

*Defenses*

**Contributory and Comparative Negligence**

# Contributory Negligence in General:

**The defendant is not liable**

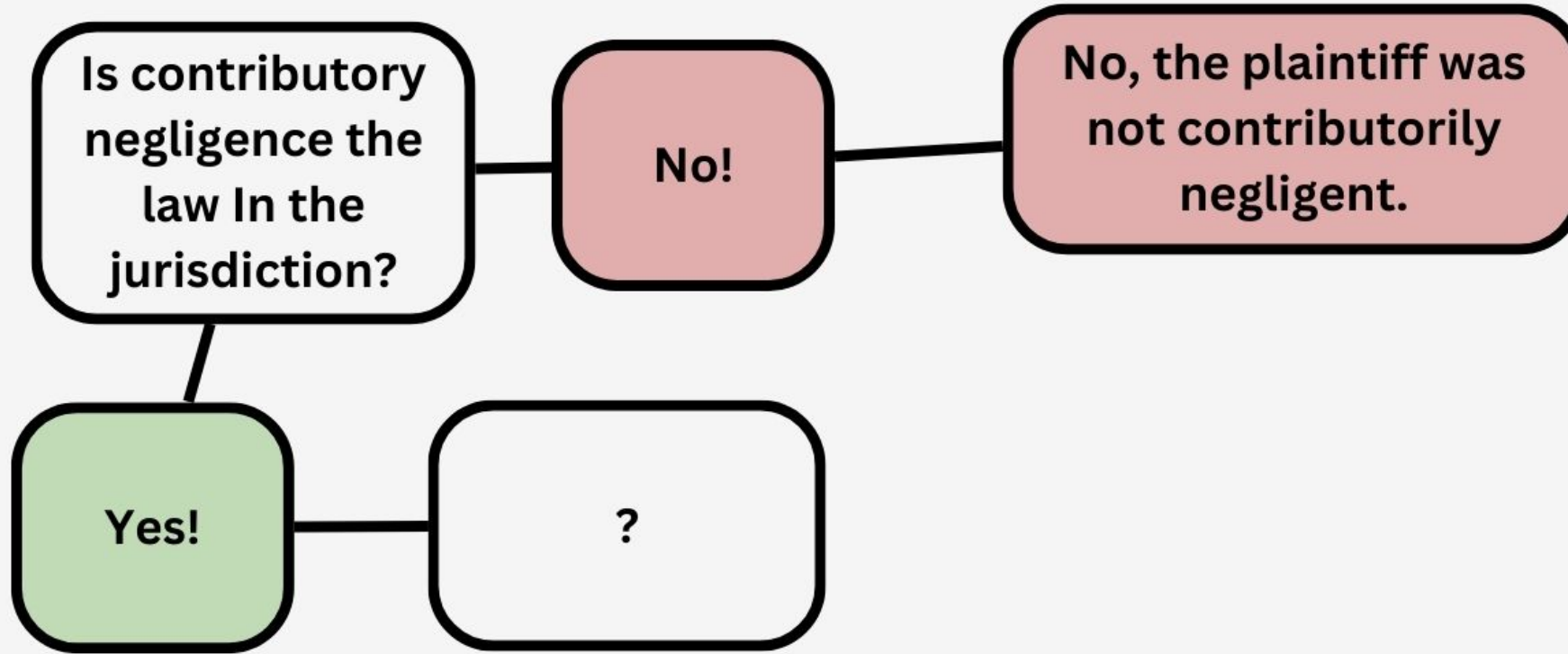
**If the plaintiff was also negligent**

- Duty,
- Breach,
- Causation, and
