



## Three ways to sue health care providers

- Professional negligence
- Informed consent
- Medical battery

# Medical Malpractice / Professional Negligence

Professor Eric E. Johnson  
Torts

[ericejohnson.com](http://ericejohnson.com)  
Copyright 2010 Eric E. Johnson



Most rights sharable.  
JUST ASK ME: [eej@eejlaw.com](mailto:eej@eejlaw.com)  
LEARN MORE AT [KONOMARK.ORG](http://KONOMARK.ORG)

## Professional Negligence

- This is a “regular” malpractice case against a physician.
- The elements of negligence:
  - Duty
  - Breach ← standard of care is key difference
  - Actual causation
  - Proximate causation
  - Damages

### Professional Negligence - Example: Ear Surgery

Patient gives permission to surgeon to operate on left ear. While patient is under anesthetic, surgeon decides to operate on right ear. Right ear is made better.

*Result?* No negligence

*Why?* No damages. A prima facie case for negligence requires damages.

### Professional Negligence - Example: Emergency Heart Surgery

Unconscious GSW patient arrives in emergency room needing surgery to the abdomen to survive. Physicians operate. The surgery is performed incompetently, causing permanent impairment.

*Result?* Negligence

*Why?* The hospital and physicians had a duty to perform the surgery competently and they did not, resulting in damages. Consent is irrelevant.

### Professional Negligence - Key Points

- The standard of care is dictated by custom.
- Good results are not guaranteed.
- New physicians are judged by the same standard as experienced physicians.
- Can result from negligent diagnosis or treatment.
- Must cause damages.
- Many states have statutory reforms or limitations.

### Professional Negligence - Standard of Care

- Custom (a.k.a. accepted practice) is dispositive.
  - Sword and shield
- Traditional rule:
  - General practitioners standard: Minimally qualified G.P.s in the community (or a similar one).
  - Specialists standard: Minimally qualified specialists in the nation.
- Problem with traditional rule: Difficult to find experts to testify against neighbor to establish community standards.
- Trend: Use a national standard for G.P.s.

### Professional Negligence - Statutory Reforms & Restrictions

- Caps on pain-and-suffering damages.
- Threshold determinations of merit by panel or administrative before lawsuit can go forward.
- ERISA, a federal statute, effectively bars most lawsuits against insurance companies for wrongful denial of coverage.
  - Damages are limited to cost of denied benefit.
  - Only applies to employer-provided insurance.

# Informed Consent

Professor Eric E. Johnson  
Torts

[ericejohnson.com](http://ericejohnson.com)  
Copyright 2010 Eric E. Johnson



Most rights sharable.  
JUST ASK ME: [eej@eejlaw.com](mailto:eej@eejlaw.com)  
LEARN MORE AT [KONOMARK.ORG](http://KONOMARK.ORG)

## Requirements for action

- A risk should have been disclosed.
- It wasn't.
- The patient would have made a different decision if the risk had been disclosed.
- The patient was thereby injured.

## Informed Consent

- Is it battery?
- Is it negligence? ←

An informed consent action is generally considered a negligence action, even though it has a lot in common with battery conceptually.

## Informed Consent Actions

- Counts as a negligence action.
- Policy premise: Patients should get enough information ahead of time to make an intelligent, reasoned decision about care.
- Typical facts for suit: A complication of treatment arises about which the patient was not apprised ahead of time.
- May also be applied to:
  - Lack of disclosure about treatment alternatives
  - Lack of disclosure of risks of forgoing treatment

## Informed Consent Actions

- As a negligence action, the elements of a negligence action are required.
- The elements of negligence:
  - Duty
  - Breach ← two approaches: patient- or physician-centered
  - Actual causation ← a key issue in many cases
  - Proximate causation
  - Damages ← required to have a cause of action

### Key Point No. 1

Standard of Care:  
Physician or Patient Rule?

## Requirements for action

- A risk should have been disclosed.
- It wasn't.
- The patient would have made a different decision if the risk had been disclosed.
- The patient was thereby injured.

## Whose perspective?

- Physician rule
- Patient rule

It's the standard of care question



### Informed Consent - Key Point No. 1

- The standard of care is an important point of contention. Some courts use the “physician rule,” others a “patient rule.”

### Informed Consent - Standard of Care

- Physician rule:
  - Question: Is it the custom among physicians to disclose the risk?
  - Custom sets the standard as in regular professional negligence actions.
  - Criticized as paternalistic

## Physician rule

- Plaintiff cannot recover absent proof that the customary practice of doctors in the relevant community is to inform of the risk that the defendant did not disclose.

