

Medical Jurisprudence

**Behavioral Sciences Term
St. Georges University
School of Medicine**

**Visiting Professor
Thaddeus Pope, JD, PhD**

Segment

2 of 8

Informed Consent

Objectives

1. What is the **history** of informed consent?
2. What is medical **battery**?
3. What is the **difference** between battery and informed consent?

4. What are the **elements** of an informed consent cause of action?
5. What are the two U.S. **standards** for measuring a physician's duty of disclosure?

6. What are the 6 **exceptions** to this duty?
7. What does the **causation** element require?
8. What is SDM and patient **decision aids**

History

1847

CODE OF
MEDICAL ETHICS
OF THE
American Medical Association.

*ORIGINALLY ADOPTED AT THE ADJOURNED
MEETING OF THE NATIONAL MEDICAL
CONVENTION IN PHILADELPHIA,
MAY, 1897.*

CHICAGO:
American Medical Association, Publishers.
1907.

Do **NOT** consider
patient's "own
crude opinions"



1905

Battery

No consent

at all



Mohr v. Williams (Minn. 1905)

Before



After



1914



Mary Schloendorff

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body”



Consent

But not

“informed”





1957



STANFORD

HOSPITAL & CLINICS

Stanford University Medical Center

Salgo v. Leland Stanford (Cal.)

1960



Natanson v. Kline (Kan.)





50 Years Later:

The Legacy

of

Gideon v. Wainwright



DIVISION OF COURTESY
CORRESPONDENCE REGULATIONS


Supreme Court at the United States
Washington, D.C.

James Gideon
Petitioner for writ
of Habeas Corpus
vs
The Supreme Court
of the State of Florida

790
OCT. TERM 1961
U.S. Supreme Court

The Honorable Earl Warren, Chief Justice of the United States

*Come to me the petitioner, Clarence
Gideon, a citizen of the United States,
in person, and appearing
on my own counsel. He petitions
this Court for a writ of Habeas Corpus
from the Supreme Court of the State
of Florida.*



**My
Mind**

**My
Body**

My Choice

1972



Jerry Canterbury

Battery

No consent

at all

4 variations

(1) No consent
to **any** procedure

Richard Dreyfus



The brilliant scientist who became a comedian

RICHARD DREYFUS
JOHN CASSINATTI

WHOSE LIFE IS IT ANYWAY?

