## Contents

About the Authors xvii

Acknowledgments xix

**PART 1**
Understanding the Context 1

**CHAPTER 1**
Introduction 3

**CHAPTER 2**
Understanding the Nursing Home Environment 11

2:1 Key Definitions 11
2:2 Background 13
2:3 Federal Funding Brings Control 15
2:4 Key Elements of the Legal Structure 16
2:5 Regulatory Interaction with Tort Liability 17
2:6 Purposes of the Nursing Home Stay 19
2:7 Significance of the Federal Categories 20
2:8 Tort Liability 21
2:9 Political Aspects 22

**CHAPTER 3**
Ownership and Administration 23

3:1 Who Owns This Nursing Home? 23
3:2 How Has the Home Managed to Obtain a Profit? 24
3:3 Role of the Corporate Budget Official 25
3:4 Role of the Nursing Home Administrator 25
PART 2  Responsibilities of Professionals

CHAPTER 4  Roles and Liabilities of Nursing Professionals
  4:1 Participants
  4:2 Staffing Levels
  4:3 Meeting Individual Patient Care Needs
  4:4 Allocating Responsibilities
  4:5 Professional Responsibility

CHAPTER 5  Roles and Liabilities of Physicians
  5:1 Role of the Nursing Home Medical Director
  5:2 Contractual Obligations
  5:3 CMS Norms on Physician Obligations
  5:4 Documentation of Decisions
  5:5 Actual Supervision of Patient Care
  5:6 Pharmaceutical Prescriptions
  5:7 Role in Restraints
  5:8 Malpractice Issues
  5:9 Physician Duty and “Right to Die” Claims

CHAPTER 6  Support Roles of Specialized Units
  6:1 Dietary Support
  6:2 Pharmacy Support
  6:3 Laboratory Support
  6:4 Rehabilitation
  6:5 Documentation
  6:6 Administration
  6:7 Admissions
  6:8 Accounting
  6:9 Staff Training and Selection
  6:10 Facilities
CHAPTER 7
Facility Safety Issues
   7:1 Premises Safety Issues 55
   7:2 Fire and Emergency Issues 56
   7:3 Floods and Evacuations 56
   7:4 Facility Maintenance Issues 57
   7:5 Stairway Accidents 58

CHAPTER 8
Liability for Neglect: Skin Ulcers and Infection Problems
   8:1 Overview 59
   8:2 Use of Clinical Practice Guidelines or CMS Guidelines as Evidence of the Standard of Care 64
   8:3 Use of Regulatory Violations to Establish Negligence Per Se or as Evidence of the Standard of Care 66
   8:4 Legal Issues 69
   8:5 Dividing the Causes 70
   8:6 Care Must Be Continuously Supervised 72
   8:7 Record-Keeping Is Essential to Defense 73
   8:8 Standard of Due Care 74
   8:9 Short Staffing 75
   8:10 Evidence 76
   8:11 Defenses 77
   8:12 Damages 78
   8:13 Punitive Damages 78
   8:14 Burns 78
   8:15 Other Infection Concerns 79
   8:16 Lessons from the Cases 79
   8:17 Summary 81

CHAPTER 9
Fall-Related Injuries
   9:1 Introduction 83
   9:2 Resident Assessments by Nursing Homes 86
9:3 Measures to Avoid Fall Injuries  
9:4 Resident Evaluation  
9:5 Procedures and Documentation  
9:6 Response to the Fall Event  
9:7 Transportation Concerns  
9:8 Fall Cases Are Not Simple  
9:9 Legal Implications of Fall Injuries  
9:10 Proving Nursing Home Negligence in the Fall Case  
9:11 Assembling the Proof of Causation  
9:12 Few Fall Cases Reach Appellate Levels  
9:13 Evaluating Potential Litigation  
9:14 Plaintiff’s Theory of the Case  
9:15 Policies and Noncompliance  
9:16 Examples of Fall Injury Cases  

### CHAPTER 10

**Liability for Neglect: Wandering, Elopement, and Escape**  
10:1 Overview  
10:2 Response When Residents Escape  
10:3 Why Residents Wander  
10:4 Safety versus Secure Buildings  
10:5 Staff Responsibilities  
10:6 Framing the Complaint  
10:7 Lessons from the Cases  
10:8 Summary  