- Harm

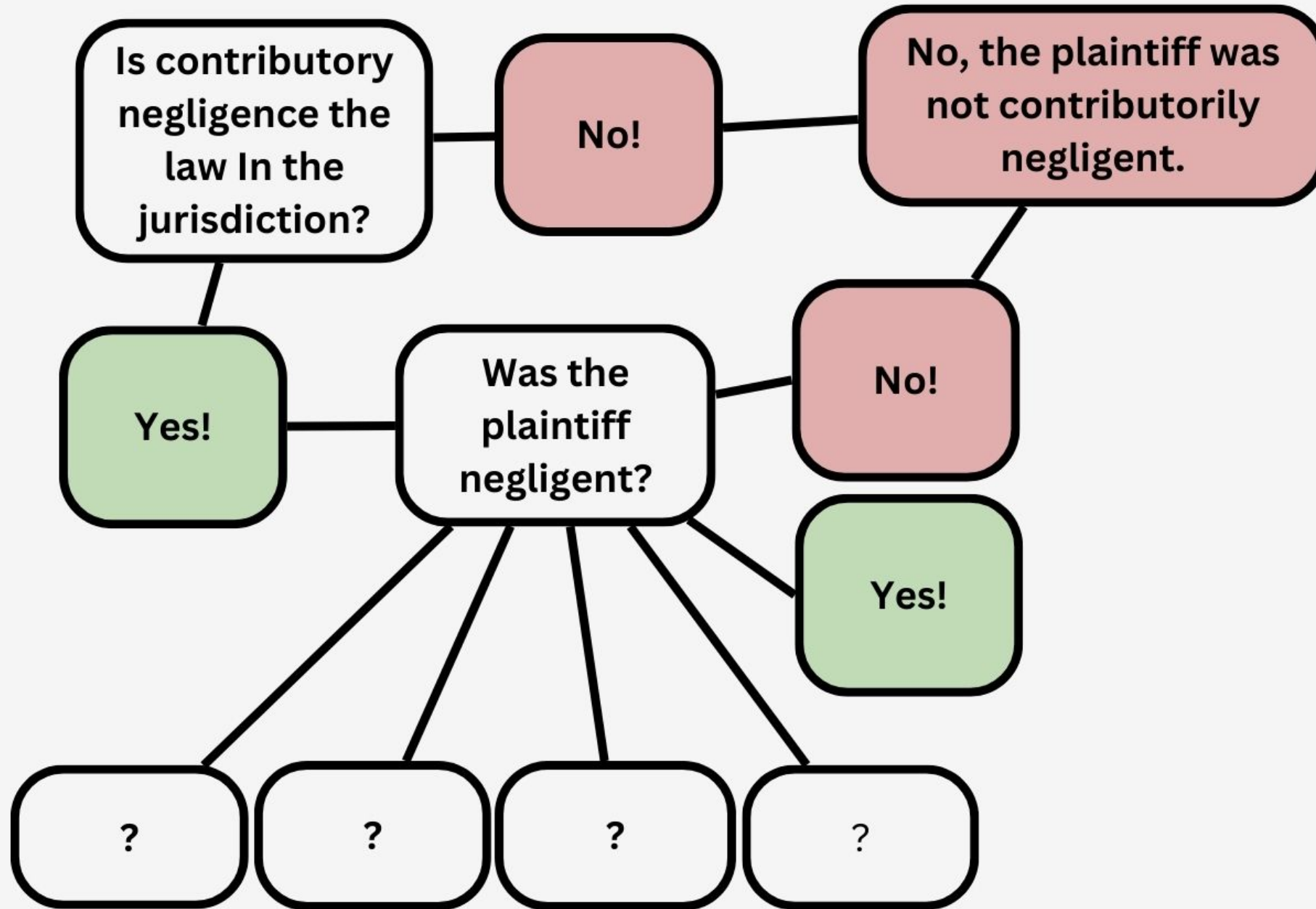
**Unless an exception applies:**

- Last clear chance,
- Recklessness or willfulness of defendant, or
- Statute

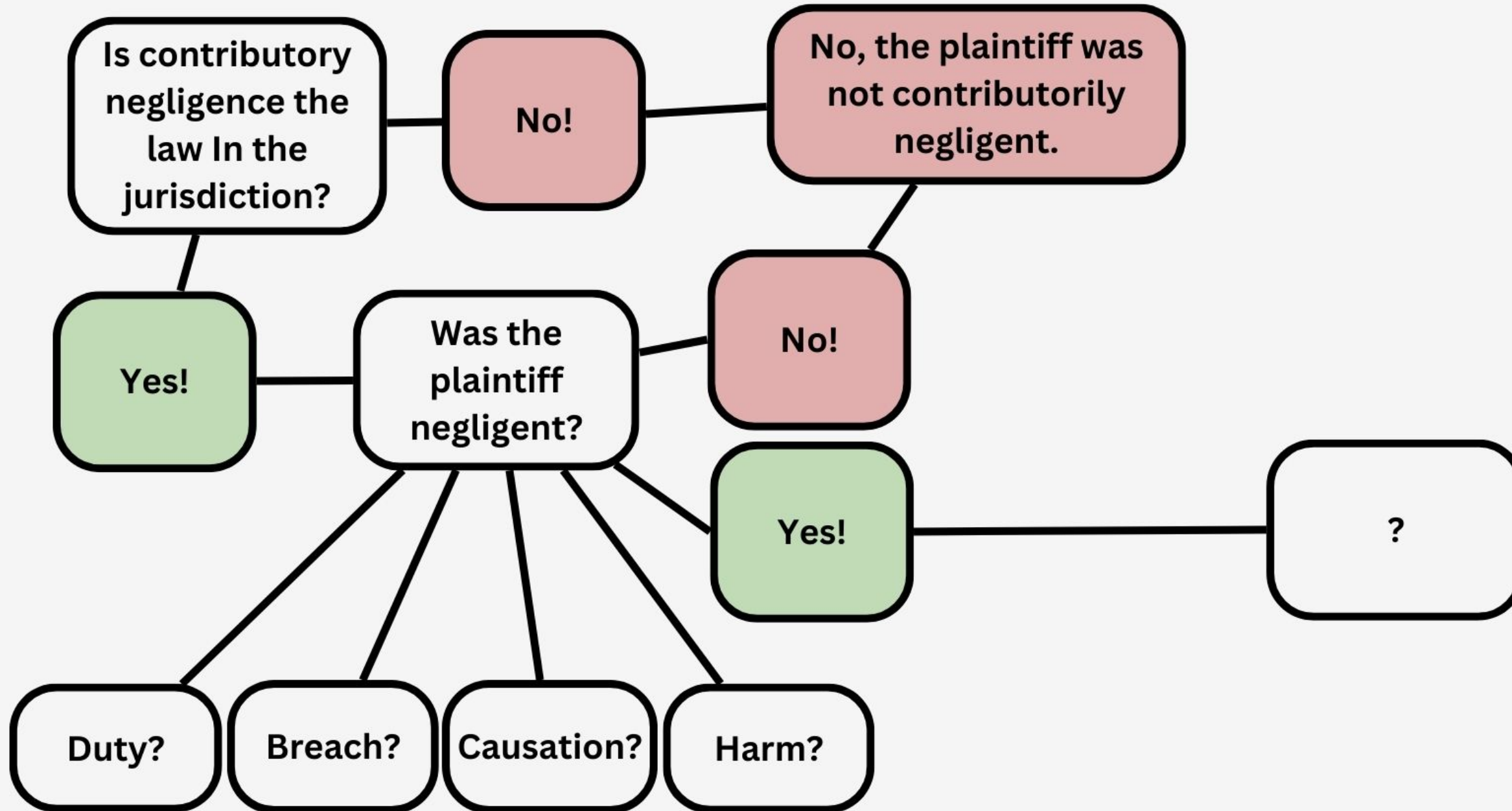
# Was the plaintiff contributorily negligent?



