

1991

Michel Lounsbury v. Neal C. Capel : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Elliot J. Williams; Elizabeth King Brennan; Snow, Christensen & Martineau; Attorneys for Defendant/Appellee.

Floyd W. Holm; Chamberlain & Higbee; Attorneys for Plaintiff/Appellant.

Recommended Citation

Brief of Appellant, *Lounsbury v. Capel*, No. 910584.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3786

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U
50
.A10
DOCKET NO

91-0584 C

MICHEL LOUNSBURY,
Plaintiff/Appellant,
vs.
NEAL C. CAPEL, M.D.,
Defendants/Appellee.

91-05284-CA

Case No. [REDACTED]
Argument Priority: 16

THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

ELLIOTT J. WILLIAMS [A3483]
ELIZABETH KING BRENNAN [A4863]
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant/Appellee
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED

JUL 30 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHEL LOUNSBURY,)	
)	BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	
vs.)	
)	
NEAL C. CAPEL, M.D.,)	Case No. 900160
)	Argument Priority: 16
Defendants/Appellee.)	

APPEAL FROM FINAL ORDER OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH

THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff/Appellant
250 South Main Street
P.O. Box 726
Cedar City, Utah 84721-0726
Telephone: (801) 586-4404

ELLIOTT J. WILLIAMS [A3483]
ELIZABETH KING BRENNAN [A4863]
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant/Appellee
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW</u>	1
<u>TEXT OF AUTHORITIES</u>	3
<u>STATEMENT OF THE CASE</u>	4
<u>STATEMENT OF FACTS</u>	6
<u>SUMMARY OF ARGUMENTS</u>	8
<u>ARGUMENT</u>	10
<u>POINT I:</u> SECTION 78-14-5 (4) (b) OF THE UTAH CODE WAS IMPROPERLY CONSTRUED AND APPLIED BY THE LOWER COURT IN DETERMINING THAT PLAINTIFF'S SPOUSE WAS AUTHORIZED TO CONSENT TO SURGERY WHEN PLAINTIFF WAS CAPABLE OF GIVING SUCH CONSENT HIMSELF AND HAD PREVIOUSLY EXPRESSED HIS REFUSAL TO CONSENT TO SURGERY	10
<u>POINT II:</u> SECTION 78-14-5 (4) (b) , AS APPLIED BY THE LOWER COURT, IS UNCONSTITUTIONAL AS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW AND AS AN IMPROPER DEPRIVATION OF THE FUNDAMENTAL RIGHT TO PRIVACY	15
<u>POINT III:</u> THE LOWER COURT IMPROPERLY CONSTRUED SECTION 78-14-5 (1) TO PRECLUDE PLAINTIFF'S CAUSE OF ACTION FOR COMMON LAW BATTERY	22
<u>POINT IV:</u> SECTION 78-14-5 (1) , AS APPLIED BY THE LOWER COURT, IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFF A REMEDY FOR COMMON LAW BATTERY, DEPRIVES PLAINTIFF OF DUE PROCESS AND DENIES PLAINTIFF OF EQUAL PROTECTION AND UNIFORM APPLICATION OF THE LAW	27

A. Open Courts	28
B. Due Process	31
C. Equal Protection and Uniform Operation of Laws	32
<u>CONCLUSION</u>	35
<u>ADDENDUM</u>	37
Section 78-14-5	
Utah Code Annotated, 1953, as amended	A 1
Anesthesia Consent	A 4
Consent to Operation, Anesthetics and Other Medical Services	A 5
Findings of Fact and Conclusions of Law and Order	A 6

TABLE OF AUTHORITIES

CASES:

<u>Bartling v. Superior Court,</u> 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984)	21
<u>Berry ex rel. Berry v. Beech Aircraft Corp.,</u> 717 P.2d 670 (Utah 1985)	28, 29, 31
<u>Brinkerhoff-Faris Trust & Savings Co. v. Hill,</u> 281 U.S. 673 (1930)	32
<u>Buttrey v. Guaranteed Securities Co.,</u> 78 Utah 39, 300 P. 1040 (1931)	32
<u>Cobbs v. Grant,</u> 8 Cal. 3d 224, 502 P.2d 1 (1972)	21, 25, 26
<u>Collins v. Itoh,</u> 503 P.2d 36 (Mont. 1972)	16
<u>Condemarin v. University Hospital,</u> 775 P.2d 348 (Utah 1989)	31, 33, 34
<u>In re Conservatorship of Torres,</u> 357 N.W.2d 332 (Minn. 1984)	16
<u>Crawford v. Wojnas,</u> 51 Wash. App. 781, 754 P.2d 1302 (1988)	17
<u>Eis v. Chestnut,</u> 96 N.M. 45, 627 P.2d 1244 (Ct. App.), <u>cert. denied</u> , 96 N.M. 116, 628 P.2d 686 (1981)	14, 23
<u>Fletcher v. Paige,</u> 124 Mont. 114, 220 P.2d 484 (1950)	10
<u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965)	15
<u>Horton v. Goldminer's Daughter,</u> 785 P.2d 1087 (Utah 1989)	29
<u>Houston Real Estate Investment Co. v. Hechler,</u> 44 Utah 64, 138 P. 1159 (1914)	10
<u>Malan v. Lewis,</u> 693 P.2d 661 (Utah 1984)	33

