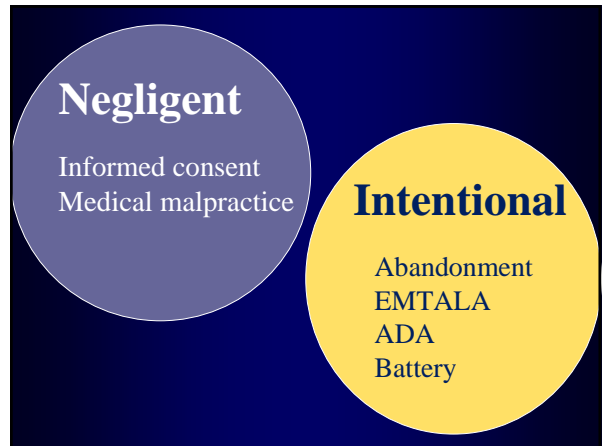


Health Law I

Professor Pope

Class 10: Sept. 22, 2011

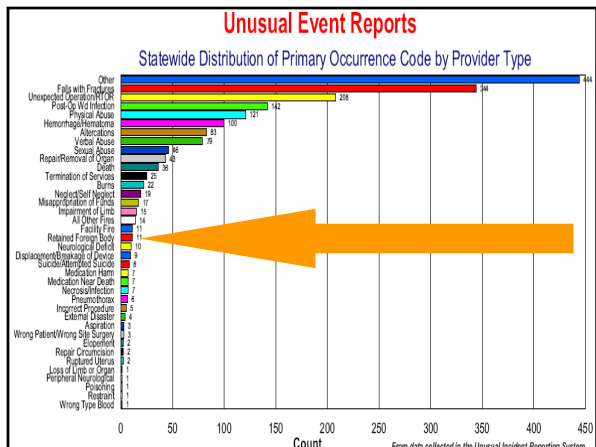


Medical Error

Iatrogenic injuries

iatros = physician
genic = produced by

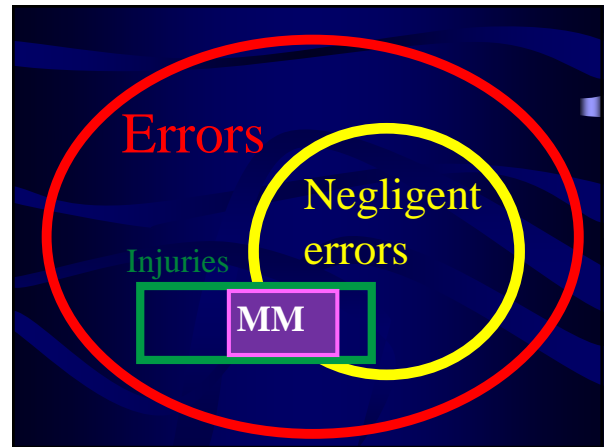
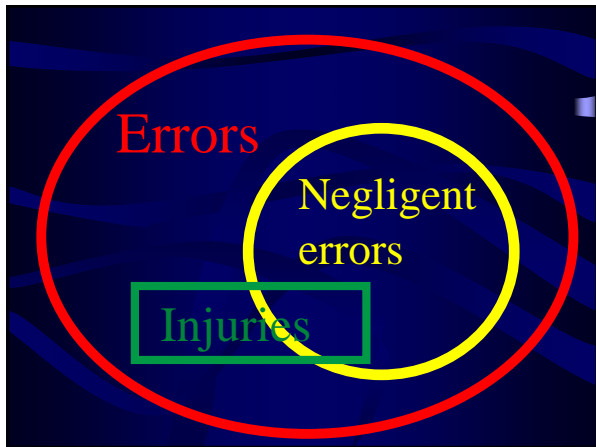
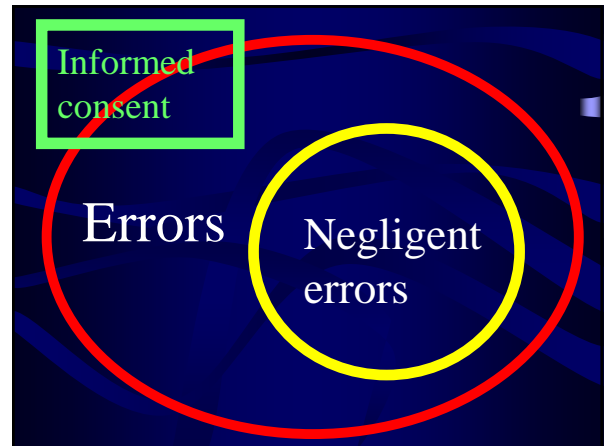
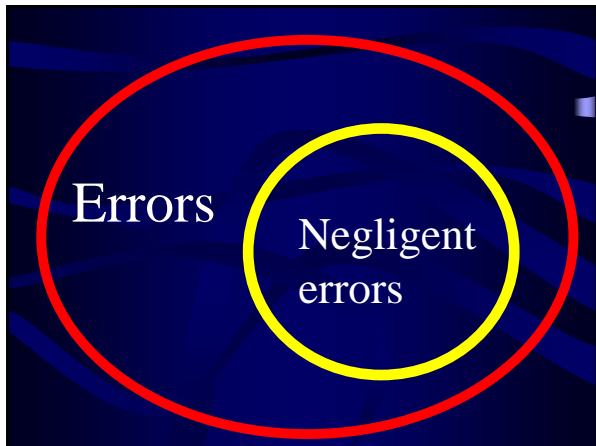
Injuries induced by physician, medical treatment, or diagnostic procedures



100,000 deaths / year

TO ERR IS HUMAN
BUILDING A SAFER HEALTH SYSTEM
INSTITUTE OF MEDICINE

Atul Gawande



Standard of Care

Informed consent

PTF claims DEF failed to disclose

PTF must establish that had **duty** to disclose

Medical malpractice

PTF claims DEF
deviated from standard
of care

PTF must establish SOC

Almost always,
PTF needs **expert
witness** to establish
the standard of care

No expert → no SOC

No SOC → no breach

No breach → no case

**McCourt
v.
Abernathy**



PTF verdict

Affirmed by
SCOSC

PTF argues DEFs committed malpractice

That they breached the standard of care

How does PTF establish what is the standard of care

March 7	Prick
March 9	Kick
March 9	Abernathy
March 13	ER Clyde
March 14	ER admit
March 15	Kovaz
March 19	Dead

