

# Legal Mechanisms for Resolving Medical Futility Disputes

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New York Law School

November 16, 2012

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## What is a futility dispute?

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Clinician

Surrogate

CMO

LSMT

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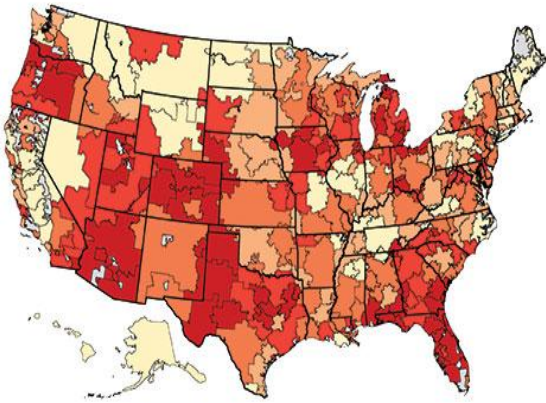
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**TRINITAS**  
Regional Medical Center

[Click here for more information](#)

## Betancourt v. Trinitas Hospital

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73yo male  
PVS  
COPD  
End-stage renal disease  
Hypertensive cardiovascular disease

Stage 4 decubitus ulcers  
Osteomyelitis  
Diabetes  
Parchment-like skin

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“The only organ that’s functioning really is his heart.”

“It all seems to be ineffective. It’s not getting us anywhere.”

“We’re allowing the man to lay in bed and really deteriorate.”

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<b>Clinician</b>	<b>Surrogate</b>
CMO	LSMT

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1. Prevention
2. Consensus
3. Transfer
4. Surrogate selection
5. Unilateral action

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# 1. Prevention

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## Prevention vs. Treatment

WHAT'S THE RIGHT BALANCE?



edited by Halley S. Faust & Paul T. Menzel

OXFORD

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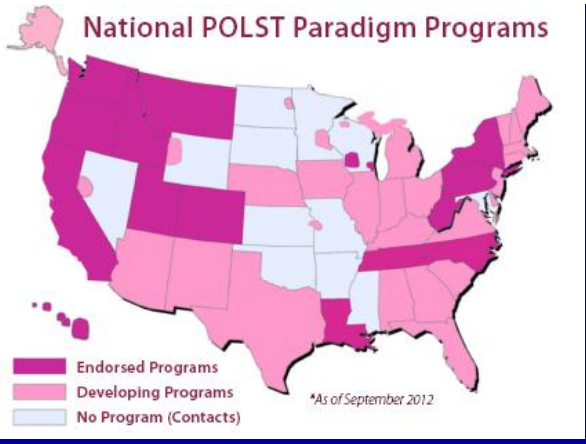
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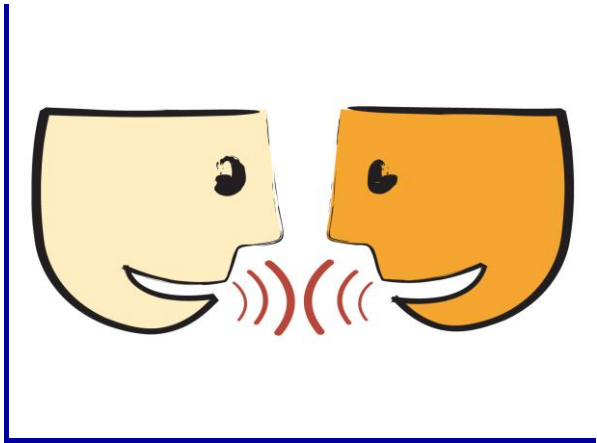
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**Palliative Care Information Act**

N.Y. Pub. Health L. 2997c  
(eff. Feb 2011)

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**A8176**  
**S7329**

Clinical Education  
in Palliative Care

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**2.**  
**Consensus**

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**5%**

18

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**3.**

# Transfer

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Rare, but  
possible

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**4.**

# Surrogate Selection

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Substituted  
judgment

Best interests

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**Agent**

PHL 2952

**Surrogate**

PHL 2994-D(4)(A)(I)