### CHAPTER 11

**Use of Resident Restraints**  
11:1 Overview  
11:2 Restraints and Uses  
11:3 Restraint-Injury Litigation  
11:4 CMS and State Norms  
11:5 FDA Hazard Alerts  
11:6 Summary
CHAPTER 12
Assault and Abuse
  12:1 Overview 127
  12:2 Long-Term Care Ombudsmen Programs 128
  12:3 Incidence of Abuse 131
  12:4 Overview of Intentional Harm: Abuse by Caregivers 133
  12:5 Overview of Neglect by Caregivers 135
  12:6 Overview of Abuse by Other Residents and Nonemployee Third Parties 139
  12:7 Criminal Aspects 140
  12:8 Definitions 141
  12:9 Sources of Assaults 143
  12:10 Regulatory Duty of Care for Protection of Residents 146
  12:11 Nursing Home Response to Assaults 149
  12:12 Framing the Complaint for Civil Tort Liability 150
  12:13 State Alternative Malpractice Remedies 153
  12:14 Defending the Nursing Home’s Supervision 154
  12:15 Rape and Sexual Assault 155
  12:16 Effects of Shock and Public Outrage 158
  12:17 Allegations of Concealment of the Assault 159
  12:18 Allegations of Employee Hiring and Supervision Errors 160
  12:19 CMS and State Penalties 162
  12:20 Punitive Damages 163
  12:21 Liability Insurance 163
  12:22 Evidentiary Issues 164
  12:23 Governmental Immunity 165
  12:24 Effect of Resident Assault on Liability to Employees 165

CHAPTER 13
Liability for Prescription Drug Problems
  13:1 Overview 167
  13:2 Medication Management 167
  13:3 Inappropriate Use of Antipsychotic Medications 169
  13:4 Polypharmacy 171
CONTENTS

13:5 Adverse Drug Interactions 172
13:6 Overview of Litigation 173
13:8 Shared Liability: Malpractice or Drug Problems? 175
13:9 Malpractice by Misprescribing 176
13:10 Negligent Polypharmacy 179
13:11 Overdosing 180
13:12 Misdelivery 181
13:13 Inattentive Medical Oversight 183
13:14 Drugs as a Resident Restraint Option 183
13:15 Medical Device Problems 185

CHAPTER 14
Liability for Food Problems: Malnutrition, Dehydration, and Choking 187

14:1 Overview 187
14:2 Why Litigation Occurs 189
14:3 Types of Harm from Food 191
14:4 Chronic Risk: Weight Loss and Wasting 192
14:5 Lessons from the Cases 193
14:6 Acute Risk: Choking and Aspiration 194
14:7 Expert Testimony 196
14:8 Responsibility for Care and Feeding 196
14:9 Tube and Pump Feeding 197
14:10 Dehydration 200
14:11 Setting the Standard of Care 201
14:12 Evaluations of Resident Nutritional Needs 201
14:13 Assembling the Case 202
14:14 Baseline Evaluations 203

CHAPTER 15
Liability for Infections and Other Injuries 205

15:1 Overview of Health-Care-Associated Infections (HAIs) 205
15:2 CMS Targets HAIs in New Initiatives 207
15:3 Ongoing Survey and Certification Work Related to HAIs
15:4 Infection Issues
15:5 Scalding and Drowning
15:6 Insects

CHAPTER 16
Nursing Home Admission and Discharge
16:1 Overview
16:2 Rationale for Placing the Resident into the Home
16:3 Economics of Admission Balancing
16:4 Admission Brochures and Agreements
16:5 Involuntary Discharge
16:6 Appeal of Involuntary Discharge
16:7 Patient Movement within Nursing Homes

CHAPTER 17
Assembling the Complaint
17:1 Overview
17:2 Elements of Knowledge
17:3 Elements of Due Care
17:4 Elements of Corporate Responsibility
17:5 Public Defendants
17:6 Statute of Limitations Defenses
17:7 False Claims Act Whistleblower Claims
17:8 Damages
17:9 Attorney Fee Requests

CHAPTER 18
Defendants
18:1 Overview
18:2 Interconnected Corporations
18:3 Deposing Corporate Representatives
18:4 Discovery of Defendant Identities
CHAPTER 19
Evaluating the Potential Plaintiff

