

Medical Malpractice and Health Care Torts

Part 2

Three ways to sue health care providers

- Medical battery
- Professional negligence
- Informed consent ← today's topic

Informed Consent Actions

- Counts as a negligence action.
- Policy premise: Patients should get enough information ahead of time to make an intelligent, reasoned decision about 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 Actions

- As a negligence action, the elements of a negligence action are required.
- The elements of negligence:
 - Duty
 - Breach ← two approaches: patient- or physician-centered
 - Actual causation ← a key issue in many cases
 - Proximate causation
 - Damages ← required to have a cause of action

Informed Consent - Key Points

- Damages are necessary to make out a case. The patient who is not told of a risk, but suffers no physical injury, has no cause of action.
- Actual causation is a barrier to many suits. The patient must show that *but for the lack of disclosure about risk*, the patient would have refused treatment.
- The standard of care is an important point of contention. Some courts use the “physician rule,” others a “patient rule.”

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.

Result? No action for informed consent.

Why? Actual causation is lacking. The patient would have had the surgery anyway.

Informed Consent - Standard of Care

- Physician rule
- Patient rule

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.
 - Two approaches for materiality:
 - Objective
 - Subjective
 - Growth of recognition of doctrine in late 1960s and 1970s

Informed Consent - Standard of Care

- Patient rule:
 - No liability for failure to disclose where justified:
 - Emergency
 - Patient requests non-disclosure
 - Therapeutic privilege:
 - Justifies non-disclosure where disclosure would have a detrimental effect on the patients physical or psychological well being.
 - The therapeutic privilege is only recognized in some jurisdictions.
 - Substantially undermines significance of the patient rule.