurers and vice president of one of the world's largest professional liability insurance brokers. In both instances, his responsibilities involved the creation and development of risk management and loss control programs for professionals—first for health care professionals, and later for legal professionals. Over the years, his expertise in the field of professional liability has also led to the development of risk management programs for financial professionals and securities brokerage firms.

Bernzweig has his law degree from Rutgers Law School and is a member of the New York and U.S. Supreme Court bars. He is the author of four books and numerous articles on health care and professional liability issues, and has been a regular contributor to *RN* Magazine and other publications on the legal liability of nurses.

In loving memory of

Abraham and Fannie Bernzweig Abraham David and Sarah Axelrad Ribner Isaac L. Ribner

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PRFFACE

As this is written, the debate on major health care reform continues to rage. Along with a host of other important issues, one of the key reforms being debated both in Congress and throughout the nation is whether basic health care coverage should be a fundamental right for all Americans. To the extent that issue ultimately is decided in the affirmative, even if on a phased-in basis, many more providers of primary health care will be needed than are currently available. Primary care—the type of care required by most Americans—currently is provided by physicians and nurse practitioners (NPs). Both categories are in short supply at the moment but can be expected to increase in numbers if and when health care reform becomes a legislative reality. Nurses with the appropriate education and training are well-positioned to provide primary care, as well as preventive health services, home care and long-term care and are logical choices for providing these basic health services under a comprehensive national health insurance scheme.

If health care reform does in fact propel more nurses into the roles described, they will have to accept stricter legal accountability along with their greater professional recognition. But legal accountability is not limited to nurses in advanced practice; it is a recognized fact of life for every practicing nurse, whether a RN employed as a staff nurse in a hospital, a Certified Nurse-Midwife in independent practice, or a LPN providing care in a long-term care facility or a patient's home. There is little doubt that the ever-present fear of involvement in a malpractice suit—a fear that is not without substance in the current malpractice litigation environment—makes it essential for nurses in all practice settings to be as familiar as possible with the legal guidelines that govern their patient care responsibilities. Although it is seldom fully appreciated, there is a vital relationship between a nurse's knowledge of legal principles and the nurse's daily professional conduct. The nurse who learns how to avoid unnecessary legal risks will not only avoid unwanted malpractice suits, but in the process will be providing a higher quality of patient care.

When this text was first published, some 25 years ago, the author made it clear that its objective was a very selective one: to teach professional and practical nurses at both the student and graduate level what law regulates their routine patient care activities, what nursing conduct might give rise to malpractice suits, and what they can do to lessen the chances of being sued for malpractice. This book does not address, nor was it designed to address, the ever-increasing number of ethical problems facing today's nurses in such areas as the right to die, euthanasia, organ transplantation, "big ticket" research and innovative medical procedures, AIDS, abortion and reproductive technology, and genetic engineering and screening. For this the author makes no apology. While not minimizing the importance of those issues to practicing nurses, dealing with the moral dilemmas and resolving the ethical conflicts in health care is simply too complex and extensive to be included in a basic text on malpractice liability.

The current edition, as was the case with earlier editions, is predicated on the theory that more can and should be done by all medical and nursing personnel to minimize the possibilities of errors or complications in treatment that may lead to litigation. Toward that end, this

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sixth edition contains several entirely new features designed to alert nurses to some of the practical ways to avoid risky situations in providing patient care. It includes, for example, graphics containing special tips on how to prevent medication errors, how to deal with suicidal patients, how to protect patients from falls, how to deal with questionable physicians' orders, and so forth. For learning-reinforcement purposes, this edition also includes four new tables and two boxed charts depicting specific legal concepts, doctrines, or procedures that are of direct practical concern to all nurses.

A number of topics have been added or substantially expanded, including other important sources of law, patients' rights, the expanded role of nurses, the doctrine of hospital corporate liability, health care reform and managed care, the nurse's criminal liability, the patient's contributory negligence and/or assumption of risk, when to follow or not follow physicians' orders, DNR orders, monitoring and observation problems, communication breakdowns, nurse-specialists in emergency care, the problem of the impaired nurse, short-staffing problems, informed consent, disciplinary action against nurses, special problems in home health care, effectiveness of consent given by a minor parent, and the malpractice litigation process. All programmed text legal material has been updated to conform to the latest statutes and court cases. All Selected References at the end of each Part have been updated and substantially expanded. Finally, the Glossary and Index have been expanded and new Test Questions have been included.

More than ever, the ability of the modern nurse to function effectively requires something beyond the mere acquisition of basic nursing knowledge and skills. Fundamental concern for the patient's safety—always a prime focus of nurses—calls for a heightened awareness of the legal parameters within which they are expected to fulfill their customary nursing duties. This programmed course is geared to meeting that objective, and it is hoped that nurses who complete this material will be better prepared to serve their patients as well as to protect themselves against the legal hazards in modern nursing practice.

