

Three ways to sue health care providers

- Professional negligence
- Informed consent
- Medical battery



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



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

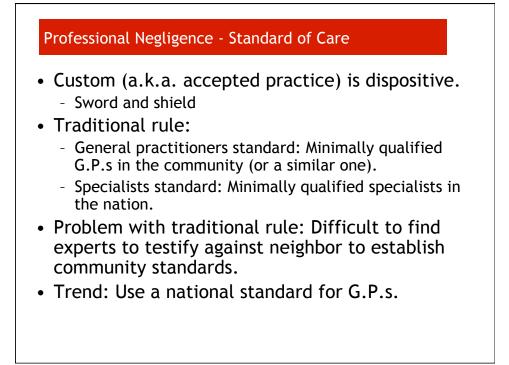
Unconscious GSW patient arrives in emergency room needing surgery to the abdomen to survive. Physicians operate. The surgery is performed incompetently, causing permanent impairment.

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.

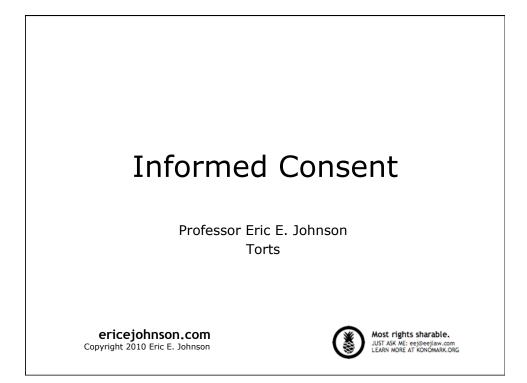


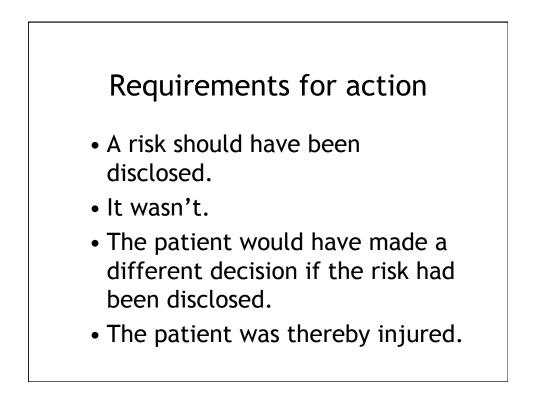
- The standard of care is dictated by custom.
- Good results are not guaranteed.
- New physicians are judged by the same standard as experienced physicians.
- Can result from negligent diagnosis or treatment.
- Must cause damages.
- Many states have statutory reforms or limitations.

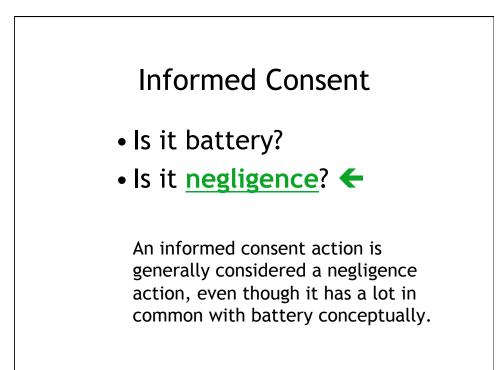


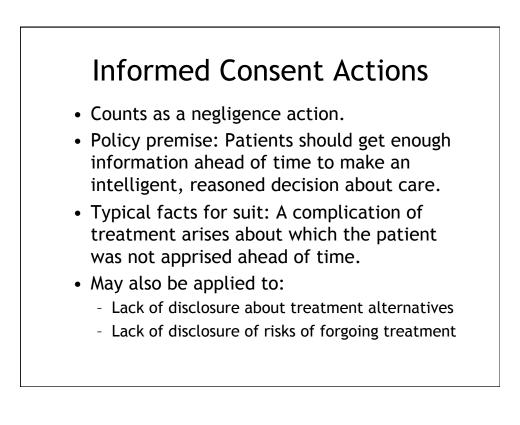
Professional Negligence - Statutory Reforms & Restrictions

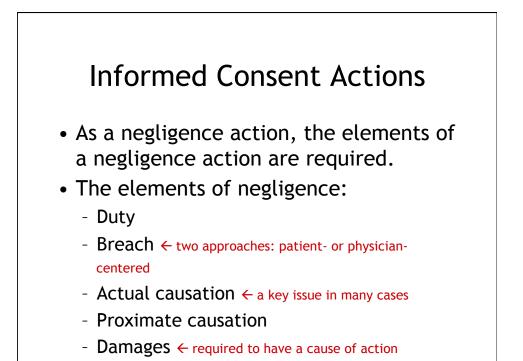
- Caps on pain-and-suffering damages.
- Threshold determinations of merit by panel or administrative before lawsuit can go forward.
- ERISA, a federal statute, effectively bars most lawsuits against insurance companies for wrongful denial of coverage.
 - Damages are limited to cost of denied benefit.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