Reject DEF requested instruction

FN4: “not liable for the result of a bona fide mistake of judgment”

Negligent

Informed consent
Medical malpractice

Intentional

Abandonment
EMTALA
ADA
Battery



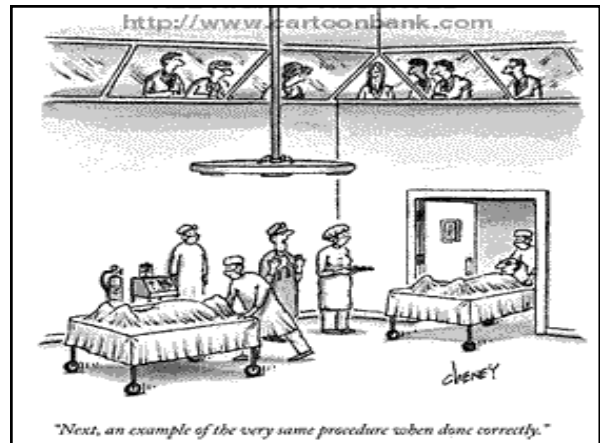
I'm not a smart doctor.”

In addition to the **actual damages** sustained, jury may award **exemplary (punitive) damages**

Fraud
Malice
Willful & wanton

DEF must have realized
dangerous, done
heedlessly & recklessly

Locke v. Pachman

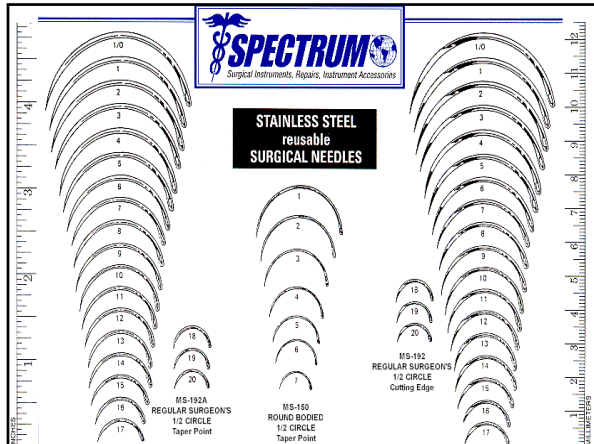


McCourt
PTF wins

Locke
PTF loses

Locke: never even
submitted to jury

DEF never puts on
evidence



PTF argues that DEF committed malpractice
 That she breached the standard of care
How does PTF establish what is the standard of care (3 ways)

Hill v. McCartney



“Oh, don’t worry about it . . . I will take care of you. I have malpractice insurance. I did something freaky to you. I fucked up.”

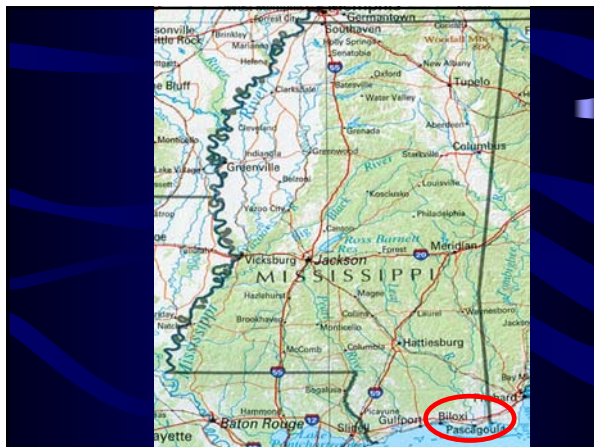
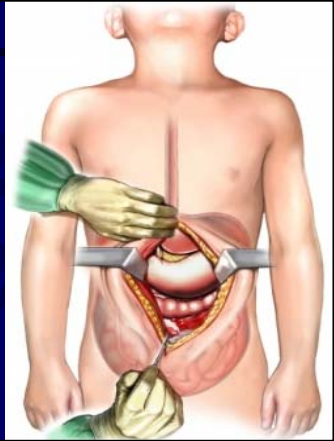


Standard of Care Variations

School of thought (Jones)
Specialization (Chapel)
Geography (Chapel)
Economic factors (Hall)
Judicial (Helling)

Hall v. Hillbun

1. Decision
operate
2. Surgery
itself
3. Post-op
care



PTF argues that DEF committed
malpractice
That she breached the
standard of care

How does PTF establish what is
the standard of care



Ranked among America's Top Hospitals
by U.S. News & World Report

Physician expected to possess
medical knowledge and to exercise
medical judgment as possessed by
minimally competent doctors
anywhere in the United States

Physician only need use **resources**
as are reasonably available

Standard is what "hold out" as

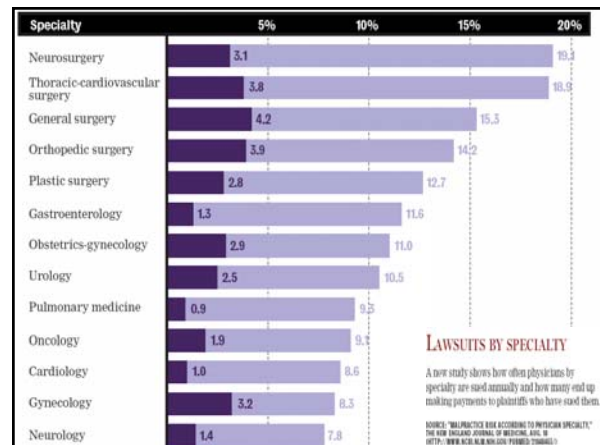
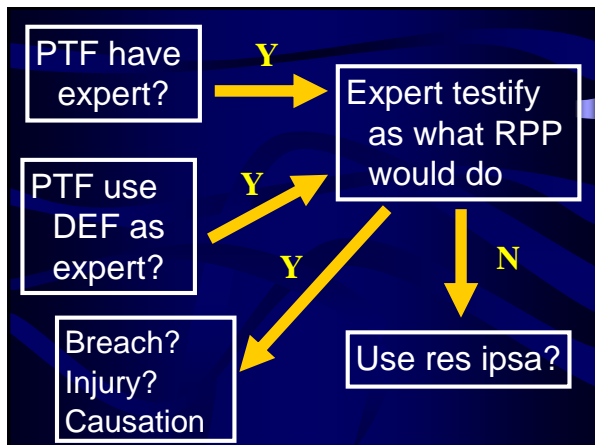
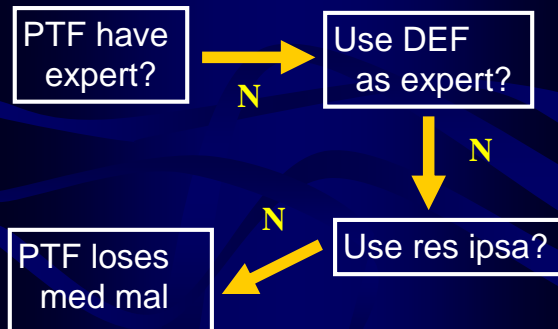
- GP held to GP
- Oncologist held to oncologist
- NP held to NP

