

Medical Jurisprudence

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

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

Segment

5 of 8

PTF is suing because
she is injured

PTF **already** established
that DEF breached the
applicable SOC

BUT

Is the injury the
result of the
malpractice

Objectives

1. What is “but for” causation (regular causation)
2. What damages are recoverable if “but for” causation is established

3. What is “lost chance” causation
4. What damages are recoverable if “lost chance” causation is established

5. What are the 4 types of damages (money recovery)
6. Which is the “main” type of damages that comprises most verdicts & settlements

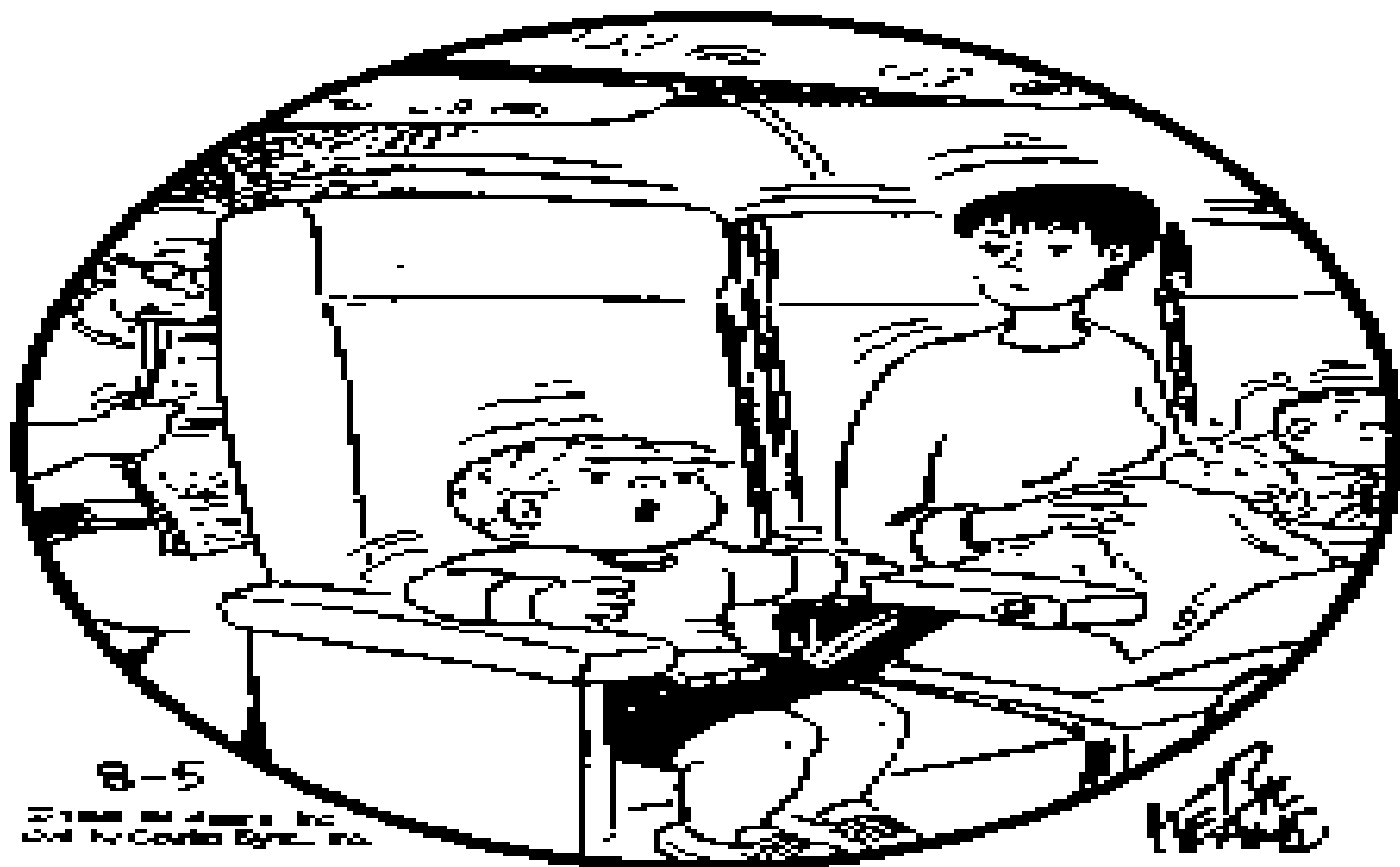
7. What are the 4 key affirmative defenses
8. What is the difference between a statute of limitations and a statute of repose

9. What is assumption
of the risk

10. What is comparative
negligence

Causation

THE FAMILY CIRCUS



8-5

© 1988 by Delta Air Lines, Inc.
and by Continental Express, Inc.

"I wish they didn't turn on that seatbelt sign so much! Every time they do, it gets bumpy."

SOC +

Breach

Injury

SOC +
Breach

Injury



Sometimes easier with
COMMISSION

Sometimes
harder



Omission

Fail order test

Fail read results

Fail inform Pt

Fail make referral

“But for”

Lost chance

**But for
causation
Definition**

Main type of
causation in
the law

Rest. 3d 26

Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.

