

Medical Malpractice and Health Care Torts

Three ways to sue health care providers

- Medical battery
- Professional negligence
- Informed consent

Medical battery

- An intentional tort
- The elements of battery:
 - Act
 - Intent
 - Causation (actual and proximate)
 - Touching
 - Harmful or offensive

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 damages does not invalidate an intentional tort action.

Medical Battery - Example: Emergency Heart Surgery

Unconscious patient arrives in emergency room needing open-heart surgery to survive. Physicians operate. The surgery is performed incompetently, 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

- 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.

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 - 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.

Professional Negligence - Example: Emergency Heart Surgery

Unconscious patient arrives in emergency room needing open-heart surgery 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 - Key Points

- The standard of care is dictated by custom.
- 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.
- Many states have statutory reforms or limitations.

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 neighbor to establish community standards.
- Trend: Use a national standard for G.P.s.

Professional Negligence - Statutory Reforms & Restrictions

- Caps on pain-and-suffering damages.
- Threshold determinations of merit by panel or administrative before lawsuit can go forward.
- ERISA, a federal statute, effectively bars most lawsuits against insurance companies for wrongful denial of coverage.
 - Damages are limited to cost of denied benefit.
 - Only applies to employer-provided insurance.

Informed Consent Actions

- We will discuss these next time.