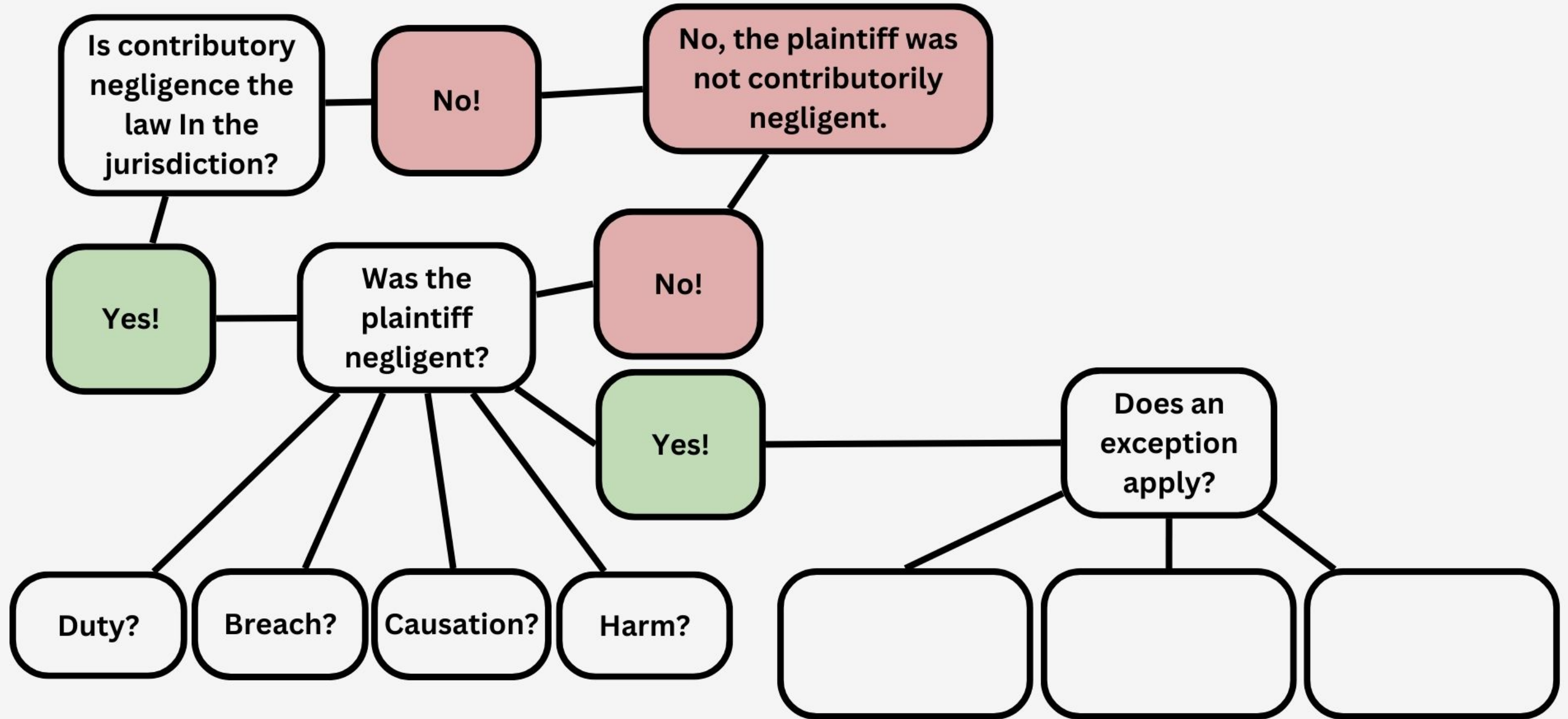
# Was the plaintiff contributorily negligent?



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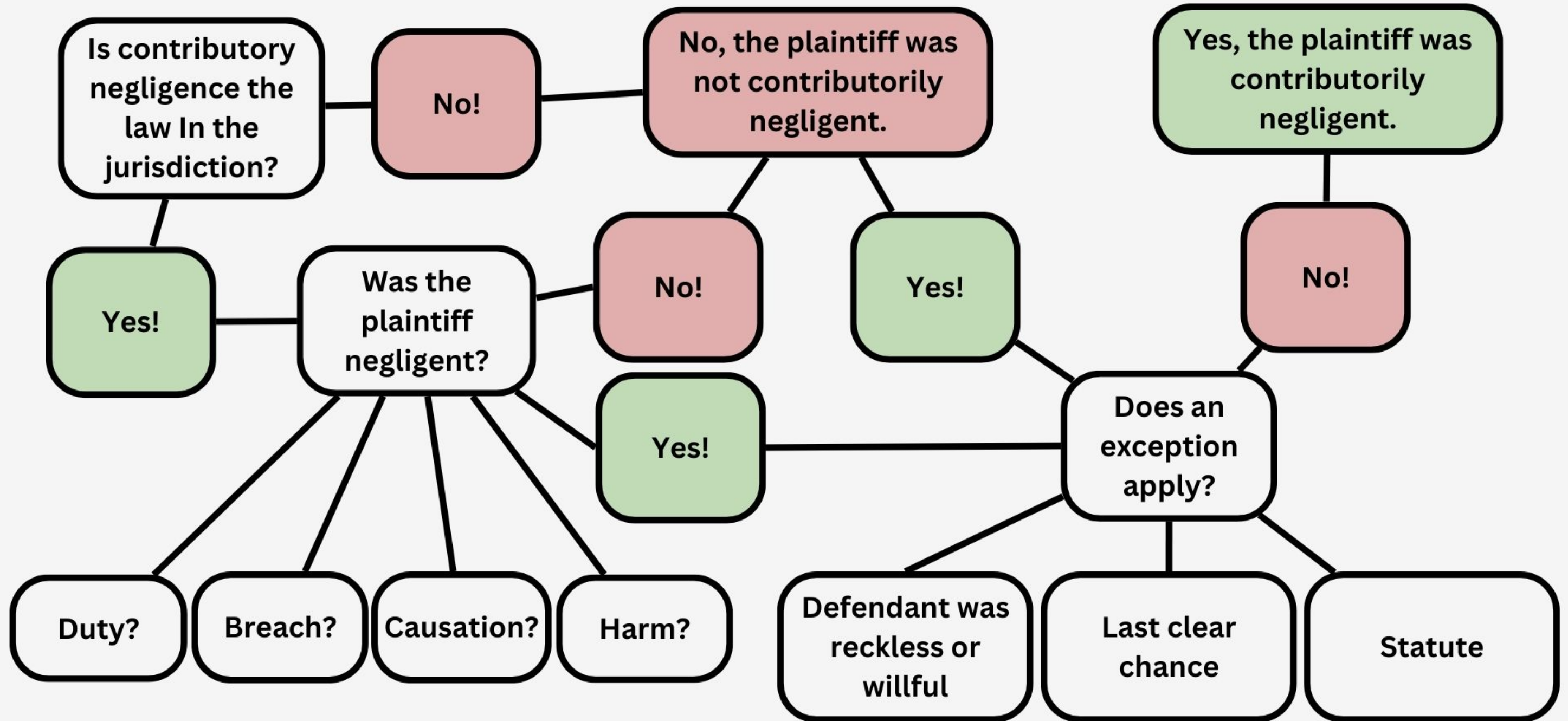


