

Professional Negligence / Medical Malpractice

Professor Eric E. Johnson
Torts

ericejohnson.com



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Three ways to sue health care providers

- Professional negligence
- Medical battery
- Informed consent



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 - Key Points

- The standard of care is dictated by custom.
 - National for specialists
 - Local (or similar locality) for general practitioners.
- 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.

Ear surgery



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.

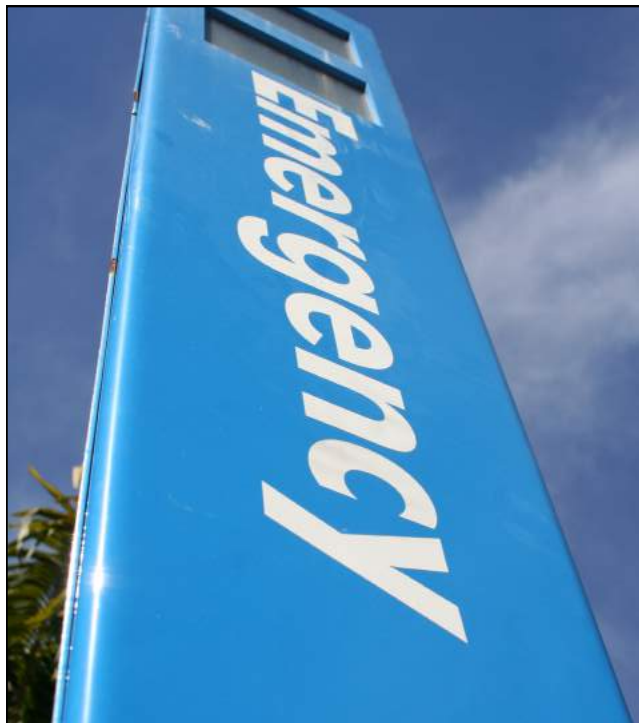
Result?

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.



Emergency
trauma
surgery

Professional Negligence - Example: Emergency trauma 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?

Professional Negligence - Example: Emergency trauma 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 - 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 a neighbor to establish community standards.
- Trend: Use a national standard for G.P.s.

Professional Negligence - Standard of Care

- Note: Professional negligence follows regular negligence doctrine with regard to **superior knowledge**.
- “[I]f a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it. ... expert skiers, construction inspectors, and doctors must all use care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over what is normally possessed by persons in the field.” Prosser and Keaton on Torts § 32

Medical specialists - some things to know:

- "General practitioner" is not the same as "primary care physician."
 - Many primary care physicians are specialists.
- What counts is how the physician holds her- or himself out to patients, not whether the physician is specially trained or board certified.
- Specialties includes these:
 - Internal medicine (internists)
 - Family practice (family practice physicians)
 - General surgery (general surgeons)
 - OB/GYN (obstetrician/gynecologist)
 - Pediatrics (pediatrician)
 - Cardiology (cardiologist) (*a subspecialty of internal medicine*)

Professional Negligence - Key Points

Review slide

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