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PHL 2992



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**66%** accurate

50% = pure chance

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Moorman & Carr  
2010

**62%**

Barrio-Catelejo et al.  
2009

**63%**

Shalowitz et al.  
2006

**58%**

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**Making Medical Decisions  
for Someone Else:  
A How-To Guide**



The American Bar Association  
Commission on Law and Aging

Making Medical Decisions  
For Someone Else

*A New Hampshire Handbook*



Are you, or will you be, responsible for managing the health care of someone else? This handbook can guide you through the decisions you may have to make and provide resources for more information.

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Helga Wanglie  
(Minn. 1991)

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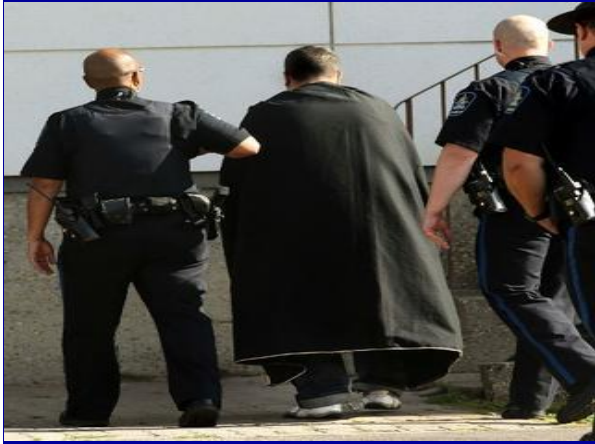
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STATE OF NEW YORK  
SUPREME COURT

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COUNTY OF MONROE

In the Matter of the Application of

STEVEN I. GOLDSTEIN, AS GENERAL  
DIRECTOR AND CHIEF EXECUTIVE  
OFFICER OF STRONG MEMORIAL HOSPITAL,

Index #08/03730

For the Appointment of a Guardian for

DOROTHY LIVADAS,  
Respondent.

An Alleged Incapacitated Person.

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Supreme Court, County of Monroe, Special Term  
April 10, 14, and 15, 2008

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*In re Rochester  
Gen. Hosp., 601  
N.Y.S.2d 375  
(1993).*

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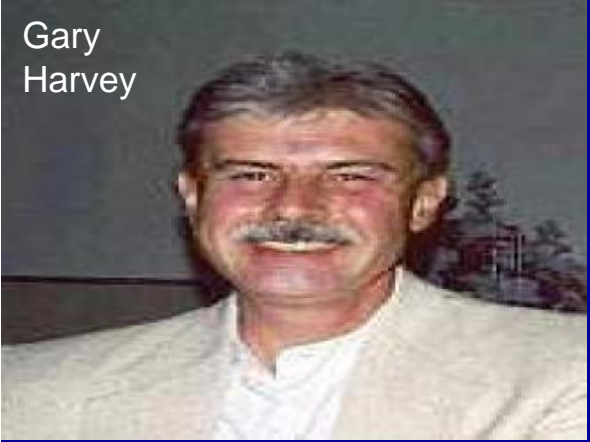
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Gary  
Harvey



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# Consent and Capacity Board

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# Limits

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**Table 3. Preferences for Goals of Care and Limited Resources**

Question and Responses <sup>a</sup>	Public, % (n=1006)	Professionals, % (n=774)
If doctors believe there is no hope of recovery, which would you prefer?		
Life-sustaining treatments should be stopped and should focus on comfort	72.8	92.6
All efforts should continue indefinitely	20.6	2.5




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**20%: “More important to prolong life.”**

*National Journal (Mar. 2011)  
Archives Surgery (Aug. 2008)*

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**TREND: DO EVERYTHING TO SAVE LIFE, OR SOMETIMES LET PATIENT DIE?**



May 1990			November 2005		
Do everything to save life	Sometimes let a patient die	It depends / DK / Ref	Do everything to save life	Sometimes let a patient die	DK / Ref
%	%	%	%	%	%
15	73	12=100	22	70	8=100

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# 5.