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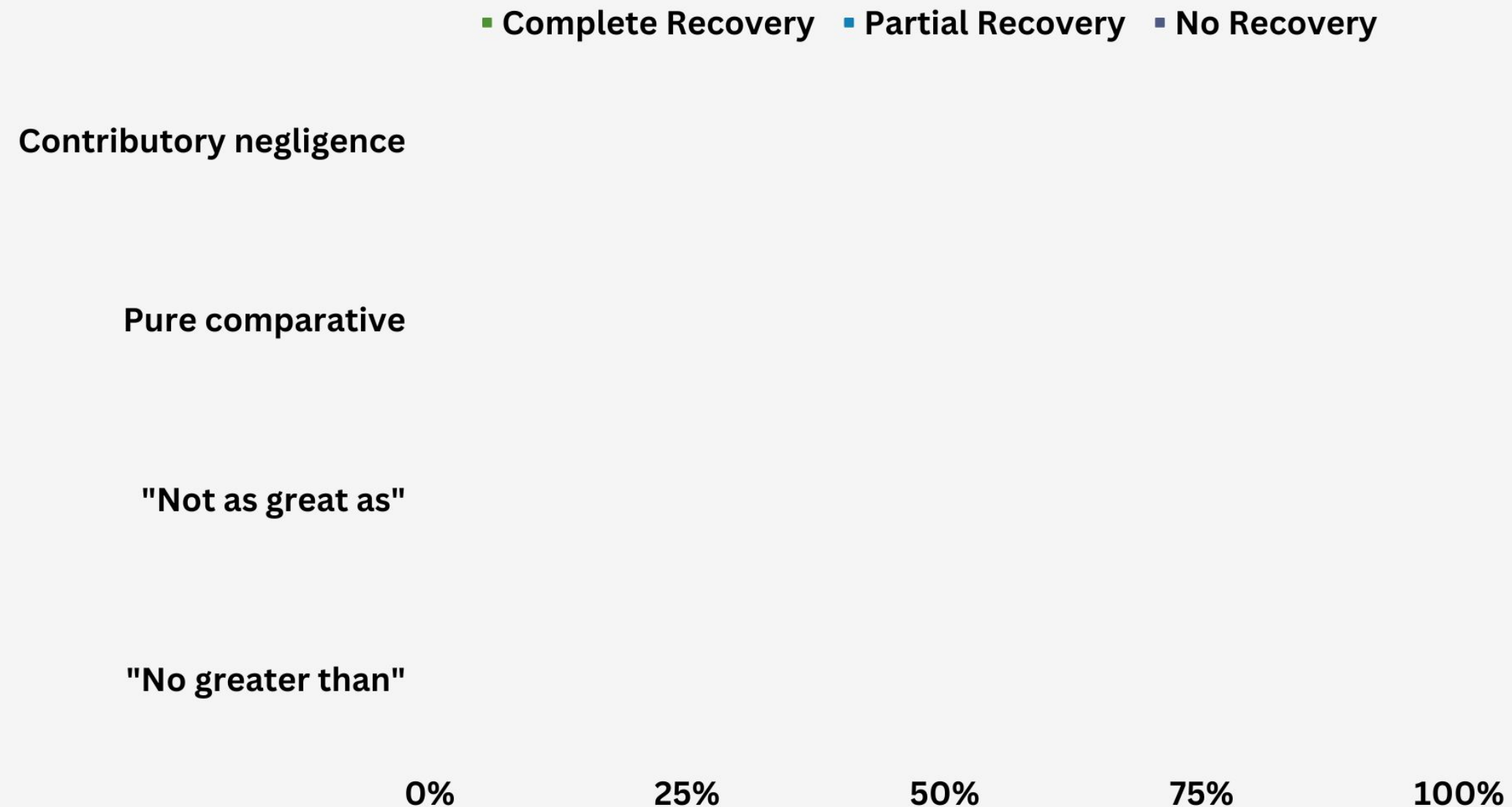
# Comparative Negligence

Three forms:

