

The Standard of Care:
Informed Consent



Torts I
Professor Hensel
10/6/09

Informed Consent

Scott v. Bradford



* Battery vs. Informed Consent

COA for Informed Consent:


- A. Duty to Inform
- B. Causation
- C. Injury



Informed Consent

Scott v. Bradford

- * Battery vs. Informed Consent
- * Duty to Inform: Physician-Centered vs. Patient-Centered
- * Causation: Objective vs. Subjective
- * Required Showing of "Injury"



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COA for Informed Consent:


A. Duty to Inform

1. Reasonable Physician – Prof. Std.
2. Reasonable Patient – Material Risks

B. Causation

1. "Reasonable Patient"
2. "This Patient"

C. Injury



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Informed Consent / Fiduciary Duty

Moore v. Regents of Univ. of California


- * Disclosure of "Material" Risks Unrelated to the Operation
- * Timeline of Liability
- * Potential Conflicts of Interest



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**The Standard of Care:
Negligence Per Se**


Torts I
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10/8/09



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Violation of a Statute

Osborne v. McMasters




- * Civil Statutory Actions vs. Doctrine of Negligence Per Se
- * Effect of Statute on Standard of Care
- * The Role of Judicial Discretion
- * Policy Concerns

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Applicability of Statute – Elements

Stachniewicz v. Mar-Cam Corp.

- * Elements Required to Substitute Statute for the Standard of Care
 - * When Statutes are Not Appropriate Substitutes
 - * Significance of the Source of Authority



Applicability of Statute

Ney v. Yellow Cab Co. 

- * General Overview of Case
- * Approaches to Determining Legislative Intent
- * “Narrow” Approach to Intent
- * Foreseeability and the “Broad” Approach to Intent

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Determining the Applicability of Statutes

1. Is the injury within the type of harm that the statute was intended to protect against?

A. Do the statute’s **title and/or words** indicate the harm against which the statute is intended to protect? (narrow approach)

B. Is it **foreseeable** that violation of the statute would result in this type of harm or risk? (broad approach)
[Ask: What makes the prohibited conduct risky in the first place?]

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2. Is the Plaintiff within the class of people that the statute was intended to protect?

A. Do the statute’s **title and/or words** indicate whom the statute is intended to protect? (narrow approach)

B. Is it **foreseeable** that violation of the statute would harm the plaintiff? (broad approach)


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One conceptual approach:

The greater the increase in risk to those in the plaintiff's situation resulting from a violation of the statute, the greater the probability that the court will find that the statute protects the plaintiff and/or the type of harm encountered.

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Hypothetical



In Acme, a statute in the section of the Code which regulates service stations prohibits the delivery of all gasoline to containers that are not labeled as such. A service station sells gas to Alex, who places it in an insecticide can. He later uses the gasoline to start an apartment fire, and four people die. Their next of kin sue the gas company. Can they use the statute to establish the standard of care?

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A statute in Kansas requires railroads to be fenced off to keep animals from wandering on to the tracks and causing accidents. A railroad does not fence a portion, and a small child wanders on the tracks and is killed. Negligence per se?

