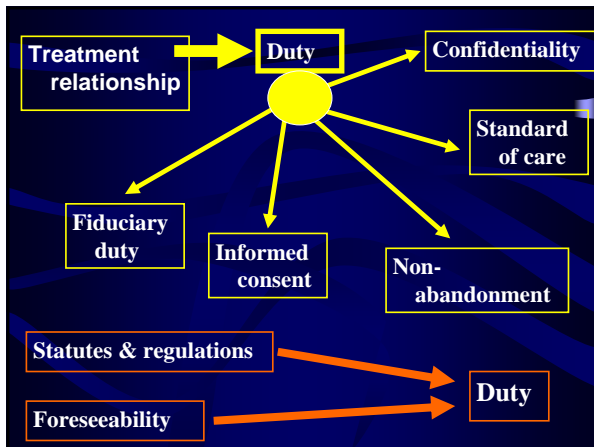


Health Law I

Professor Pope

Class 7: Sept. 13, 2011

Informed Consent Introduction



**Common law duties
owed by physicians**

**All forms, theories of
medical malpractice**

Non-abandonment

Informed consent

Fiduciary duty

Standard of care

**Relationship
to battery**

Battery

No consent **at all**

E.g. different procedure

E.g. same procedure,
different body part

E.g. different doc

Informed Consent

Patient **did** consent to
the procedure

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

Did Dr. Spence commit a
battery on Canterbury

What if Dr. S did
something other than a
laminectomy

Relationship to medical malpractice

Physician may have **performed** the procedure perfectly

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

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

Types of information to disclose

Inherent risks of proposed treatment

Probability

Degree of harm

Alternatives

Benefits & risks of each

Doing nothing

Who will be providing treatment

Including role of residents, fellows, students, and others

Exceptions to duty

Information already known

To this particular patient

Or commonly known

Emergency

Urgent immediate need

No capacity

No opportunity for consent
from patient or surrogate

Therapeutic privilege

Disclosing risk information
would make the patient so
upset:

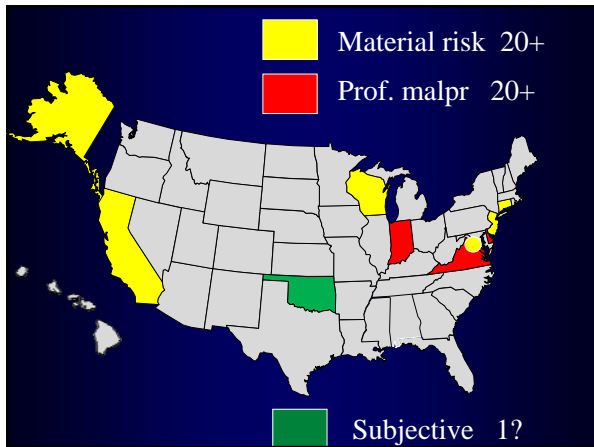
That could not make a
rational choice

That would materially
affect medical condition

Waiver

Public Health

Disclosure duty standards



Material Risk Standard

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

Professional Malpractice Standard

What would the
reasonable physician
have disclosed

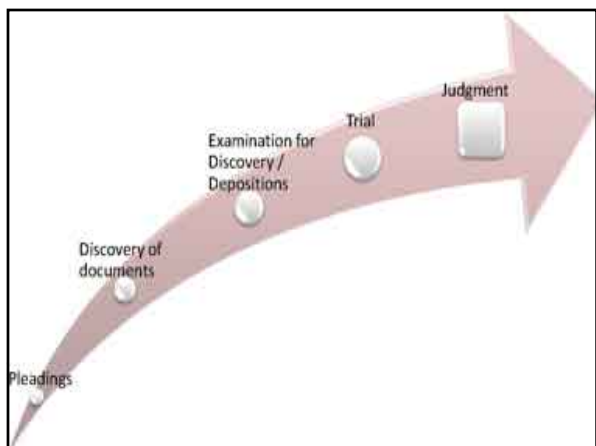
Subjective Standard

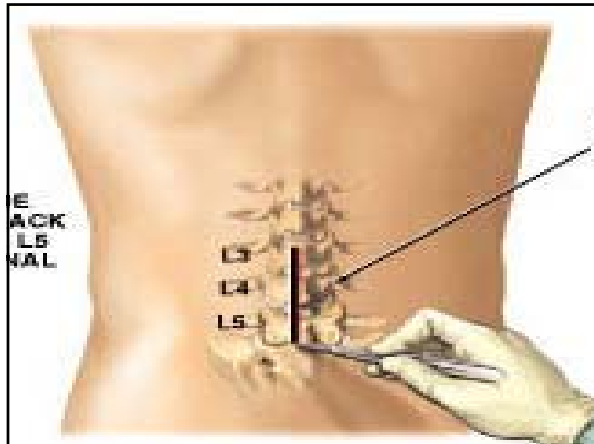
What would **this
particular patient**
consider material in
making a treatment
decision

