

## Ch. II (E): The Special Case of Medical Malpractice.

- 1) How is the standard of care different in a medical malpractice case?
- 2) Are the rules of proof different in a medical malpractice case?
- 3) How is a case based on a failure to get the patient's informed consent different from a case based on the physician's negligence in treatment?

## Medical Malpractice: How is the standard of care different in a medical malpractice case?

1. The standard is the reasonably prudent professional, or specialist, with the
  - Skill,
  - Training, and
  - Experience commonly held by dr's in that field.
2. Expert testimony is almost always necessary to establish what the standard is.
3. Custom is usually dispositive, one way or the other.

Medical Malpractice: How is the standard of care different in a medical malpractice case?

Sheeley v. Memorial Hospital:

1. Can a board certified OB/GYN testify about the standard of care that applies to a second year family practice resident?
2. Must the expert testify about what the standard of care is in that locality, or a similar locality?

Medical Malpractice: How is the standard of care different in a medical malpractice case?

Hypothetical: Cronkrite v. Fahrbach, 853 F.Supp. 257. P. was hit by a pipe while at work. He visited his family practitioner, who sutured the wound and sent him home. The next day, his leg broke under moderate stress.

P. offers testimony by a board certified orthopaedic surgeon who will testify that she would have x-rayed the leg, and that an x-ray would have revealed a linear fracture that required treatment. The fracture caused the leg to break under stress.

Is the testimony admissible?

Medical Malpractice: How is the standard of care different in a medical malpractice case?

Hypothetical: A personal injury lawyer fails to advise his client that the amount of damages attributable to pain & suffering are included in gross income, and therefore are taxable. The client fails to pay taxes on the award and is penalized by the IRS

P. seeks to introduce testimony by a tax professor to establish the standard of care.

Medical Malpractice: How is the standard of care different in a medical malpractice case?

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1) How is the standard of care different in a medical malpractice case?

Reasonably prudent professional, with skill, training and experience commonly held by members of the profession.

- Expert testimony is necessary, unless obvious to a lay person
- Hold out as specialist, specialist standard applies
- Rejection of the “locality rule”
- Schools of thought
- Best judgment rule

## Ch. II (E): The Special Case of Medical Malpractice.

2) Are the rules of proof different in medical malpractice case?

## Ch. II (E): The Special Case of Medical Malpractice: Are the rules of proof different?.

Connors v. University Associates (p. 117())

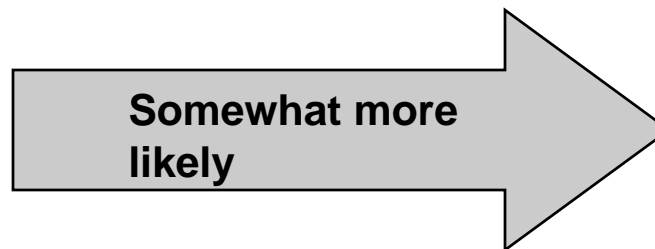
1. Can res ipsa be used in a medical malpractice case?
2. Can expert testimony be used to establish the foundational facts?
3. Can res ipsa be used in a case where the plaintiff has also presented direct evidence of negligence?

## Res Ipsa Loquitur: The Foundational Facts

- If:
- 1) When this type of accident occurs, it is usually result of negligence,
  - 2) Defendant in exclusive control of instrumentality, and
  - 3) Not due to plaintiff's voluntary contribution

Then:

Evidentiary Fact:  
The accident  
occurred



Target Fact:  
Defendant  
failed to use  
reasonable  
care

## Ch. II (E): The Special Case of Medical Malpractice.

2) Are the rules of proof different in medical malpractice case?

- Division on whether *res ipsa loquitor* can be used to establish an inference of negligence

## Ch. II (E): The Special Case of Medical Malpractice.

3) How is a case based on a failure to get the patient's informed consent different from a case based on the physician's negligence in treatment?