

Health Law: Quality & Liability

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Medical Malpractice –
Alternative Liability
Theories



Alternative Theories of Liability



We **already** examined
Abandonment
Battery
Informed consent
Medical malpractice



Res ipsa
Breach of contract
Inadequate pain
control
Vicarious liability



Res ipsa loquitor



Normally in medical
malpractice need an
expert witness to
establish the standard
of care



Sometimes, rarely,
there is no need
for an expert
witness

Res ipsa loquitor

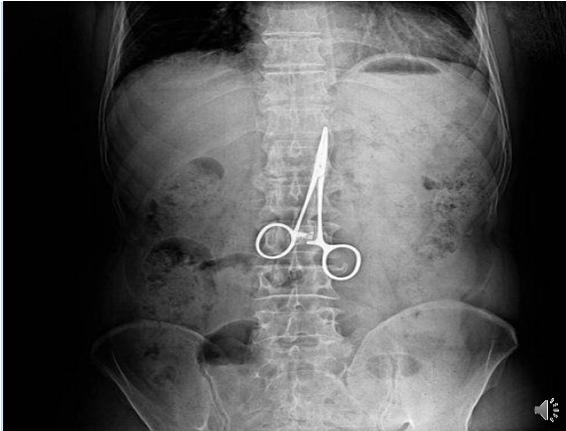
Thing speaks for itself

Lay jury can just
infer there was
malpractice, if:

1. Event of type that ordinarily does not occur without negligence
2. That event probably caused by DEF



2 paradigm cases
for res ipsa loquitor



Can **infer**
negligence from
the freakishly
wierd

Breach of contract

Need a specific
guarantee

Usually in writing

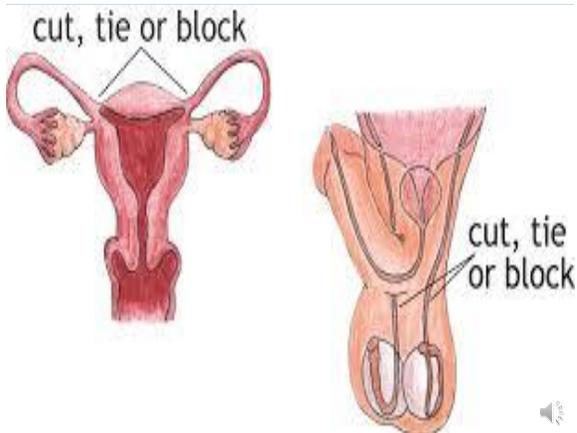
Rare claim

More common
among cosmetic
clinicians





Other situations



Puffery okay

Reassurance okay

**Inadequate
Pain Control**

Current standard of care in most jurisdictions requires that physicians adequately treat pain.

In many states, inadequate pain management of elderly patients is “**elder abuse**”

Elder abuse may expose a physician to liabilities that do not arise in a normal medical malpractice suit

May **not** be covered by a physician’s malpractice insurance policy

IIED
NIED

Intentional / negligent infliction of emotional distress

2 elements

Extreme & outrageous conduct	Not just rude Not just insult, offense Outside the bounds
Severe emotional distress	Must be severe Best show with physical symptoms

May not be malpractice to make patient DNR without consent (if clearly not indicated)

But might **still** be liable for IIED if do so in a secretive, outrageous, insensitive manner

Liability for, IIED **not** be covered by insurance

Vicarious Liability

Physician may have done **nothing** wrong

Someone **else**
committed
malpractice

Patient can always
sue the person who
committed
malpractice

Can **also** sue physician
if exercises “control”
over person who
committed malpractice

Employers liable for
torts of employees

Surgeons often like
temporary employers
over staff (temporary
employees)

No double recovery

If \$50,000 in damages,
can recover from **either**
culpable clinician or
supervising physician

Hospitals & entities
liable for all torts of
employees

Hospitals & entities
also liable for torts of
ostensible agents
(non-employees who
look like employees)