<u>McGrew v. Industrial Commission,</u> 96 Utah 203, 85 P.2d 608 (1938)	16
<u>Meyer v. Nebraska,</u> 262 U.S. 390 (1923)	15, 18
<u>Miller v. Kennedy,</u> 11 Wash. App. 272, 522 P.2d 852 (1974)	26
<u>Morris v. Gross,</u> 572 S.W.2d 902 (Tenn. 1978)	32
<u>Mountain Fuel Supply Co. v. Salt Lake City Corp.,</u> 752 P.2d 884 (Utah 1988)	33
<u>People v. Belous,</u> 71 Cal. 2d 954, 458 P.2d 194 (1969)	18
<u>Planned Parenthood v. Danforth,</u> 428 U.S. 52 (1976)	18
<u>In re Quinlan,</u> 70 N.J. 10, 355 A.2d 647 (1976)	20
<u>Reiser v. Lohner,</u> 641 P.2d 93 (Utah 1982)	12, 13
<u>Roe v. Wade,</u> 410 U.S. 113 (1973)	17, 18, 20
<u>Schloendorff v. Society of New York Hospitals,</u> 211 N.Y. 125, 105 N.E. 92 (1914)	17
<u>Sun Valley Waterbeds v. Herm Hughes & Son,</u> 782 P.2d 188 (Utah 1989).	29
<u>Union Pacific Railroad Co. v. Bean,</u> 167 Or. 535, 119 P.2d 575 (1941).	10
<u>Webster Reproductive Health Services,</u> 109 S.Ct. 3040 (1989)	19
<u>In re Welfare of Colyer,</u> 99 Wash. 2d 114, 660 P.2d 738 (1983)	17, 20
<u>ZeBarth v. Swedish Hospital Medical Center,</u> 81 Wash. 2d 12, 499 P.2d 1 (1972)	25

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend XIV, § 1	15, 27, 28, 32
Utah Const. art. I, § 7	15, 27
Utah Const. art. I, § 11	27, 28
Utah Const. art. I, § 24	28, 32
Utah Const. art. I, § 27	15

STATUTES:

Utah Code Ann. § 68-3-2 (1986)	10
Utah Code Ann. § 68-3-11 (1986)	24
Utah Code Ann. § 78-14-2 (1987)	30
Utah Code Ann. § 78-14-5 (1987)	11, 22, 24

OTHER AUTHORITIES:

6 Am. Jur. 2d <u>Assault and Battery</u> (1963)	23
<u>Blacks Law Dictionary</u> (5th ed. 1979)	25

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff/Appellant
250 South Main Street
P.O. Box 726
Cedar City, Utah 84721-0726
Telephone: (801) 586-4404

IN THE SUPREME COURT OF THE
STATE OF UTAH

MICHEL LOUNSBURY,)	
)	BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	
vs.)	
)	
NEAL C. CAPEL, M.D.,)	Case No. 900160
)	
Defendants/Appellees.)	

STATEMENT OF JURISDICTION

Statutory jurisdiction is conferred upon this Court because this is an appeal from the judgment of a district court over which the Court of Appeals does not have original appellate jurisdiction. Utah Code Ann. §§ 78-2-2(3)(j); 78-2a-3 (Supp. 1990).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Was Section 78-14-5(4)(b) Utah Code Annotated, 1953, as amended, improperly construed and applied by the lower court in its conclusion of law that the consent executed by Plaintiff's wife was proper when Plaintiff was capable of giving such consent himself and when Plaintiff had previously refused to execute the consent?

2. Assuming that the lower court's construction of Section 78-14-5-(4)(b) was proper, is said statute unconstitutional as applied in this case in that it denies Plaintiff due process and the right to privacy as guaranteed by Article I Sections 7 and 27 of the Utah Constitution and Amendment 14, Section 1 and fundamental penumbra rights of the United States Constitution?

3. Did the lower court improperly determine that Section 78-14-5(1) precluded Plaintiff's cause of action for common law battery?

4. Is Section 78-14-5(1) unconstitutional as applied in this case in that it denies Plaintiff a remedy for common law battery, denies Plaintiff due process and denies Plaintiff equal protection of the law as guaranteed under Article I, Sections 7, 11 and 24 of the Utah Constitution and Amendment 14, Section 1 of the United States Constitution?

Since all of the above issues prevented for review are based upon conclusions of law, the appropriate standard of review is that the lower court's conclusion should be accorded no particular deference and should be reviewed for correctness. Asay v. Watkins, 751 P.2d 1135 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Further, the order dismissing the case was essentially a directed verdict based on proffered evidence. Thus, this Court must examine that evidence in a light most favorable to Plaintiff and if there is a reasonable basis in the evidence, and in the inferences to be drawn therefrom, that

would support a judgment in favor of Plaintiff, the final order of the lower court must be reversed. Management Committee of Greystone Pines Homeowners Assn. v. Greystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982).

