

# Health Law: Quality & Liability

Prof. Thaddeus Pope

Informed Consent -  
Breach & Causation  
Elements



Only the duty  
element  
varies from  
state to state



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



PTF claims doc  
failed to disclose

Material risk  
jurisdiction?

Exception  
apply?

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

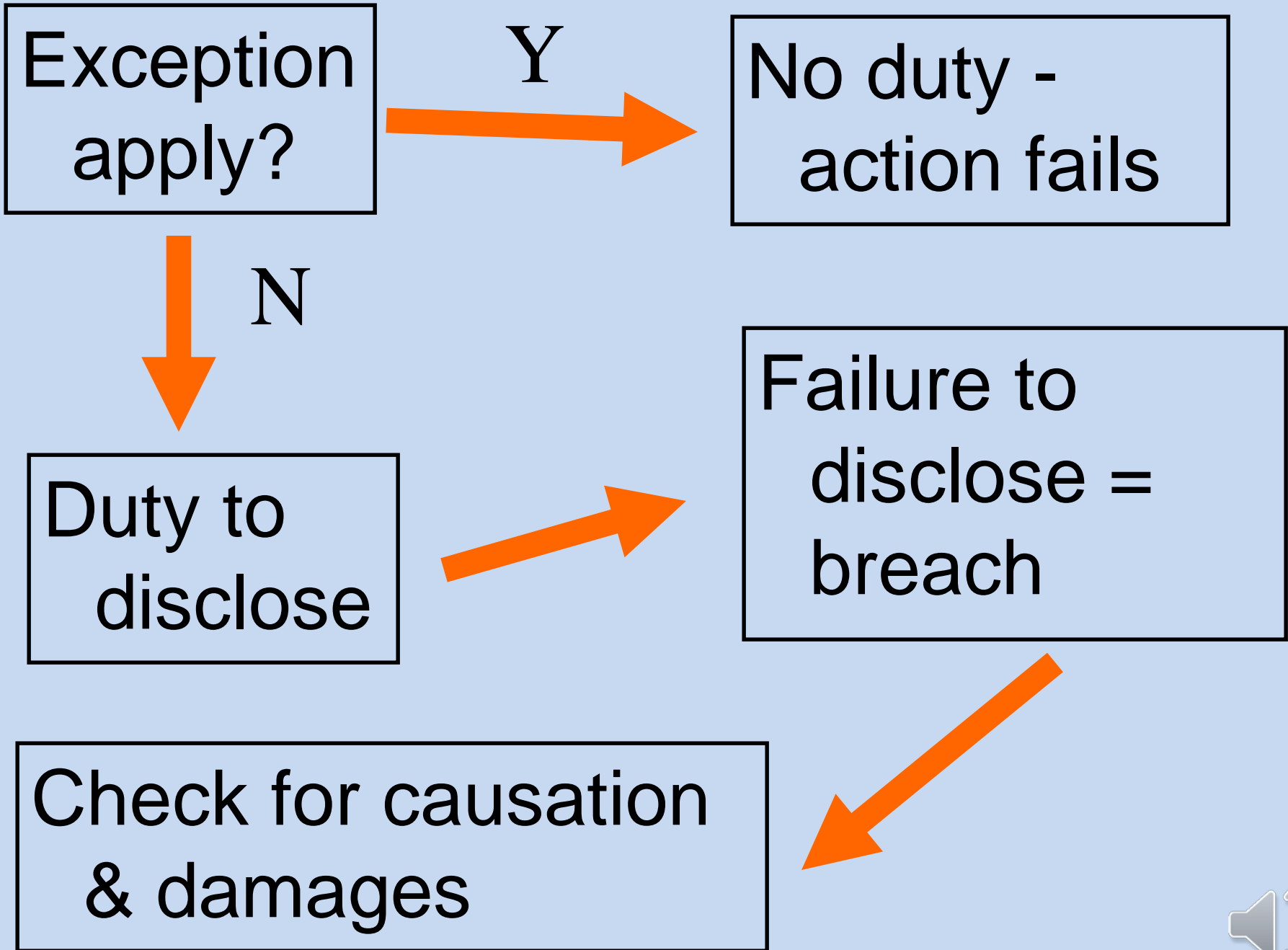
No  
duty

Y

Y

N





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



PTF claims doc  
failed to disclose

Reasonable MD  
jurisdiction?

Exception  
apply?