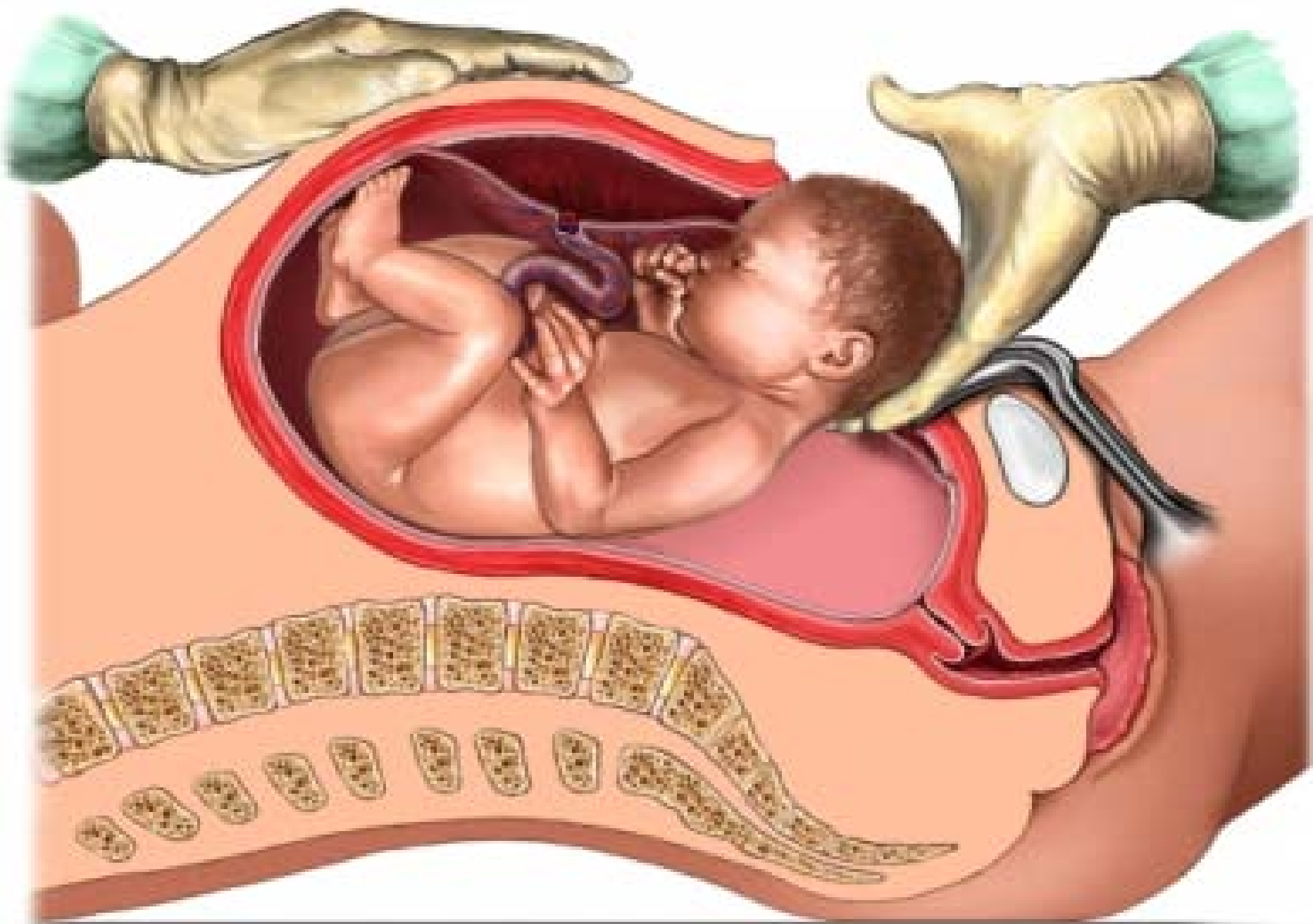


(2) Consent

only to

different

procedure



Seaton

v.

Patterson

(Ky. App. 2012)

**Hey, wait a sec.
I'm pretty sure
I had a penis when
I checked in here.**





AP

(3) Same
procedure,
**different body
part**

(4) Same
procedure,
same part,
different doc

John
CULLENBAUM

LOVE & OTHER DRUGS

Anna
HATHAWAY



NOV. 24

**Comparing
battery &
informed
consent**

Battery is far
simpler

	Informed Consent	Battery
Injury	X	
Duty	X	
Exceptions	X	
Conduct causation	X	
Experts re risks (or duty –IN,DE)	X	
Punitive damages		X

PTF **need not be**
injured (can even
be benefitted)

(harm is to
dignity, not body)

Battery

PTF: “I did **not**
consent”

Informed consent

PTF: “I **did** consent
...”

“BUT I would not
have consented, **if**
disclosure had been
appropriate [non-
negligent]”

**Comparing
malpractice
& informed
consent**

3 theories of medical malpractice

Abandonment

Informed consent

Deviation SOC

But deviation
from SOC is also
referred to
“malpractice”

3 theories of medical malpractice

Abandonment

Informed consent

Malpractice

Physician may
have **performed**
the right
procedure
perfectly

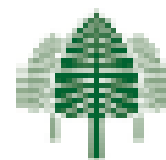
Problem is
physician did not
make appropriate
disclosures

PATIENTS' PREFERENCES MATTER

Stop the silent misdiagnosis

Al Mulley, Chris Trimble, Glyn Elwyn

The King's Fund >



THE
Dartmouth
CENTER
for HEALTH CARE
DELIVERY SCIENCE

Informed Consent (Elements)

Duty

What to disclose

Breach

Did not disclose

Injury

**Undisclosed risk
happened**

Causation

**With disclosure,
would have avoided
injury**

Duty

Core complaint:

Physician failed to
disclose information

But legally actionable
only if physician had
a **duty** to disclose
that information