TEXT OF AUTHORITIES

1. U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

2. Utah Const. art. I, § 7.

No person shall be deprived of life, liberty or property, without due process of law.

3. Utah Const. art. I, § 11.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

4. Utah Const. art. I, § 24.

All laws of a general nature shall have uniform operation.

5. Utah Const. art. I, § 27.

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

6. Utah Code Ann. § 78-14-5 (1987). (Set forth verbatim in Addendum [hereinafter "A."] 1-3).

STATEMENT OF THE CASE

Plaintiff brought this action for battery against Defendant related to back surgery performed by Defendant on Plaintiff on May 15, 1987. Plaintiff alleges that such surgery was performed without his consent, that the surgery was unsuccessful and, therefore, he is entitled to general and special damages for Defendant's battery. Complaint, ¶¶ 10-12. (R.2).

Trial of the case commenced on January 29, 1990. A jury was duly empanelled and counsel for both parties delivered opening statements. Before any witnesses were called, the parties stipulated that evidence would be submitted by proffer and the Court would rule whether such evidence, as proffered and taken in a light most favorable to Plaintiff, would support a judgment in favor of Plaintiff. Findings of Fact and Conclusions of Law and Order (hereinafter "Findings" or "Conclusions" or "Order") 1-2. (R. 320-21; A. 6-7).

Based upon the proffers presented by counsel, the lower court determined, as a matter of law, that based upon Section 78-14-5 of the Utah Code, Defendant was entitled to a directed verdict. Accordingly, the Court dismissed the case, with prejudice. Order at 5. (R. 324; A. 10).

In support of its order of dismissal, the lower court reasoned that a consent executed by Plaintiff's wife, Janet Lounsbury, was proper under Section 78-14-5(4)(b) of the Utah

Code, that the consent form signed by Mrs. Lounsbury complied with Section 78-14-5(2)(e) of the Utah Code and, therefore, Defendant was authorized as a matter of law to rely upon the consent to perform the surgery. Conclusions, ¶¶ 2-4. (R. 322; A. 8).

Further, the lower court determined that Plaintiff had failed to prove that he suffered any personal injuries arising out of the surgery performed by Defendant, that a reasonable prudent person in Plaintiff's position would have consented to the health care after being fully informed and that the Plaintiff had failed to show that the unauthorized surgery was the proximate cause of the injuries he complained of in accordance with subsections (c), (f) and (g) of Section 78-14-5(1). Conclusions, ¶¶ 7-8. (R. 323; A. 9).

The lower court also specifically determined that Plaintiff could not recover for mental and emotional damages because such damages were unforeseeable to Defendant and therefore, were not proximately caused by Defendant's surgery. Finally, the lower court stated that because Plaintiff had failed to show that Defendant was negligent, and that such negligence was a proximate cause of Plaintiff's injury, he could not recover. Based on the above reasoning, the lower court determined that Plaintiff's claim for lack of informed consent failed as a matter of law. Conclusions, ¶¶ 8-10. (R. 323-24; A. 9-10).

STATEMENT OF FACTS

Plaintiff injured his lower back in an industrial accident on October 10, 1986. After attempting for several months to treat the injury by conservative means, Plaintiff's treating physician recommended surgery. Plaintiff sought a second opinion from a Dr. David Moore in St. George. Dr. Moore also suggested surgery, however, he declined to perform it. (Tr. 46-49).

Ultimately, on April 22, 1987, Plaintiff visited Defendant and was examined in his office. Plaintiff stated some personal misgivings and concerns about having surgery but, subsequent to the exam, Defendant did recommend surgery. Because of the way Defendant conducted the examination and his overall attitude, Plaintiff continued to have misgivings about the surgery and expressed them to Defendant. Nevertheless, a myelogram, which is a special x-ray of the back, was scheduled for May 14, 1987, with surgery to follow the next morning. (Tr. 49-50).

At the time Defendant's agent, Brent Little, called to schedule the myelogram, Plaintiff expressed to Little that he would decide to consent to the surgery after the results of the myelogram were fully discussed and explained to Plaintiff. Plaintiff reiterated these same intentions on the morning of May 14th, immediately prior to the myelogram being performed. (Tr. 50-51).

After the myelogram testing was completed by approximately noon of May 14, 1990, Plaintiff was admitted to Dixie Medical

Center in St. George. At that time a nurse presented Plaintiff with a consent form for the surgery contemplated by Defendant. Because Plaintiff had not discussed the results of the myelogram with Defendant, he refused to execute the consent. Similarly, later that afternoon when an anesthetist discussed anesthetic procedures with Plaintiff, Plaintiff again refused to execute the consent to anesthetic services. (Tr. 51-52).

Although even later in the afternoon of May 14th Defendant did come to the door of Plaintiff's hospital room and state that he was going to examine the myelogram results, Defendant never returned to Plaintiff's room to discuss and explain the myelogram results. (Tr. 52).