# Unilateral action

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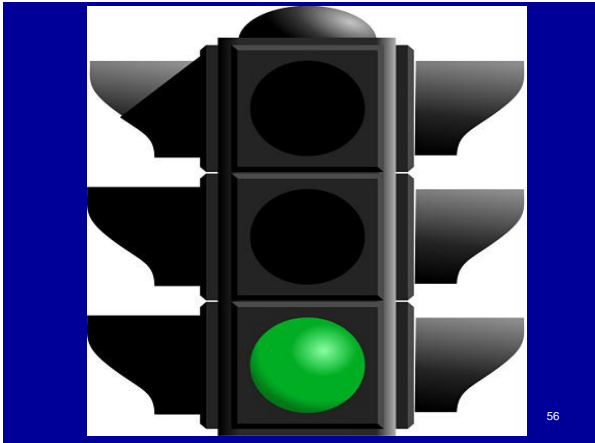
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You may stop LSMT  
for **any reason**

- with immunity
- if your HEC agrees

*Tex. H&S 166.046*

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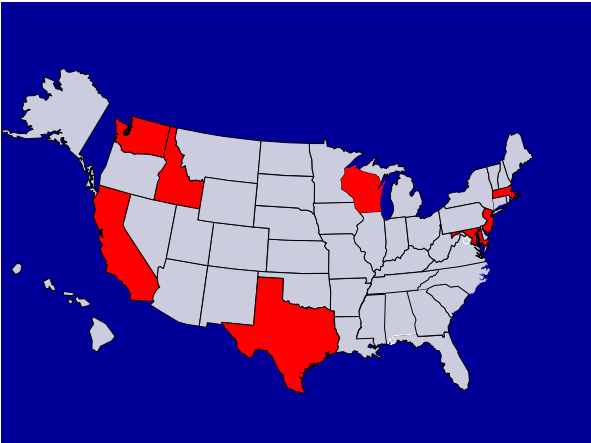
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Perceptions of “futile care” among caregivers in intensive care units

Robert Sibbald MSc, James Downar MD, Laura Hawryluck MD MSc

*CMAJ* 2007;177(10):1201-8

“Why they follow . . .  
SDMs instead of doing  
what they feel is  
appropriate . . . **lack of  
legal support.**”

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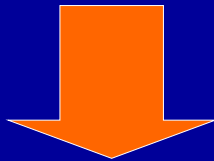
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Typical response to “bad  
law” claims



Safe harbor immunity

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# Talking Points on Key Issues

## 2013 Texas Legislative Session



TEXAS HOSPITAL ASSOCIATION

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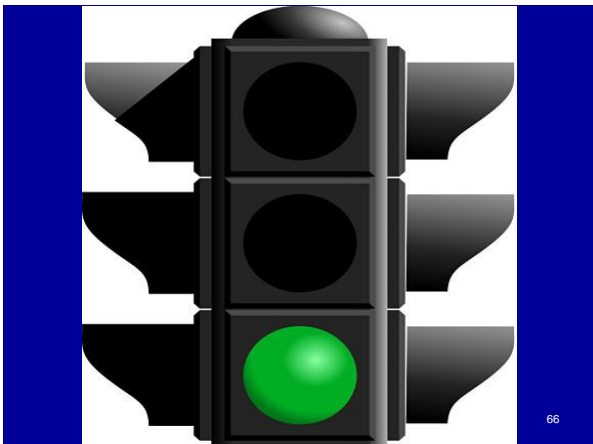
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66

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Treat  
'til  
transfer

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**Okla. H.B. 2460 (2012)**  
(died in committee)