Types of information to disclose

Risks

Inherent risks from
proposed treatment

Probability

Severity

Alternatives

Benefits & risks of
each **alternative**

One alternative is
doing nothing

who

Who will be providing
treatment

Including: role of:
residents, fellows,
students, and others

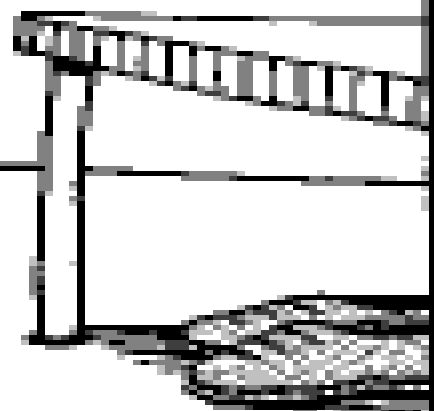
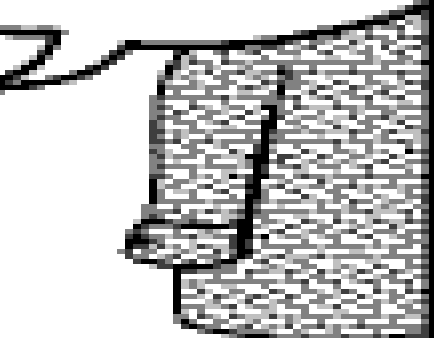
**Physician
experience**



per. a. blain

"No, I haven't performed the procedure myself, but I've seen it done successfully on 'E.R.' and 'Chicago Hope.'"

BEFORE MY PHYSICAL, COULD YOU ASSURE ME THAT YOUR MEDICAL JOURNALS ARE MORE UP-TO-DATE THAN THE MAGAZINES IN THE WAITING AREA?



Doc Said	Best in world	Literature	Limited experience
2%	11%	15%	30%

Johnson v. Kokemoor



Conflicts of interest

Disclose intent in using
patient for research and
economic gain

Doc does **not**
have a duty
to disclose
all of this

What to disclose?

Not everything

Can't send patient
to med school

Risks
alternatives

DUTY identifies the
subset of risks &
alternatives to disclose

2 main ways

to **measure**

MD duty

Reasonable PT

20+ states

Reasonable MD

20+ states

Which standard
applies depends
on **which state**
you are in

Reasonable

Patient

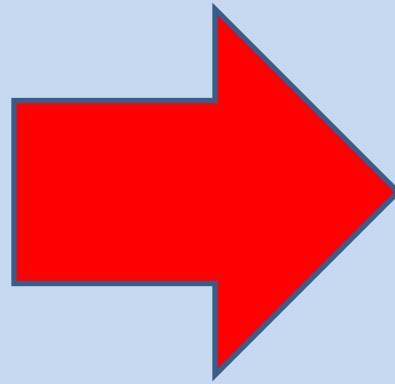
Standard

aka “material risk”
standard

Duty measured
by **patient** needs

Duty to disclose what
would a **reasonable**
patient consider
important / significant in
making this treatment
decision

Odd



No
duty

Canterbury

v.

Spence



THE
BACK
LEG
MAY

L3
L4
L5



Right procedure

Performed

competently

1% risk

paralysis

Reasonable
prudent patient
would want to
know that risk

Therefore,
physician has
duty to
disclose it

Duty measured by
what hypothetical
reasonable patient
would deem material,
significant in making
treatment decision

But a hypothetical
reasonable patient
in **this patient's**
circumstances

Inflammation and thickening of the shoulder capsule

“Frozen shoulder”



**Reasonable
Physician
Standard**

aka “professional standard”

aka “malpractice standard”

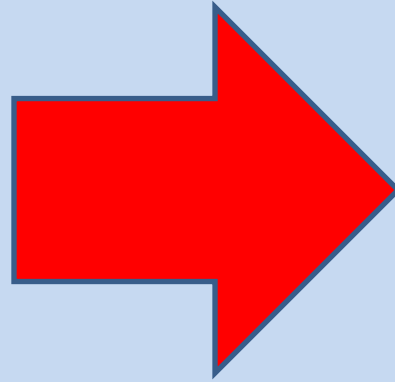
Duty is measured
by professional
custom

Duty to disclose
what would the
reasonable
physician have
disclosed under the
circumstances

