Informed Consent

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Three ways to sue health care providers

- Professional negligence
- Medical battery
- **Informed consent**

Informed consent action requirements:

1. A risk should have been disclosed.
2. The risk was not disclosed.
3. The patient would have made a different decision if the risk had been disclosed.
4. The patient was injured as a result.

Informed Consent - Key Points

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

Informed Consent: How to categorize it?

- Is it battery?
- Is it negligence?
- An informed consent action is most commonly considered a negligence action, but it is possible in some courts it could be brought as a battery claim.
- As a conceptual matter, however, it's probably best to think of an informed consent action as its own thing.

Informed Consent: Some context ...

- 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

Key Point No. 1

Standard of Care: Physician or Patient Rule?

Informed consent requirements, in detail

1. A risk should have been disclosed.
   - There are two approaches:
   - Physician rule – Would the reasonable physician have disclosed the risk?
   - Patient rule – Would the risk be considered material to the reasonable patient?
2. The risk was not disclosed.
3. The patient would have made a different decision if the risk had been disclosed.

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

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.
  - Growth of recognition of doctrine in late 1960s and 1970s

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 patients physical or psychological well being.
    - The therapeutic privilege is only recognized in some jurisdictions.
    - Substantially undermines significance of the patient rule.

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 plaintiff (or a reasonable patient) would have refused treatment.

Informed consent requirements, in detail

1. A risk should have been disclosed.
2. The risk was not disclosed.
3. The patient would have made a different decision if the risk had been disclosed.
   - This is a causation requirement.
   - There are two approaches:
   - Subjective standard – Whether the plaintiff would have made a different decision.
   - Objective standard – Whether the hypothetical reasonable patient would have made a different decision.
4. The patient was injured as a result

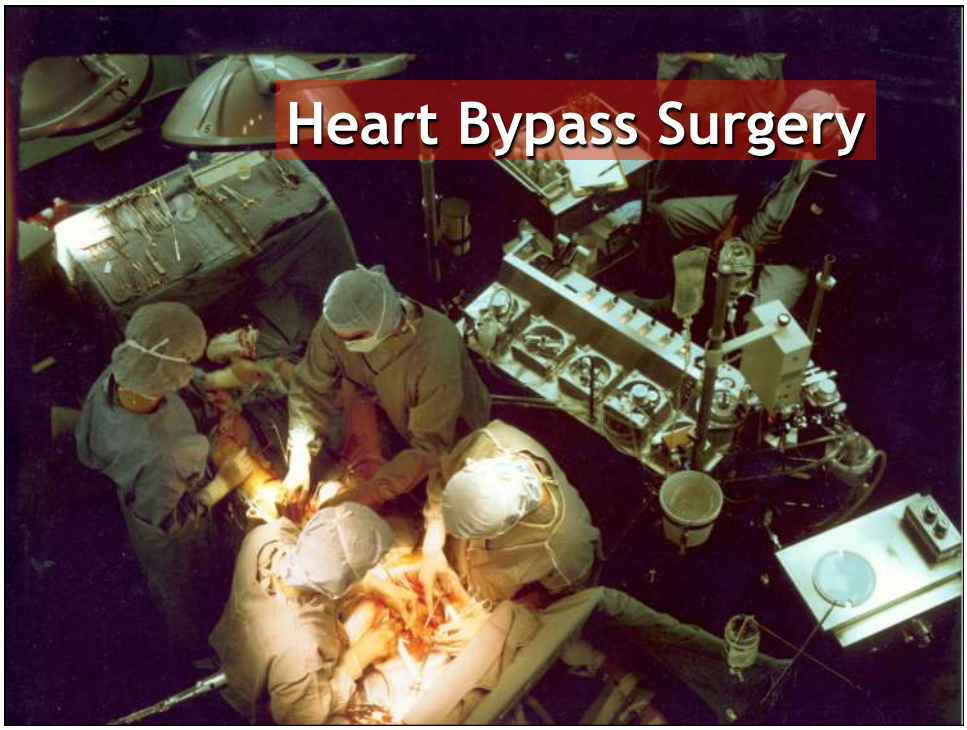
Key Point No. 3

The Need for Damages (i.e., an Injury)

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.

Examples



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, as would any reasonable patient.

Result?

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Result?

A. Yes, there's an informed consent action here

B. No, there's not

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Result?

A. Yes, there's an informed consent action here

B. No, there's not

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

Why? **No causation.**

Informed Consent - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney. After doing the left-side surgery, the surgeon, feeling a burst of energy and having needed materials on hand, goes ahead and does the right kidney as well. The additional right-side kidney surgery, which the patient never would have consented to, carries elevated risks of pulmonary embolism, myocardial infarction, and stroke, any of which could be fatal. Luckily, the patient's recovery is complication-free, and the outcome is greatly enhanced kidney function.

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

Why? **No injury/damages.**

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