Health Law I

Professor Pope

Class 11: Sept. 27, 2011

Establishing standard of care



Standard of Care Variations

- Geography (Chapel, Hall)
- Economic factors (Hall)
- School of thought (Jones)
- Specialization (Chapel)
- Judicial (Helling)

Geography

Standard of Care Variations

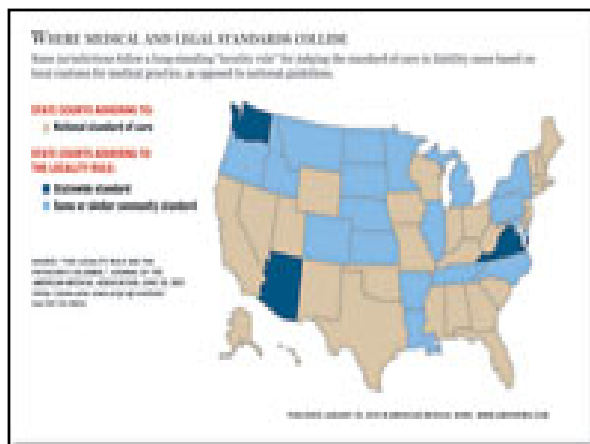
DEF measured against the reasonable physician **where**

1. Strict locality
2. Statewide
3. Same or similar
4. National

Strict locality

Livingston, MT doc measured against Livingston, MT doc

No longer followed anywhere



Statewide

VA DEF duty to act as RPP doc **in VA**

Only VA, WA, AZ

Same or similar

DEF duty to act as RPP
in DEF community **or**
one similar to it

17 jurisdictions

National

DEF duty to act as
RPP **in USA**

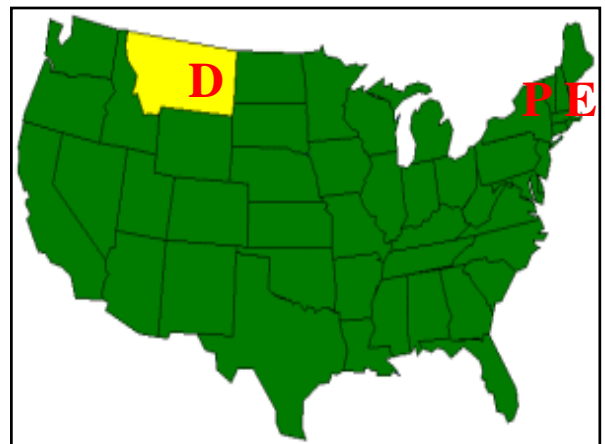
31 jurisdictions

Physician expected to possess
medical knowledge and to
exercise medical judgment
as possessed by reasonable
doctor **anywhere in the
United States**

Chapel
v.
Alison

DEF Livingston, MT
GP

PTF Denman, MA
expert Orthopedic
surgeon



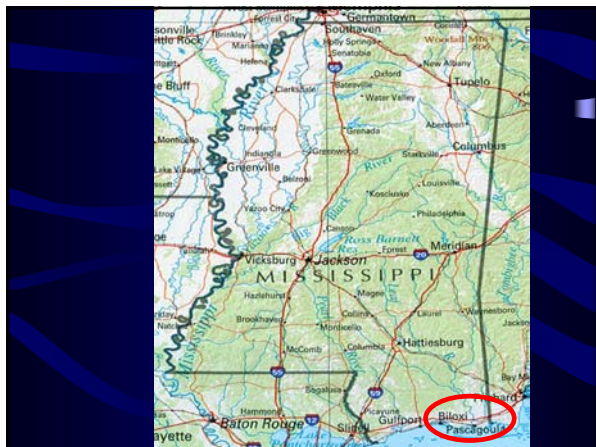
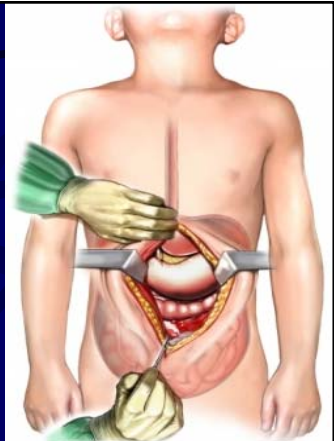
Directed verdict
for DEF at close
of PTF *prima
facie* case

Problems with the
“old” locality rule

How does court
modify it

Hall v. Hillbun

1. Decision
operate
2. Surgery
itself
3. Post-op
care



PTF argues that DEF committed
malpractice
That she breached the
standard of care

How does PTF establish what is
the standard of care



Economic
Standard of Care
Variations

Even on national standard re
knowledge and judgment
Physician only need use
resources as are
reasonably available

Specialization
Standard of Care
Variations

Specialists **always**
held to national
standard
Even in same or
similar jurisdictions

Standard is what “hold out”

GP held to GP

Oncologist held to
oncologist

NP held to NP

School of thought

Standard of Care
Variations

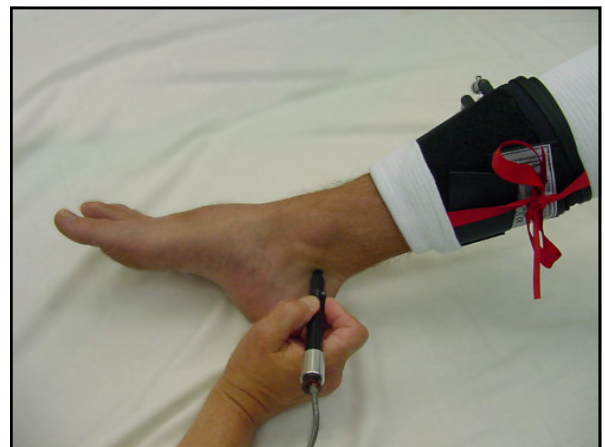
Standard of care
established
through PTF
experts

SOC 2

Established with
DEF experts

SOC 1

Jones
v.
Chidester



Jury does **not** determine
which SOC is “better”

Sufficient that DEF
conduct complies
with **either** one

Jury instruction:

Sufficient that DEF complied
with either school of thought
if has “respected advocates
and followers”

Why does Jones appeal this?