19:1 Overview 235
19:2 Deterioration of Mental and Physical Condition 236
19:3 Testimony Issues 237
19:4 Peer Pressure 237
19:5 Actions after the Patient’s Death 238
19:6 State Wrongful Death Actions 238
19:7 Standing and Family Representation 238
19:8 Practical Issues 240
19:9 Effects of Death of the Plaintiff 240

CHAPTER 20
State Oversight and Regulation

20:1 Overview 241
20:2 State-Federal Funding 242
20:3 State Licensing 243
20:4 Ombudsman Roles 244

CHAPTER 21
Attributing Shared Fault

21:1 Overview 247
21:2 Nursing Liability 248
21:3 Physician Liability 249
21:4 Administrative Liability 250
21:5 Corporations Research 251
21:6 The Role of Respondeat Superior Liabilities 252

CHAPTER 22
Witnesses

22:1 Overview 255
22:2 When Are Experts Needed? 257
CONTENTS

22:3 Case Evaluation and Nontestifying Experts 258
22:4 Current Administrators 258
22:5 Current Medical and Nursing Staff 260
22:6 Former Staff Members 261
22:7 Support Staff 262
22:8 Preparation and Document Review 263
22:9 Daubert Effects 263
22:10 Fact Witnesses 264
22:11 Deposing Management and Supervisory Employees 264
22:12 Deposing the Corporate Representative 265
22:13 Testimony of the Patient 265

CHAPTER 23
Use of Government Survey Findings 267
23:1 What Are Surveys? 267
23:2 Utility of Survey Findings to Plaintiffs 269
23:3 Authentication and Admissibility 270
23:4 Penalties and Appeals 271

CHAPTER 24
Documentation: Needs and Sources 273
24:1 Overview 273
24:2 Assembly of Records for Expert Review 275
24:3 Effect of Alteration or Destruction of Records 276
24:4 Patient Privacy Issues 277
24:5 Mandatory Reports 277
24:6 Informed Consent 278
24:7 DNR and Advance Directives 278
24:8 Patient Care Plans 278
24:9 License and Survey Data Regarding the Nursing Home 279
24:10 Medicare Cost Reports 280
24:11 HHS Office of Inspector General Reports 280
CHAPTER 25
Product-Related Risk Issues

25:1 Overview  281
25:2 Assistive Devices  282
25:3 Medical Devices  285
25:4 Residential Products  287
25:5 Reporting Injuries to Government  288