Risks, alternatives DEF has
duty to disclose

Are those **reasonable**
physician would disclose
under circumstances

Custom
to not
disclose



No
duty

How do we know what a
reasonable physician
would disclose

Expert witnesses

Almost always, PTF
needs **expert witness**
to establish the
standard of care

No expert \rightarrow no SOC

No SOC \rightarrow no breach

No breach \rightarrow no case

In any given state,
duty is established
in just **one** way

Exceptions to duty

Even if *prima facie*
duty under reasonable
patient or reasonable
physician standard, no
duty if any 1 of **6**
exceptions applies

Information **already** known

To this particular
patient

Or commonly known

Emergency

Urgent immediate need

Patient lacks capacity

No opportunity for consent
from surrogate

No known objection

Therapeutic privilege

Disclosing risk information would make the patient so upset:

That could not make a rational choice

That would materially affect medical condition

Waiver

Patient does not want to know (defers to physician)

Public Health

Must treat to protect the community (e.g. infectious disease)

CBO clause

Clinicians can sometimes
avoid duty for
moral/religious reasons

Breach

DEF **actually failed**

to disclose what

she had a duty to

disclose

Injury

PTF must **actually**
be injured from
undisclosed risk

(no dignitary tort)

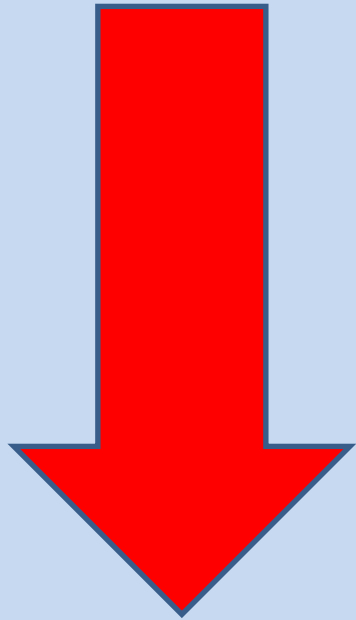
“I **could** have
been”

No injury →
No informed consent
claim



Causation

Breach



Causation

Injury

Hypothetical
question

Objective
standard

But for DEF breach
(i.e. lack of
disclosure), PTF
would not be
injured

3 sub-

elements

1. **PTF** would
have chosen
differently

Had disclosure been
made, **this patient**
(PTF) would **not**
have consented

2. Reasonable patient would have chosen differently

Had disclosure been made, a **reasonable person** in the patient's circumstances would **not** have consented

Sub-elements 1 & 2
establish the premise
of this equation

No consent =

no procedure

3. Different
choice would
have avoided
injury

Sub-element 3
establishes this
equation

**No procedure =
no injury**

The materialized
risk must have
been caused
(etiologically) by
the intervention



If knew 1% risk,
would have
decided against
procedure

No procedure

→ no paralysis

If paralysis from
procedure (as
opposed to
underlying illness)

Diachronic Aspect to Duty

Not a one-time

ongoing duty



**New clinical
circumstances
change risks**

**Sufficient
disclosure**

**Must update
disclosure**



**Contractions – VB
now option**

Cesarean

**Must update
disclosure**



Cesarean

v.

No baby

Cesarean

v.

**VB (but big
baby)**



Liver function

Gastrectomy

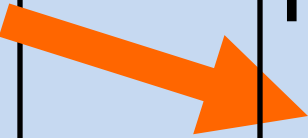
**Must update
disclosure**

Reasonable patient
states: duty disclose
new information **IF**
reasonable patient
would find material

Reasonable physician
states: duty disclose
new information **IF**
professional custom to
disclose that

PTF claims doc failed to disclose

Material risk jurisdiction?

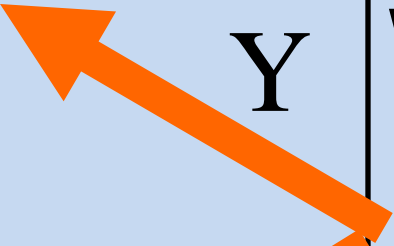


Exception apply?



Y

Would info be material (sig factor) to reasonable person's decision?

