

Health Law: Quality & Liability

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Informed Consent -
Duty Element



Informed Consent (Elements)



Duty

What to disclose

Breach

Did not disclose

Injury

**Undisclosed risk
happened**

Causation

**With disclosure,
would have avoided
injury**



Types of information to disclose



Core complaint:

Physician failed to
disclose information



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



Conflicts of interest

Disclose intent in using
patient for research and
economic gain



These are just **types**
or categories of
information



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



Duty



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



2 main tests or
measures of duty



2 main ways
to **measure**
MD duty



Reasonable

physician

20+ states



Reasonable

patient

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



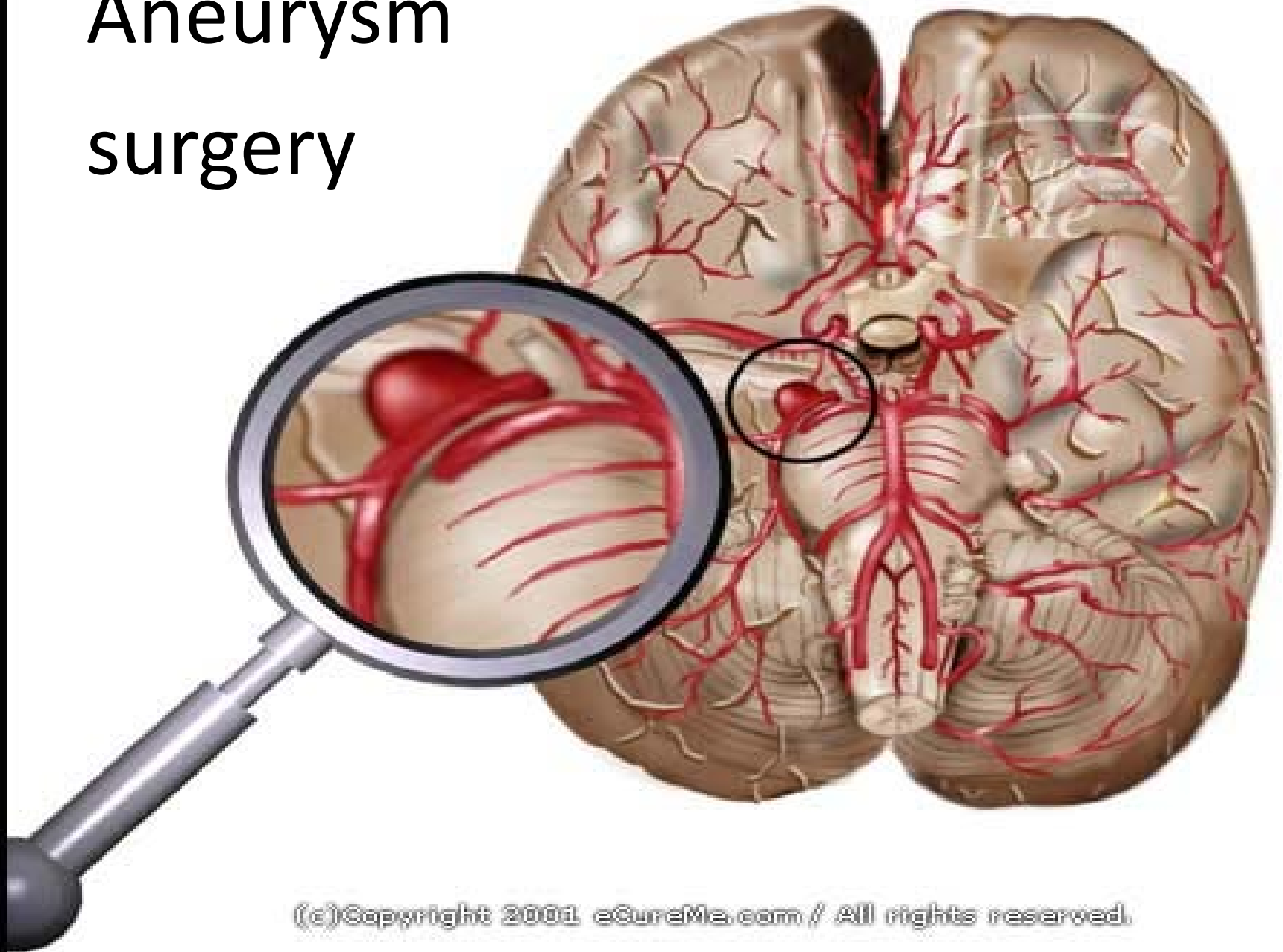
Johnson

v.

Kokemoor



Aneurysm surgery



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



Canterbury

v.

Spence





19-year-old
Back pain



Physician recommends laminectomy

THE
BACK
LEG
PAIN

L3

L4

L5



Right procedure

Performed

competently



No malpractice



But inherent non-
negligently
caused risk



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
this treatment decision



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

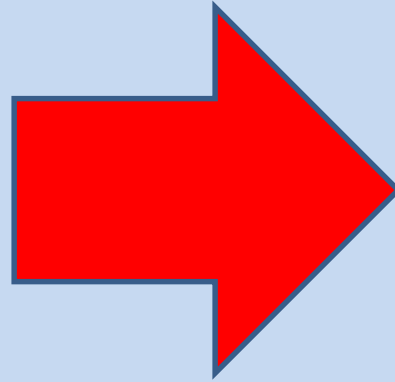


Risks, alternatives DEF has
duty to disclose

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



However duty is
established,
no duty if an
exception applies



Exceptions to duty



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



1



Information **already** known

To this particular
patient

Or commonly known



2



Emergency

Urgent immediate need

Patient lacks capacity

No opportunity for consent
from surrogate

No known objection



All 4 elements
must be
satisfied

(e.g. no
transfuse JW
even if life-
saving)



3



Therapeutic privilege

Disclosing risk information would make the patient so upset:

That could not make a rational choice

That would materially affect medical condition



CAUTION: Not to be used when you think the patient is making a “stupid” choice



4



Waiver

Patient does not want to know (defers to physician)



5



Public Health

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



6



CBO clause

Clinicians can sometimes
avoid duty for
moral/religious reasons





e.g.
Catholic ED
after sexual
assault



Diachronic Aspect to Duty



Not a one-time

ongoing duty





**New clinical
circumstances
change risks**

**Sufficient
disclosure**

**Must update
disclosure**



Disclose the
new alternative
/ option





**Contractions – VB
now option**

Cesarean

**Must update
disclosure**





Cesarean

v.

No baby

Cesarean

v.

**VB (but big
baby)**