But for DEF's
negligence

PTF would not be
injured

Sine qua

non

Not enough that
DEF negligence
increased the
risk of harm

DEF negligence
must be **most**
likely cause

**But for
causation
Consequences**

> 50% chance that
injury from DEF
negligence

100% damages

50% or < 50% chance
injury from DEF
negligence

0% damages

**But for
causation**

Math problems

Baseline risk
death

5%

After DEF
negligence
risk of death

25%

Negligence **increases** risk
of adverse outcome

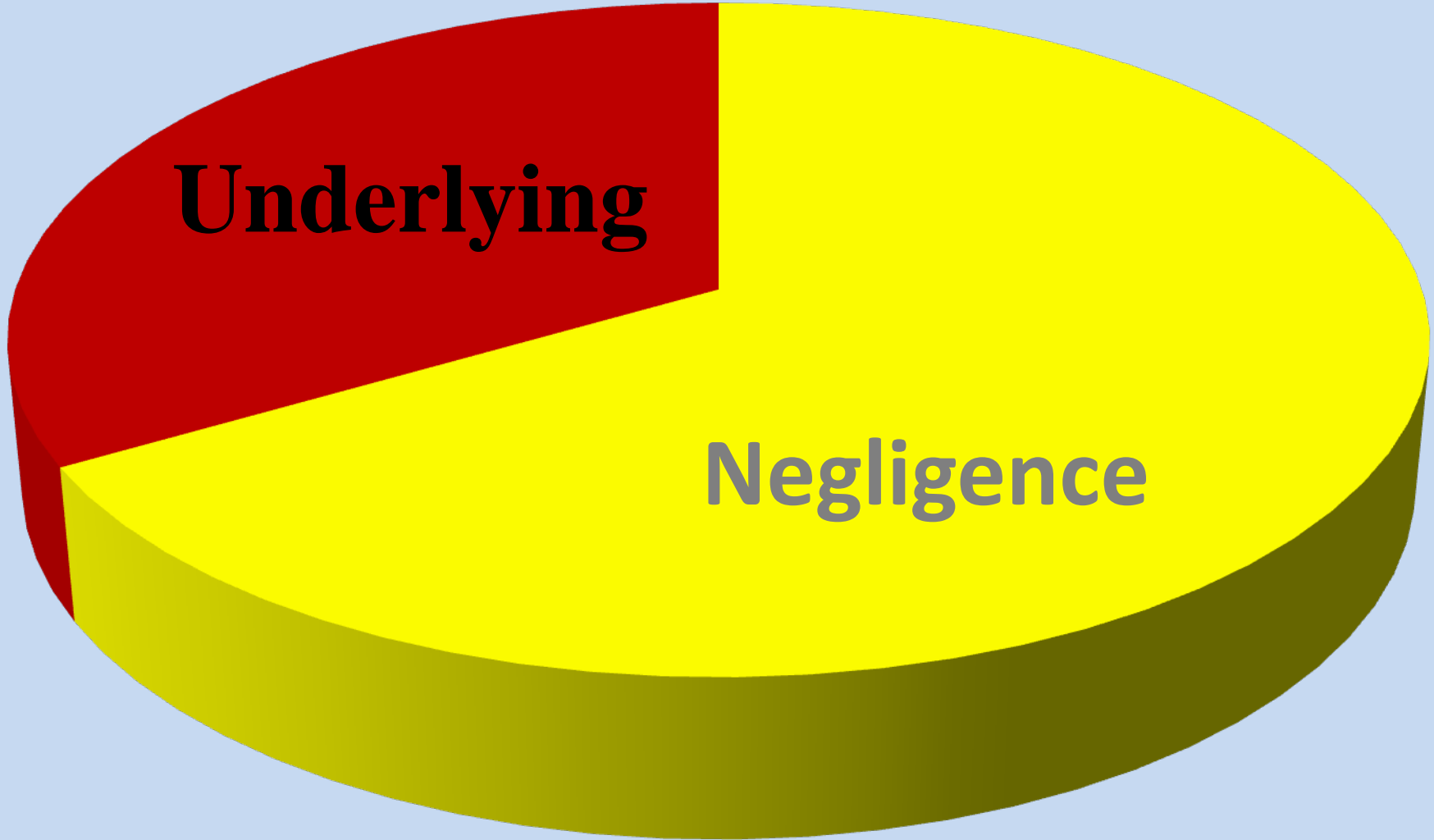
Adverse outcome obtains

Risk before negligence

10%

Risk after negligence

30%



Underlying

Negligence

1% → 3%

30% → 50%

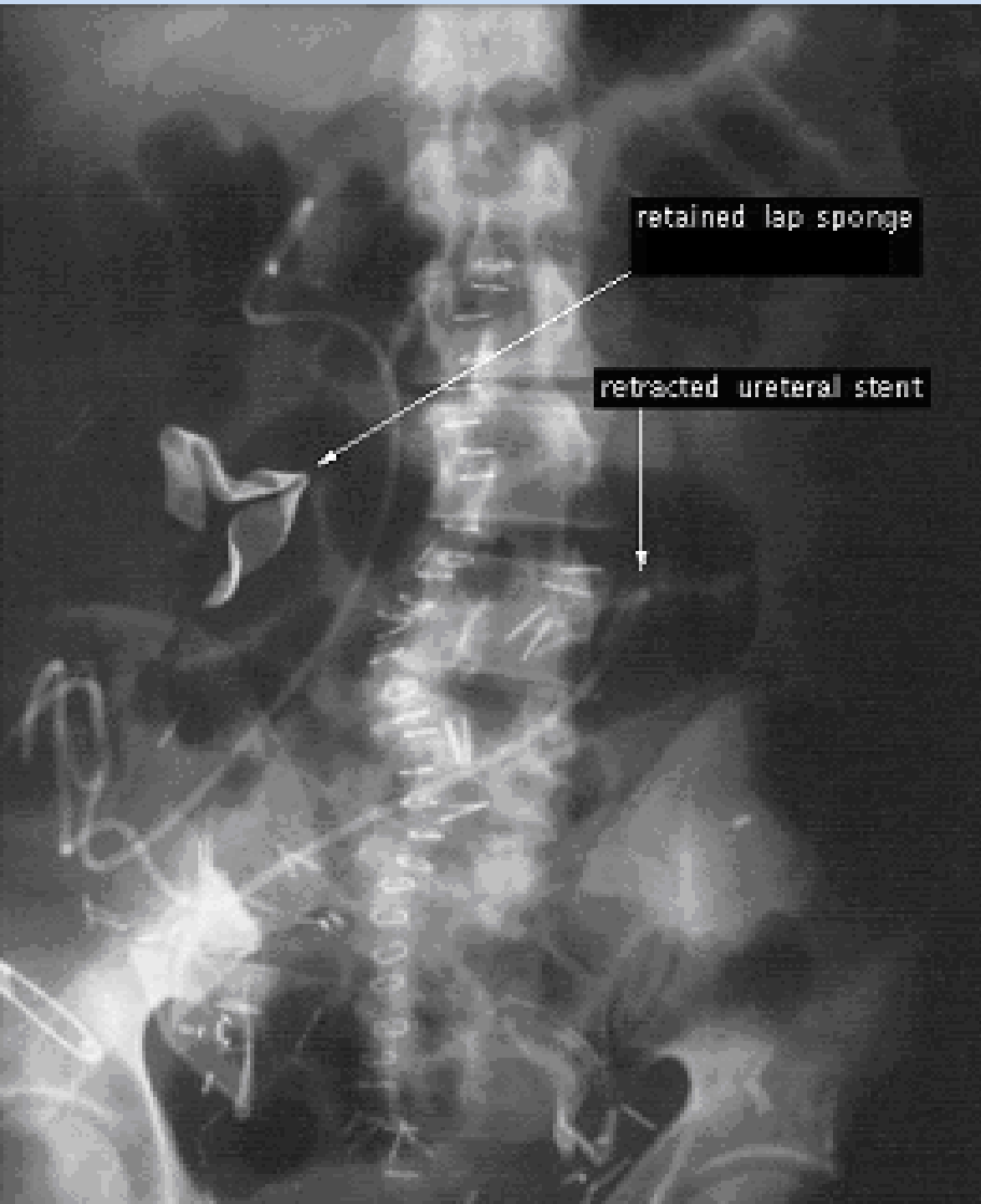
66% → 99%

30% → 70%

40% → 70%

Often no statistical
probabilities just
expert opinion

**But for
causation
Cases**



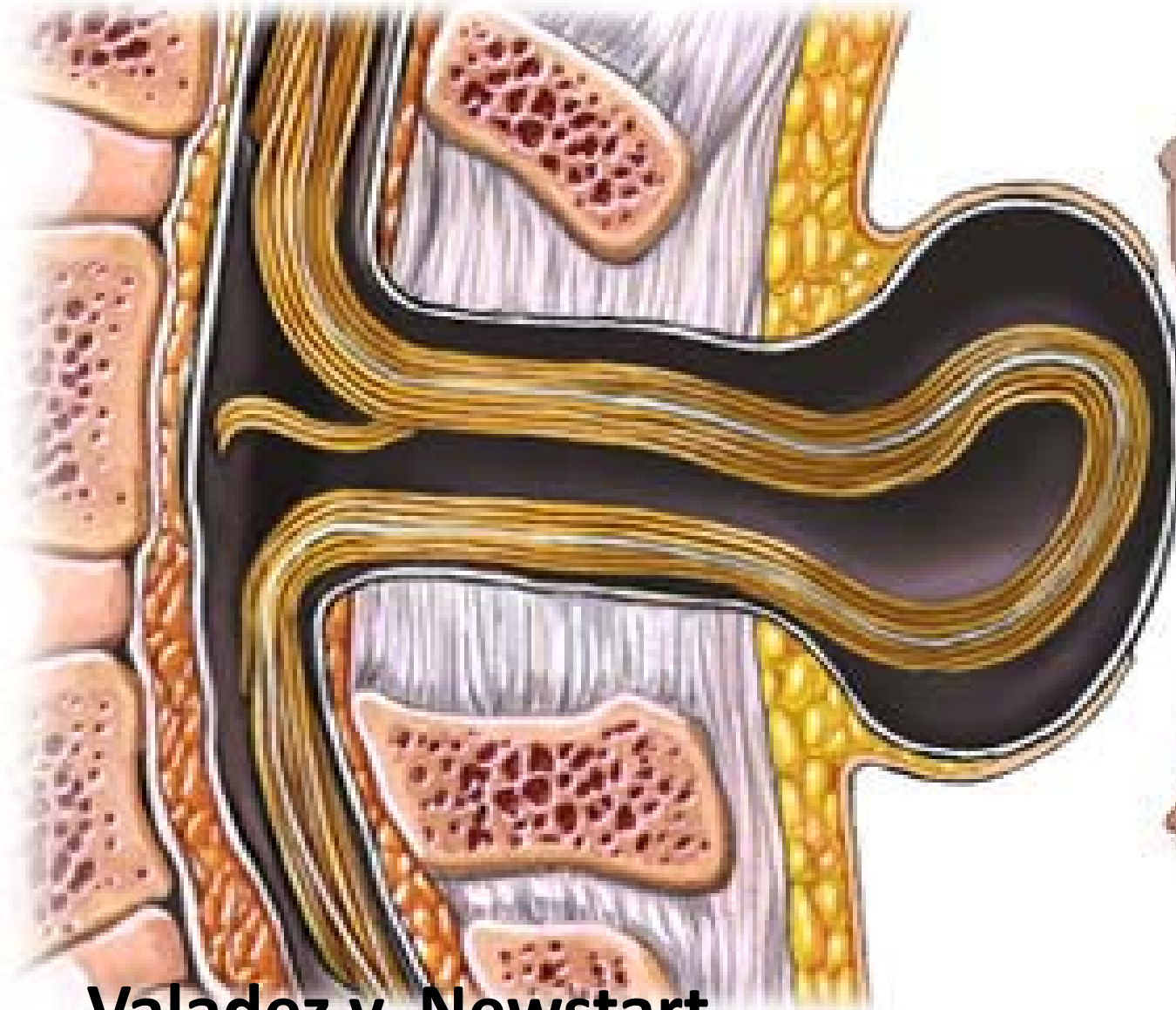
Hall

v

Hillbun

Died from **other**
causes before
sponge
could/would
create problems

Meningomyelocele



Valdez v. Newstart

w/o negl.

____ % in
prenatal
surgery
group

with negl.

____ % in
prenatal
surgery
group

Lost chance

causation

Rationale



ALL OR



NOTHING?