All physicians

**Recognized & respected
physicians**

BOTH

Reputable and
respected

AND

Considerable
number

Johnson v. Richardson (Tenn. App. 2010)

Tennessee is a “same or similar
jurisdiction”

Expert: Springfield, MO

Defendant: Memphis, TN

This is a qualification issue

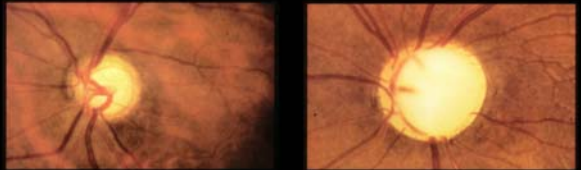
A question for the court

Judicially set


Standard of Care
Variations

Helling v. Carey

Glaucoma...
...afflicts 3 million Americans...



...but half of them haven't been diagnosed because they haven't had an eye exam.



Super rare

Much criticized

Infamous

Health Law I

Professor Pope

Class 12: Sept. 29, 2011

TUE 10/4

Damages
Essay writing

THU 10/6

Last class
before midterm

Review through
informed consent

TUE 10/11

No class
In-service

THU 10/13

Midterm exam

TUE 10/18

SOL / SOR

Judicially set

Standard of Care
Variations

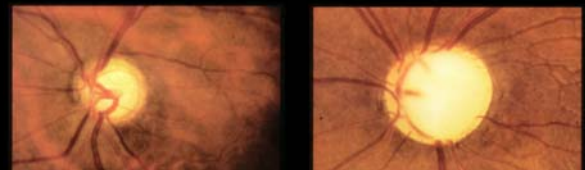
Helling

v.

Carey

Glaucoma...

...afflicts 3 million Americans...



...but half of them haven't been diagnosed
because they haven't had an eye exam.



All expert evidence agreed: “SOC is **not** to test for glaucoma under age 40”

SCOW: “Who cares! They **should** test the under 40s.”

Super rare

Much criticized

Infamous

CPG

Standard of Care
Variations

Guideline based on systematic review of clinical evidence.

Legislature: “compliance with CPG = safe harbor”

Experts

Qualification

Qualification
Credibility &
weight



Thompson
v.
Carter



“Dr. Robert Schmidt who **sought consultation with** Dr. Robert Carter, a urologist”

Outcome in trial court

Why does appellate court **reverse**

Experts should normally be of the **same** specialty

But title and degrees do not matter as much as knowledge and training

Look to **specific** issue at hand

General surgeon can testify against plastic surgeon re general surgical issues

Jones

v.

Bogalkotalkar

DEF

Dr. White
Board-certified **internist**

PTF expert

Dr. Krenytzky
Board-certified **pediatrician**

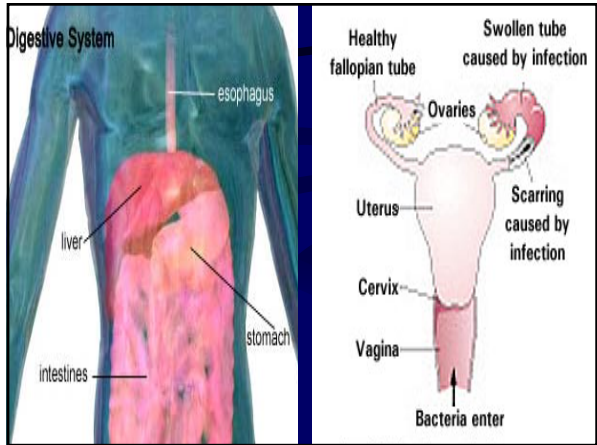


Emergency medicine

Pediatrics

Experts Examination & Credibility

Trower v. Jones



Contrast *Thompson*

Here, PTF expert
Martins **got** to testify

He was qualified

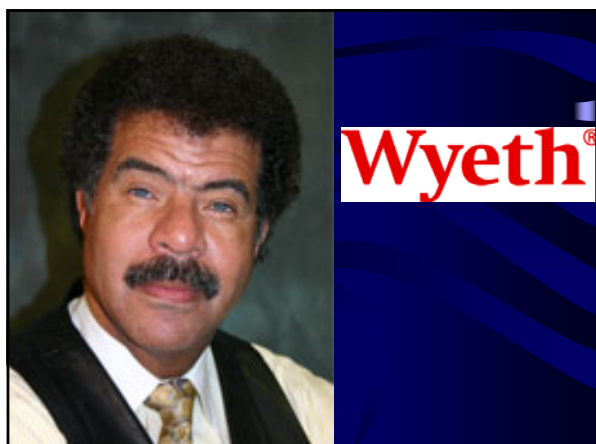


Cross-examiner:

"Are you being paid for your testimony?"

Witness:

"I am being paid for my time, experience, expertise and out-of-pocket expense."



Causation

But for

There must be **injury** (no nominal damages)

Rest. 3d 26
Tortious conduct must be a factual cause of harm for liability to be imposed.
Conduct is a factual cause of harm when the harm would **not have occurred absent the conduct.**

But for
More likely than not
Sine qua non

Not enough that DEF negligence **increased** the risk
DEF negligence must be **most likely cause**

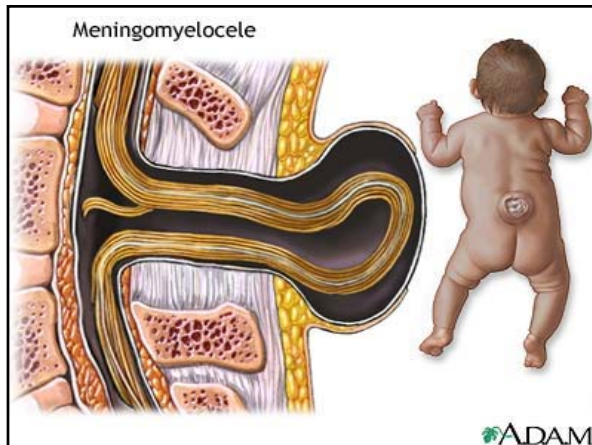
Causation

Lost chance

Valadez

v.