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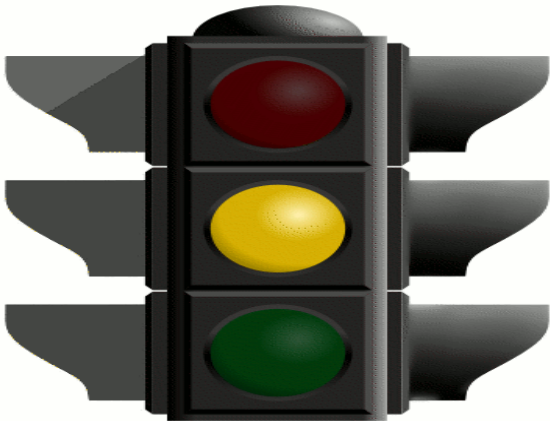
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“generally  
accepted  
health care  
standards”

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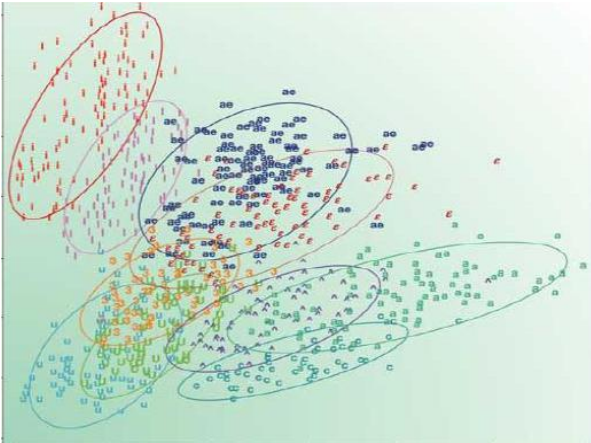
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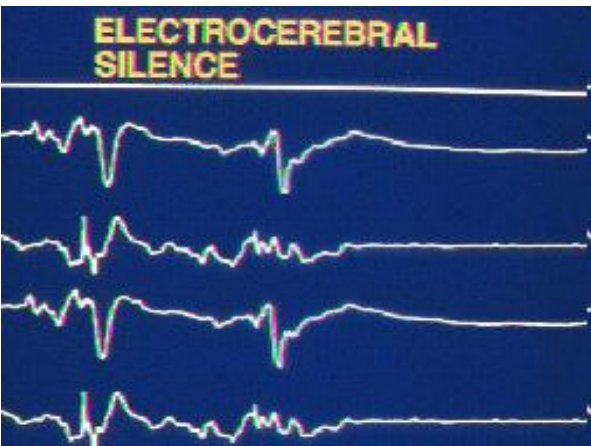
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Risk > 0

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**Liability**  
averse

**Litigation**  
averse too

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Even prevailing  
parties pay  
transaction costs

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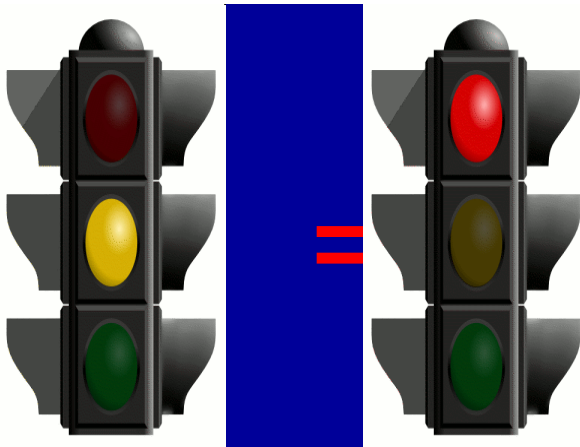
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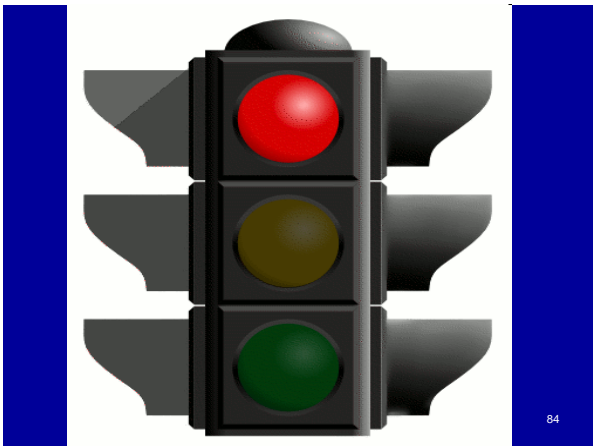
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Surrogate