From approximately 1:00 p.m. on May 14, Plaintiff was given Demerol and other medication which made him drowsy. The following morning at 7:00 a.m., while Plaintiff was under the influence of the above medication, plus pre-operative anesthetic that was administered at approximately 6:00 a.m., a nurse presented Plaintiff's wife, Janet Lounsbury, a sheaf of forms and told her to sign them. Mrs. Lounsbury felt intimidated and assumed that Defendant had spoken to Plaintiff regarding the myelogram results. Therefore, Mrs. Lounsbury executed the papers, which included a consent form for the surgery and the anesthetic services. Immediately after Mrs. Lounsbury executed the forms, Plaintiff was transported to the surgery suite, where surgery was ultimately performed on Plaintiff. (Tr. 51-53). (R. 103, 120; A. 4-5).

Since the surgery was performed, Plaintiff's physical and mental condition have worsened. Testimony from Dr. Reed Fogg, an orthopedic surgeon, shows that the surgery was unsuccessful and that Plaintiff's physical condition was considerably worse at the time of trial than immediately prior to the surgery. Further, testimony from Dr. Daniel P. Sternberg, a psychologist, establishes that Plaintiff is now suffering from depression and related psychological problems because of the unsuccessful surgery. (Tr. 71-75).

SUMMARY OF ARGUMENTS

POINT I: Section 78-14-5(4)(b) should be liberally construed in light of subsection (3), which allows any person to refuse health care for religious or personal reasons and subsection (2)(e) which invalidates a consent obtained without legal capacity or by fraudulent omission. Further, based upon a liberal interpretation of Section 78-14-5(4), a spouse may consent to surgery only in an emergency or when the patient is otherwise unable to execute the consent form himself.

POINT II: Assuming Section 78-14-5(4)(b) was properly construed by the lower court to authorize Plaintiff's spouse to consent to surgery upon Plaintiff, said section is unconstitutional as applied because it denies to Plaintiff a basic liberty and a right to privacy to determine what is done with his own body and to be free from bodily invasion, without a legitimate state justification or interest to be protected.

POINT III: Because Plaintiff has alleged that Defendant did not obtain any consent whatsoever, this case does not involve failure to obtain informed consent, which, as a term of art, is defined as the disclosure of the facts upon which a patient can decide whether to submit to health care. Therefore, based upon the proper definition of "informed consent", Section 78-14-5(1) does not apply in this case and Plaintiff can maintain his cause of action for common law battery. Finally, even if Plaintiff must prove the elements of Section 78-14-5(1), he has proffered sufficient facts to prove a prima facie case under that provision.

POINT IV: Even assuming that the lower court properly required Plaintiff to prove the additional elements under Section 78-14-5(1) and further assuming that Plaintiff cannot make a prima facie case under such elements, then Section 78-14-5(1) is unconstitutional. First, it denies Plaintiff a remedy for common law battery without providing an adequate substitute for it and without a reasonable legitimate justification, as prohibited under the Open Courts Provision of the Utah Constitution. Second, the denial of the common law cause of action for battery deprives Plaintiff of a cause of action (property) without due process of law. Finally, because Section 78-14-5(1) treats plaintiffs in battery actions against health care providers differently from plaintiffs in other battery actions, and there is no rational justification for such distinction, the section is an unconstitutional denial of equal protection and uniform operation of laws.

ARGUMENT

POINT I

SECTION 78-14-5(4)(b) OF THE UTAH CODE WAS IMPROPERLY CONSTRUED AND APPLIED BY THE LOWER COURT IN DETERMINING THAT PLAINTIFF'S SPOUSE WAS AUTHORIZED TO CONSENT TO SURGERY WHEN PLAINTIFF WAS CAPABLE OF GIVING SUCH CONSENT HIMSELF AND HAD PREVIOUSLY EXPRESSED HIS REFUSAL TO CONSENT TO SURGERY

Based upon its construction of 78-14-5(4)(b) of the Utah Code, the lower court determined that the consent form executed by Mrs. Lounsbury was authorized, that it fulfilled the requirements of Section 78-14-5(2)(e) and that, therefore, Defendant could rely upon the consent and perform the surgery. Conclusions, ¶¶ 2-4. (R. 322; A. 8). In so ruling, the lower court has improperly construed Section 78-14-5(4)(b) in light of other provisions of the same statute.

Section 68-3-2 of the Utah Code states that statutes "and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice." Utah Code Ann. § 68-3-2 (1986). See Houston Real Estate Investment Co. v. Hechler, 44 Utah 64, 138 P. 1159, 1161 (1914).

Another general rule of statutory construction is that the statute should be considered as a whole and that every provision should be considered and given meaning if it is possible to give effect to it. Fletcher v. Paige, 124 Mont. 114, 220 P.2d 484, 486 (1950); Union Pacific Railroad Co. v. Bean, 167 Or. 535, 119 P.2d 575, 579 (1941).

In the instant case, the lower court failed to consider two provisions in its construction of of Section 78-14-5 and its ultimate determination that the consent executed by Mrs. Lounsbury was proper.