Malpractice PTFs often
start out sick

Bad baseline

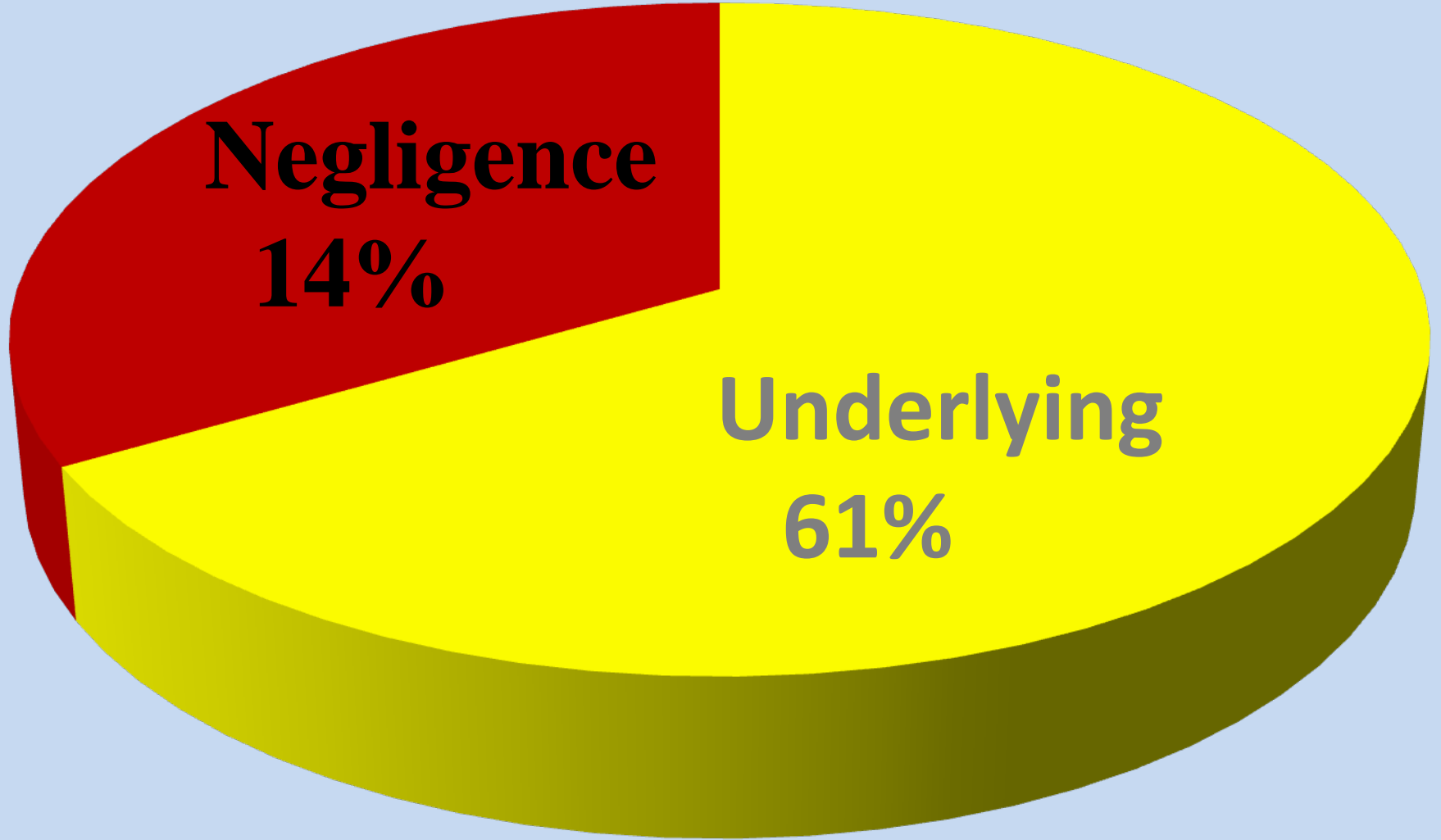
Hard to show “but for”
causation

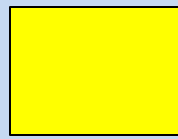
Herskovits

v.

Group Health

	Chance survive	Chance death
Without negligence	39%	61%
With negligence	25%	75%

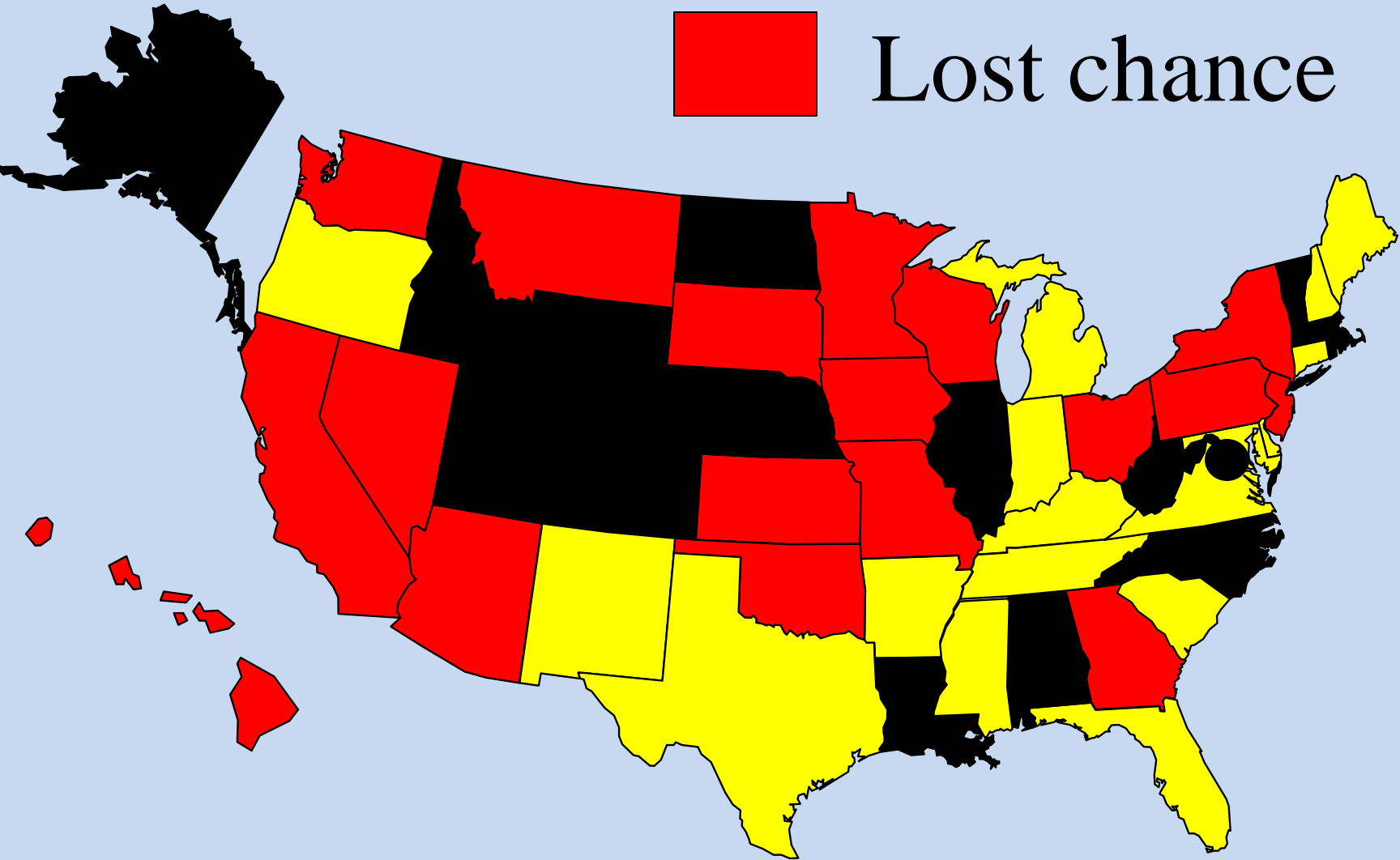




But for only



Lost chance



Lost chance

causation

Definition

PTF can recover

even if DEF

negligence is **not**

probable cause

of injury

Negligence does not change
probable outcome

With negligence

Probably dead

Without negligence

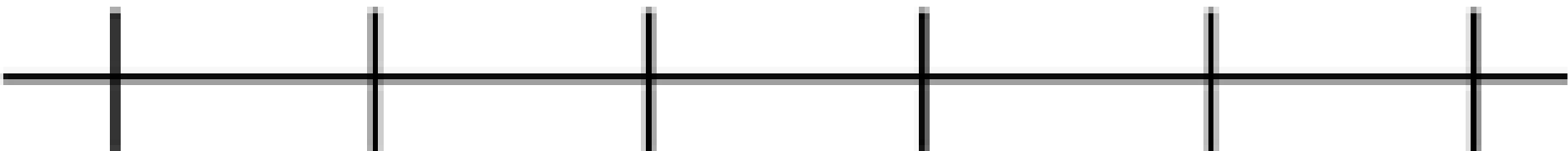
Probably dead

Suing for an injury that
was **probably** going to
happen **anyway** –
even without DEF
negligence