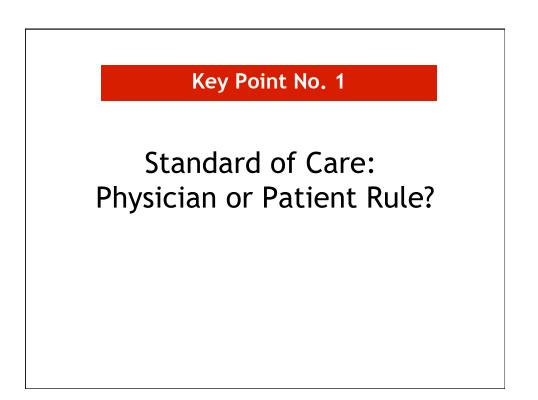


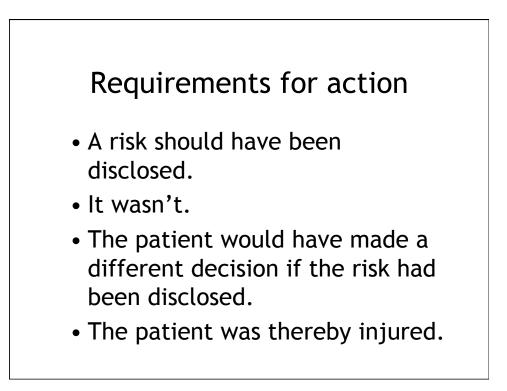


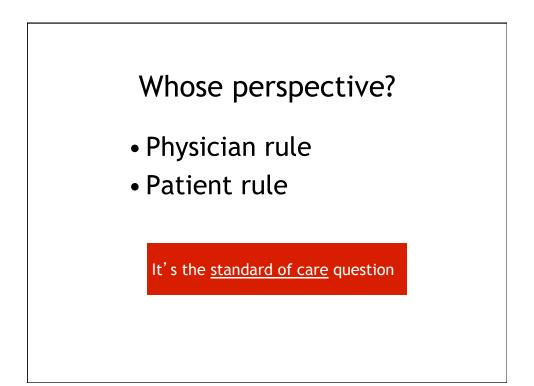












Informed Consent - Key Point No. 1

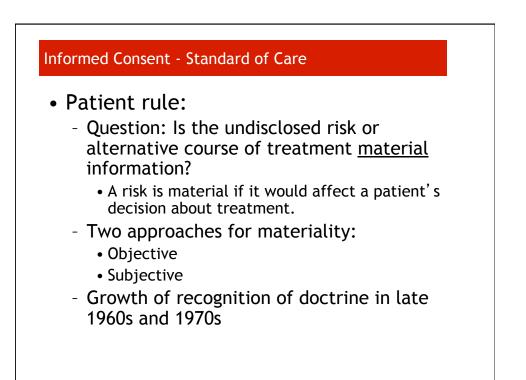
 The standard of care is an important point of contention.
Some courts use the "physician rule," others a "patient rule."

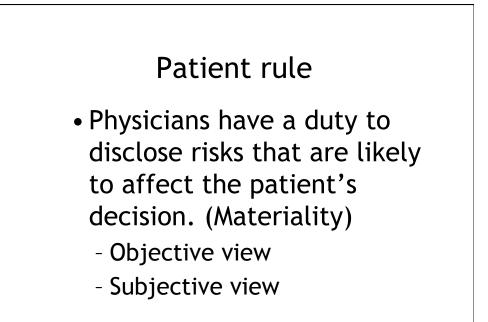
Informed Consent - Standard of Care

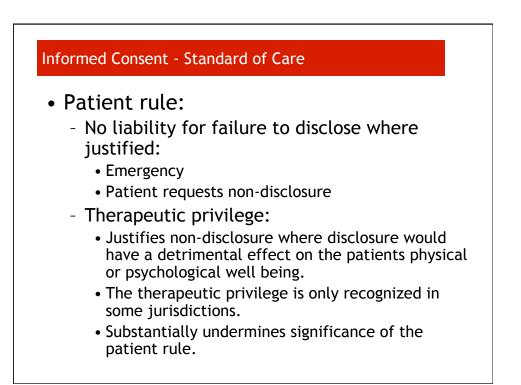
- Physician rule:
 - Question: Is it the custom among physicians to disclose the risk?
 - Custom sets the standard as in regular professional negligence actions.
 - Criticized as paternalistic