Newstart



w/o
negligence

___ % in
prenatal
surgery
group

w/ negligence

___ % in
prenatal
surgery
group

Loss of chance: over 25 states

Malpractice PTF often start out
sick

Bad baseline.

Hard to show BUT FOR
causation

Wendland

v.

Sparks

Hospital cancer patient codes – but doc says:
no CPR “I just can’t do it to her”

Defendants response to the suit is _____

w/o negligence

____ % death

____ % survival

w/ negligence

____ % death

____ % survival

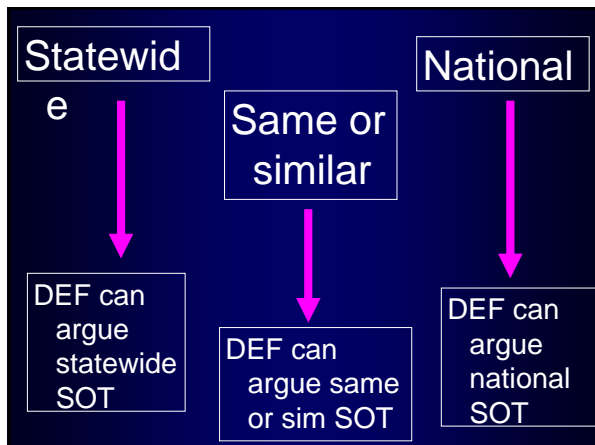
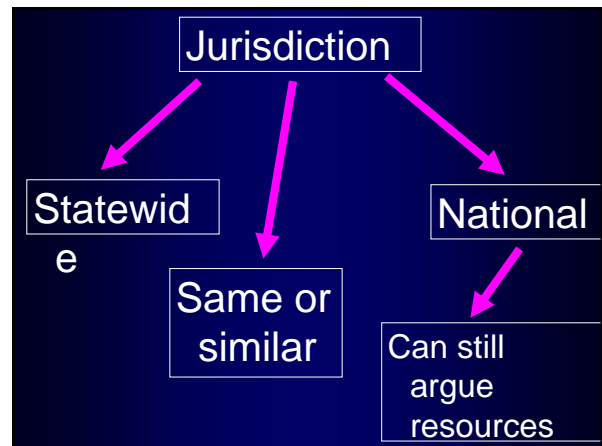
Herskovits v. Group Health

	Chance survive	Chance death
Without negligence	39%	61%
With negligence	25%	75%

Health Law I

Professor Pope

Class 13: Oct. 4, 2011



But for causation

“But for” causation is always **sufficient**

In most states, it is also **necessary**

Baseline risk death **5%**

After DEF negligence risk of death **25%**

Negligence **increases** risk of adverse outcome

10% → 30%

1% → 3%

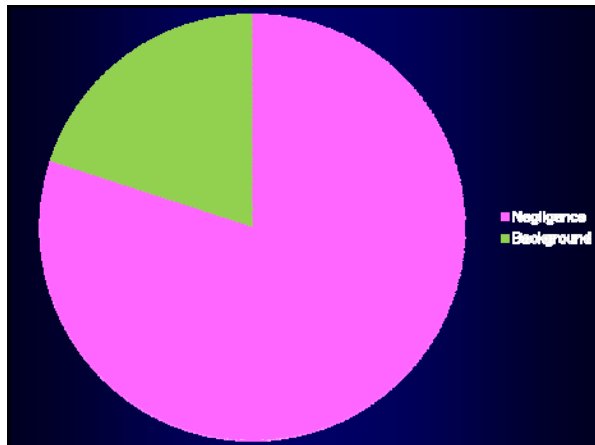
30% → 70%

Negligence **increases** risk of adverse outcome

30% → 50%

66% → 99%

40% → 70%



> 50% chance that injury from DEF negligence = 100% damages

50% or < 50% chance = \$0 damages, no liability

Traditional rule

**Lost
chance
causation**

Suing for an injury that was **probably** going to happen **anyway** – even without DEF negligence

DEF just made a probable outcome **even more** probable

Herskovits v. Group Health

Negligence does not change
probable outcome

With negligence
Probably dead

Without negligence
Probably dead

	Chance survive	Chance death
Without negligence	39%	61%
With negligence	25%	75%

Damages

Fein v. Permanente

Jury verdict

\$25,000	Past lost wages
\$700,000	Future lost wages
\$63,000	Future medical
\$500,000	Non-economic

Economic

Past lost wages
Future lost wages
Future medical

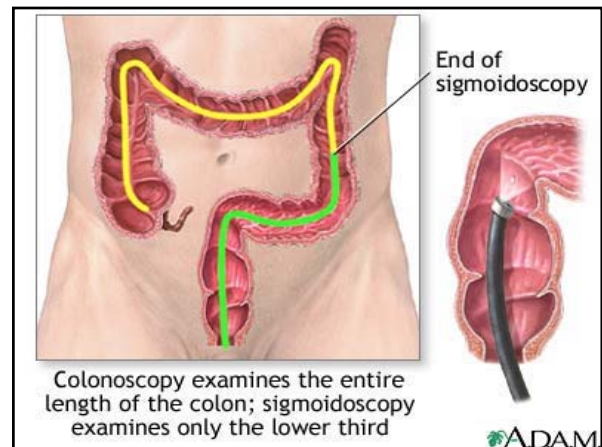
Non-economic

Pain & suffering

What was Fein's **average annual salary** for the rest of his pre-negligent life expectancy?

