

## 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

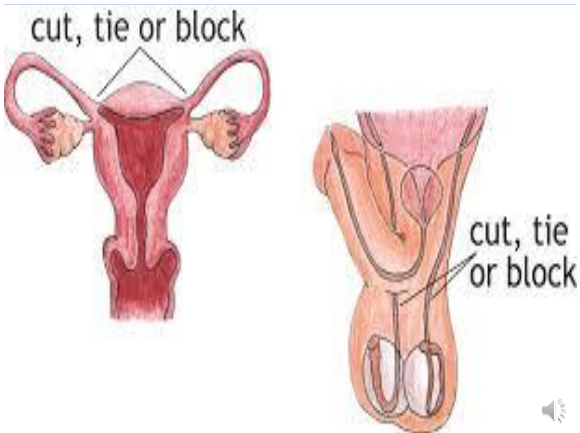
Rare claim

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)