Gross Negligence and Lack of Informed Consent

Within the context of medical malpractice, the term "gross negligence" refers to conduct so reckless or mistaken as to render itself virtually obvious to a layman without medical training. Examples include a surgeon amputating the wrong limb or leaving a surgical instrument inside a body cavity of the patient.

Some states will permit a person to establish a cause of action for medical malpractice grounded in gross negligence without the need for expert testimony. A minority of states still permit an action for "res ipsa loquitur" ("the thing speaks for itself"), meaning that such an accident or injury to the patient could not have occurred unless there was negligence by the doctor’s having control over the patient.

Unauthorized Treatment and Lack of "Informed Consent"

Virtually all states have recognized, either by express statute or common law, the right to receive information about one’s medical condition, the treatment choices, risks associated with the treatments, and prognosis. The information must be in plain language terms that can readily be understood and in sufficient amounts such that a patient is able to make an "informed" decision about his or her health care.

If the patient has received this information, any consent to treatment that is given will be presumed to be an "informed consent." A doctor who fails to obtain informed consent for non-emergency treatment may be charged with a civil and/or criminal offense such as a "battery" or an unauthorized touching of the plaintiff’s person.

In order to prevail on a charge that a doctor performed a treatment or procedure without "informed consent," the patient must usually show that, had the patient known of the risk or outcome allegedly not disclosed, the patient would not have opted for the treatment or procedure and thus avoided the risk. In other words, the patient must show a harmful consequence to the unauthorized treatment.
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