\$ _____ Past lost wages
\$700,000 Future lost wages
\$63,000 Future medical expenses
\$ _____ Non-economic damages

Roberts v. Stevens Clinic Hosp

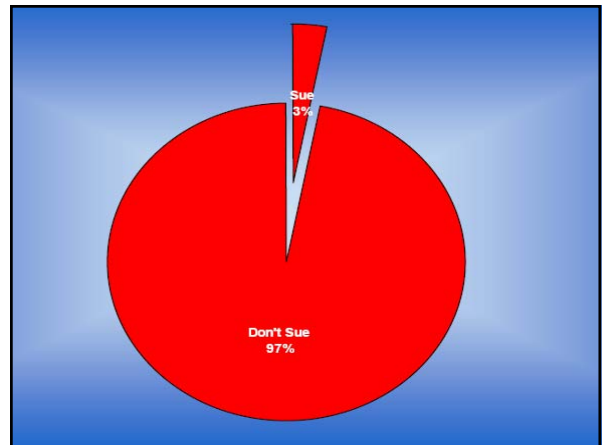


PTF sued for negligence

What should have been
PTF **lead theory**
against Dr. Magnus

Jury award = \$10,000,000

Remit = \$3,000,000

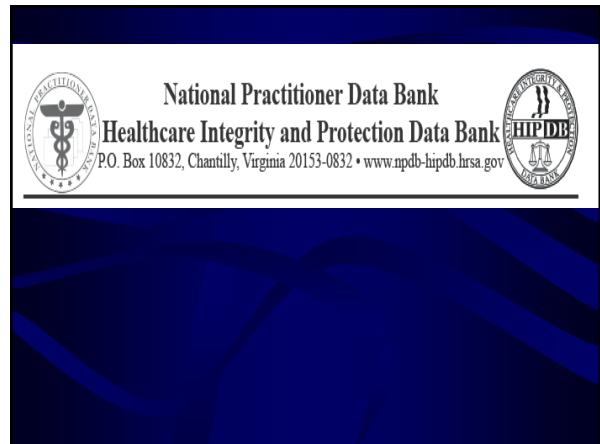


Bleday
v.
OUM Group

Underlying litigation
Worshesky v. Bleday

OUM settled for \$10,000
Bleday objected

“The company may make such . . . settlement of **any** claim of suit as **it deems** expedient.”



Punitive damages

“In any action for medical negligence, punitive damages may be awarded **only if** it is found that the injury . . . was maliciously intended or was the result of willful or wanton misconduct by the health care provider . . .”

Loss of consortium



Health Law I

Professor Pope

Class 16: Oct. 18, 2011

Damages

Bleday

v.

OUM Group

Underlying litigation
Worshesky v. Bleday

OUM settled for \$10,000
Bleday objected

“The company may make such . . . settlement of **any** claim of suit as **it deems** expedient.”



National Practitioner Data Bank
Healthcare Integrity and Protection Data Bank
P.O. Box 10832, Chantilly, Virginia 20153-0832 • www.npdb-hipdb.hrsa.gov



Punitive damages

“In any action for medical negligence, punitive damages may be awarded **only if** it is found that the injury . . . was maliciously intended or was the result of willful or wanton misconduct by the health care provider . . .”

Loss of consortium



**Statute of
Repose**

**Statute of
Limitations**

Effect & Impact

Bright-line deadline

Complete bar to suit

Affirmative defense to
plead in answer

SOL-SOR vary by state
and kind of action

Rationale

Deterioration of evidence
Witnesses die
Memories fade
Risk of error increases

Ability to throw out trash

Avoid re-ignition of
conflicts quieted by time

Peace of mind for
potential defendants

3 key inquiries
to determine if
your lawsuit is
time-barred

1. Date triggered
2. Length
3. Date lawsuit filed

SOL and SOR
differ in
trigger date

SOR

Date of injury

SOL

Date injury
discovered

SOL

Plaintiffs cannot sit on

SOR

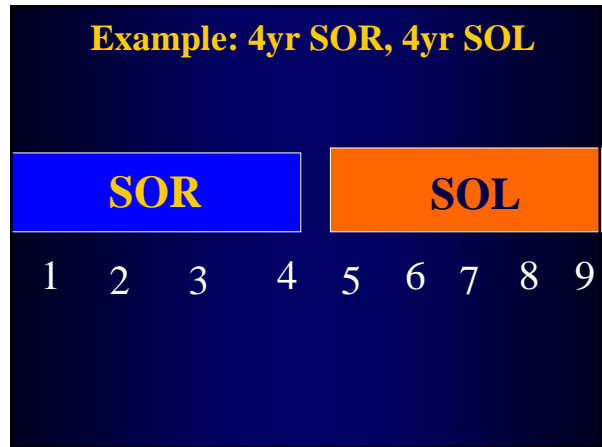
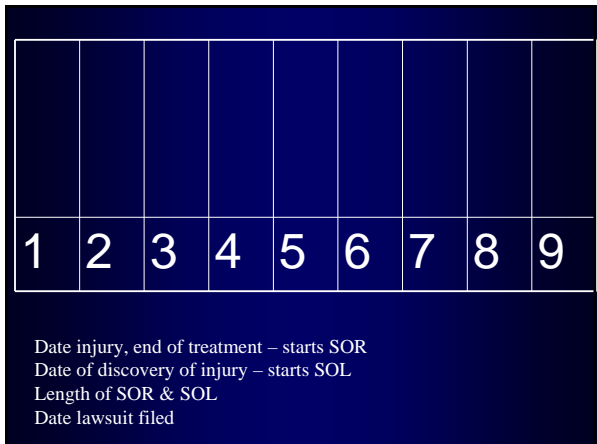
Med mal reform

Lawsuit barred as
soon as **either**
SOR or SOL
runs, whichever
runs **first**

18 Del. C. § 6856

No action . . . damages . . .
arising out of medical
negligence shall be brought
after the expiration of **2 years**
from the date upon which
such injury occurred . . .

provided, however, that . . .
 injury . . . unknown to and
 could not in the exercise of
 reasonable diligence have
 been discovered . . . **3 years**
from the date upon which
such injury occurred . . .