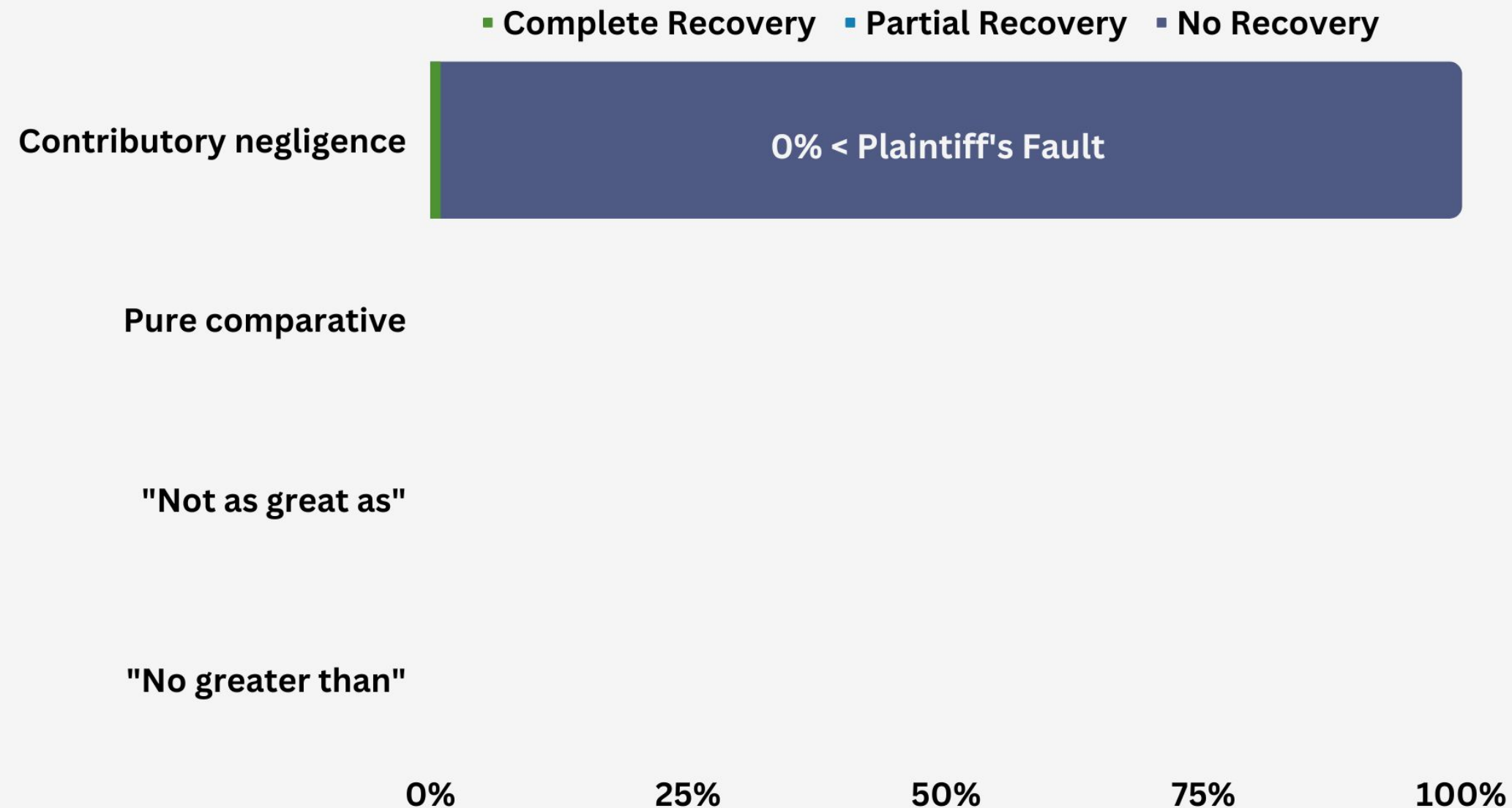
1. Pure comparative negligence
2. “Not as great as” = (Plaintiff less than 50% at fault)
3. “No greater than” = (Plaintiff 50% or less at fault)



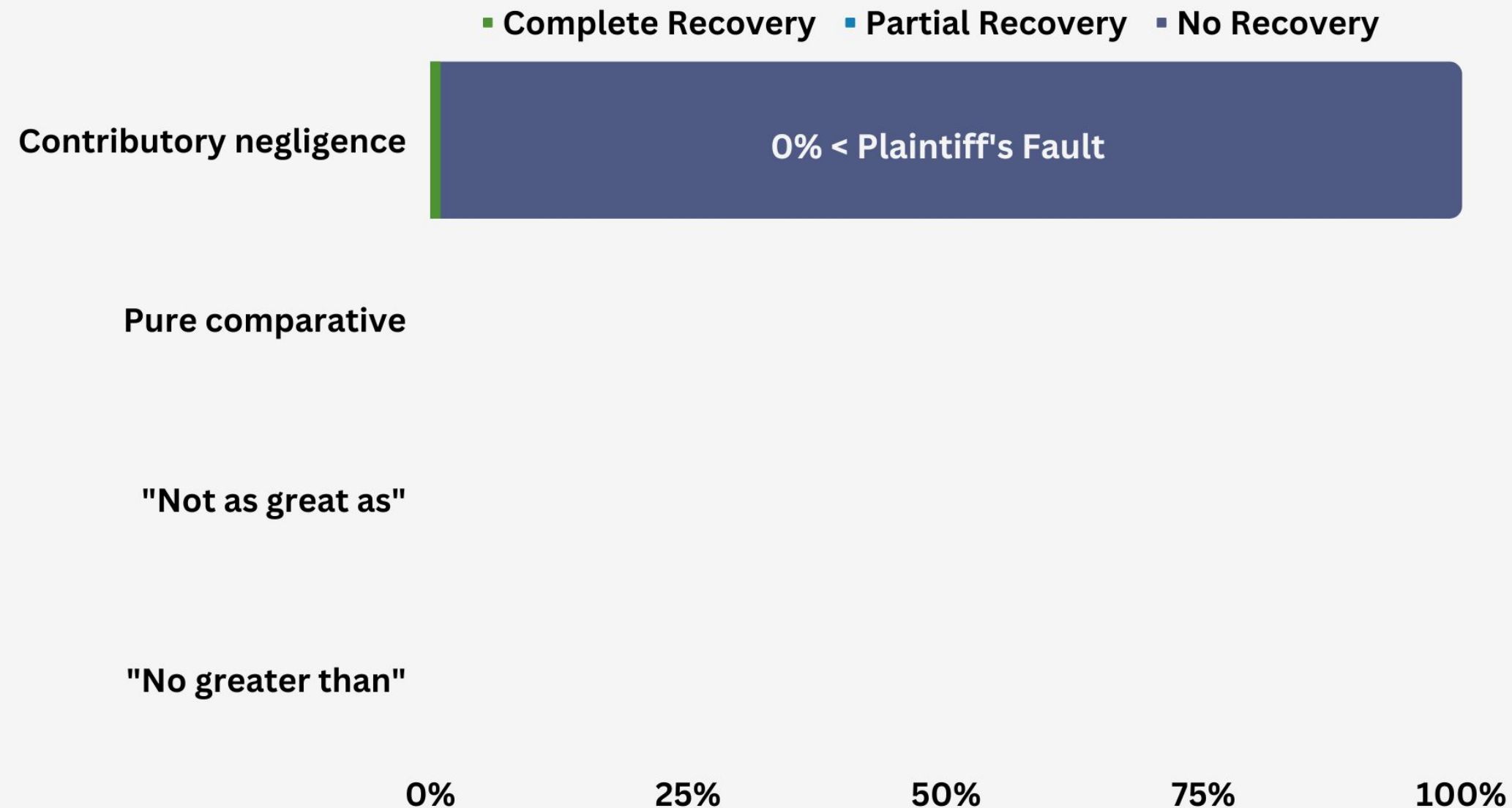
# Can the negligent plaintiff recover damages?