Subsection (3) provides that "[n]othing contained in this act shall be construed to prevent any person eighteen years of age or over from refusing to consent to health care for his own person upon personal or religious grounds." Utah Code Ann. § 78-14-5(3) (1987). Subsection (2)(e) provides that a written consent form, with all of the provisions required by subsection (2)(e), is a defense in an action for failure to obtain consent "unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts." Id., Subsection (2)(e).

In this case, Plaintiff specifically stated his intention on at least two occasions that he would not consent to surgery until the doctor had fully explained the results of the myelogram with him. In effect, therefore, he was refusing to consent until that discussion was completed, which it never was. Furthermore, Plaintiff expressly refused to sign consent forms on at least two separate occasions when they were presented to him. Under subsection (3), Mrs. Lounsbury could not override Plaintiff's

refusal to consent by executing the consent form under subsection (4) (b) and, therefore, such consent was invalid.

Because of Plaintiff's repeated refusal, Mrs. Lounsbury "lacked capacity to consent" as provided under subsection (2) (e). Furthermore, since Defendant never explained the results of the myelogram to either Plaintiff or his wife, it may amount to a "fraudulent omission to state material facts", thereby voiding any consent form executed by Mrs. Lounsbury.

Even assuming subsections (2) (e) and (3) do not nullify the consent form executed by Mrs. Lounsbury, subsection (4) (b) should be liberally construed to apply only when Plaintiff was incapable of giving the consent himself. In other words, it must first be determined whether Plaintiff can give consent under subsection (4) (e) as a "patient eighteen years of age or over" before resorting to obtain consent from his spouse under subsection (4) (b). This court seems to apply such a construction in Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

In Reiser, a child and her parents brought a malpractice action for damages related to the obstetrical care of Mrs. Reiser and the delivery of the child. Plaintiffs claimed, inter alia, that the consent for an amniocentesis, which apparently set off the unfortunate chain of events in the case, should have been obtained from both parents, not just Mrs. Reiser. The lower court determined that consent from only the mother was appropriate and this court affirmed, citing Section 78-14-5(4) (f)

for the proposition that "where a married woman is in full possession of her faculties, she alone has the power to submit to surgical procedures upon herself." Id. at 99. This court also stated:

It is the settled general rule that in the absence of an emergency or unanticipated conditions, a physician must first obtain the consent of the patient before treating or operating on him. The physician must inform the patient of all substantial and significant risks which might occur; yet he need not advise the patient of every conceivable risk.

Id. at 98 (emphasis added) (footnote omitted).

The sense of Reiser is, then, that the health care provider must first go to the patient to obtain consent for a surgical procedure. If there is an emergency or other unanticipated condition making the patient incapable of giving his consent, then, and only then, should the health care provider resort to obtaining consent from other persons as provided under subsection (4) (b). Indeed, the consent form itself signed by Mrs. Lounsbury apparently recognized this rule. It provides that the signature of a representative is "[t]o be used only if the patient is a minor or unable to sign." (R. 120; A. 5).

Defendant will likely contend that the requirements of Reiser have been met because, at the time Mrs. Lounsbury signed the consent form, Plaintiff was unconscious from preoperative medication. Such a contention is improper, however, in the context of the elective surgery that was to be performed upon Plaintiff.

In Eis v. Chestnut, 96 N.M. 45, 627 P.2d 1244 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981), plaintiff brought an action against defendant for medical malpractice and battery, claiming that defendant performed a knee operation on the plaintiff without plaintiff's consent. Defendant had obtained consent for the surgery from plaintiff's daughter on the day before the surgery, apparently, because at the time, plaintiff was confused. The lower court granted summary judgment for the defendant doctor, but the New Mexico Court of Appeals reversed, holding that there was a genuine issue of material fact as to whether proper consent could have been obtained from the plaintiff. The court stated that there was no evidence that the surgery was performed in an emergency or that plaintiff's confusion lasted for such a long period that she could not have consented at some other time, while she was not disoriented. Id., 627 P.2d at 1247.

In the instant case, although there is no dispute that Plaintiff was unable to sign the consent form at 7:00 a.m. on the morning of surgery, this was elective surgery, there was no emergency and there is certainly evidence that there were other times at which consent could have been obtained, including two occasions on the day prior to surgery. Therefore, if subsection (4)(b) is construed under the Reiser criteria, then the consent form executed by Mrs. Lounsbury was insufficient.

POINT II

SECTION 78-14-5(4)(b), AS APPLIED BY THE LOWER COURT, IS UNCONSTITUTIONAL AS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW AND AS AN IMPROPER DEPRIVATION OF THE FUNDAMENTAL RIGHT TO PRIVACY

Assuming that Section 78-14-5(4)(b) cannot be appropriately construed to nullify Mrs. Lounsbury's consent to the surgery, then such provision is unconstitutional as applied in this case because it deprives Plaintiff of liberty without due process of law as required under both the United States and Utah Constitutions. U.S. Const. amend. XIV, § 1; Utah Const. art. I, ¶ 7. Similarly, it deprives Plaintiff of the fundamental right to privacy as construed to exist under both Constitutions. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); cases cited, infra; Utah Const. art. I, § 27.