Example: Laughlin v. Forgrave

4yr SOR, 2yr SOL

1951: surgical operation
 (instrument left inside)

1962: plaintiff discovers
 instrument

Example: Kenyon v. Hammer

2yr SOR

1980: Prenatal exam – chart as
 Rh+ not Rh- blood

1981: Birth – no RhoGam

1986: Second child stillborn

Rock v. Warhank

October 5, 2004 Lawsuit filed

_____ Earliest SOL could
have started to run

May & June 2003 Warhank

Jewson v. Mayo Clinic

April 19, 1978 Lawsuit filed

_____ Earliest SOR could
have started to run

Wells v. Billars

June 15, 1984 Lawsuit filed

_____ Earliest SOR could
have started to run

May 27, 1982 Eye appointment

Gomez v. Katz

July 2, 2004 Lawsuit filed

_____ Earliest SOR could
have started to run

June 29, 1999 LASIK


Cunningham v. Huffman

- Statute of limitations
- Statute of repose
- Huffman left the 2d IUD in Lynn on April 8, 1980 or March 12, 1981
- She sued Huffman and Carle Clinic on March 21, 1989

Health Law I

Professor Pope

Class 18: Oct. 25, 2011



Lessons from Tragedy:
 Legal, Professional, and Ethical Issues Raised by Bradley and Beyond

Sponsored by
 - Widener Law Review
 - Widener University School of Law
 - Widener University Health Law Institute

November 4, 2011
 8:30 a.m. – 5:00 p.m.

Widener University
 School of Law
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Six CLE credits available in DE and PA (includes one ethics credit).

Widener Law
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Health Abuse Bill of Rights

Introduction:
 These questions are based on the following statute. In 2002, Pennsylvania adopted the MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR (MCARE) ACT. Section 513(a) provides: "Except as provided in subsection (b) or (c), no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged or breach of contract." Section 513(b) provides: "Injuries caused by foreign object—if the injury is or was caused by a foreign object unintentionally left in the individual's body, the limitation in subsection (a) shall not apply." A separate, older statute Pa. Cons. Stat. 5524 provides: "The following actions and proceedings must be commenced within two years . . . (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or an violence or negligence of another."

Question 1
 Steve saw his doctor on January 5, 2004. His doctor failed to diagnose cancer that a subsequent treating physician first diagnosed (at an advanced stage) on March 16, 2008. Steve filed against the first doctor on April 10, 2011.

- Steve's claim is barred by the statute of limitations.
- Steve's claim is barred by the statute of repose.
- Steve's claim is barred by BOTH the statute of limitations AND the statute of repose.
- Steve's claim is barred by NEITHER the statute of limitations NOR the statute of repose.

Question 2
 Steve saw his doctor on January 5, 2004. His doctor failed to diagnose cancer that a subsequent treating physician first diagnosed (at an advanced stage) on March 16, 2008. Steve filed against the first doctor on April 10, 2010.

- Steve's claim is barred by the statute of limitations.
- Steve's claim is barred by the statute of repose.
- Steve's claim is barred by BOTH the statute of limitations AND the statute of repose.
- Steve's claim is barred by NEITHER the statute of limitations NOR the statute of repose.

Question 3
 Steve saw his doctor on January 5, 2004. His doctor failed to diagnose cancer that a subsequent treating physician first diagnosed (at an advanced stage) on March 16, 2008. Steve filed against the first doctor on April 10, 2009.

- Steve's claim is barred by the statute of limitations.
- Steve's claim is barred by the statute of repose.
- Steve's claim is barred by BOTH the statute of limitations AND the statute of repose.
- Steve's claim is barred by NEITHER the statute of limitations NOR the statute of repose.

Thursday, Oct. 27

Review Midterm Exam

Work through malpractice "problem" in PTF & DEF "teams"

Affirmative Defenses

SOL

SOR

Argue both if applicable

ADR

Negotiation

Mediation

Arbitration

Schneider

v.

Revici



Complementary therapies

- Naturopathic medicine
- Nutritional therapy
- Physical rehabilitation
- Mind-body medicine
- Spiritual support

Conventional therapies

- Surgery
- Chemotherapy
- Immunotherapy
- Radiation
- Stem cell transplant

Covenant not to sue

EAR

IAR

Alternative Theories of Liability

Res ipsa

Not a different **theory** of liability

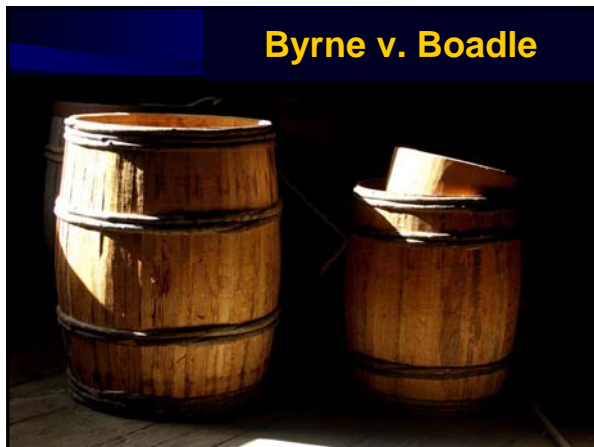
An alternative **way** to establish med mal

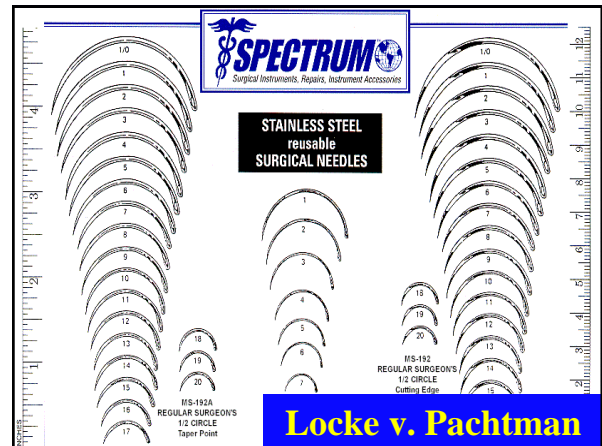
Rule of evidence

Alternative way to establish duty + breach

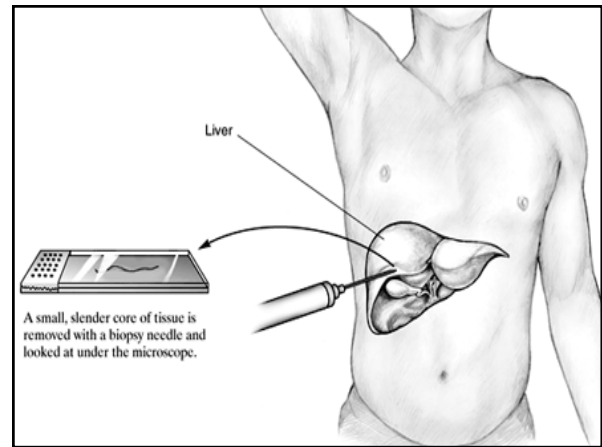
1. Event of type that ordinarily does not occur without negligence
2. Event most probably caused by DEF

Byrne v. Boadle





**Freeman
v.
X-Ray
(Del. 2010)**



18 Del. Code 6853(e)

No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care . . . However . . .

a rebuttable inference that . . . injury . . . was caused by negligence . . . in any 1 or more of the following . . .