Eli P. Bernzweig

INTRODUCTION

This self-instructional course is intended to teach nurses in understandable terms about their legal liability for acts of malpractice. Some nurses may have only the vaguest idea what the terms *liability* and *malpractice* even mean, but by the time this course is completed, the learner will not only know what these words mean but will begin to appreciate the fact that many of the routine nursing functions performed each day have important legal consequences.

Knowledge precedes meaningful action, and nurses who know the legal consequences of daily patient care activities will soon begin to think and act preventively; that is, they will consciously conduct themselves in a manner designed to prevent unwanted suits from ever arising. This conscious behavior on the part of the nurse will save the embarrassment, loss of prestige, and worry that accompany every lawsuit, and it is bound to result in better patient care.

Throughout this course (except where specifically indicated) no attempt has been made to distinguish between the liability of the registered nurse, the practical nurse, and the nursing student since the courts themselves have generally made little distinction in this respect. In the final analysis, the same body of legal principles is equally applicable to all classes of nurses. This fact emphasizes the need for all nurses to become familiar with the information taught in this course.

Statement of Behavioral Objectives

The purpose of this program is not to make lawyers out of nurses or even to teach nurses how to solve specific legal problems. That role is best played by the medicolegal specialist, and the intelligent nurse will always consult such a person when in need of legal advice concerning a particular aspect of this complex field of law. The prime objective of this course is to give the learner a grounding in the fundamental principles of malpractice law and then to show how these fundamental principles are applied in specific fact situations. On completion of the program, the learner should be able to do the following:

- 1. Analyze a fact situation involving a particular aspect of nursing care, identify the principles of malpractice law that apply, and determine with reasonable certainty the legal consequences (if any) for her or him in the given situation.
- 2. Determine his or her malpractice-liability potential in carrying out various types of nursing functions and make appropriate changes in behavior to assure not only conformity with the applicable legal standards of care but higher quality care for all his or her patients.
- 3. Identify patients who are more likely to be suit-prone and take the steps necessary in caring for such patients to forestall the possibility of later malpractice claims.
- Employ the terminology of malpractice law in a meaningful way when discussing specific legal problems with nursing supervisors, hospital administrators, lawyers, or others.

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How to Proceed

A programmed course builds a structure of information in systematically arranged steps, each of which is referred to as a *frame* This particular program utilizes the multiple-choice type of frame, which requires the learner to check the correct response or responses to each question. Programmed instruction is an active teaching process, which requires active responding on the part of the learner. *Checking the appropriate box or boxes, therefore, is a vital and necessary part of the program.* The choice made should be compared with the correct response set at the bottom of the page. The learner should not look at the answer until he or she has indicated what the appropriate response should be. It may be helpful to cover the answer with the provided mask while reading the text.

The questions presented throughout the program are not intended to be deceptive or unusually difficult. The purpose is to teach, not to confuse or confound. The learner who reads carefully and pays close attention to the instructional material should get correct responses to the questions posed in all or nearly all the frames.

Test questions that appear at the end of the program may be used both for pretest and posttest purposes.

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PART ONE

GENERAL PRINCIPLES

PART ONE General Principles

TYPES AND SOURCES OF LAW

1-1 Throughout this course we will have occasion to refer to the words "law," "common law," "civil law," and "statutory law," so it is important for you to have a reasonably clear understanding of the meaning of these words and the distinctions between them.

The word "law" has many different meanings and is used in many different ways, depending upon the subject under discussion. For example, we refer to physical laws (such as the law of gravity), economic laws (such as Gresham's law), and psychological laws (such as the law of operant conditioning), and although all these have an effect on human beings in one way or another, none of them has any legal significance.

"Law," in the sense we will be using the term in this course, refers to those rules made by humans that regulate social conduct in a formally prescribed and legally binding manner.

Without knowing the exact context in which the word "law" was being used, a person could □ could not be sure of the specific sense in which the word was intended.

Human beings are affected by various types of laws. We will be discussing in this course only those types of laws that □ determine human behavior and psychological motivation □ regulate human social conduct in a legally binding manner

determine and influence physical environment

1.3

1-3	Check each of the laws listed below that has legal significance in the sense that it regulates human social conduct in a legally binding manner.				
	□ law of gravity				
	□ law of diminishing returns				
	☐ Indiana Nurse Practice Act				
	☐ Federal Drug Abuse Control Act				
	☐ Murphy's Law				
	☐ Florida Motor Vehicle Code				
	☐ law of economic cycles				
1-4	Laws that regulate human social conduct are derived from two principal sources. One source of law finds expression in formal legislative enactments, generally referred to as "statutes." When law is formally expressed in a statute, we refer to it as statutory law. A law passed by Congress or a state or a provincial legislative body would be an example of statutory law.				
	The distinguishing feature of statutory law is that it				
	☐ regulates human social conduct				
	☐ is one of two basic kinds of law				
	☐ is derived from formal legislative enactments				
	1-3 If you are not sure of the dis-				

tinction between laws that do and laws that do not regulate human social conduct, turn to p. 9, Note A.

tive enactments

The other two items are also features, but neither of them is the distinguishing feature of statutory law.