



## 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

# Professional Negligence

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



## Three ways to sue health care providers

- Professional negligence
- Medical battery
- Informed consent



### Professional negligence – what it is

- 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 few key points

- For the standard of care, custom (a.k.a. “accepted practice” or “standard of practice”) is dispositive.
  - National for specialists
  - Local or similar locality, or national, for non-specialists.
  - Persons holding themselves out as specialists/board-certified have generally been held to a national standard no matter where they practice.
  - Ratcheted upward for superior knowledge/skill
- New physicians are judged by the same standard as experienced physicians.
- Can result from negligent diagnosis or treatment.
- Must cause injury/damages.

## Professional negligence – a few key points

- Keep in mind that 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 (emphasis added)

# Professional Negligence

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

**Examples**

## Elective ear surgery



### Professional negligence - Example: Elective 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.

Is there a good claim for professional negligence?

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Why not?

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No.

Why not?

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.

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Is there a good claim for professional negligence?

Yes.

Why?

All the elements are there. In brief: 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.



# Medical Battery

## Three ways to sue health care providers



- Professional negligence
- Medical battery
- Informed consent



### Medical battery – what it is

- 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 – a few 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

Elective ear surgery



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Is there a good claim for medical battery?

Yes.

Why?

All the elements are there. Note that cutting on someone's ear is harmful/offensive, and injury is not an element. So surgery without permission is battery even if it helps the patient.



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### Medical battery - Example: Emergency trauma surgery

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Is there a good claim for medical battery?

No.

Why?

There's a prima facie case, because all the elements are there. But the hospital and physicians can prove an affirmative defense of consent. For a patient incapable of giving or withholding consent in an emergency situation like this, consent is implied by law.

# 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)**

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### **Informed consent requirements (in detail)**

1. A risk should have been disclosed.
  - There are two approaches:
  - Physician rule – Would the physician under the relevant standard of practice 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

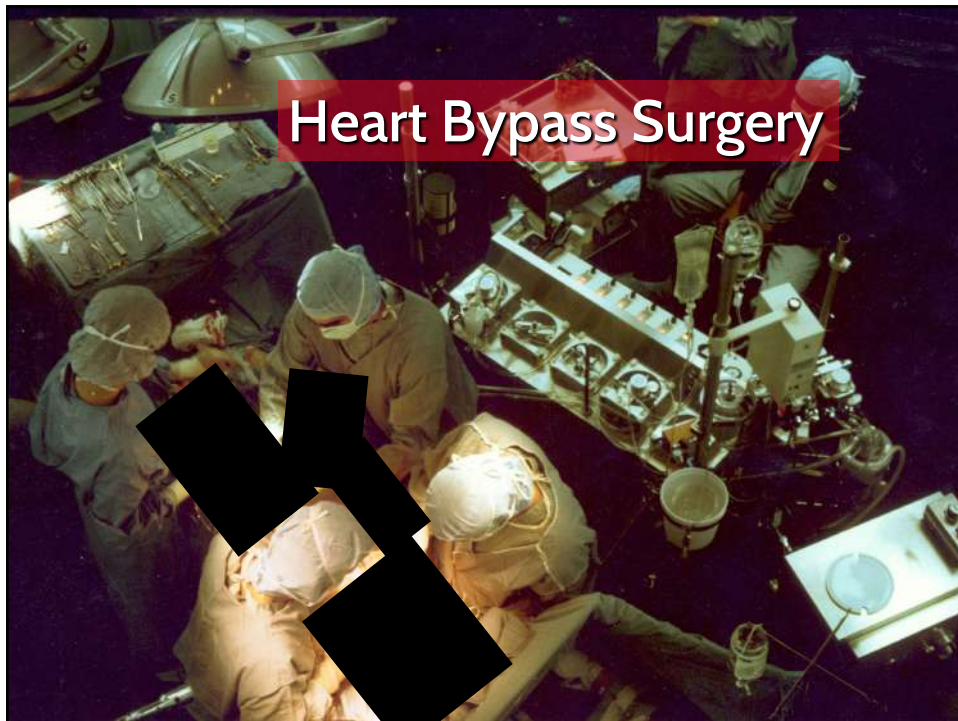
- Physician rule:
  - Question: Is it the custom among physicians to disclose the risk?
  - Custom sets the standard as in regular professional negligence actions.
  - Criticized as paternalistic

### 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 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.

Is there a good informed-consent action claim?

Why or why not?

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Is there a good informed-consent action claim?

**No informed consent action.**

Why or why not?

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Is there a good informed-consent action claim?

No informed consent action.

Why or why not? 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.

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Is there a good informed-consent action claim?

No informed consent action.

Why or why not? There's no injury/damages.

Let's do  
one review  
problem.

Kidney  
surgery  
again ...



**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, decides to perform a procedure on the right kidney. The patient never woke up. The surgeon was well. The patient died. The patient's family filed a lawsuit. Happily, the surgeon was found liable for medical battery. The patient's family was greatly enhanced kidney function.

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

Is there a good medical battery claim?  
Why or why not?

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Is there a good medical battery claim? **Yes.**

Why or why not?

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Is there a good medical battery claim? **Yes.**

Why or why not? **There was an act, intent, a touching, and cutting on a kidney counts as harmful/offensive.**