As early as 1923, the United States Supreme Court has recognized that liberty encompasses something more than "freedom from bodily restraint." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). There, the Court stated the following definition of liberty:

Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

This Court has similarly defined liberty in McGrew v. Industrial Commission, 96 Utah 203, 85 P.2d 608, 611 (1938):

[L]iberty as used in the constitution is the right to enjoy to the fullest extent the privileges and immunities given or assured by law to people living within the country and under a government which "derives its just powers from the consent of the governed," subject only to such restrictions as may be imposed by law for the benefit of the whole, within the limits of a written constitution and to a like liberty on the part of the other members of the body public.

The right to consent to health care upon one's own person is a liberty as defined above. Indeed, the right to consent to surgery may even fit into the strictest definition of liberty: "freedom from bodily restraint." Certainly, the surgery contemplated here would require confinement to a hospital during and after surgery subject to its regulations. In any event, the right to consent to or refuse surgery or other health care is generally one of the rights "essential to the ordinary pursuit of happiness."

Several courts have recognized a common law right to determine what is done with one's own body in terms of health care and to be free from invasion of one's own body. See, e.g., In re Conservatorship of Torres, 357 N.W.2d 332, 339 (Minn. 1984) (individual has right to refuse consent to any medical treatment, "based upon a constitutional right of privacy and/or the common law right to be free from invasions of one's bodily integrity"); Collins v. Itoh, 503 P.2d 36, 40 (Mont. 1972) ("[e]ach man is

considered master of his own body and may request or prohibit even lifesaving surgery"); In re Welfare of Colyer, 99 Wash. 2d 114, 660 P.2d 738, 743 (1983) (may refuse life sustaining treatment on basis of "common law right to be free from bodily invasion"); Crawford v. Wojnas, 51 Wash. App. 781, 783, 754 P.2d 1302, 1303 (1988) (informed consent doctrine is "premised on the fundamental principal that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body'" (quoting Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 129, 105 N.E. 92 (1914))).

Although, based upon the general definitions and case law cited above, the right to consent to health care appears to be a liberty entitled to the protections of substantive due process, most, if not all, courts have determined the constitutionality of laws that restrict the right to consent to health care on the basis that such a right of consent flows from the fundamental right to privacy.

No court has directly determined the constitutionality of Section 78-14-4(b) or a similar statute. Nevertheless, because the right to consent or refuse health care is at least a fundamental common law right, the analysis adopted by courts in the "right to privacy" cases is applicable here.

No analysis of the right to privacy should be considered without a discussion of Roe v. Wade, 410 U.S. 113 (1973). There, a woman brought an action for declaratory and injunctive relief

on the basis that Texas criminal laws prohibiting abortion were unconstitutional. A three-judge panel of the United States District Court for the Northern District of Texas determined the abortion laws were unconstitutional and the case was appealed directly to the United States Supreme Court. The Court affirmed, holding that it was unconstitutional to prohibit abortions at all stages of pregnancy. Id. at 165-66.

The Roe v. Wade Court reasoned that there was a constitutional right of privacy founded upon the concept of liberty under the Fourteenth Amendment and determined that such right includes a right to an abortion. Id. at 153-54 (citing Meyer v. Nebraska, supra). The Court then concluded that a deprivation of the right of privacy (to have an abortion) could only be justified when outweighed by substantial state interests. Id. Because the Court determined that there was not a sufficient, justifiable state interest to prohibit abortions under any circumstances, it determined the Texas abortion laws to be an unconstitutional deprivation of the right to privacy. Further, to pass constitutional muster, the Court held that a statute must be narrowly drawn to express only legitimate state interests. Id. 155-56. See also People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 199-201 (1969).

The United States Supreme Court has also held that it is an unconstitutional deprivation of the right to privacy to require that a spouse consent to an abortion before it is performed. Planned Parenthood v. Danforth, 428 U.S. 52, 68-71 (1976).

In this case there is no legitimate state interest in allowing a spouse to consent to surgery under all circumstances.¹ The only conceivable legitimate purpose for such a provision would be if the patient was unable to consent himself either because of incompetence or an emergency situation. Unfortunately, Section 78-14-5(4)(b) is not so narrowly drawn.² Therefore, as in Roe v. Wade, that statute is unconstitutional as applied in this case.

Although the United States Supreme Court has apparently limited the effect of Roe v. Wade in Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), it did not derogate the fundamental right to privacy and the analysis in Roe v. Wade remains the same. Further, the state interest advanced in both Roe v. Wade and Webster, is the desire to protect a fetus and further the reproduction of life. That justification is inapplicable in this case because Plaintiff's determination whether to consent to elective surgery has no direct effect upon anyone else's life, only his own.

Another line of cases applying due process standards to the right of privacy are those involving the decision to terminate

¹Conceivably, if a spouse could consent under all circumstances he/she could consent to a surgical procedure for a patient, such as sterilization, despite the patient's religious or personal objections to such a procedure.

