

MORE WAYS TO BE SUED
New Informed Consent Forms Required for Physician Protection
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While most physicians believe that they are immune from liability if they can prove that they performed their services skillfully, a recent court decision reminds us that this is not necessarily so.

In addition to lawsuits alleging medical malpractice, which requires a plaintiff to prove that injury resulted from a deviation from a recognized standard of care, plaintiffs can also sue physicians for battery, even if the surgery was performed flawlessly, with a perfect result.

Battery, historically, has been available when a physician performs a procedure on a patient without informed consent. Now, battery may also be a viable weapon when informed consent has been obtained, but the physician then elects to perform a procedure using a technique or materials which were different from the patient's expectations.

The case causing concern involves an allegation by a patient that he consented to spinal surgery but with the condition that the surgeon would not use cadaver bone in his spine, but only the patient's own bone material. The surgeons denied that there was any such limitation placed on the surgery and there is no documentation that the patient ever placed a limitation either on the manner in which the surgery would be performed, or the materials to be used.

The informed consent form described the surgery as a "lumbar discectomy and fusion with iliac crest bone graft + 'steffe plates.'" During the surgery the physicians removed bone fragments and grafted plaintiff's own bone to his spine. They also used cadaver bone as dowels for the bone graft. The grafted bone did not fuse and the patient's workers' compensation carrier referred him to another orthopedist who informed the patient that cadaver bone had been used in the surgery.

In his lawsuit, the plaintiff complained that the surgeons' use of cadaver bone constituted both a breach of contract and a battery and that he was entitled to damages not only arising out of the use of cadaver bone, but all damages arising out of the surgery.

The court held that a failure to conduct the procedure authorized is the equivalent of operating with no consent, which constitutes a battery. Even if the procedure itself were authorized, according to the court, if the patient placed conditions on his consent, and those conditions were not fulfilled, the surgery is a battery. The court also found that it is up to a jury to decide whether the plaintiff actually placed the conditions on surgery.

Battery is a powerful claim since it does not require proof that the operation was negligently performed. Indeed, damages are available even if the surgery was skillfully performed.

If battery can be proven, the plaintiff may recover for all injuries proximately caused by the mere performance of the surgery, even in the absence of negligence. Damages can include an award for mental anguish, and because a battery connotes an intentional invasion of another's rights, punitive damages, as well. Punitive damages are not covered by medical liability insurance.

Also, damages may not be limited to those resulting from the unauthorized acts. If a jury is unable to segregate the harm caused by the unauthorized acts, and the harm caused by the actions

to which consent was granted, the physician is liable for the entire harm. Moreover, according to this decision, the burden is on the physician to prove which damages were based on the unauthorized act, rather than from the surgery itself. Failure to do so will result in the physician being liable for all damages resulting from the surgery, even though the surgery was performed skillfully.

In addition to battery, performing surgery in a manner other than that specifically agreed to can constitute a breach of contract. Breach of contract can result in a full panoply of damages, including recovery for mental anguish, pain and suffering, and the worsening of the patient's condition, including damages from subsequent surgery necessary to attempt to correct the prior surgery.

Because of this decision, physicians and healthcare facilities may wish to include more information in their informed consent documents. In particular, they may wish to revise these documents to demonstrate that no condition or restriction has been placed on the surgeon or on the procedure. For example, the following language may be included in an informed consent:

I have placed no limitations or restrictions on the manner in which my doctors may perform this procedure, or the materials that may be used except as follows:

The decision in this case gives rise to another concern. Many hospitals and surgi-centers are currently supplying reprocessed "single use" medical devices to their physicians. Often the physician is unaware of the use of reprocessed devices and certainly patients are rarely informed of their use. Could the undisclosed use of reprocessed medical devices constitute a battery? Only time will tell. In the meantime, physicians may wish to inquire as to whether reprocessed devices are being used and, when they are used, advise their patients, in writing, of their use and obtain their consent.

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