(1) A foreign object was unintentionally left within the body of the patient following surgery . . . [or]

(3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body

Res ipsa – but need expert to say these do not happen unless negligence

Failure to observe a tumor in an x-ray

That needle broke during operation

Common knowledge

Sponge left

Operate wrong side

Need expert

Paralyzed after treat bleeding

Numb arm after masectomy

Common knowledge no need expert

- Laparotomy pad left in body during operation
- Needle left in chest during surgery
- Dentist removed wrong tooth
- Bed rails not up for elderly person who fell out of bed

Ordinary negligence

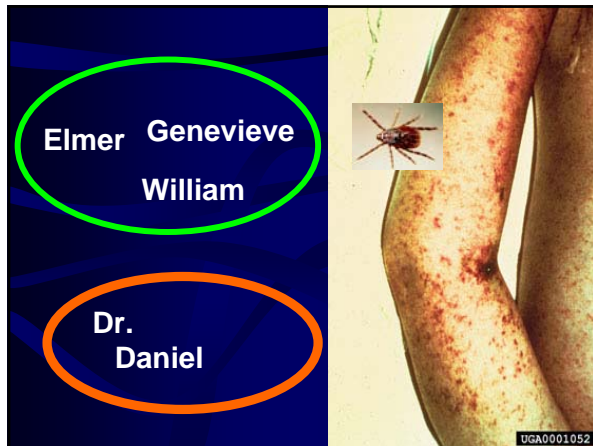
1. No P-P relationship with patient

2. No P-P relationship with 3rd party

Bradshaw

v.

Daniel



Breach of contract

Advantages over tort

No med mal reform hurdles

Do you need an expert



Del. Code § 6851

No liability shall be imposed upon any health care provider on the basis of an alleged breach of contract, express or implied, assuring results to be obtained from undertaking or not undertaking any diagnostic or therapeutic procedure in the course of health care, **unless such contract is set forth in writing** and signed by such health care provider or by an authorized agent of such health care provider.

Intentional torts

Battery

IIED

Misrepresentation

Invasion of privacy

Fraud

Defamation

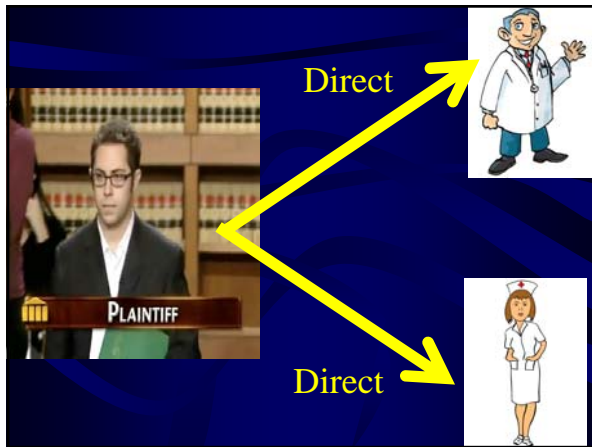
Health Law I

Professor Pope

Class 20: Nov. 1, 2011

Alternative Theories

Vicarious Liability



Respondeat superior
Actual agency
Employer-employee
Mater-servant



Choose when, where and how they perform services

Provide facilities, equipment, tools and supplies

Directly supervise the services

Set the hours of work

Require exclusive services (individual cannot work for your competitors while working for you.)

Set the rate of pay

	Employer/employee relationship	Independent contractor
Control over work	The employer has the right to direct the manner in which the work is performed. However, skilled workers may be extended a high level of independence.	Typically the contractor has a higher level of independence in the way the work is performed, within the limits of the contract for the work.
Power to delegate	The employee usually provides labour/services for one payer. The employee would reasonably be expected to perform work personally.	Free to work for others. May arrange for some or all of the work to be done by others without the approval of the principal (delegation rights).
Tools and equipment	Ordinarily provided by the payer except when specifically agreed otherwise.	Provides significant tools and equipment that are integral to business.
Independence	Employees have a duty to perform work for the employer as directed or in accordance with an employment contract.	The contractor must perform duties in accordance with the contract, but not in other roles except by agreement.
Mode of payment	Worker receives payment irrespective of output. For example hourly rates or commission. Payments for work are made directly to the employee, not to an intermediary such as a company, partnership or trust. Worker accrues paid leave entitlements.	Payment based on results not the time taken. Submission of invoices. Business name used. Not paid leave entitlements.
Legal liability	The employer is legally liable for the work.	The contractor is legally liable for the work performed under the contract.
Commercial risk	The employee is not liable for costs arising out of injury or defect in carrying out the work.	The contractor bears the risk and is able to benefit from good management. The contractor is responsible for remedying any defective work at their own expense.

Master is liable for the torts of:

1. Servants

- Agents over whom master has right to control physical conduct (e.g. "employees")
- Contrast "independent contractors"

2. Acting in scope of employment

EXCEPTION: Master is **NOT** liable for torts of servant acting in scope of employment **IF**:

Servant is "borrowed" by another master and under the control of that other master

Apparent agency

Ostensible agency



Even if actor is not an actual agent, the principal could still be liable where the patient had **reasonable belief** that the actor was acting as principal's agent

Regardless of actual, specific arrangement

From perspective of reasonable patient

Reliance by patient not required

Affirmative misrepresentation not required

Franklin v. Gupta

Theories to hold surgeon liable for negligent acts of **others**

~~Captain of the ship (status)~~

Borrowed servant (actual control)

Agency through business entity