²Of course, nothing precludes this court from determining that the legislature intended subsection (4)(b) to be so interpreted and construed.

life sustaining procedures for terminally ill or "brain dead" patients. The seminal case on this issue is In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). There, a father sought to be appointed guardian of his daughter so that he could direct and authorize the discontinuance of life sustaining procedures for the comatose daughter. The lower court denied both the guardianship and the authorization to terminate the life supporting equipment. The New Jersey Supreme Court determined that the father could make the decision to terminate the life supporting systems on behalf of his daughter if the attending physician determined that there was no reasonable possibility of the daughter ever recovering.

In its holding, the New Jersey Supreme Court determined that there was a constitutional right to privacy "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions." Id., 355 A.2d at 663 (citing Roe v. Wade, supra). Again, as in Roe v. Wade, the New Jersey Supreme Court weighed the right of privacy against the interests of the state in the preservation of human life and determined that, after certain safeguards were met, the right to determine what is done with one's body is paramount over the state's interests. See also, In re Welfare of Colyer, 99 Wash. 2d 114, 660 P.2d 738, 742-44 (1983).

The California Court of Appeals has carried the Quinlan/Colyer rule one step further in Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984). There, a patient himself sought to terminate treatment for a condition that, although probably incurable, was not diagnosed as terminal. The lower court denied an injunction requiring the hospital to disconnect a respirator but the California Court of Appeals remanded, holding that the patient had the right to order the disconnection of the equipment. Again, after weighing the state's interest of preservation of life, protecting innocent third parties, preventing suicide and protecting professional ethics, against the right to exercise control over one's own body, the California Court of Appeals determined that the latter interest was paramount. The court stated that "'a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.'" Id. at 193-94, 209 Cal. Rptr. at 224 (quoting Cobbs v. Grant, 8 Cal. 3d 229, 242, 502 P.2d 1, 9 (1972)).

In this case, Plaintiff did not need the surgery to preserve his life. Further, the surgery was entirely elective. Indeed, Plaintiff had spent considerable time obtaining second and third opinions to determine whether surgery was warranted. Plaintiff had no incurable or terminal illness making the surgery necessary to preserve his life. Accordingly, the state's interest in this

case, if any, is substantially less significant than in Quinlan, Colyer or Bartling, all of which determined that the state's interests were outweighed by the right to consent or refuse medical treatment. Accordingly, as in Quinlan, Colyer and Bartling, Section 78-14-5(4)(b) is an unconstitutional deprivation of the rights of personal liberty, privacy and other applicable fundamental rights.

POINT III

THE LOWER COURT IMPROPERLY CONSTRUED SECTION 78-14-5(1) TO PRECLUDE PLAINTIFF'S CAUSE OF ACTION FOR COMMON LAW BATTERY

The lower court determined that Plaintiff had failed to meet at least three of the requirements to maintain a cause of action against Defendant under Section 78-14-5(1) of the Utah Code. That subsection provides that to maintain an action for failure to obtain informed consent, he must show that he "suffered personal injuries arising out of the health care rendered", that he "would not have consented to the health care rendered" after being fully informed of the facts and that "the unauthorized part of the health care rendered was the proximate cause of the personal injuries suffered" by him. Utah Code Ann. § 78-14-5(1)(c), (f), (g) (1987).

Plaintiff's complaint alleges a cause of action for common law battery based upon Defendant's failure to obtain any consent for the surgery. Assuming it is applicable to Plaintiff's action, Section 78-14-5(1) requires that Plaintiff prove more

than he ordinarily would be required to prove in order to maintain a cause of action for common law battery.

As a general rule, in an action for common law battery, a plaintiff need not necessarily show that he sustained personal injury. Neither is proximate cause an element of a common law cause of action for battery. 6 Am. Jur. 2d Assault and Battery §§ 5, 111, 178, 180 (1963). The New Mexico Court of Appeals applied this general rule in Eis v. Chestnut, 96 N.M. 45, 627 P.2d 1244 (Ct. App.), cert. denied, 628 P.2d 686 (1981), and stated the following with a regard to a battery similar to the one here:

A physician who operates without the patient's consent commits a battery In a suit against a surgeon for battery there is no need that the patient be physically damaged by the surgery. Consequently, there is no need for expert medical testimony to show either causation or standard of care. The only question to be determined is whether the patient consented to the specific operation performed.

Id. at 1246 (citations omitted).

Assuming that Plaintiff need not meet the criteria set forth in Section 78-14-5(1), by construing the facts of the case in a light most favorable to Plaintiff, Plaintiff can certainly make out a prima facie case for common law battery. And, based upon rules of construction, the requirements of subsection (1) should not apply in this case.

Section 68-3-11 of the Utah Code provides as follows:

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

Utah Code Ann. § 68-3-11 (1986).

Section 78-14-5(1) provides that the subject criteria must be met "in an action based upon the provider's failure to obtain informed consent." Utah Code Ann. § 78-14-5(1) (emphasis added). Since "informed consent" is a term of art having a "peculiar and appropriate meaning in law" Section 78-14-5(1) must be construed according to the peculiar definition of informed consent.