DEF just made a
probable outcome
(e.g. death) **even**
more probable

Doc
Should've
Diagnosed
Patient

Doc
Finally
Diagnosed
Patient



Patient
Got Sick

Doc
"Loss of
Case"

Patient
"Loss of
Chance"

Injury **IS** the
lost chance
itself



PTF **not** claim

DEF negligence

caused **death**

PTF claim DEF

negligence caused X%

greater chance of

death (or Y% lower

chance survival)

Preponderance of the evidence

In civil litigation: how
persuasively must party
establish elements

Jury must think DEF
breach **probably**
($>50\%$) caused PTF to
lose $X\%$ chance of
better outcome

Lost chance

causation

Consequences

51% I from B →
100% damages

49% I from B →
49% damages

PTF has 45% chance
recovery

DEF negligence
reduces that to 15%

DEF negligence
reduced chance
recovery by 30%
(45% - 15%)

Full (but for) damages
\$600k

Lost chance = \$600k x
0.30 - \$180k

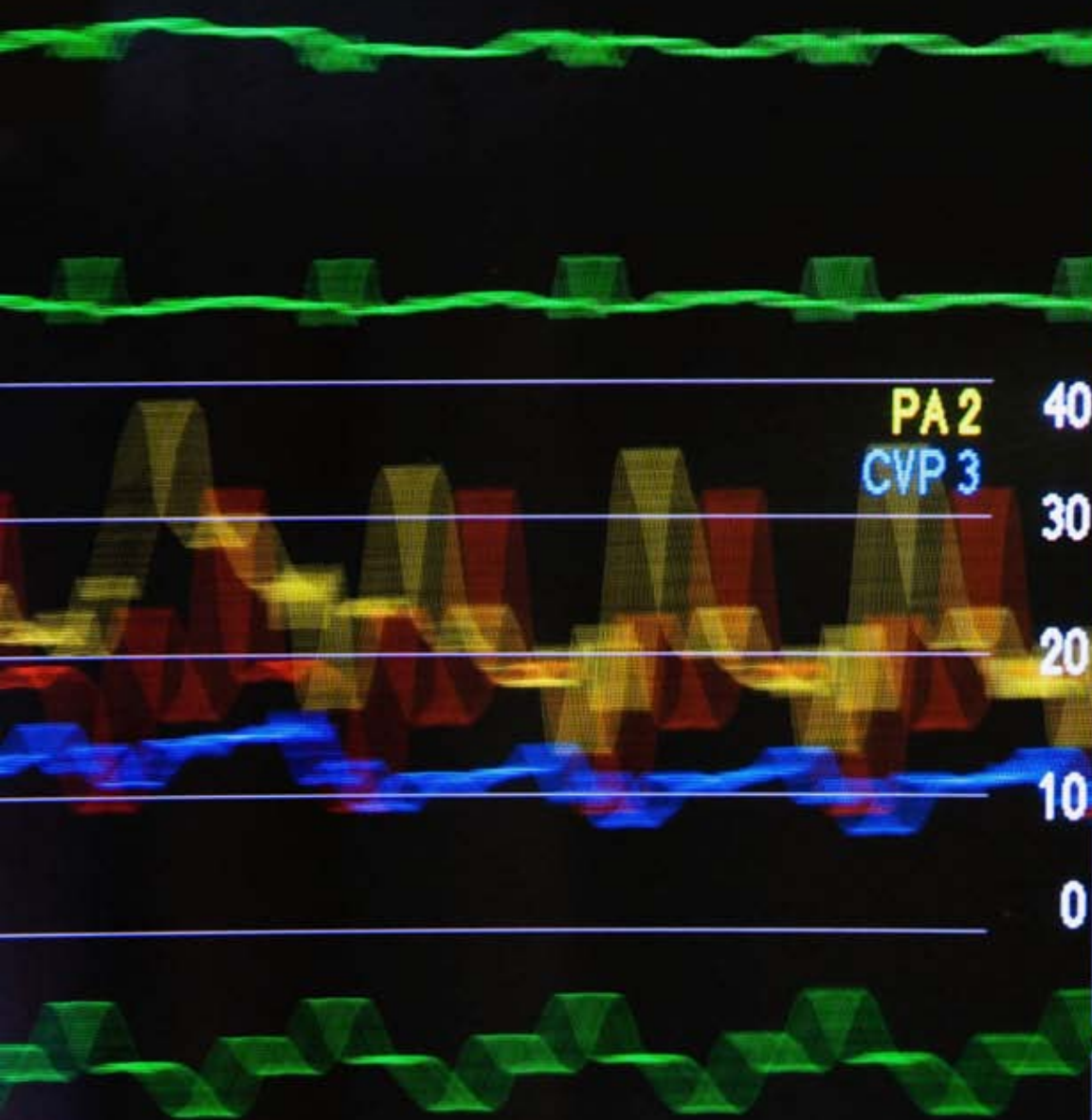
Wendland

v.

Sparks

T:ADULT 0

6N-3



64

J+ 60ms II 0.5 mm

ANT		INF		LAT	
II	0.5	I	0.2	AVL	0.0
III	0.2	AVF	0.3	V5	-0.5

ECG
150
50

105/ **52**

73

ART 1
140 M
65

26/ **13**

22

PAW 22 17:42

PA 2
350 D
-99

11

CVP 3
350
-99

******* **100**

SP02
105
90

CPR is the only
procedure MD needs
consent **NOT** to
perform

Need consent to DNR

Hospital cancer patient
codes – but doc says:
no CPR “I just can’t
do it to her”

Dickhoff

v.

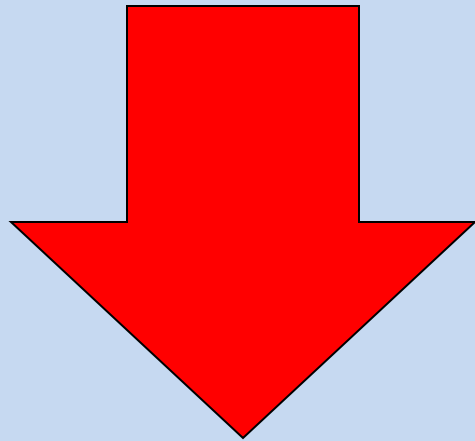
Green



DEF failure
to diagnose
cancer of
Jocelyn
Dickhoff



40% die



60% die

Negligence **increases** risk
of adverse outcome

Adverse outcome obtains

Of 60% total risk

DEF negligence
contributed only 20%

No but for causation

DEF negligence **did**
deprive PTF of 20%
chance of avoiding injury

Can recover for that lost
chance

Causation

Examples

Problem 1

Negligent delay diagnosis reduces patient's chances of avoiding injury from 40% to 10%.

Could describe as

Chance injury 60%

After negligence, chance injury raised to 90%

No but for causation

Injury already probably going to happen

Only 1/3 of 90% risk from DEF negligence

Problem 2

Bishop (Ill App 1995)

PTF expert say 10-20% chance that cancer was just stage 1 at time of negligent diagnosis

If so, PTF would have had 40% better chance survival (if diagnosis properly made) versus chances now with stage 3

No but for causation

No lost chance either

No sufficient basis to say chances better

The basis for the 40% is that stage 1 at time initial diagnosis (and that is not probable, only possible)

80-90% chance already stage II back then

Problem 3

Hemminger v. LeMay (Ill. App. 2014)

June 2000

Complain abdominal pain

Pelvic exam – large, firm

No biopsy

Diagnose 6 months later

Died April 2002

If no negligence & diagnosed in
June 2000 → 80-90% chance
survival (range)

Evidence establishes probably
stage 1 at that time

Delay decreased survival to 32%
(stage 3B)

Only 10-20% chance death

Negligence raises to 68%

48-58% of the 68% (more than half) from DEF negligence

Problem 4

Physician negligence

reduced Greg's chances of survival from 49% to 9%.

Greg died and suffered \$4 million in damages.

Under "but for" causation,
Greg can recover:

\$4 m

\$2.4 m

\$1.6 m

\$0

**Under lost chance
causation, Greg can
recover:**

\$4 m

\$2.4 m

\$1.6 m

\$0

Patient has an illness with 19% chance of recovery. But if a certain procedure is performed, patient would have 49% chance of recovery. Physician commits malpractice. Patient dies.

Can patient successfully sue for malpractice under traditional "but-for" causation?

Yes, the physician was negligent and that negligence probably caused patient's death.