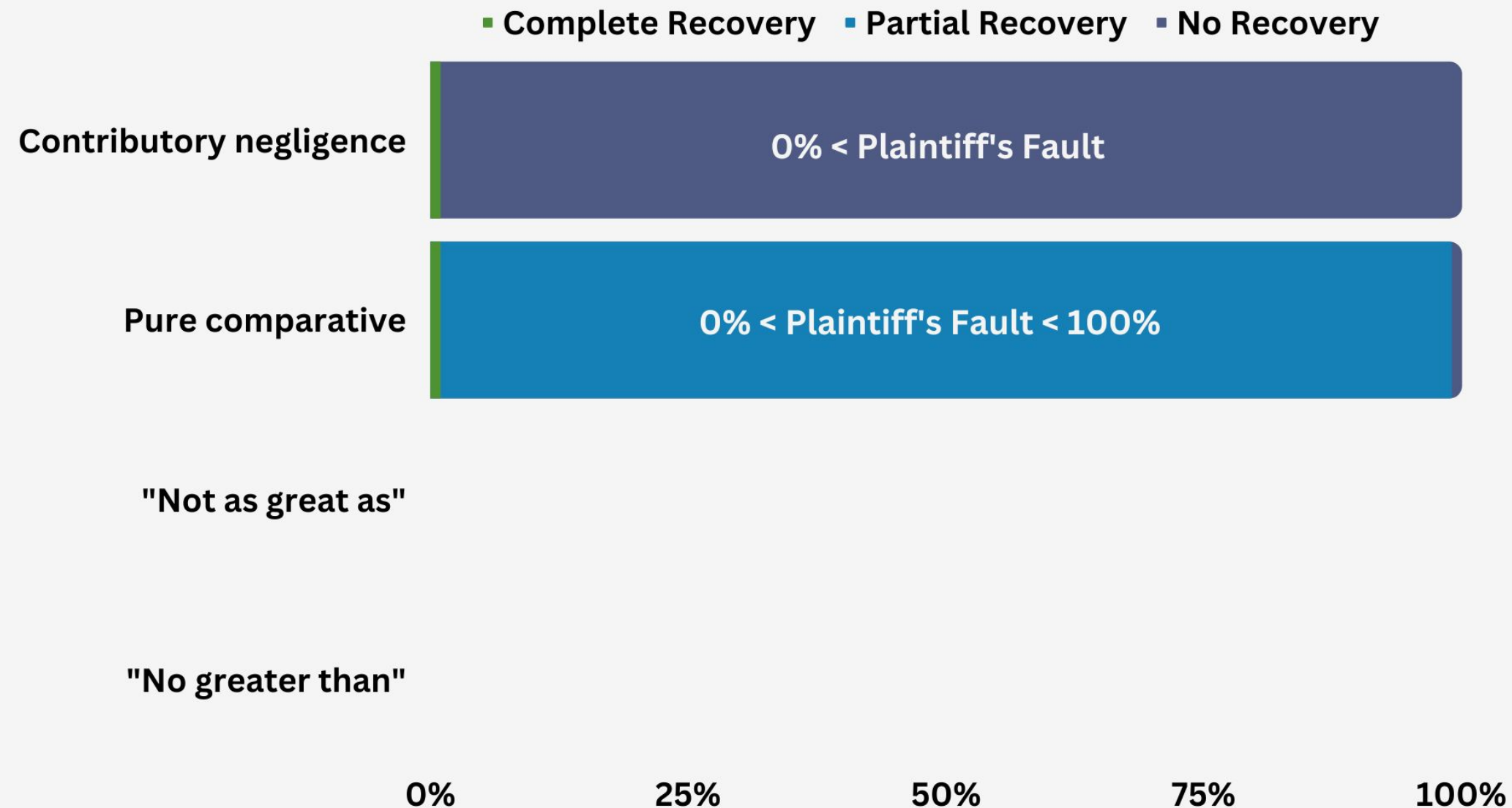
# Can the negligent plaintiff recover damages?