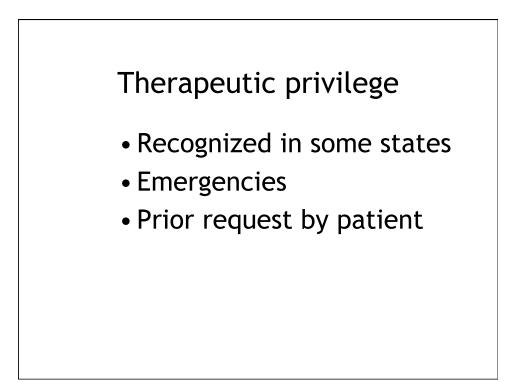
Physician rule

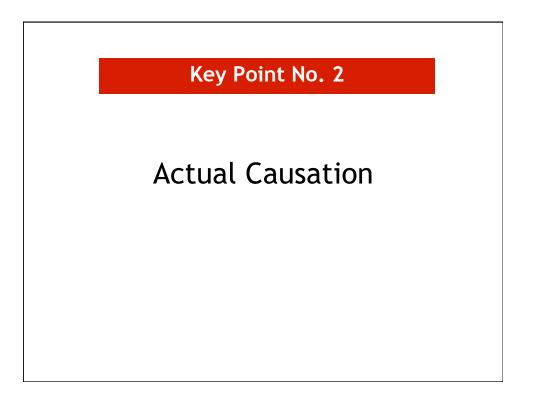
 Plaintiff cannot recover absent proof that the customary practice of doctors in the relevant community is to inform of the risk that the defendant did not disclose.











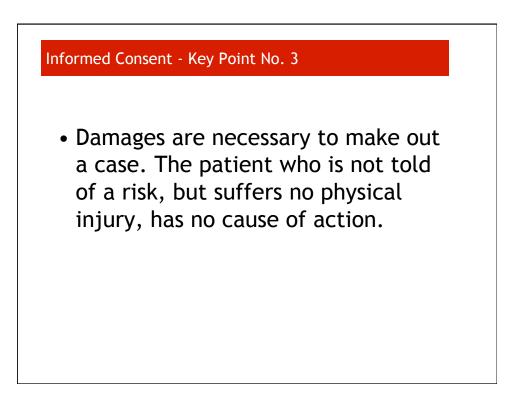
Informed Consent - Key Point No. 2

• 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.



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

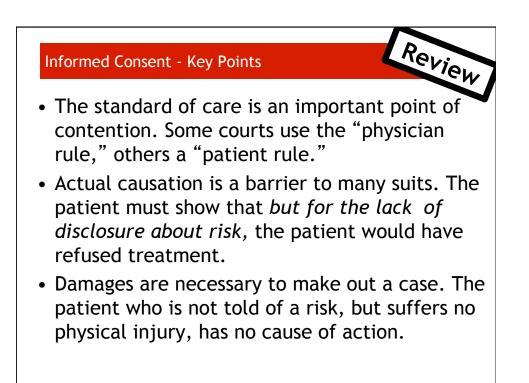




Informed Consent - Example: Knee Arthroplasty (of the future ...)

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.

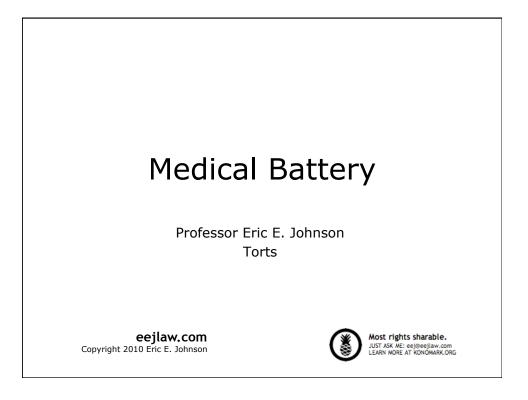
Why? No damages.



Informed Consent - 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

- 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

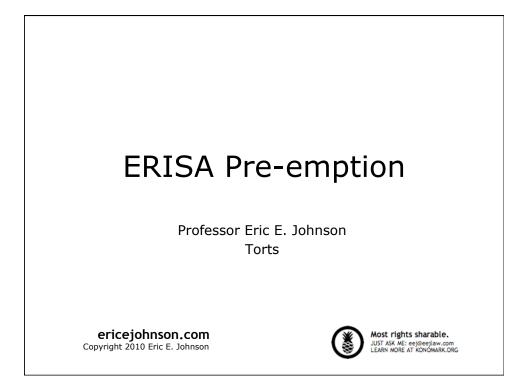
Unconscious patient arrives in emergency room needing open-heart surgery to survive. Physicians operate. The surgery is performed incompetently, causing permanent impairment.

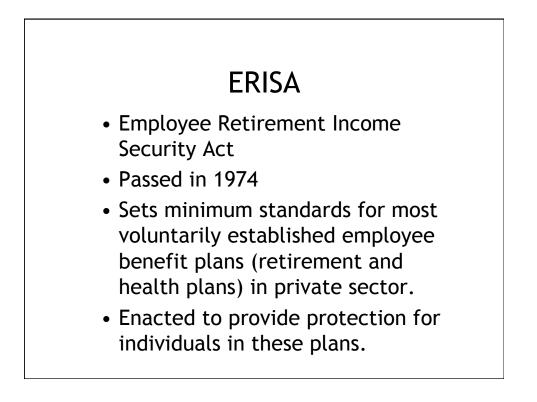
Result? No battery

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



- 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 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"

