

A professional football player signed a written consent for his team's physician to perform a knee operation. After the athlete was under a general anesthetic, the physician asked a world-famous orthopedic surgeon to perform the operation. The surgeon's skills were superior to the physician's, and the operation was successful.

In an action for battery against the surgeon, will the athlete prevail?

- A. No, because the operation was successful.
- B. No, because the surgeon's skills were superior to the physician's.
- C. Yes, because the athlete did not agree to allow the surgeon to perform the operation.
- D. Yes, because the consent form was in writing.

Explanation:

Battery requires that a defendant intend to create contact (or imminent apprehension of contact) and cause harmful or offensive contact with the plaintiff. Contact is harmful if it causes physical impairment (eg, alteration of the body), pain, or illness. However, a defendant is **not liable** for battery if the contact is **consensual**. **Consent** exists when the defendant's **conduct** is the **same** as, or **substantially similar** to, the conduct agreed to by the plaintiff. Therefore, consent is limited to the individual whose conduct was agreed to by the plaintiff.

Here, the surgeon operated on the athlete's knee (intentional act), which physically impaired the athlete's body (harmful contact). And since the athlete only gave the *physician* written consent to perform the operation, not the *surgeon* (nonconsensual contact), the surgeon is liable for battery.

(Choice A) Although the operation was successful, contact is harmful if it alters the plaintiff's body in any way, even if the alteration results in no other harm. Therefore, the surgeon is still liable for intentionally altering the athlete's body without his consent.

(Choice B) The surgeon's superior skill does not negate the fact that he operated on the athlete without his consent and, therefore, does not absolve the surgeon of liability.

(Choice D) Consent to contact can be verbal or written. But consent (verbal or written) is limited to the individual whose conduct was agreed to by the plaintiff.

Educational objective:

Consent only extends to conduct that is the same as, or substantially similar to, the particular conduct agreed to by the plaintiff. Therefore, consent is limited to the individual whose conduct was agreed to by the plaintiff.

References

Restatement (Second) of Torts § 13 (Am. Law Inst. 1965) (battery by harmful contact).

Restatement (Second) of Torts § 15 (Am. Law Inst. 1965) (meaning of harmful contact).

Restatement (Second) of Torts § 892A (Am. Law Inst. 1979) (effect of consent).

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Scope of consent

A tells B, "Go ahead and hit me," while C watches.