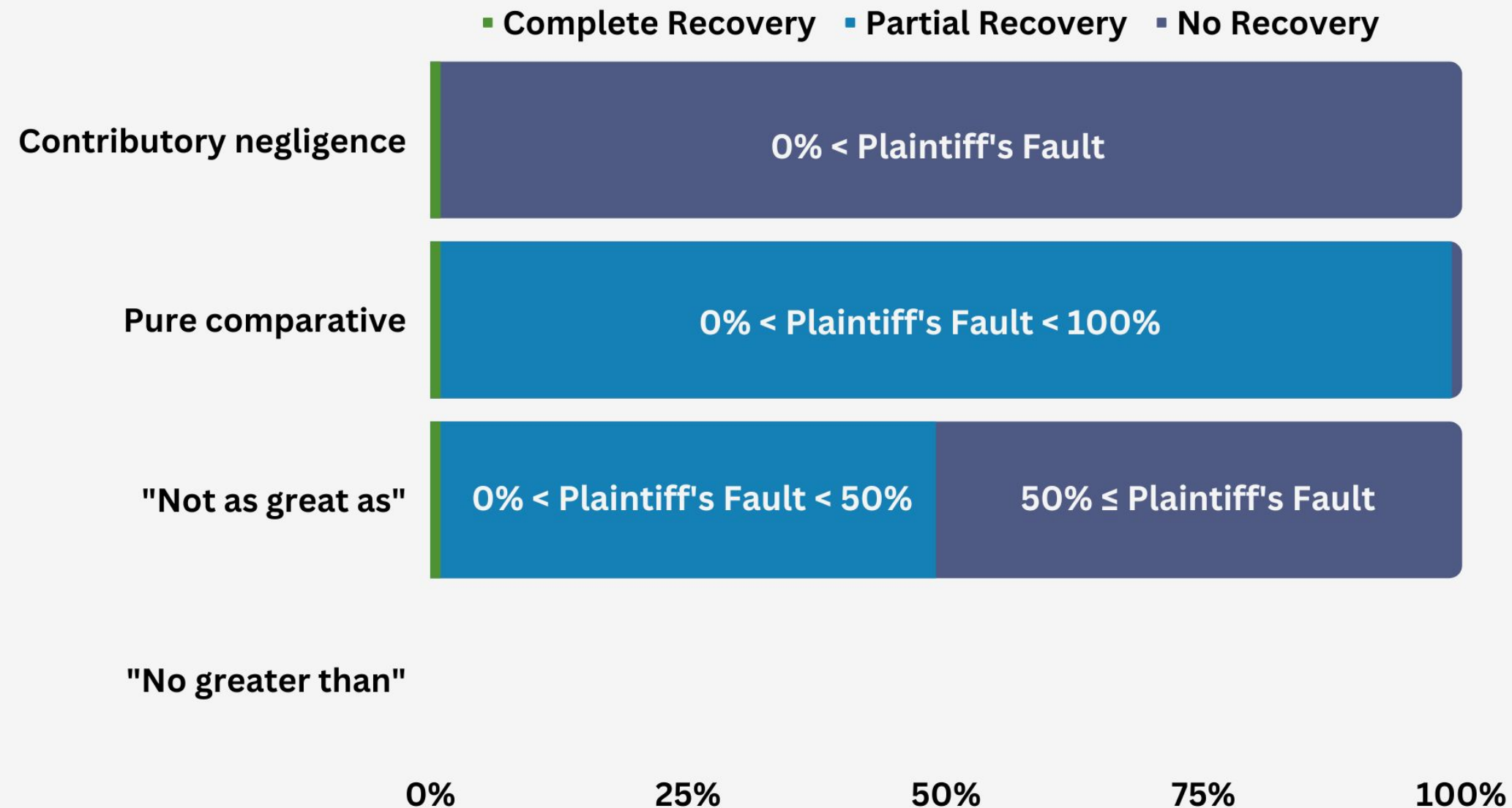
# Can the negligent plaintiff recover damages?



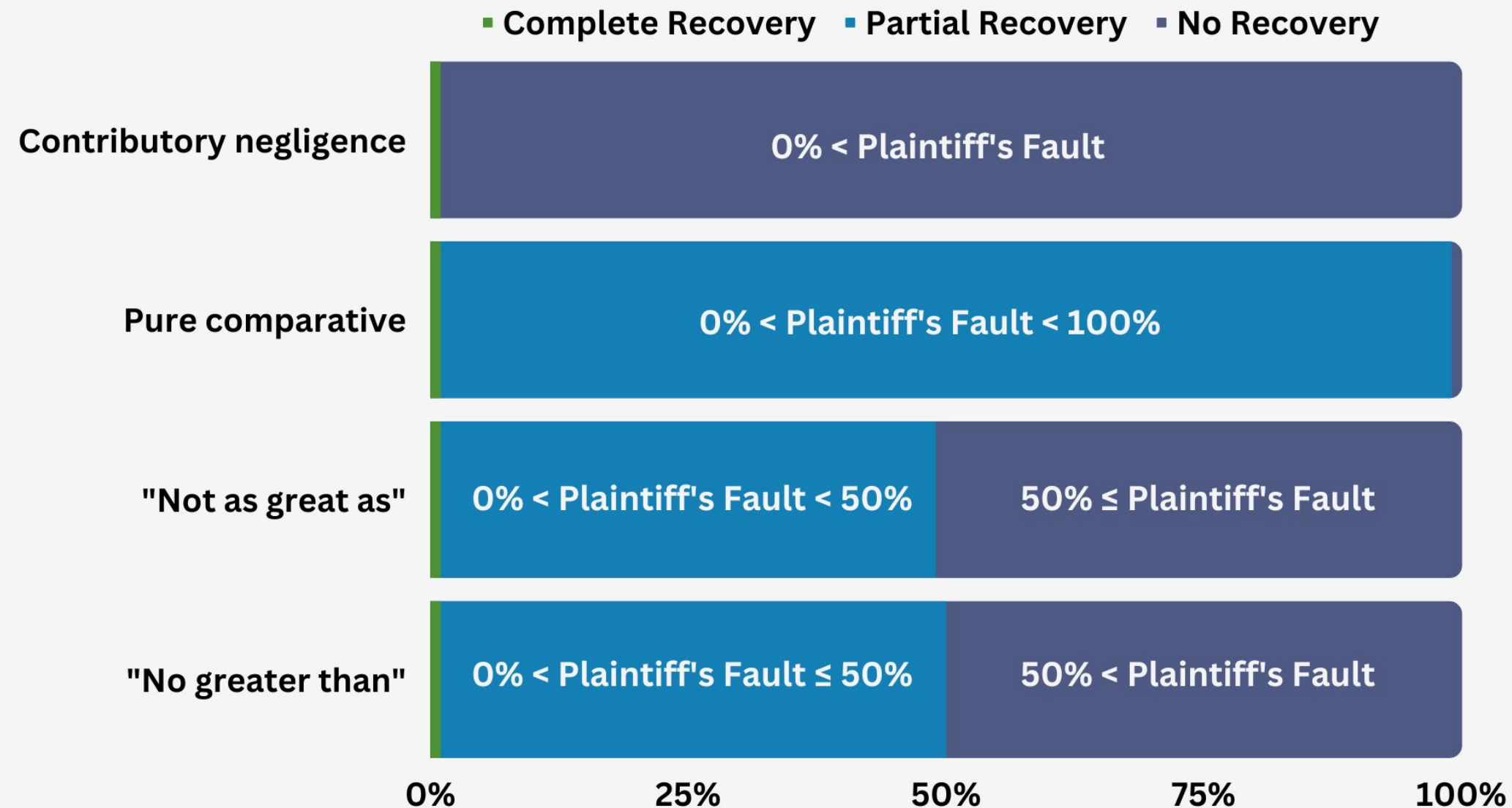
# Can the negligent plaintiff recover damages?