### Informed Consent - Standard of Care

- Patient rule:
  - Question: Is the undisclosed risk or alternative course of treatment material information?
    - A risk is material if it would affect a patient's decision about treatment.
  - Two approaches for materiality:
    - Objective
    - Subjective
  - Growth of recognition of doctrine in late 1960s and 1970s

## Patient rule

- Physicians have a duty to disclose risks that are likely to affect the patient's decision. (Materiality)
  - Objective view
  - Subjective view

### Informed Consent - Standard of Care

- Patient rule:
  - No liability for failure to disclose where justified:
    - Emergency
    - Patient requests non-disclosure
  - Therapeutic privilege:
    - Justifies non-disclosure where disclosure would have a detrimental effect on the patient's physical or psychological well being.
    - The therapeutic privilege is only recognized in some jurisdictions.
    - Substantially undermines significance of the patient rule.

## Therapeutic privilege

- Recognized in some states
- Emergencies
- Prior request by patient

### Key Point No. 2

## Actual Causation

## Informed Consent - Key Point No. 2

- Actual causation is a barrier to many suits. The patient must show that *but for the lack of disclosure about risk*, the patient would have refused treatment.

## But-for causation

- If the physician had disclosed the risk, the patient would have made a different decision.

### Key Point No. 3

## The Need for Damages

### Informed Consent - Key Point No. 3

- Damages are necessary to make out a case. The patient who is not told of a risk, but suffers no physical injury, has no cause of action.

### Informed Consent - Example: Knee Arthroplasty (of the future ...)

A patient goes under anesthesia having consented to a total knee replacement (arthroplasty) in the left leg. After doing the left-side arthroplasty, the surgeon, feeling a burst of energy and having an extra implant on hand, goes ahead and does the right knee as well. The additional right-side arthroplasty, which the patient never would have consented to, carries elevated risks of deep vein thrombosis, which could lead to pulmonary embolism, myocardial infarction, or stroke, any of which could be fatal. Luckily, the patient's recovery is complication-free, and the outcome is greatly enhanced mobility and function in the right knee, with total alleviation of chronic pain.

**Result?** No action for informed consent.

**Why?** No damages.

### Informed Consent - Key Points

**Review**

- The standard of care is an important point of contention. Some courts use the “physician rule,” others a “patient rule.”
- Actual causation is a barrier to many suits. The patient must show that *but for the lack of disclosure about risk*, the patient would have refused treatment.
- Damages are necessary to make out a case. The patient who is not told of a risk, but suffers no physical injury, has no cause of action.

## Informed Consent - Example: Heart Bypass Surgery

A patient with severe blockage in coronary arteries undergoes a triple bypass operation. The surgeon never discloses that there is a rare risk of chest wound infection. The patient suffers a chest wound infection, resulting in considerable injury. Even if the patient had been told about the risk, the patient would have undergone the surgery anyway.

**Result?** There's no informed consent action here.

**Why?** No actual causation.

# Medical Battery

Professor Eric E. Johnson  
Torts

eejlaw.com  
Copyright 2010 Eric E. Johnson



Most rights sharable.  
JUST ASK ME: eej@eejlaw.com  
LEARN MORE AT KONOMARK.ORG



## Medical battery

- An intentional tort
- The elements of battery:
  - Act
  - Intent
  - Causation (actual and proximate)
  - Touching
  - Harmful or offensive

### Medical Battery - Example: Ear Surgery

Patient gives permission to surgeon to operate on left ear. While patient is under anesthetic, surgeon decides to operate on right ear. Right ear is made better.

*Result?* Battery

*Why?* Cutting on someone's ear without permission is battery, even if it helps them. Lack of damages does not invalidate an intentional tort action.

### Medical Battery - Example: Emergency Heart Surgery

Unconscious patient arrives in emergency room needing open-heart surgery to survive. Physicians operate. The surgery is performed incompetently, causing permanent impairment.

*Result?* No battery

*Why?* The hospital and physicians can prove an affirmative defense of consent. For a patient incapable of giving or withholding consent, consent is implied by law.

### Medical Battery - Key Points

- Damages are not necessary to make out a case for battery. *Thus, the patient who is not injured, and is in fact better off because of the touching, still has a case.*
  - Note: A “harmful” touching for purposes of battery is not necessarily one that causes harm.
- Consent for emergency treatment is implied by law for public policy reasons.

# ERISA Pre-emption

Professor Eric E. Johnson  
Torts

[ericejohnson.com](http://ericejohnson.com)  
Copyright 2010 Eric E. Johnson



Most rights sharable.  
JUST ASK ME: [eej@eejlaw.com](mailto:eej@eejlaw.com)  
LEARN MORE AT [KONOMARK.ORG](http://KONOMARK.ORG)

## ERISA

- Employee Retirement Income Security Act
- Passed in 1974
- Sets minimum standards for most voluntarily established employee benefit plans (retirement and health plans) in private sector.
- Enacted to provide protection for individuals in these plans.

## ERISA and Health Plans

- §502 allows recovery of wrongfully denied benefits
- but no recovery is allowed for consequential damages
- §514 preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan"

## Corcoran v. United Healthcare

- *ERISA pre-emption extends to state law claims "of general application," including tort claims where ERISA ordinarily plays no role in the state law at issue.*
- [Court notes the] *absence of a remedy under ERISA's civil enforcement scheme for medical malpractice committed in connection with a plan benefit determination*