Canterbury v. Spence



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





3 separate legal theories

	Duty	Breach
Standard		
How satisfied		

	Injury	Causation
Standard		
How satisfied		

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

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

Duty

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

Measured by MR or RPP
test

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)

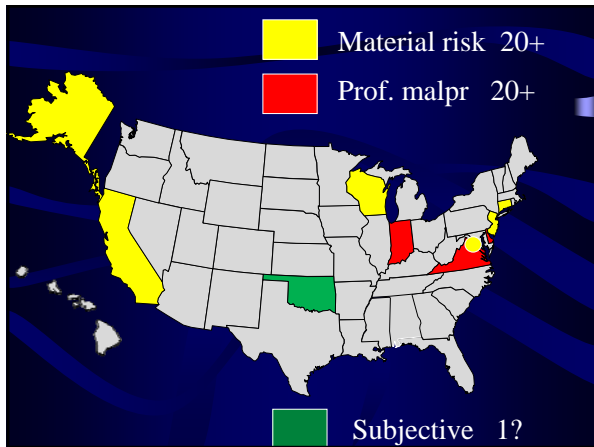
Disclosure



Waive right to
sue for
informed
consent

Is this assumption of the risk consistent
with *Tunkl*

Disclosure duty standards



Exceptions to duty

Information already known

To this particular patient

Or commonly known

Emergency

Urgent immediate need

No capacity

No opportunity for consent from patient or surrogate

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 Public Health

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

Injury
Is PTF injured from type of
undisclosed risk

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

A hypothetical question

Objective standard

Not a subjective standard

But a **little** individualized

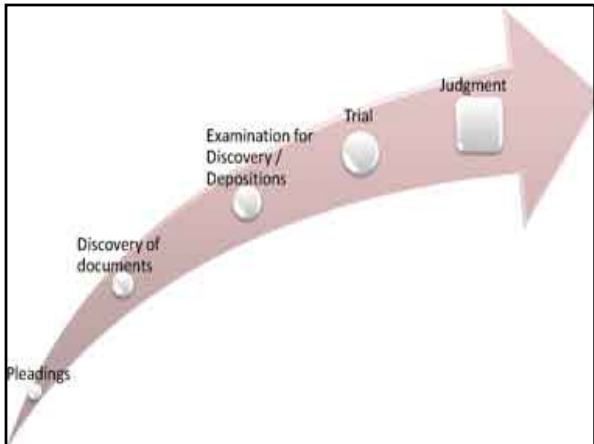
Subjective Standard

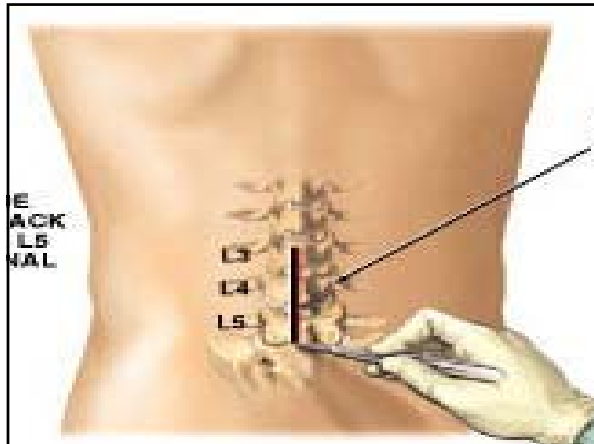
- Contrast with *Canterbury* -
 - NOT what the **reasonable patient** would consider material
 - Rather, what **this particular patient** would consider material in making a treatment decision

Canterbury v. Spence



12-00-58	Back pain
02-04-59	Myelogram
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02-12-59	Fall
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03-07-63	Lawsuit filed
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05-19-72	Appellate decision





