



Professional Negligence / Medical Malpractice, Medical Battery, and Informed Consent Actions

Torts
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Three ways to sue health care providers

- Professional negligence
- Medical battery
- Informed consent



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**Professional
Negligence**
(a/k/a standard-variety
"medical malpractice")



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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
 - Injury

Professional Negligence

(a/k/a standard-variety
"medical malpractice")

Examples



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 injury/damages.



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, below the customary standard of practice, 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, below the customary standard of practice, causing permanent impairment.

Result? Negligence

Why? The hospital and physicians had a duty to perform the surgery to the customary standard of practice, 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*)

Waivers, Releases, Exculpatory Contracts, Etc.


- Recall that hospitals, physicians, dentists, are traditional categories of defendants that are excluded from using express agreements to avoid negligence liability.
- This applies to professional negligence and informed consent actions.

Professional Negligence - Key Points

Review

- 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 injury/damages.

Medical Battery



Three ways to sue health care providers

- Professional negligence
- Medical battery ←
- Informed consent

Medical battery

- Medical battery is battery, an intentional tort
- The elements of medical battery are the elements of battery.
- A plaintiff can establish a prima facie case for battery by showing:
 - (1) the defendant undertook an **act**,
 - (2) with **intent**, effecting a
 - (3) **harmful or offensive**
 - (4) **touching** of the plaintiff.

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.

Medical Battery

Examples

Ear surgery



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?

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 injury/damages does not invalidate an intentional tort action.



Medical Battery - 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, below the customary standard of practice, causing permanent impairment.

Result?

Medical Battery - 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, below the customary standard of practice, 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

Review
slide

- 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.

Informed Consent Actions



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: 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 their 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 - 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 in some courts) 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.

Key Point No. 1

Standard of care:
physician rule or patient rule?

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.
4. The patient was injured as a result.

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.
4. The patient was injured as a result.

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.
- There was a growth of the recognition of the patient rule in the late 1960s and 1970s.

Informed Consent - Standard of Care

Patient rule - some details:

- No liability for failure to disclose where justified by:
 - 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.
 - Where recognized, it substantially undermines significance of the patient rule.

Which do you like better?

A. Physician rule

B. Patient rule

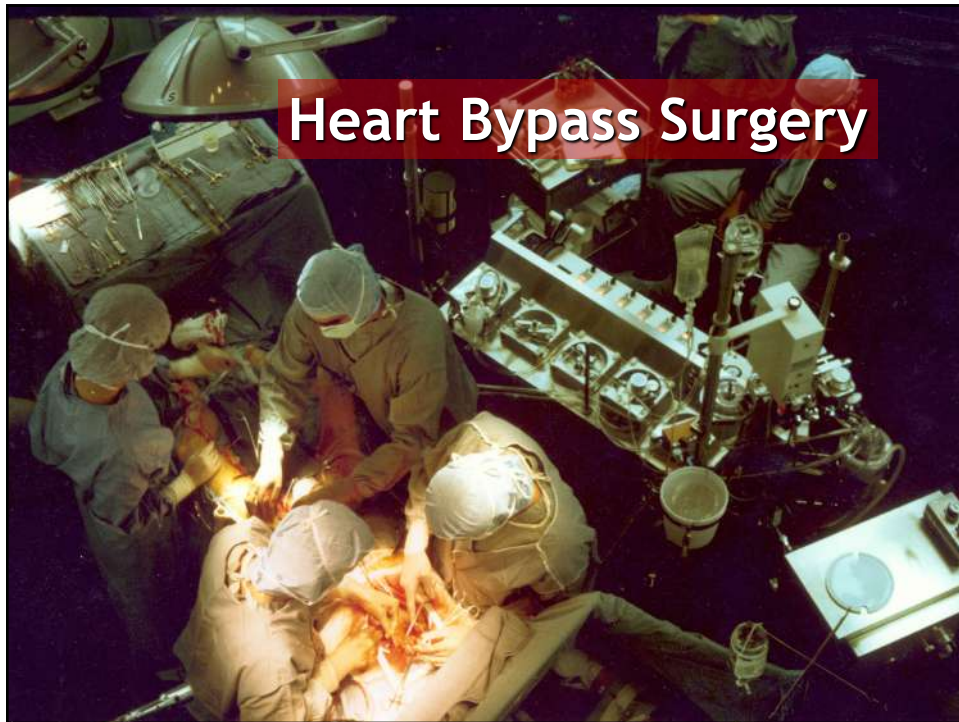
Informed Consent - Key Points

Review

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Informed Consent Actions

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?

Why?

Informed Consent - Example: Heart Bypass Surgery

A patient with severe blockage in coronary arteries

A. Yes, there's a good informed consent action here.

B. No, there's not. 

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? No informed consent action.

Why?

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? No informed consent action.

Why? The causation requirement is not met: Actual causation is lacking.

Kidney surgery



Informed Consent - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney. After doing the left side, the surgeon, feeling a burst of energy and having needed materials on hand, does the right kidney as well. The additional right-side kidney surgery, which the patient never would have consented to, carries elevated risks of collapsed lung, infection, and pneumonia. Happily, the surgery and recovery turns out complication-free, the outcome being greatly enhanced kidney function.

Result?

Why?



Informed Consent - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney.

A. Yes, there's a good informed consent action here.

B. No, there's not. 

Result?

Why?

Informed Consent - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney. After doing the left side, the surgeon, feeling a burst of energy and having needed materials on hand, does the right kidney as well. The additional right-side kidney surgery, which the patient never would have consented to, carries elevated risks of collapsed lung, infection, and pneumonia. Happily, the surgery and recovery turns out complication-free, the outcome being greatly enhanced kidney function.

Result? No informed consent action.

Why? There's no injury/damages.

Informed Consent - Key Points

Review

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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 in some courts) would have refused treatment.
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Some review ...

Let's do
one
review
problem.

Kidney
surgery
again ...

Kidney surgery



Kidney surgery



Medical Battery - Example: Kidney Surgery

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Result?

Why?

Let's do the same facts, but look at it as a potential medical battery claim.

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Result?

Why?

Medical Battery - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney.

A. Yes, there's a good medical battery action here. ←

B. No, there's not.

Result?
Why?

Medical Battery - Example: Kidney Surgery

A patient goes under anesthesia having consented to surgery on the left kidney. After doing the left side, the surgeon, feeling a burst of energy and having needed materials on hand, does the right kidney as well. The additional right-side kidney surgery, which the patient never would have consented to, carries elevated risks of collapsed lung, infection, and pneumonia. Happily, the surgery and recovery turns out complication-free, the outcome being greatly enhanced kidney function.

Result? There's a good battery claim.

Why? There was an act, intent, a touching, and cutting on a kidney counts as harmful/offensive.