2994f(3)

Agent

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86

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“If surrogate directs [LST] . . . provider that does not wish to provide . . . **shall nonetheless comply** . . . .”

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Idaho Discrimination  
in Denial of  
Life Preserving  
Treatment Act (2012)

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“Health care . .  
. **may not be** . . .  
**denied** if . . .  
directed by . . .  
surrogate”

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“Futile care”  
exception

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“death is imminent  
within hours . . .”

**OR**

“denial . . . will not  
result . . . death.”

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**S.B. 1695 (2012)**  
Passed Senate, died House

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**SB 172, HB 309 (2012)**  
CPR only, died

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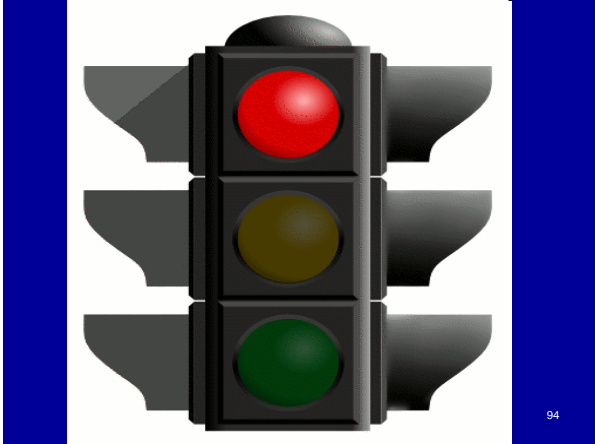
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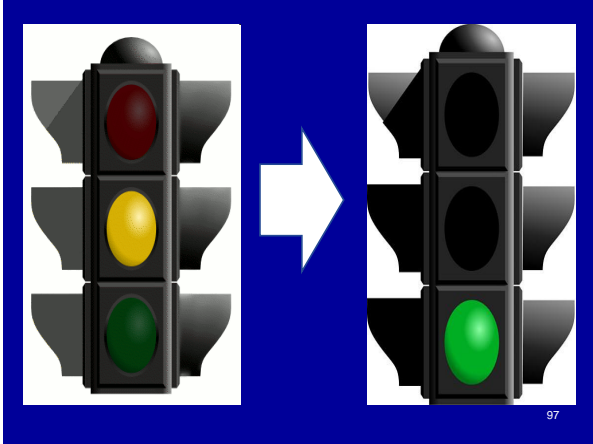
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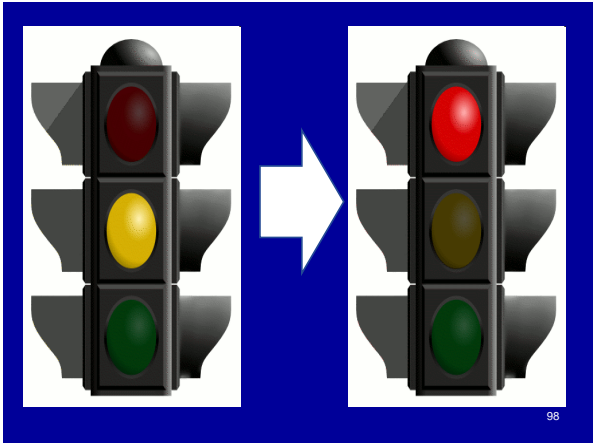
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## Thaddeus Mason Pope

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B [medicalfutility.blogspot.com](http://medicalfutility.blogspot.com)

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