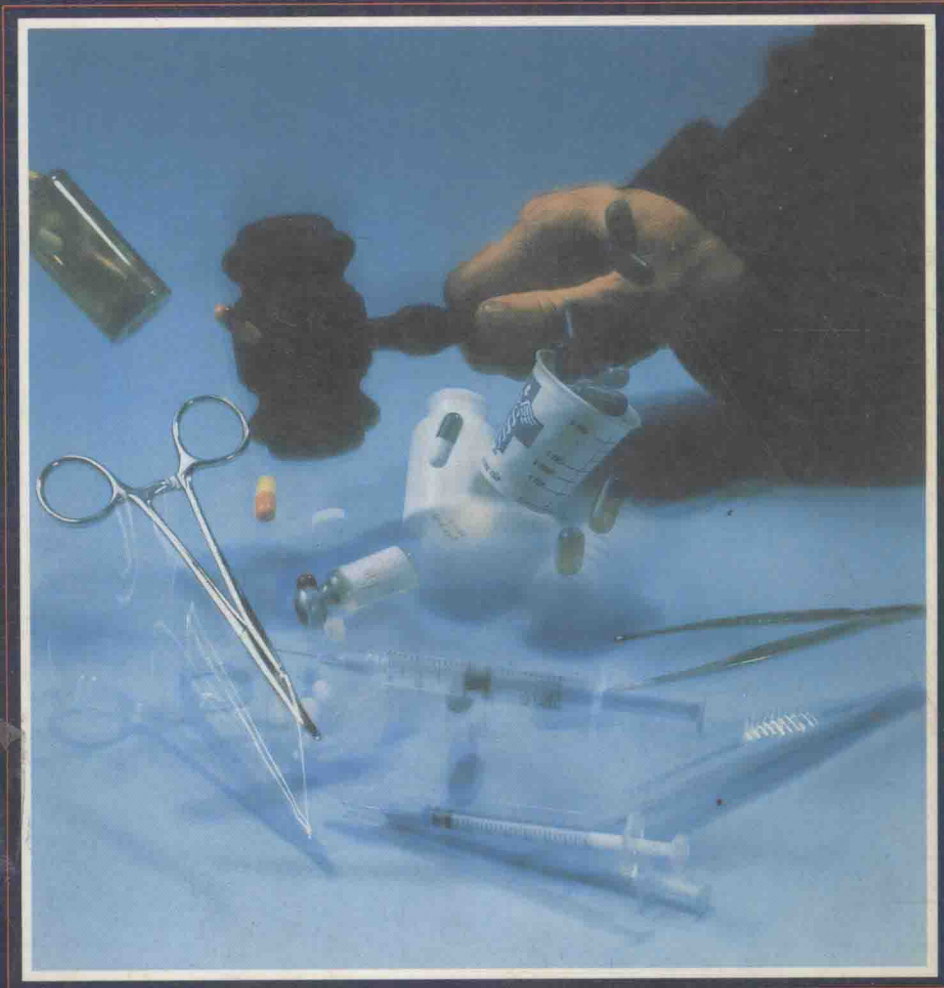


# The Nurse's Liability for Malpractice

A PROGRAMMED COURSE

FIFTH EDITION



Eli P. Bernzweig

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**Eli P. Bernzweig, J.D.**

Member of the New York Bar

**FIFTH EDITION**

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## ABOUT THE AUTHOR

ELI P. BERNZWEIG is a consultant, writer, and frequent speaker on professional liability issues and is widely recognized as one of the top authorities on medical malpractice in the country. During his 20-year tenure as a government attorney, he was chief legal advisor to the U.S. Public Health Service hospital system, where he was responsible for reviewing all malpractice claims against the Public Health Service. From 1971 through 1973, he held the post of Executive Director of the H.E.W. Secretary's Commission on Medical Malpractice, the first national body to explore the basic causes and consequences of the medical malpractice problem.

In addition to his government service, Bernzweig served 2 years as vice president of one of the country's largest medical malpractice insurance carriers and later spent 2 years as a guest scholar at the Brookings Institution in Washington, D.C., analyzing and critiquing our various injury compensation systems. From 1986 to 1988 he served as vice president of a professional liability insurance service organization, where his responsibilities were primarily in the area of development of risk management and loss control programs for health care professionals.

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 a frequent lecturer and the author of three books and numerous articles on professional liability issues. He has been a regular contributor to *RN Magazine* and other publications on the legal liability of nurses.

*To the loving memory of my parents*  
**Abraham and Fannie Bernzweig**

## PREFACE

Since the appearance of the first edition of this work some 20 years ago, not only has the field of professional nursing seen enormous changes in health care technology, but the legal problems associated with modern nursing care have increased greatly, along with those of other categories of health care practitioners. One thing is clear: as the patient care responsibilities of nurses have increased, so has their degree of legal accountability. As a consequence, these past 20 years have been witness to a substantial rise in malpractice claims against nurses as well as doctors, a phenomenon paralleling the general increase in all forms of personal injury litigation. Indeed, if the past is a reliable indicator, then nurses individually, and the profession as a whole, should be quite concerned about the growing tide of malpractice suits.

Although it is seldom fully appreciated, there is a vital relationship between the nurse's knowledge of legal principles and concepts and the nurse's daily professional conduct. Certainly, nursing practices have undergone significant change with each new advancement in medical science and technology, and the pressures these have created for nurses have been enormous. Nevertheless, simply keeping abreast of technical advancements in medical and nursing care is not enough, for there are legal as well as health care implications in all these advancements, and the prudent nurse must be alert to, as well as sensitive to, these legal implications. The legally sophisticated nurse, for example, must not only be aware of the standard of care for each nursing situation, but must know the source of that standard if he or she is to function effectively and without fear of being sued whenever the outcome of treatment is less than expected.

As was the case with earlier editions, the current edition 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 fifth edition has been updated and expanded significantly. In addition to the revision and expansion of most of the existing subject areas, new material has been added on consent to treatment of mature minors, the liability of supervisors, surrogate decision making for elderly incompetent patients, the different standards of disclosure in informed consent cases, the concept of therapeutic privilege, the concept of foreseeability of injury, and the increasingly important role of the nurse as the patient's advocate. In addition, the Selected References at the end of each Part have been updated to better assist the nurse in locating primary source materials for more in-depth personal study.

A programmed study course such as is presented in this work is not, and was never intended to be, a substitute for authoritative legal advice when a nurse has a specific legal problem. Only a medicolegal specialist who is acquainted with the court system, statutes, and traditions of legal practice in the local area can provide the professional assistance needed in such circumstances. Nurses who are employed by hospitals should consult with the hospital's legal counsel before acting on their own in complex situations having serious legal overtones.

It is my hope that each nurse who completes this programmed course will become a better nurse for having done so. At the very least he or she should develop a deeper appreciation of the way in which the law and the nursing profession share a common objective in seeking to preserve and protect the integrity of the individual—both patient and nurse—within the framework of our legal system.

**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. As mentioned in the Preface, 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.
4. Employ the terminology of malpractice law in a meaningful way when discussing specific legal problems with nursing supervisors, hospital administrators, lawyers, or others.

### 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**





## 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 have any *legal significance*.

“Law,” in the sense we will be using the term in this course, refers to those rules made by humans which 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.

---

**1-2** Human beings are affected by various types of laws. We will be discussing in this course only those types of laws which

- ☐ determine human behavior and psychological motivation
- ☐ regulate human social conduct in a legally binding manner
- ☐ determine and influence physical environment

1-1    *could not*

1-2    *regulate human social conduct in a legally binding manner*