Recap

med mal

Duty - owed
because in a
treatment
relationship

Duty - defined by
standard of care
established by
expert witnesses

Right way to **prove**
standard of care
depends - on DEF
geography,
specialty

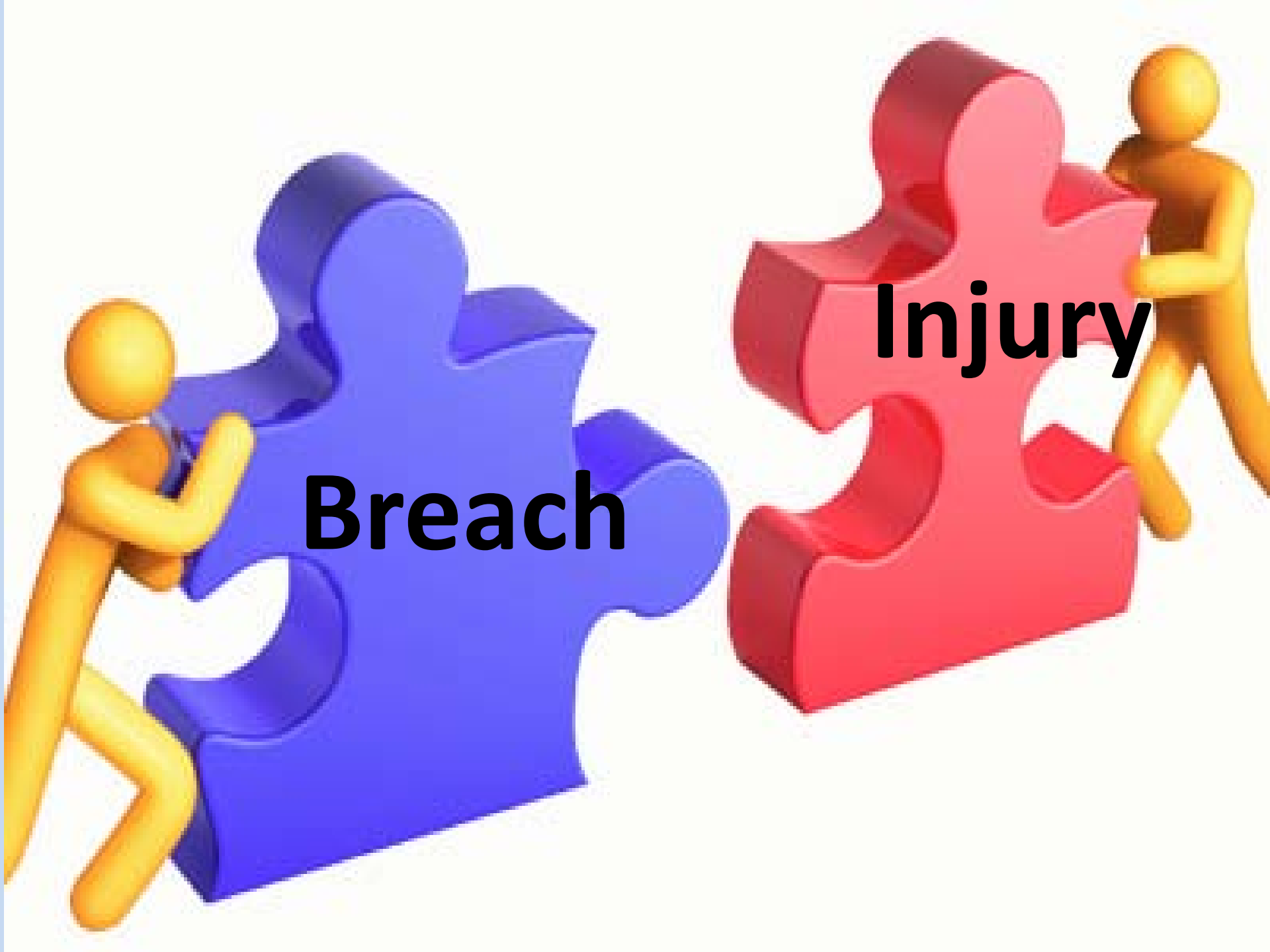
Breach – DEF

failure to conform
to applicable
standard of care

Causation – PTF

injury results

from DEF breach



Breach

Injury

But for

Always sufficient

Lost chance

Alternative sufficient
in some states

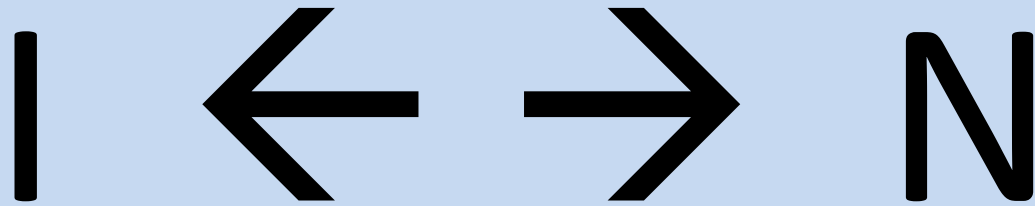
Never

Speculative

Merely possible

PTF must **always**
establish injury more
probable than not
resulted from DEF
negligence

But for



Physical
harm

Lost chance

LC ← → N

Damages

4 types of
damages

Economic

Non-economic

Punitive

Nominal

Economic

Damages

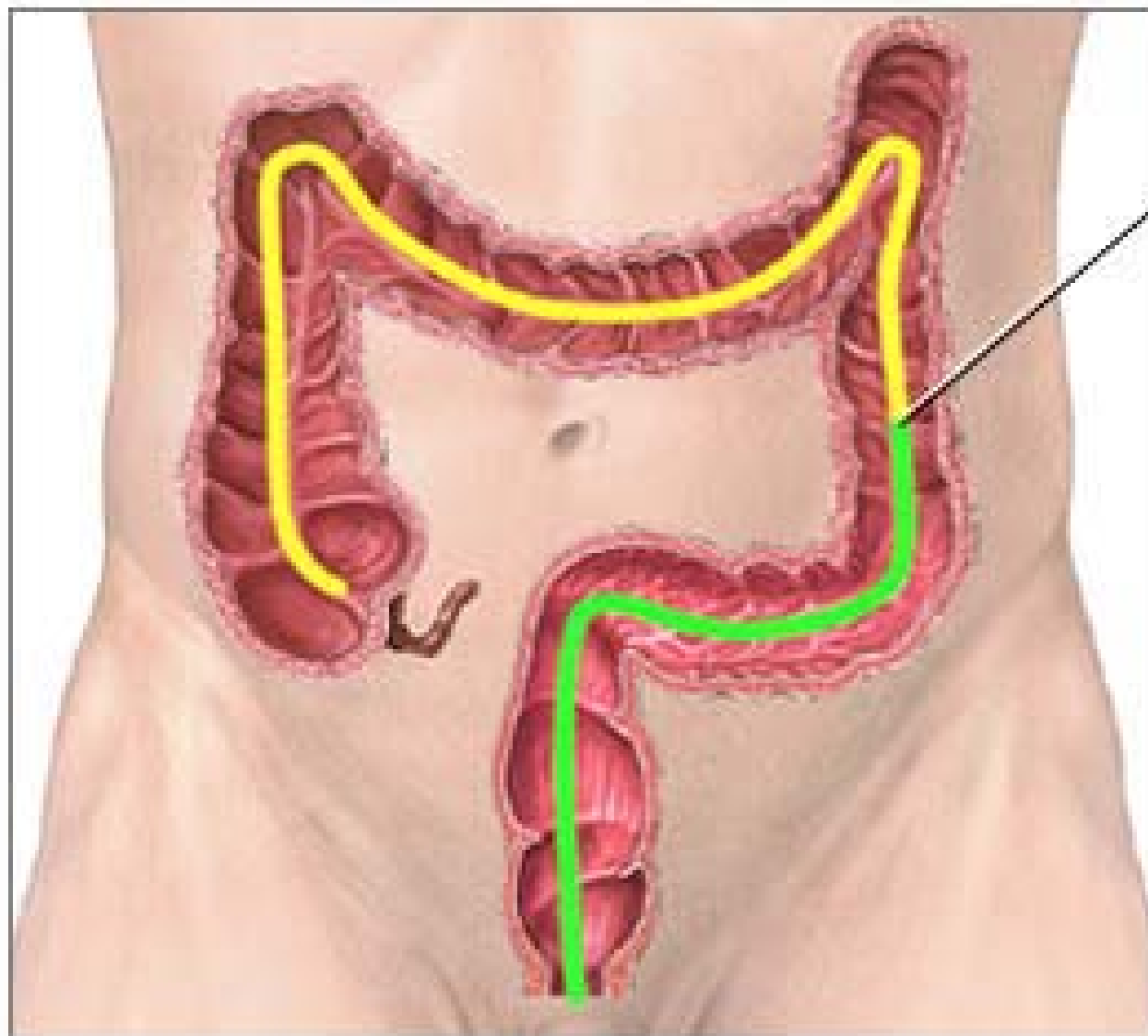
Roberts

v.

