

# Health Law I

Professor Pope

Class 7: Sept. 13, 2011

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# Informed Consent Introduction

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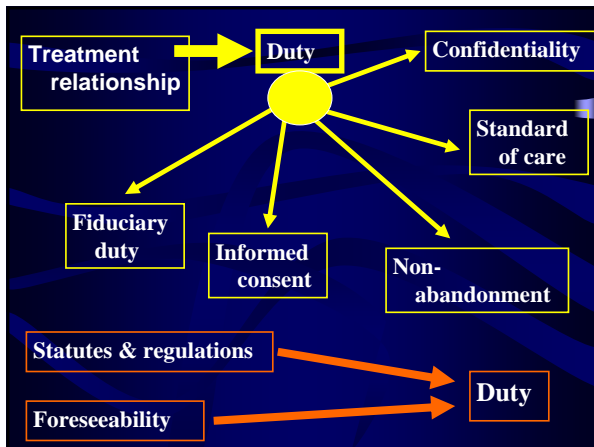
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**Common law duties  
owed by physicians**

**All forms, theories of  
medical malpractice**

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**Non-abandonment**

**Informed consent**

**Fiduciary duty**

**Standard of care**

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**Relationship  
to battery**

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## Battery

No consent **at all**

E.g. different procedure

E.g. same procedure,  
different body part

E.g. different doc

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## Informed Consent

Patient **did** consent to  
the procedure

But would **not** have if  
disclosure were  
appropriate

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Did Dr. Spence commit a  
**battery** on Canterbury

What if Dr. S did  
something other than a  
laminectomy

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# Relationship to medical malpractice

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Physician may have **performed** the procedure perfectly

The problem is that the physician did not make appropriate **disclosures**

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<b>Duty</b>	What to disclose
<b>Breach</b>	Did not disclose
<b>Injury</b>	Undisclosed risk happened
<b>Causation</b>	With disclosure, no injury

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# Types of information to disclose

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## Inherent risks of proposed treatment

Probability

Degree of harm

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## Alternatives

Benefits & risks of each

Doing nothing

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**Who will be providing treatment**

Including role of residents, fellows, students, and others

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**Exceptions to duty**

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**Information already known**

To this particular patient

Or commonly known

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## Emergency

Urgent immediate need

No capacity

No opportunity for consent  
from patient or surrogate

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## Therapeutic privilege

Disclosing risk information  
would make the patient so  
upset:

**That** could not make a  
rational choice

**That** would materially  
affect medical condition

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## Waiver

## Public Health

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# Disclosure duty standards

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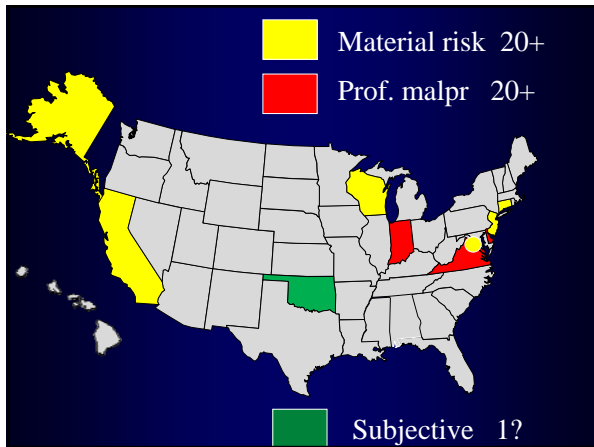
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## Material Risk Standard

What would a **reasonable patient** consider important in making a treatment decision

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## Professional Malpractice Standard

What would the  
**reasonable physician**  
have disclosed

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## Subjective Standard

What would **this  
particular patient**  
consider material in  
making a treatment  
decision

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## Canterbury v. Spence

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12-00-58	Back pain
02-04-59	Myelogram
02-11-59	Laminectomy
02-12-59	Fall
02-12-59	Second operation
03-07-63	Lawsuit filed
04-00-68	Trial
12-18-69	Appellate argument
05-19-72	Appellate decision