No  
duty

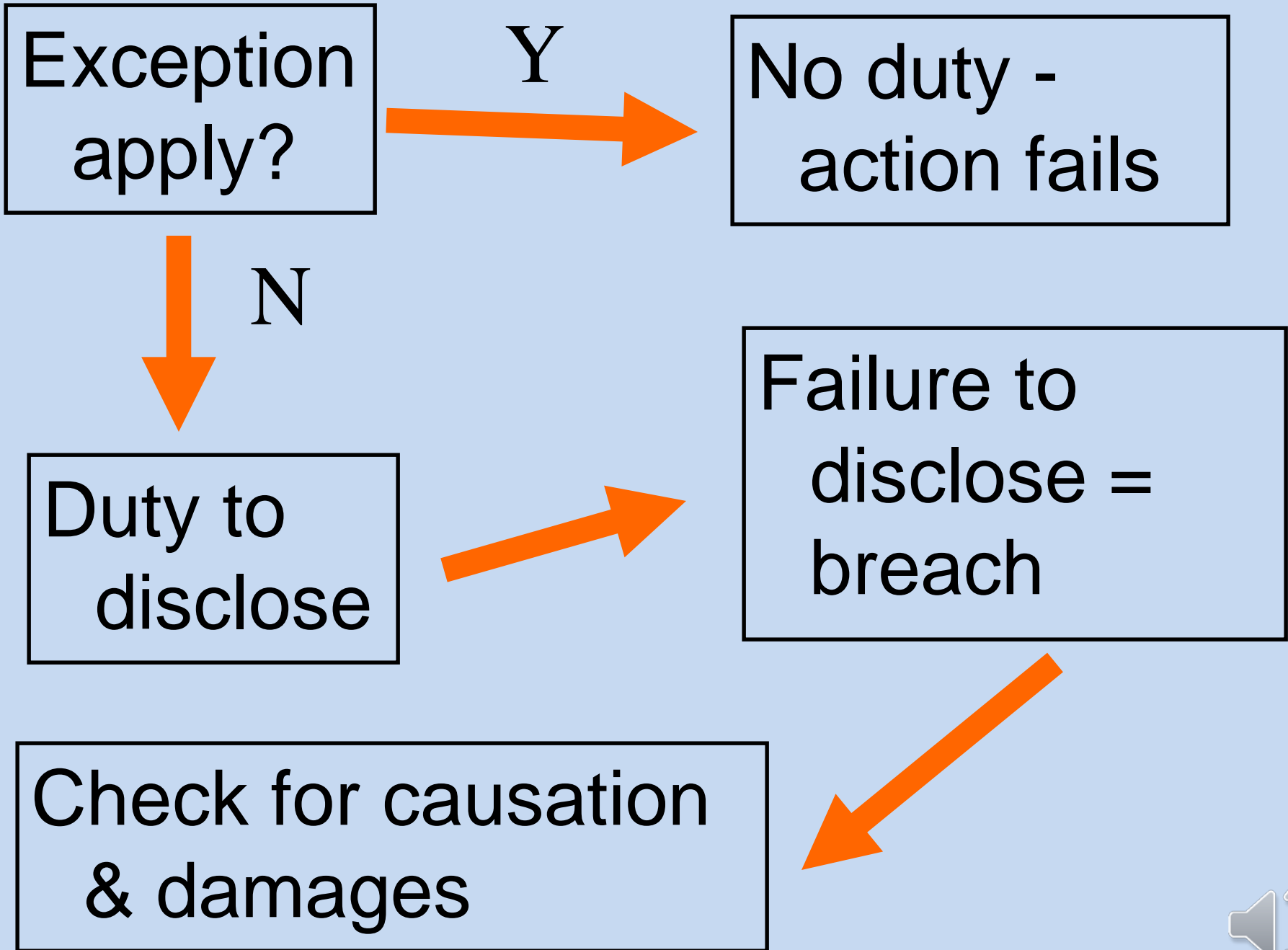
Is this information  
that a reasonable  
MD would  
disclose

Y

Y

N







# Breach



If

1. Duty under the applicable standard
2. No exception applies

Then failure to disclose =  
breach



DEF **actually failed**  
to disclose what  
she had a duty to  
disclose



Contemporaneous  
record usually  
sufficient to prove  
disclosure made

But patients tape (BMJ)



**Injury**



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

(no dignitary tort)