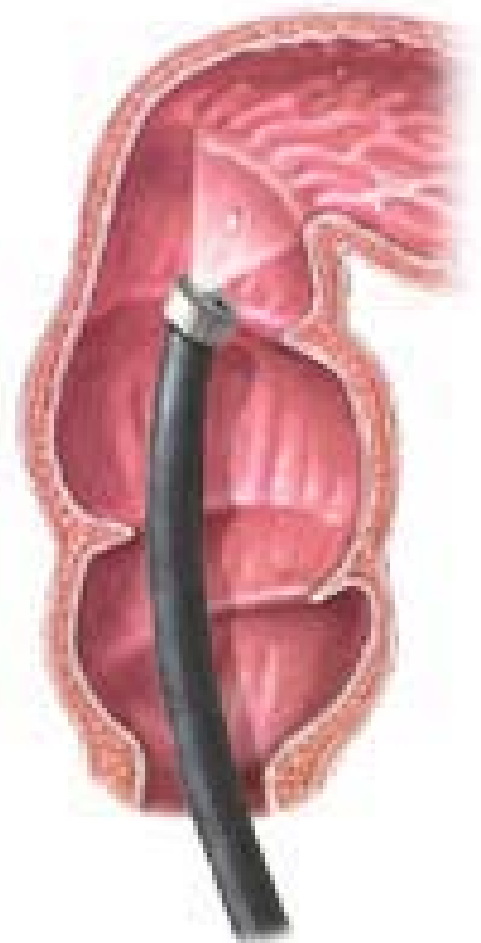
Stevens Clinic

Hosp





End of
sigmoidoscopy



Colonoscopy examines the entire length of the colon; sigmoidoscopy examines only the lower third

Jury award =
\$10,000,000



Past lost wages

Future lost wages

Past medical

Future medical

Malpractice allegation group	n (%)	Mean, US\$
Diagnosis related	100249 (28.6)	386849
Treatment related	95635 (27.2)	196960
Surgery related	84980 (24.2)	280257
Obstetrics related	22951 (6.5)	651670
Medication related	18697 (5.3)	257333
Anesthesia related	10525 (3)	419126
Monitoring related	7101 (2)	354131
Other miscellaneous	6929 (2)	176781
Equipment/product related	1872 (0.5)	128204
Intravenous and blood-products related	1080 (0.3)	294011
Behavioural health related	687 (0.1)	212494
Total	350706 (100)	313813



I'm suing my
husband's law school
for loss of
consortium!

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**Non-
economic
damages**

Pain & suffering

Loss of enjoyment
of life

**Punitive
damages**

Usually, damages =
economic
+
non-economic

Rarely, also
punitive (aka
exemplary)
damages

2008 medical liability costs

\$3.15b economic damages

\$2.40b non-economic

\$0.17b punitive

Negligence

No awareness or
consciousness required

Just a lack of care

Normally med mal

Gross negligence

No awareness or
consciousness required

Greater lack of care than
with negligence

Not even the care of a
careless person

Still not enough

Reckless disregard

Aware that conduct
probably creates risk

Consciously disregard
substantial risk

DEF realized
dangerous,
done anyway

Minn. Stat. 549.20(1)

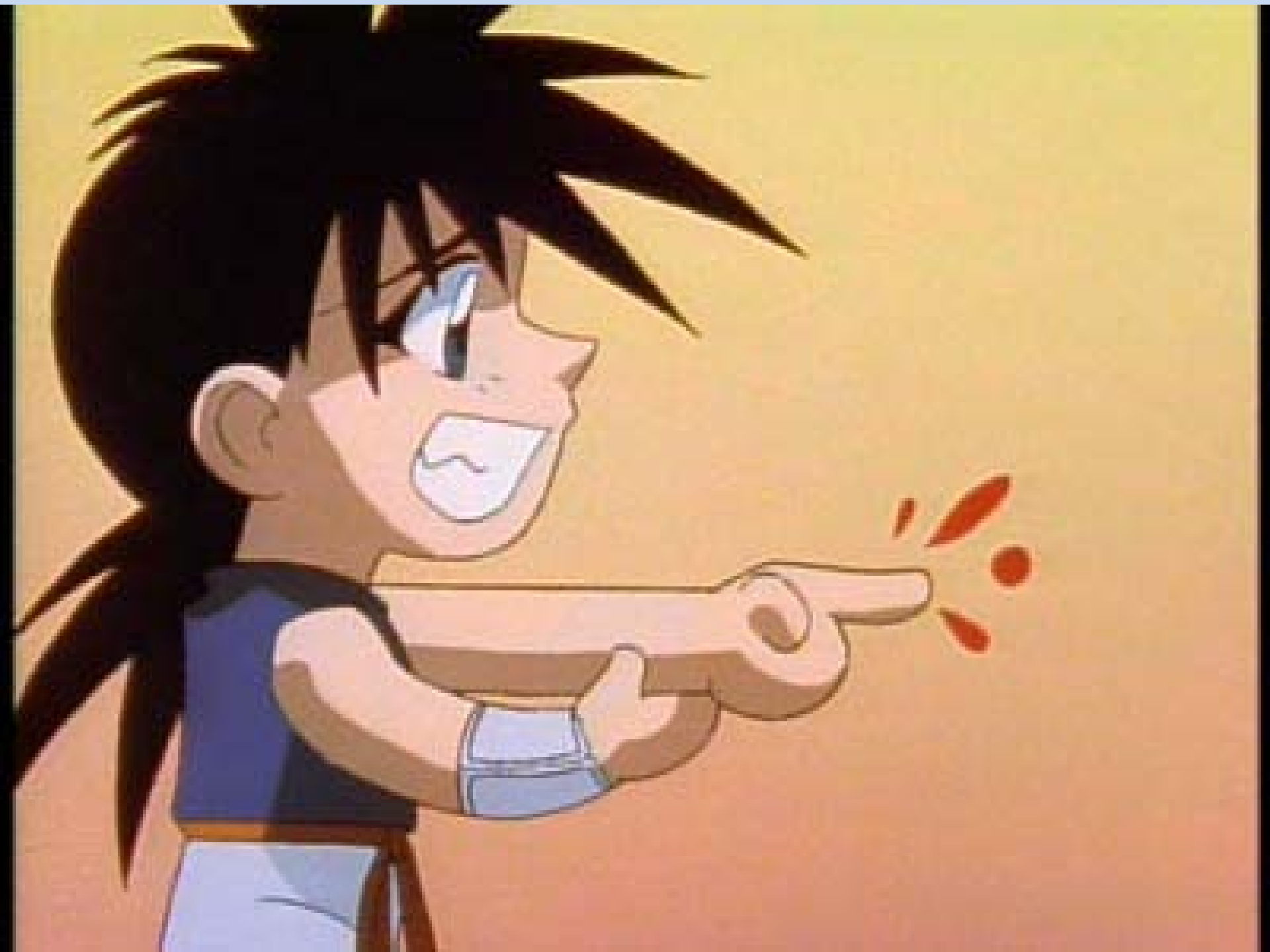
- (a) Punitive damages shall be allowed in civil actions only upon **clear and convincing evidence** that the acts of the defendant show **deliberate disregard** for the rights or safety of others.

(b) . . deliberate disregard . . .
defendant has knowledge of facts
or intentionally disregards facts
that create a **high probability** of
injury to the rights or safety of
others and . . . **deliberately**
proceeds to act in conscious or
intentional disregard of the high
degree of probability of injury

McCourt

v.

Abernathy



March 7

Prick

March 9

Kick

March 9

Abernathy

March 13

ER Clyde

March 14

ER admit

March 15

Kovaz

March 19

Dead

Willful ignorance

Aware of conduct very
probably creates risk

Not just probability but
practical certainty

Deliberately avoid knowledge

Actual knowledge

Deliberate intent

Conscious objective to
harm

Subjective hope

Negligent

Informed consent

Medical malpractice

Intentional

Abandonment

Battery

Determining
amount of
punitive
damages

Likelihood serious harm

Degree DEF aware of likelihood

Profitability DEF conduct

Duration

Attitude and conduct on discovery

Financial condition DEF

**Nominal
damages**

Like punitive
damages,
very rare

Normally

just \$1

Not worth
transaction
costs of
litigation

PTF **not** physically
injured

But **rights** were
violated

Battery – procedure
without consent

But PTF better off

Abandonment – physician
fired patient without
notice

But PTF found new
physician to address
needs

**Other
consequences
verdict or
settlement**

the DataBank

NATIONAL PRACTITIONER



U.S. Department of Health and Human Services

Health Resources and Services Administration

45 C.F.R. 60.7

“Each entity, including an insurance company, which makes a payment . . . for the benefit of a . . . health care practitioner . . . **must report** information . . . to the NPDB”

Affirmative

Defenses

DEF can avoid
liability **even if**
PTF establishes
prime facie case

Statutes of Limitation

Statutes of Repose

Assumption of Risk

Comparative Negligence

Arbitration & Settlement

Good

Samaritan

Provide **immunity**
from civil damages
for personal injuries
that result from
ordinary negligence.