3 separate legal theories

	Duty	Breach
Standard	MR or PP	Fail to disclose
How satisfied	MRP or expert	

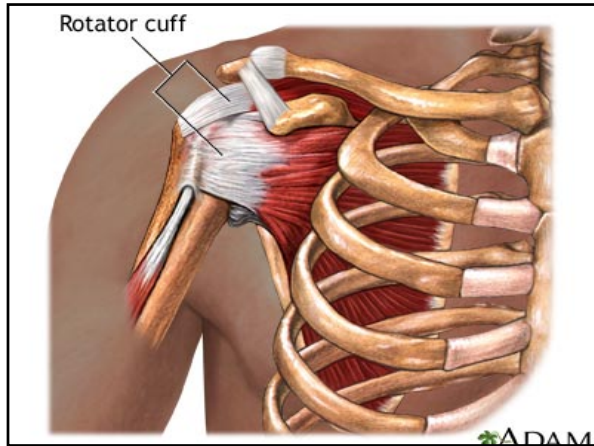
	Injury	Causation
Standard		
How satisfied		

Wilson v. Merritt

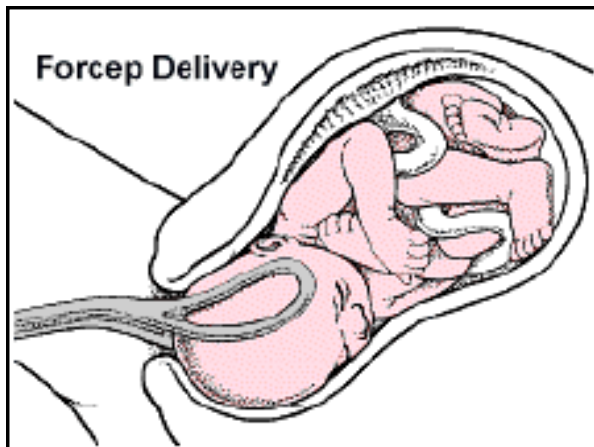
Materiality to (1) reasonable person
(2) in the plaintiff's circumstances

Plaintiff testimony is not itself
sufficient to establish materiality

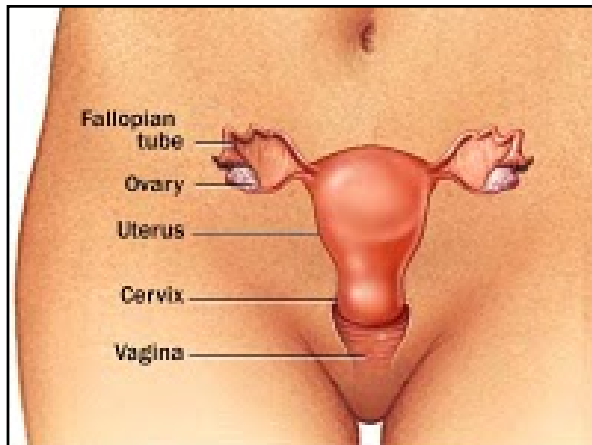
For materiality, argue probability
and/or severity risk relative to
benefit from procedure



Rizzo v. Schiller



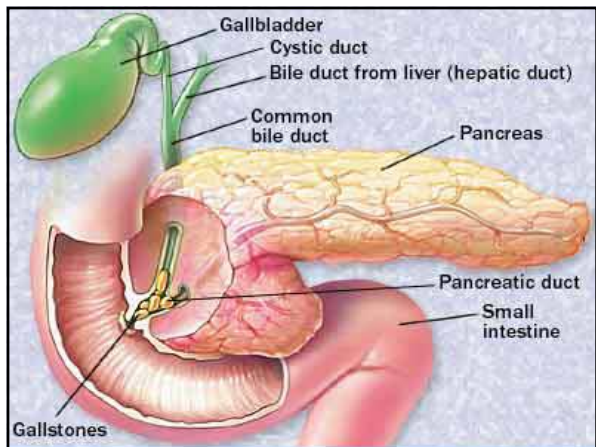
Culbertson v. Mernitz



Merenstein case



Arato v. Avedon



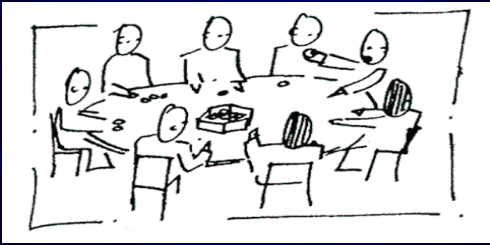
Health Law I

Professor Pope

Class 9: Sept. 20, 2011

No case-specific slides

Roundtable format



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

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

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

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

Canterbury

Paralysis from laminectomy

Culbertson

Cervical adherence

Rizzo

Forceps-caused cerebral palsy

6. PTF must show causation (2 parts)

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

A hypothetical question

Objective standard

Like for duty in a MR state

Not a subjective standard

Only a **little** individualized

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