# Can the negligent plaintiff recover damages?



# Can the negligent plaintiff recover damages?





# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: A - 40%, B - 30%, C - 10%, D - 20%

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: A - 40%, B - 30%, C - 10%, D - 20%

**Question 1:** In a traditional common law jurisdiction, how would damages be allocated? Why?

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: A - 40%, B - 30%, C - 10%, D - 20%

**Question 2:** Assume instead that we are in a jurisdiction that has “pure” comparative negligence. How would damages be allocated?

Why?

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: A - 40%, B - 30%, C - 10%, D - 20%

**Question 3:** Assume instead that we are in a jurisdiction that has “no greater than” modified comparative negligence. How would damages be allocated? Why?

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: **A - 50%, B - 30%, C - 10%, D - 10%**

**Question 4:** Assume the comparative fault of the parties has changed. Under “no greater than” modified comparative negligence, how would damages be allocated? Why?

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: **A - 51%**, B - 30%, C - 10%, **D - 9%**

**Question 5:** Assume the comparative fault of the parties has changed. Under “no greater than” modified comparative negligence, how would damages be allocated? Why?



# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: **A - 50%**, **B - 30%**, **C - 10%**, **D - 10%**

**Question 6:** Assume the comparative fault of the parties has changed. Under “not as great as” modified comparative negligence, how would damages be allocated? Why?

# Comparative Negligence Exercise

Plaintiff A has suffered \$100,000 of damages in a car accident with B, C, and D.

A now sues B, C, and D for negligence.

Comparative fault of the parties: **A - 40%, B - 30%, C - 10%, D - 20%**

**Question 7:** Assume the comparative fault of the parties has changed back to the original numbers. Under “not as great as” modified comparative negligence, how would damages be allocated? Why?

**If multiple defendants are liable,  
how much are they each paying?**

# Doctrine of Contribution

## Traditional Common Law Approach

Two versions:

1. Joint and several liability
2. Several liability

# Apportionment based on factual cause

**Don't  
forget about  
factual cause!**



# Don't forget about factual cause!

Tortfeasors are only liable for the injuries they caused.

# Order of operations with multiple injuries and multiple liable defendants

## First step:

Separate injuries based on factual cause.

## Second step:

For injuries that multiple defendants caused, sort out liability based on the contribution rule in the jurisdiction.

# Doctrine of Contribution

## Traditional Common Law Approach

Example:

Four defendants (A, B, C, and D) with \$100k damages.

Joint and several liability jurisdiction

A, B, C, and D have plenty of money

Who pays what?

# Doctrine of Contribution

## Traditional Common Law Approach

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Four defendants (A, B, C, and D) with \$100k damages.

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# Doctrine of Contribution

## Traditional Common Law Approach

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A and B have plenty of money

C and D have no money

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# Doctrine of Contribution

## Traditional Common Law Approach

Example:

Four defendants (A, B, C, and D) with \$100k damages.

Several liability jurisdiction

A and B have plenty of money

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Who pays what?



# Doctrine of Contribution

## Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault.

B is 10% at fault.

C is 20% at fault.

D is 30% at fault.

# Doctrine of Contribution

## Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault. So A owes \$40k.

B is 10% at fault. So B owes \$10k.

C is 20% at fault. So C owes \$20k.

D is 30% at fault. So D owes \$30k.

**What about vicarious liability?**

# Vicarious liability and the doctrine of contribution

## Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault.

B is 10% at fault.

C is 20% at fault.

D is 30% at fault.

E is vicariously liable for D's negligence.

# Vicarious liability and the doctrine of contribution

## Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault. So A owes \$40k.

B is 10% at fault. So B owes \$10k.

C is 20% at fault. So C owes \$20k.

D is 30% at fault. E is vicariously liable for D's negligence. So E owes \$30k.

# Fritts v. McKinne

“The Doctor Who Blamed the Drunk Driver”

# **McCarty v. Pheasant Run, Inc.**

“Unlocked Hotel Room Door”

and

# **Wassell v. Adams**

“Opened Hotel Room Door”

# Discussion Questions

Given the facts of these cases, what would a just outcome in each case have been?

How capable is our legal system of producing just outcomes in these cases? How does it fall short? What would need to change?