No protection from
liability for “gross”
negligence - willful,
wanton, even
malicious

Applies only when

1. Outside medical setting
(accident scene, choking in restaurant, natural disaster)
2. No pre-existing duty to provide care
3. No expectation of remuneration
4. Recipient does not object

SOL

SOR

Effect &

Impact

Bright-line
deadline

Complete bar

Affirmative
defense

DEF to plead
in Answer

SOL & SOR **vary**

by state

by type of

action

Medical malpractice

1yr state A

Medical malpractice

2yr state B

Medical malpractice

2yr state A

Battery

1yr state B

SOR / SOL

Analysis

3 key inquiries

to determine if
your lawsuit is
time-barred

1. Date triggered
2. Length
3. Date lawsuit filed

SOL and SOR

differ in **trigger**

date

SOR

Date of
malpractice

Tenn. Code Ann. § 28-1-106

“no such action may be brought more than three years after the date on which the negligent act or omission **occurred . . .**”

SOR

Rationale

Tort reform

Protect medical
insurance

SOL

Date injury
discovered (or
should have been)

Tenn. Code Ann. § 29-26-116

A medical malpractice action must be brought within one year after the date upon which the claimant **discovered** the injury.

SOL

Rationale

Deterioration of evidence

Witnesses die

Memories fade

Risk of error increases

Ability to throw out trash

Avoid re-ignition of
conflicts quieted by time

Peace of mind for
potential defendants

Lawsuit barred as
soon as **either** SOR
or SOL runs,
whichever runs
first

SOL

SOR

Lawsuit can be
barred by **both**

Data points for analysis

Date injury starts SOR

Date of discovery starts SOL

Length of SOR & SOL

Date lawsuit filed

Example: 4yr SOR, 4yr SOL

“Oops. Oh, crap.”

SOL

SOR

Example: 4yr SOR, 4yr SOL



SOR



SOL

0 1 2 3 4 5 6 7 8 9

Tyler suffered a malpractice injury on Sept. 4, 2011. He discovered his injury on Oct. 26, 2013. The jurisdiction has a 2-year SOL and a 3-year SOR. What is the LATEST date on which Tyler can file a non-time-barred lawsuit?

Lawsuit is already barred.

November 4, 2013

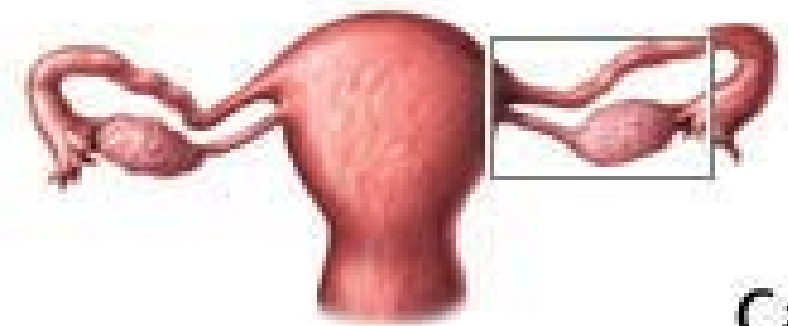
November 4, 2014

October 26, 2015

Teeters

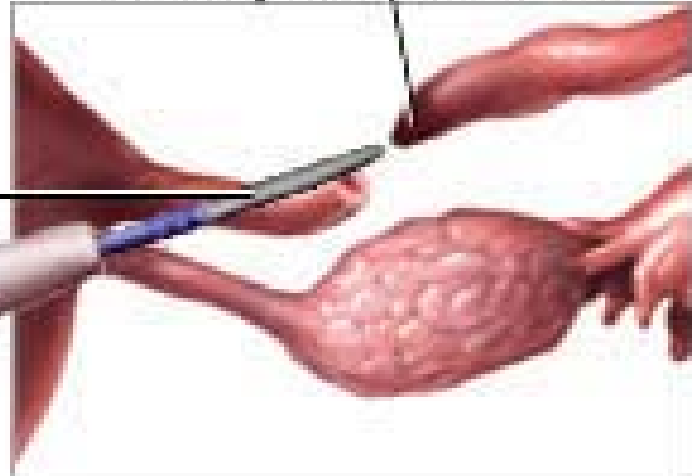
v.

Currey

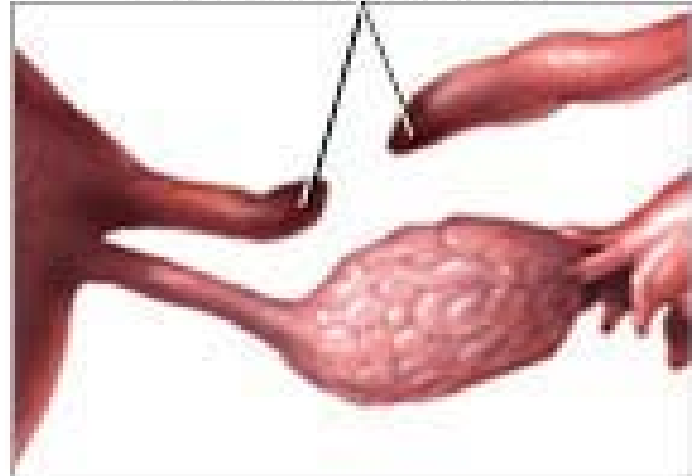


Cauterization of fallopian tubes

Cautery



Fallopian tubes sealed shut



06-05-70 Tubal ligation

12-06-72 Pregnant

03-09-73 Delivery

11-15-73 Lawsuit

1-year SOL

1-year SOL

3-year SOL

SOL & SOR

Problems

Example: Laughlin v. Forgrave

4yr SOR, 2yr SOL

1951: surgical operation
(instrument left inside)

1962: plaintiff discovers
instrument

SOL runs 1964

SOR already ran 1955

Example: Kenyon v. Hammer

2yr SOR

1980: Prenatal exam – chart as
Rh+ not Rh- blood

1981: Birth – no RhoGam

1986: Second child stillborn

Claim barred 1983

2-year SOL

7-year SOR

Steve saw his doctor on January 5, 2007. His doctor failed to diagnose cancer that a subsequent treating physician first diagnosed (at an advanced stage) on March 16, 2011. Steve filed against the first doctor on April 10, 2014.

For SOL,
discovery . . .
of what

Lump

Fine needle

MD Diagnosis



SOR is harsh

Claim barred before
patient even knew
had claim

Exception

Continuous course
of treatment

LASIK

06-29-99

NEGL

Post-op

06-30-99

07-09-99

07-19-99

11-24-99

05-00-00

05-16-02

SOR
starts

SOR is tolled until the negligent physician discontinues treatment for the injury that formed the basis for the cause of action.

Rationale: actionable treatment does not ordinarily consist of a single act or, even if it does, it is most difficult to determine the precise time of its occurrence.



**Care
Clinic**

Cunningham v. Kaufmann

Carle Clinic left
IUD in patient

Side effects

Not find / remove

Jan. 1981

Mar. 1981

Dec. 1983

June 1986

Aug. 1988

Nov. 1988

SOR starts

Assumption of Risk

Complete defense

100% bar to damages

Not about PTF **fault**

About PTF **consent**

PTF understood and
voluntarily agreed to
confront risks
(subjective standard)

1. Express

2. Implied



October 5, 2011

The New York Times

In Arizona Bull Run, Danger, Yes. Liability, No.



1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;

2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE of those persons released from liability below, and assume full responsibility for my participation; and,

4. I, for myself and on behalf of my heirs ... HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees (“Releasees”), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, except that which is the result of gross negligence and/or wanton misconduct.

