

**5.50A DUTY AND NEGLIGENCE** (Approved 3/02)

In this case, the plaintiff(s), [*insert plaintiff(s) name(s)*], contend(s) that the defendant(s), [*insert defendant(s) name(s)*], was (were) negligent in the diagnosis and [/or] treatment of [*insert name*], and that such negligence was a substantial factor in causing the plaintiff(s), [*insert plaintiff(s) name(s)*], to be injured.

Negligence is conduct which deviates from a standard of care required by law for the protection of persons from harm. Negligence may result from the performance of an act or the failure to act. The determination of whether a defendant was negligent requires a comparison of the defendant's conduct against a standard of care. If the defendant's conduct is found to have fallen below an accepted standard of care, then he or she was negligent.

In this case the defendant(s) is/are [*describe the profession*]. Therefore, to decide this case properly you must know the standard of care imposed by law against which the defendant's (s') conduct as a [*describe the profession*] should be measured.

***NOTE TO JUDGE***

For the standard of care, the appropriate paragraph of Options A or B (as follows) may be read.

**[Option A: Specialist.]** The defendant(s) in this case is (are) a medical specialist(s) in the field of [*insert appropriate specialty description*]. Specialists in a field of medicine represent that they will have and employ not merely the knowledge

and skill of a general practitioner, but that they have and will employ the knowledge and skill normally possessed and used by the average specialist in the field. Thus, when a physician holds himself/herself out as a specialist and undertakes to diagnose and treat the medical needs of a patient, the law imposes a duty upon that physician to have and to use that degree of knowledge and skill which is normally possessed and used by the average specialist in that field, having regard to the state of scientific knowledge at the time that he/she or she attended the plaintiff.

**[Option B: General Practitioner.]** The defendant(s) in this case is (are) a general practitioner(s). A person who is engaged in the general practice of medicine represents that he/she or she will have and employ knowledge and skill normally possessed and used by the average physician practicing his/her profession as a general practitioner.

**[Remainder of Charge.]**

Given what I have just said, it is important for you to know the standard of care which a general practitioner/specialist in *[insert appropriate specialty description, if applicable]* is required to observe in his/her treatment of a patient under the circumstances of this case. Based upon common knowledge alone, and without technical training, jurors normally cannot know what conduct constitutes standard medical practice. Therefore, the standard of practice by which a physician's conduct is to be judged must be furnished by expert testimony, that is to say, by the testimony of

persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on medical subjects.

You as jurors should not speculate or guess about the standards of care by which the defendant physician(s) should have conducted himself/herself/themselves in the diagnosis and treatment of the plaintiff. Rather, you must determine the applicable medical standard from the testimony of the expert witness(es) you have heard in this case.<sup>1</sup>

Where there is a conflict in the testimony of the medical experts on a subject, it is for you the jury to resolve that conflict using the same guidelines in determining credibility that I mentioned earlier. You are not required to accept arbitrarily the opinions offered. You should consider the expert's qualifications, training, and experience, as well as his/her understanding of the matters to which he/she or she testified.

Where an expert has offered an opinion upon an assumption that certain facts are true, it is for you, the jury, to decide whether the facts upon which the opinion is based are true. The value and weight of an expert's testimony in such instances is dependent upon, and no stronger than, the facts upon which it is predicated.

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<sup>1</sup> If references to medical treatises were permitted under *N.J.R.E.* 803(c)(18), then the jury could further be charged that if an expert was permitted to refer to or rely on material from medical textbooks, articles, or the like, to support his/her opinion on the issue of the standard of care, then you may consider such material as evidence of the applicable standard of care. *Jacober v. St. Peter's Medical Center*, 128 N.J. 475 (1992).

When determining the applicable standard of care, you must focus on accepted standards of practice in [*insert general practice or specialty involved*] and not on the personal subjective belief or practice of the defendant doctor.<sup>2</sup>

The law recognizes that the practice of medicine is not an exact science. Therefore, the practice of medicine according to accepted medical standards may not prevent a poor or unanticipated result.<sup>3</sup> Therefore, whether the defendant doctor was negligent depends not on the outcome, but on whether he/she adhered to or departed from the applicable standard of care. *Ibid.*

***NOTE TO JUDGE***

Where the defendant has satisfied the burden of proving that medical judgment is involved in the case, insert Charge 5.50G, Medical Judgment, here.

If you find that the defendant(s) has (have) complied with the accepted standard of care, then he/she/they is/are not liable to the plaintiff regardless of the result. On the other hand, if you find that the defendant(s) has (have) deviated from the standard of

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<sup>2</sup> *Morlino v. Medical Center of Ocean County*, 295 N.J. Super. 113 (App. Div. 1996), *aff'd*, 152 N.J. 563 (1998). See also, *Fernandez v. Baruch*, 52 N.J. 127, 131 (1968), *Carbone v. Warburton*, 11 N.J. 418, 425 (1953), *Schueler v. Strelinger*, 43 N.J. 330, 346 (1964), *Ziembra v. Riverview Medical Center*, 275 N.J. Super. 293 (App. Div. 1994), *Nguyen v. Tama*, 298 N.J. Super. 41 (App. Div. 1997).

<sup>3</sup> *Morlino, supra*. *Aiello v. Muhlenberg Regional Medical Center*, 159 N.J. 618 (1999), *Velazquez v. Portadin*, 163 N.J. 677 (2000).

care resulting in injury or damage to plaintiff, then you should find defendant(s) negligent and return a verdict for plaintiff.

***NOTE TO JUDGE***

The standard charge for proximate cause and burden of proof should be used, deleting, however, the word "malpractice" where used and inserting in its place the word "negligence." Likewise, in those cases in which a jury will be permitted to supply the standard of care without the need for expert testimony, the standard charge should be used, but the phrase "guilty of malpractice" should be deleted and the word "negligence" inserted in its place.

As to any other charge which may be relevant to a case involving professional negligence, the Committee suggests that the use of the term "malpractice" or the phrase "guilty of malpractice" not be used and that the general term "negligence" be used in its place.