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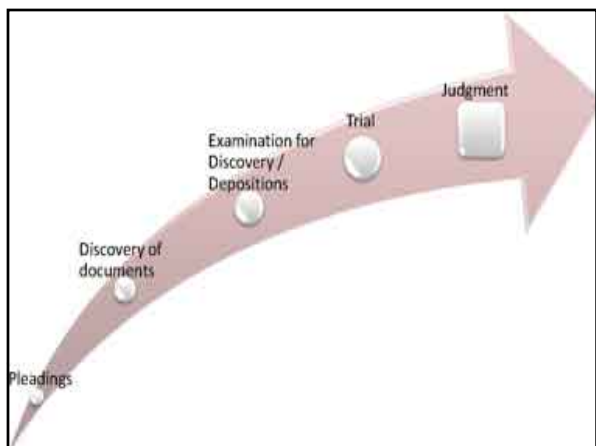
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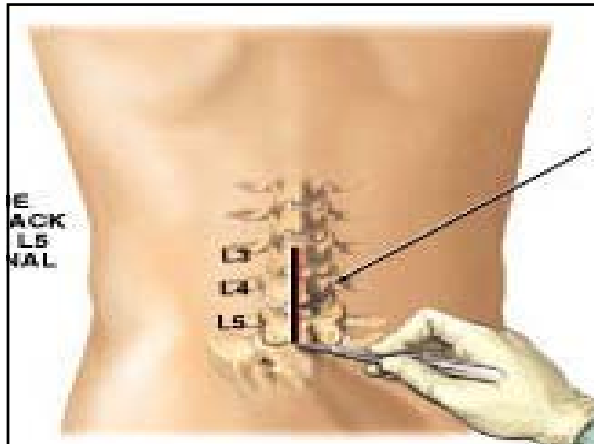
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**3** separate legal theories

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	Duty	Breach
Standard		
How satisfied		

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	<b>Injury</b>	<b>Causation</b>
<b>Standard</b>		
<b>How satisfied</b>		

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**Health Law I**  
**Professor Pope**  
**Class 8: Sept. 15, 2011**

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**Duty:**  
**Breach:** doc did not disclose information she had a duty to disclose  
**Injury:** patient injured because of non-disclosure  
**Causation:** had disclosure been made, a reasonable person in the patient's circumstances would not have consented

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## Duty

Of all the many risks,  
which did DEF have a  
**duty** to disclose

**Measured** by MR or RPP  
test

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PTF claims that physician failed to  
disclose information

Actionable only if physician had a  
**duty** to disclose that information

Duty measured, depending on  
jurisdiction, on 1 of 2 tests  
(specific variations aside)

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Disclosure



Waive right to  
sue for  
informed  
consent

Is this assumption of the risk consistent  
with *Tunkl*

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# Disclosure duty standards

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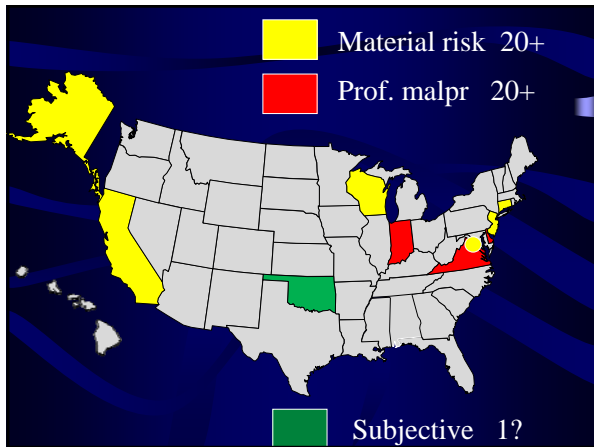
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# Exceptions to duty

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## Information already known

To this particular patient

Or commonly known

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## Emergency

Urgent immediate need

No capacity

No opportunity for consent from patient or surrogate

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## Therapeutic privilege

Disclosing risk information would make the patient so upset:

That could not make a rational choice

That would materially affect medical condition

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# Waiver

## Public Health

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**Breach**  
Did DEF **actually** disclose what she had a duty to disclose