I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

Enforceability of exculpatory contract depends on validity of consent

1. Risks understood & appreciated

2. Risks voluntarily and freely assumed

Public policy

limitation on

assumption of risk



Tunkl v. UCLA

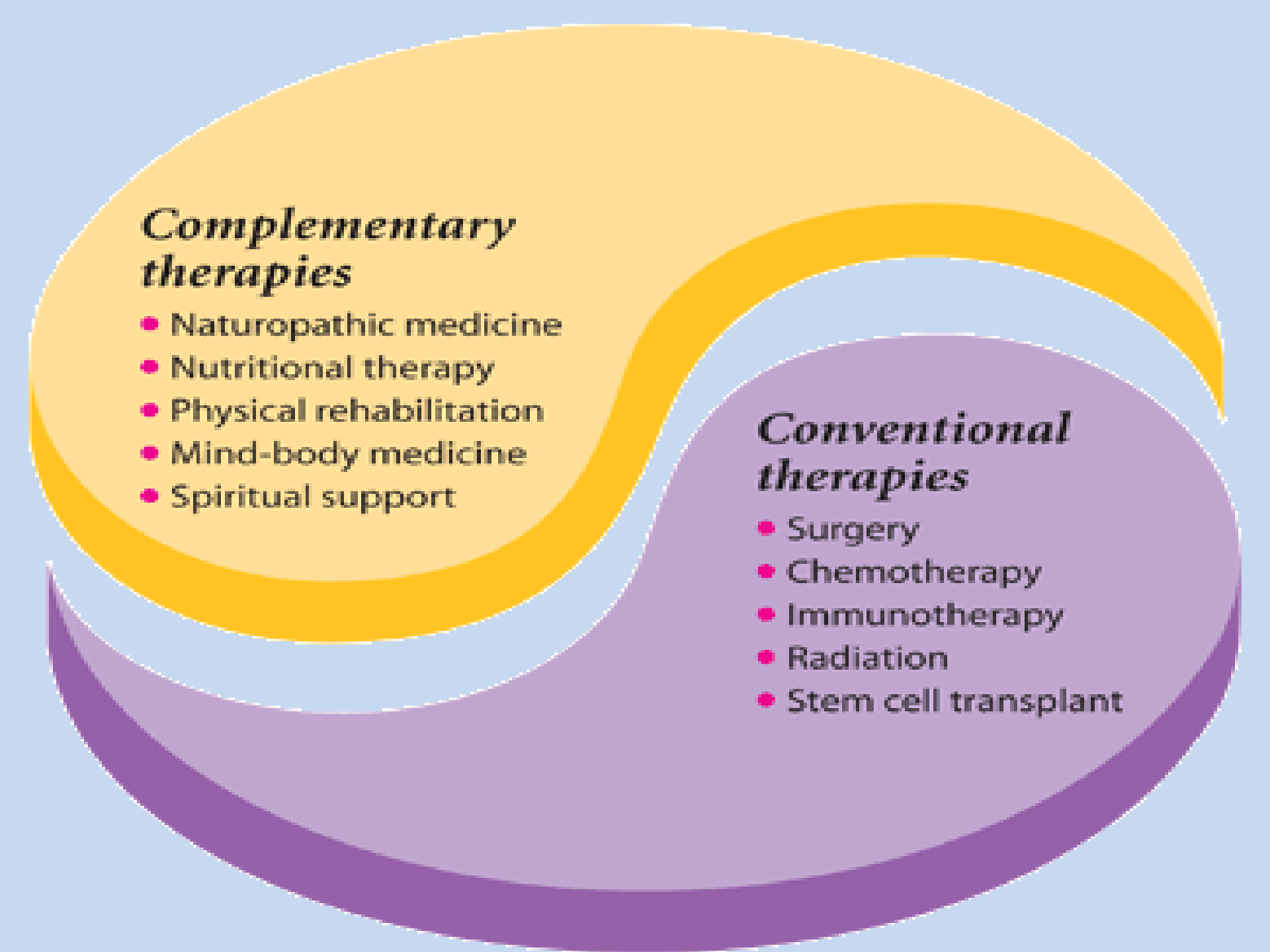
Transaction suitable for public
regulation

Service of great importance

Service a practical necessity

Party invoking exculpation has
decisive advantage bargaining
strength





Complementary therapies

- Naturopathic medicine
- Nutritional therapy
- Physical rehabilitation
- Mind-body medicine
- Spiritual support

Conventional therapies

- Surgery
- Chemotherapy
- Immunotherapy
- Radiation
- Stem cell transplant

Comparative

Negligence

Usually partial (not
complete) defense

Reduced damages

Not about PTF

consent (like AR)

About PTF **fault**

PTF not do what
reasonable person
would do (objective
standard)

Medical Chart

Patient Name			
Date			
Physical Assessment		D	ND
Temperature pm			
Pulse			
Respiration pm			
Blood Pressure pm			
Height			
Weight			
Chest	nds q visit		
Asthma Control:			ND
Cough	eeze or chest tightness (<4da		
Wake	ight (<1/wk)		
Physical	tivity limited due to asthma		
Needs	ever with exercise		
Needs	ever (<4/wk)		
School	rk absence since last visit		ND
Spirometry			
FEV 1			
FEV 1			
FEV 1	ange		
PEF	pr		
PEF	pr		
PEF %	ange		
Medications			
Current			
Prescriptions			
Monitor	ial side effects	D	ND
Referrals		D	ND
Education	rogram		
Support	Group		
Specialist			
Medical History			

**Document
that told
patient
what to do**



SMOKING WITH DIABETES

Things you don't want to miss:

Birthdays

Weddings

Holidays

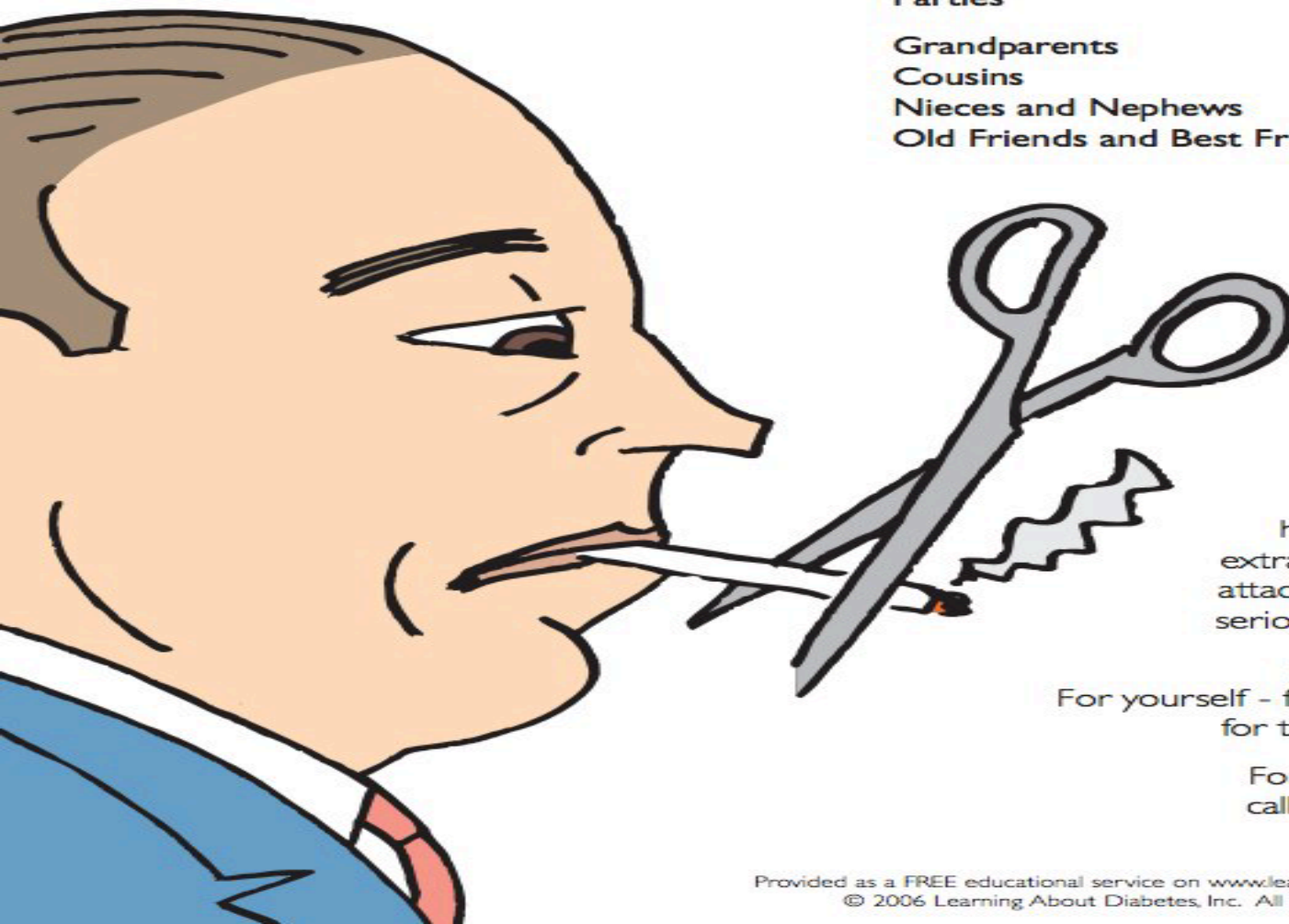
Parties

Grandparents

Cousins

Nieces and Nephews

Old Friends and Best Friends



Smokers who have diabetes are at extra-high risk for heart attack, stroke, and other serious health problems.

Quit smoking now!
For yourself - for those you love -
for those who love you.

For more information,
call 1-800-QUITNOW.

No provide contact
information (to get
rest result)

No follow-up on test

No provide

information (allergy)

Fail follow advice

(1) Was DEF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 1 was "no", do not answer any further questions on this **form**.

(2) Was the negligence of DEF a legal cause of injury to PTF?

Answer "yes" or "no." _____

If your answer to Question No. 2 was "no," do not answer any further questions on this **form**.

(3) Was PTF negligent?

Answer "yes" or "no." _____

If your answer to Question No. 3 was "no," you must now complete Question 7.

(4) Was negligence of PTF a legal cause of injury to him/her?

Answer "yes" or "no." _____

If your answer to Question No. 4 was "no," you must now complete Question 7.

(5) What . . . damages . . . caused . .

**(6) Determine percentage of fault for
PTF and DEF for damages identified**

Defendant %

Plaintiff %

TOTAL 100 %

Pure

jurisdictions

Even if PTF 99%
responsible

Still can sue DEF for 1%
contribution to injury

In some
states

PTF cannot
recover if PTF
fault $>50\%$

In some
states

AL
DC
MD
VA

PTF cannot
recover if PTF
fault > 0%

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B medicalfutility.blogspot.com