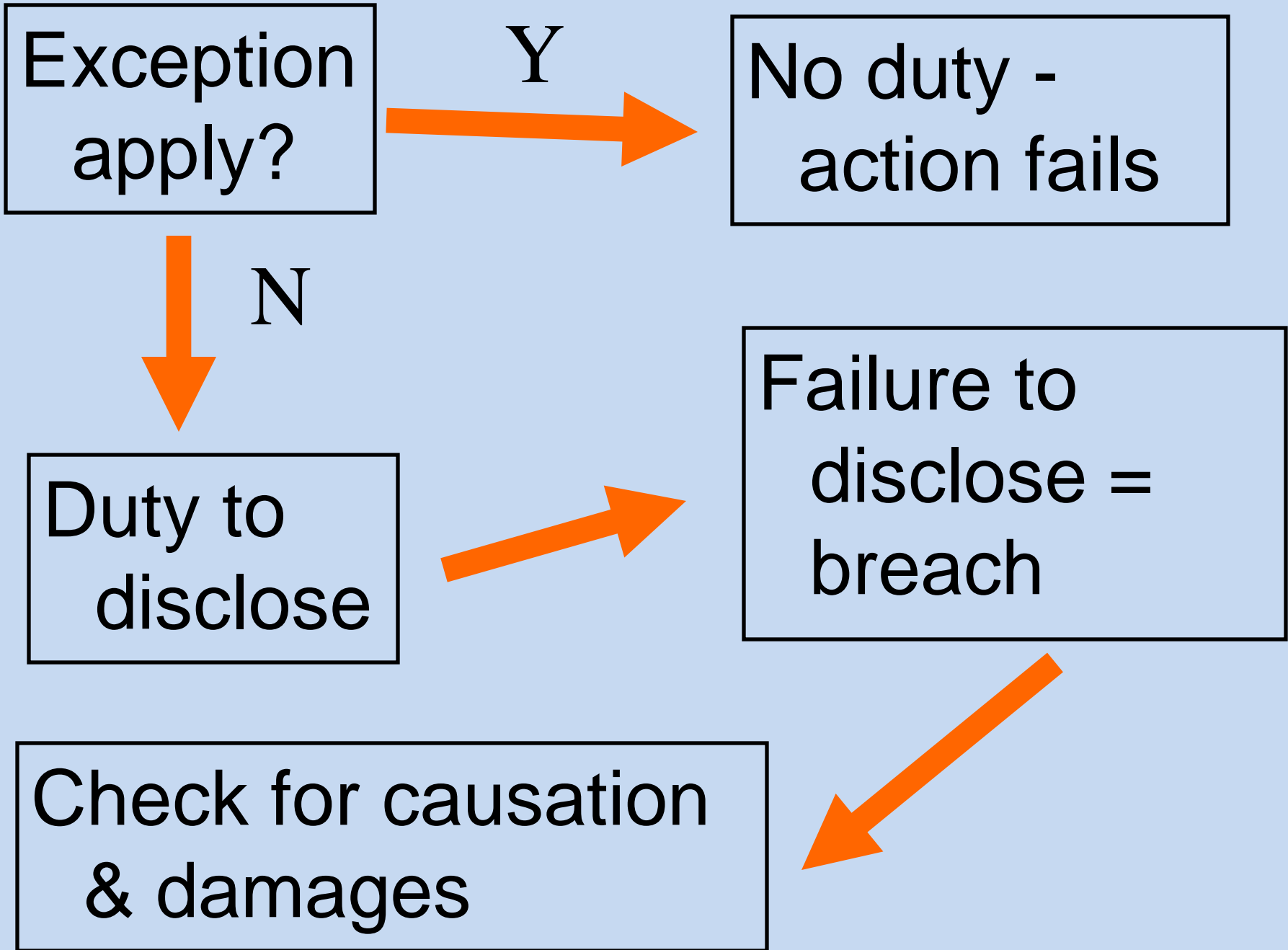


Y



N

No duty



Exception apply?

Y

No duty -
action fails

N

Duty to
disclose

Failure to
disclose =
breach

Check for causation
& damages

Thaddeus Mason Pope

Director, Health Law Institute

Hamline University School of Law

1536 Hewitt Avenue

Saint Paul, Minnesota 55104

T 651-523-2519

F 901-202-7549

E Tpope01@hamline.edu

W www.thaddeuspope.com

B medicalfutility.blogspot.com