**Injury**  
Is PTF injured from type of undisclosed risk

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Unrevealed, materialized risk  
Must have been caused by the intervention

Disclosure of the risk must have prevented its occurrence

Reasonable person in circs would not have consented

1 of 2  
Scientific

2 of 2  
Conduct

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A hypothetical question

Objective standard

**Not** a subjective standard

But a **little** individualized

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### Subjective Standard

- Contrast with *Canterbury* -
  - NOT what the **reasonable patient** would consider material
  - Rather, what **this particular patient** would consider material in making a treatment decision

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# Canterbury v. Spence

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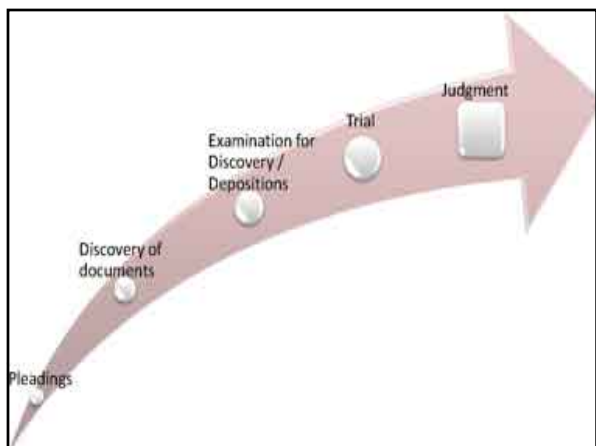
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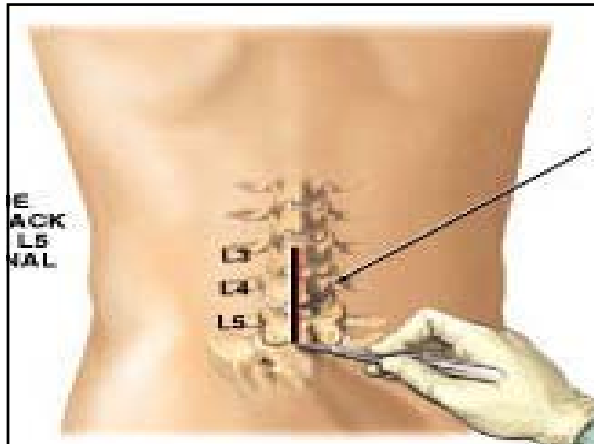
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**3** separate legal theories

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	<b>Duty</b>	<b>Breach</b>
<b>Standard</b>	MR or PP	Fail to disclose
<b>How satisfied</b>	MRP or expert	

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	<b>Injury</b>	<b>Causation</b>
<b>Standard</b>		
<b>How satisfied</b>		

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# Wilson v. Merritt

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Materiality to (1) reasonable person  
(2) in the plaintiff's circumstances

Plaintiff testimony is not itself  
sufficient to establish materiality

For materiality, argue probability  
and/or severity risk relative to  
benefit from procedure

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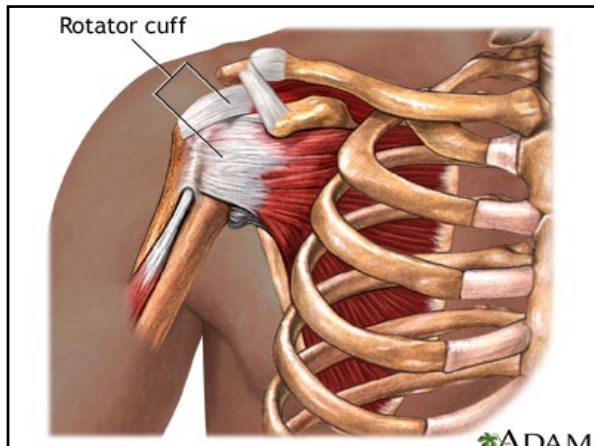
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**Rizzo  
v.  
Schiller**

