



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 - Key Points

- The standard of care is dictated by custom.
 - National for specialists
 - Local or similar locality, or national, for non-specialists.
- 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.

Professional Negligence

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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

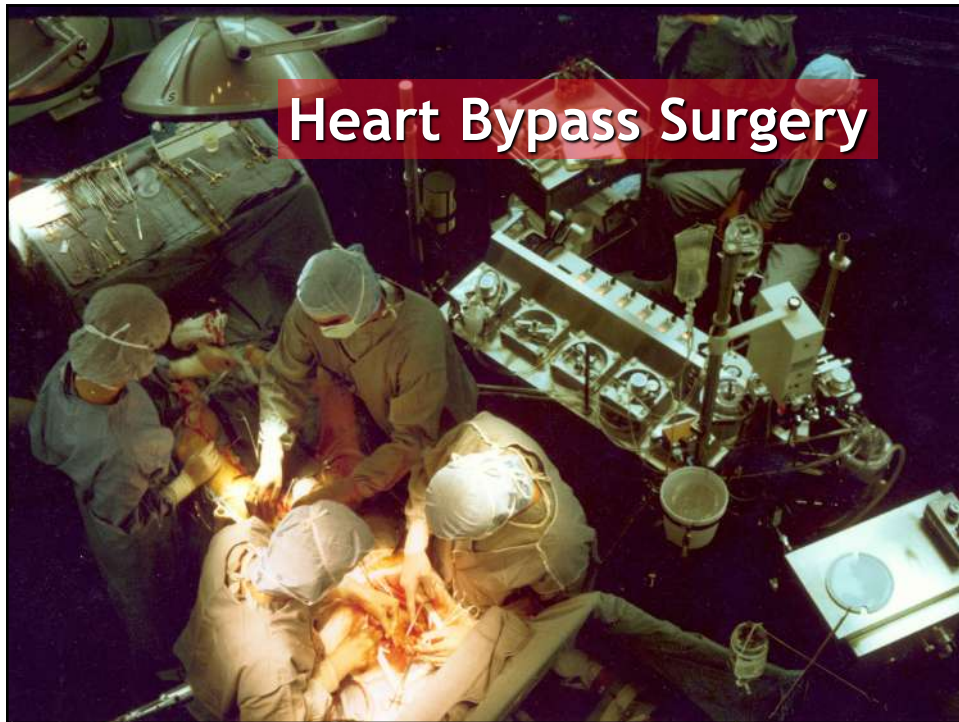
- Custom (a.k.a. “accepted practice” or “standard of practice”) is dispositive.
 - Sword and shield
- What’s basis for determining custom?
 - Courts used to say the custom was that of the local area. But that often made it impossible to get experts to testify as to the applicable standard.
 - Now courts look to the same or similar communities, or to the nation. The trend is toward a national standard.
 - Persons holding themselves out as specialists/board-certified have generally been held to a national standard no matter where they practice.

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

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.

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? 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.

- A. Yes, there's a good informed consent action here.**
- B. No, there's not.**

Result:

Why?

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- A. Yes, there's a good informed consent action here.**
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Result? No informed consent action.

Why? There's no injury/damages.