CHAPTER 26
Causes of Action

26:1 Overview  289
26:2 Negligence  290
26:3 Use of Clinical Practice Guidelines or CMS Guidelines as Evidence of the Standard of Care  291
26:4 Negligence Per Se  301
26:5 Wrongful Death Statutes  304
26:6 Loss of Chance of Life  305
26:7 Statutory Causes of Action  306
26:8 Medical Malpractice  307
26:9 Intentional Torts  310
26:10 Wrongful Discharge of a Resident  312
26:11 Misrepresentation  314
26:12 Breach of Fiduciary Duty  314
26:13 False Claims Act  315
26:14 Infliction of Emotional Distress  316
26:15 Economic “Abuse” by Theft or Fraud  318
26:16 Breach of Contract  318
26:17 Remedies for Regulatory Inactivity  319
26:18 Class Actions  319
26:19 Government Exclusions of Providers  320
26:20 Exclusive Workers Compensation Remedy  320
26:21 Employee Discipline and Termination  321
<table>
<thead>
<tr>
<th>CHAPTER 27</th>
<th>Damages Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>27:1 Elders Have Low Economic Damages</td>
<td>323</td>
</tr>
<tr>
<td>27:2 Noneconomic Damages or “Specials”</td>
<td>323</td>
</tr>
<tr>
<td>27:3 Calculating Damages</td>
<td>324</td>
</tr>
<tr>
<td>27:4 Allocating Liability</td>
<td>326</td>
</tr>
<tr>
<td>27:5 Death Effect</td>
<td>327</td>
</tr>
<tr>
<td>27:6 Effects of Tort Reform</td>
<td>328</td>
</tr>
<tr>
<td>27:7 Punitive Damages</td>
<td>329</td>
</tr>
<tr>
<td>27:8 Statutory Damage Provisions</td>
<td>331</td>
</tr>
<tr>
<td>27:9 Caps as Deterrence to Litigation</td>
<td>332</td>
</tr>
<tr>
<td>27:10 Consequences of Large Awards for Medicaid Eligibility</td>
<td>332</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 28</th>
<th>Defenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>28:1 Overview</td>
<td>335</td>
</tr>
<tr>
<td>28:2 Defenses Related to Residents</td>
<td>339</td>
</tr>
<tr>
<td>28:3 Defenses Related to Families</td>
<td>341</td>
</tr>
<tr>
<td>28:4 Defenses Related to Regulators</td>
<td>341</td>
</tr>
<tr>
<td>28:5 State Charitable Immunity</td>
<td>342</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 29</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>29:1 Overview</td>
<td>343</td>
</tr>
<tr>
<td>29:2 The Case for Requiring Arbitration by Contract</td>
<td>344</td>
</tr>
<tr>
<td>29:3 Criticism of the Use of Arbitration</td>
<td>345</td>
</tr>
<tr>
<td>29:4 Costs and Award Limitations</td>
<td>348</td>
</tr>
<tr>
<td>29:5 Procedures</td>
<td>349</td>
</tr>
<tr>
<td>29:6 Defenses against Arbitration</td>
<td>350</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 30</th>
<th>Motion Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>30:1 Discovery Motions</td>
<td>353</td>
</tr>
<tr>
<td>30:2 Failure to State a Claim</td>
<td>354</td>
</tr>
<tr>
<td>Chapter</td>
<td>Title</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td>30:3</td>
<td>Summary Judgment</td>
</tr>
<tr>
<td>30:4</td>
<td>Removal to Federal Court</td>
</tr>
<tr>
<td>30:5</td>
<td>Motions to Dismiss</td>
</tr>
<tr>
<td>30:6</td>
<td>Motions after Verdict</td>
</tr>
<tr>
<td>30:7</td>
<td>Remittitur</td>
</tr>
<tr>
<td>31:1</td>
<td>Voir Dire—The “Ideal” Juror</td>
</tr>
<tr>
<td>31:2</td>
<td>Presentations and Demonstrative Evidence</td>
</tr>
<tr>
<td>31:3</td>
<td>Decisions on Evidence</td>
</tr>
<tr>
<td>31:4</td>
<td>Impeachment and Response</td>
</tr>
<tr>
<td>32:1</td>
<td>Coverage of Nursing Home Liability Cases</td>
</tr>
<tr>
<td>32:2</td>
<td>Settlement Authority at “Policy Limits”</td>
</tr>
<tr>
<td>32:3</td>
<td>Bad-Faith Litigation</td>
</tr>
<tr>
<td>32:4</td>
<td>Long-Term Care InsuranceLitigation</td>
</tr>
<tr>
<td>32:5</td>
<td>Veterans and Private Nursing Home Payment</td>
</tr>
<tr>
<td>32:6</td>
<td>Beneficial Role of Insurers</td>
</tr>
<tr>
<td>33:1</td>
<td>Overview</td>
</tr>
<tr>
<td>33:2</td>
<td>Settlement Influences</td>
</tr>
<tr>
<td>33:3</td>
<td>Effects of Settlement and Release</td>
</tr>
<tr>
<td>33:4</td>
<td>Verdicts Allocating Percentage Fault</td>
</tr>
<tr>
<td>33:5</td>
<td>Special Verdicts and Interrogatories</td>
</tr>
<tr>
<td>33:6</td>
<td>Verdicts against Individual Actors</td>
</tr>
<tr>
<td>33:7</td>
<td>Partial Settlements with Selected Defendants</td>
</tr>
<tr>
<td>33:8</td>
<td>Releases of Selected Defendants</td>
</tr>
<tr>
<td>33:9</td>
<td>Threats of Bankruptcy</td>
</tr>
</tbody>
</table>
CHAPTER 34
After-Verdict Liens and Offsets

34:1 Subrogation and the Effect of Repayment of Liens 377
34:2 Specific Steps for the Prudent Plaintiff’s Counsel 381
34:3 Informing the Client Early 381
34:4 Continued Eligibility 381
34:5 Payment of Private Insurer Liens 382

Table of Cases 385

Index 411