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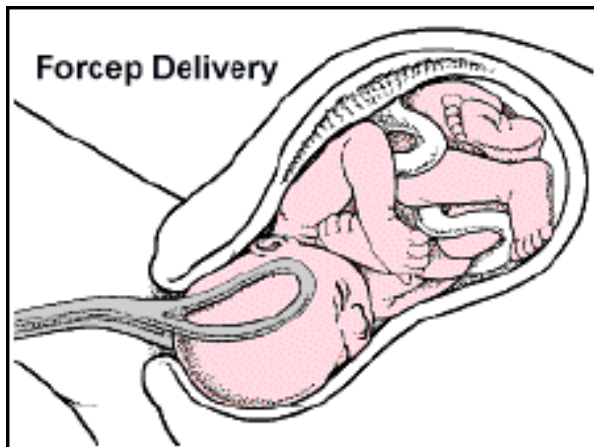
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# Culbertson v. Mernitz

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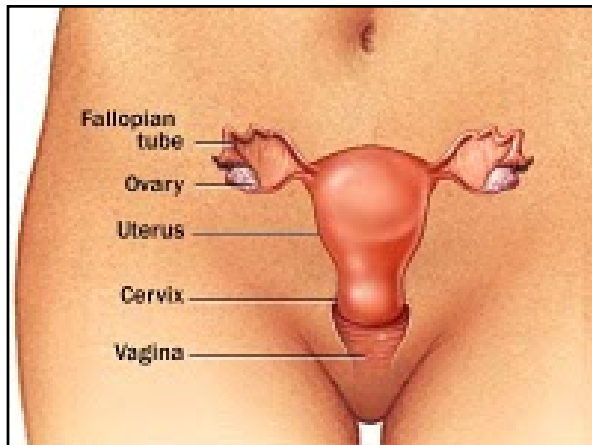
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# Merenstein case

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# Arato v. Avedon

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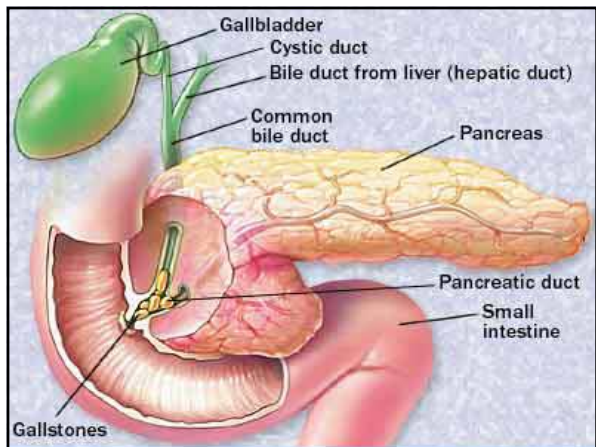
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# Health Law I

Professor Pope

Class 9: Sept. 20, 2011

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No case-specific slides

Roundtable format



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1. Patient claims doc failed to disclose X
2. What is the duty standard in this jurisdiction?
  - If material risk (DC, CA, NJ, CT), then doc had a duty to disclose, if reasonable patient in circumstances would have considered X material
  - If prudent physician (IN, DE), then doc had a duty to disclose X if, through expert testimony, patient establishes reasonable physician would have disclosed X under the circumstances

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3. Doc can argue there was **no duty**

- On PP, she can get her own experts
- On MR, she can explain why X would not be material
- She can also show application of an exception

4. PTF must show breach

- Show failure to disclose X
- Doc can argue X was disclosed

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5. PTF must show undisclosed risk, X, actually materialized (injury)

- There are no nominal damages
- This is not a dignitary tort

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**Canterbury**

Paralysis from laminectomy

**Culbertson**

Cervical adherence

**Rizzo**

Forceps-caused cerebral palsy

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## 6. PTF must show causation (2 parts)

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### Unrevealed, materialized risk

Must have been caused by the intervention

1 of 2  
Scientific

Disclosure of the risk must have prevented its occurrence

Reasonable person in circs would not have consented

2 of 2  
Conduct

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### A hypothetical question

Objective standard

Like for duty in a MR state

**Not** a subjective standard

Only a **little** individualized

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**Subjective Standard – (Okla.)**

PTF need not establish that the **reasonable patient** would have declined treatment after disclosure

Rather, only that **this particular patient** would have declined

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