No injury →  
No informed  
consent claim

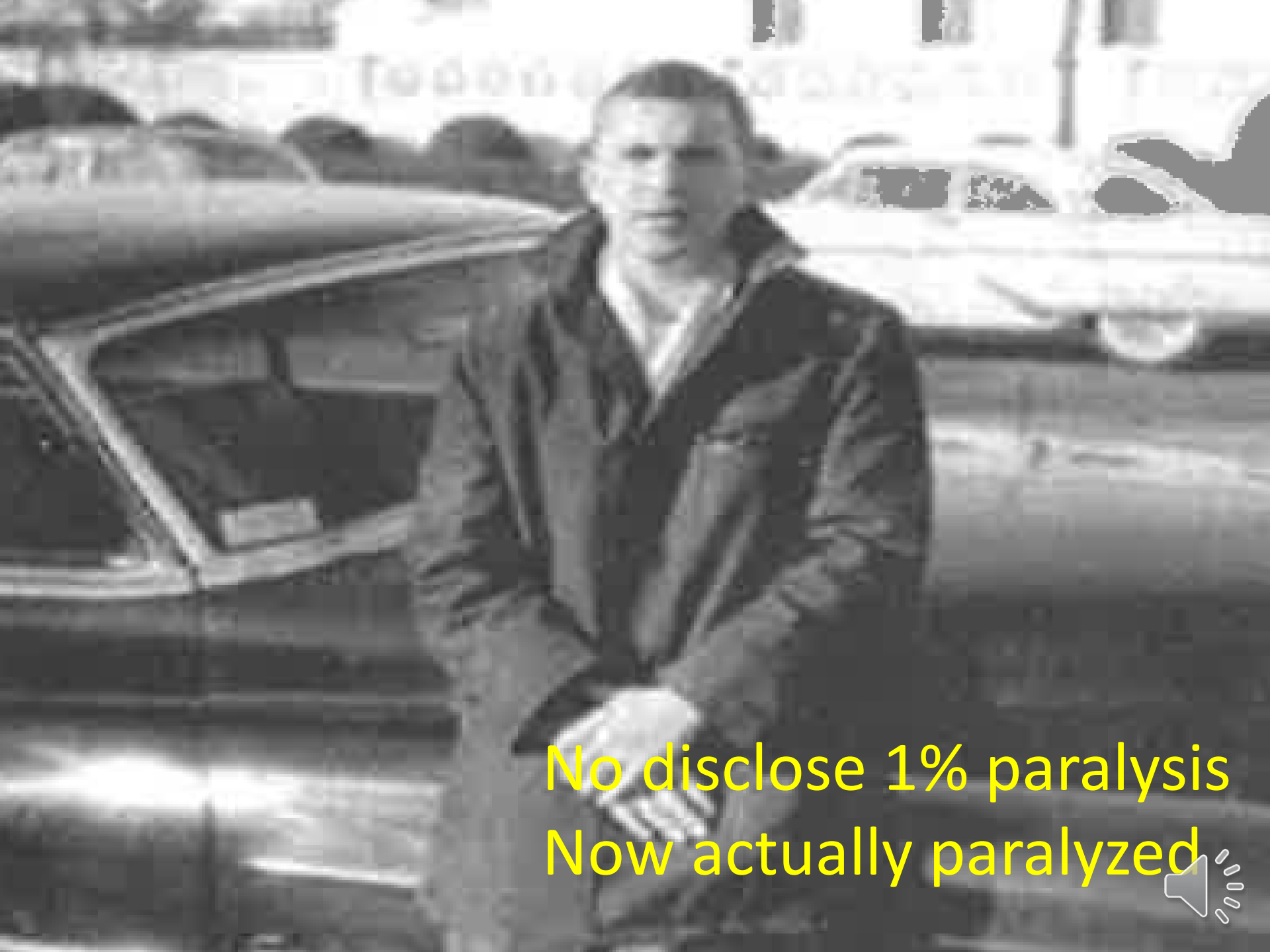


Not sufficient:

“I **could** have  
been . . . .”







No disclose 1% paralysis  
Now actually paralyzed



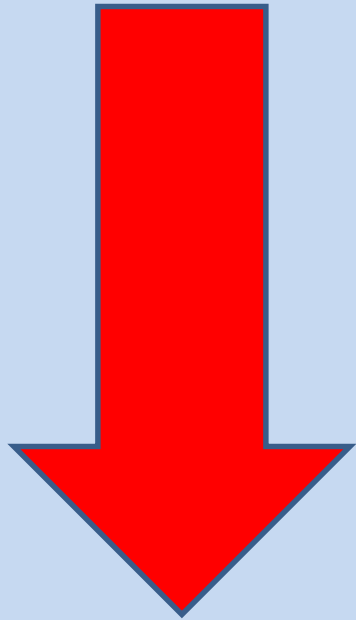
# Causation



Trickiest  
of the 4  
informed  
consent  
elements



# Breach



Causation

# Injury



Plaintiff must  
establish



**Without** DEF

breach (i.e. lack of disclosure), PTF probably would not be injured



This is a  
hypothetical  
question



3 sub-

elements





1



**PTF** would  
have chosen  
differently



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



e.g. Jerry

Canterbury would  
not have gotten  
laminectomy (if  
knew 1%)



2



**Reasonable**  
**patient** would  
have chosen  
differently



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



e.g. person in  
Canterbury's situation  
would not have had  
laminectomy (if knew)





Disclosure →

no consent

No consent →

no procedure



But would a  
different choice  
have avoided  
injury



3



No procedure

→ no injury



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



# Recap





If knew 1% risk,  
would JC & RPt  
have decided  
against  
procedure?





If yes, he would  
not have had  
procedure (else  
a battery)



If JC did not have  
the procedure,  
would he be  
paralyzed