Black's Law Dictionary defines "informed consent" as follows:

A person's agreement to allow something to happen (such as surgery) that is based on a full disclosure of facts needed to make the decision intelligently; i.e., knowledge of risks involved, alternatives, etc. Informed consent is the name for a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient as to whatever grave risks of injury might be incurred from a proposed course of treatment, so that a patient, exercising ordinary care for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by

reasonably balancing the probable risks
againsts against the probable benefits.

Black's Law Dictionary 701 (5th ed. 1979) (citing ZeBarth v, Swedish Hospital Medical Center, 81 Wash. 2d 12, 499 P.2d 1, 8 (1972)).

In the instant case, Plaintiff alleges that Defendant did not make any disclosures of the facts he felt were needed in order to decide whether to submit to surgery. Plaintiff simply alleges that Defendant did not obtain any consent whatsoever to perform the surgery. Consequently, the wrongful acts that Plaintiff alleges do not fall within the definition of "informed consent" as the term is used in Section 78-14-5(1), and he need not prove the elements outlined in that subsection.

At least two courts have recognized a distinction between an action based upon failure to obtain informed consent and an action for failure to obtain any consent whatsoever, namely battery. In Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1 (1972), the California Supreme Court explained the difference between a duty to provide informed consent and the failure to obtain any consent whatsoever:

The battery theory should be reserved for those circumstances when a doctor performs an operation to which the plaintiff has not consented. . . . However, when the patient consents to the certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed

to meet his care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

Id., 502 P.2d at 8. See also Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852, 860 (1974).

In the instant case, the elements that a patient must prove in order to maintain an action for lack of informed consent are essentially elements of negligence, which is appropriate, based upon the distinct duty established in Cobbs and Miller. Conversely, based upon Cobbs and Miller, since the Plaintiff in this case has alleged, and can prove, that Defendant obtained no consent whatsoever for the surgery performed, he need only prove the elements of battery and not the negligence elements of Section 78-14-5(1).

Even assuming that Plaintiff must establish the elements of Section 78-14-5(1) in order to maintain this action, the evidence, when considered in a light most favorable to Plaintiff, establishes that he has met the elements that the lower court found lacking.

Plaintiff has demonstrated that he has suffered personal injuries as a result of the unsuccessful surgery. Both Dr. Fogg and Dr. Sternberg have testified that Plaintiff's physical and mental condition have worsened since the unsuccessful surgery. Furthermore, Dr. Sternberg has testified that the emotional and mental injuries that Plaintiff has suffered were caused by the

unsuccessful surgery. Finally, because of Plaintiff's apprehensions about Dr. Capel in general, it is not conclusively established, as a matter of law, that Plaintiff would have consented to the surgery even if Dr. Capel had shown Plaintiff that the myelogram results dictated surgery. Accordingly, regardless of the Court's construction of Section 78-14-5(1), Plaintiff has made a prama facie case for battery and/or negligence.

POINT IV

SECTION 78-14-5(1), AS APPLIED BY THE LOWER COURT, IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFF A REMEDY FOR COMMON LAW BATTERY, DEPRIVES PLAINTIFF OF DUE PROCESS AND DENIES PLAINTIFF OF EQUAL PROTECTION AND UNIFORM APPLICATION OF THE LAW

Even assuming that the lower court properly construed Section 78-14-5(1) to require Plaintiff to prove additional elements in order to maintain his cause of action, such a construction, as applied in this case, unconstitutionally denies Plaintiff his right to a common law action for battery under the Open Courts Provision of the Utah Constitution. Utah Const. art. I, § 11. Moreover, the effective abrogation of Plaintiff's claim for common law battery denies him substantive due process guaranteed under both the Federal and State Constitutions. U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 7. Finally, because there is no justifiable basis for denying Plaintiff an action for common law battery in this case, while preserving such

a right in all other situations, Plaintiff has been denied equal protection and uniform application of the laws as required under both the Federal and State Constitutions. U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 24.

A. Open Courts

Article I, Section 11 of the Utah Constitution declares that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law" Utah Const. art. I, § 11. Although this court has never addressed the constitutionality of Section 78-14-5(1) under Article I, Section 11, it has set forth criteria for analyzing the constitutionality of laws under the Open Courts Provision in several recent cases testing the constitutionality of statutes of repose.

In Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), plaintiffs brought an action for wrongful death against the manufacturer of an airplane under products liability theories for defects in the airplane that caused the death of their husband and father. The lower court granted summary judgment to the defendant manufacturer of the airplane on the grounds that the action was barred under a products liability statute of repose providing that such an action cannot be brought for more than six years after the product is initially purchased or ten years after its date of manufacture. This court reversed the summary judgment and remanded the matter to the lower court

for trial, holding that the products liability statute of repose was unconstitutional under the Open Courts Provision. The court established a two-part analysis for determining whether a provision is unconstitutional under the Open Courts Provision:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Id. at 680 (citations and footnote omitted).

This court has adopted the Berry test in subsequent cases involving the builders and architects statute of repose. See Horton v. Goldminer's Daughter, 785 P.2d 1087, 1094 (Utah 1989); Sun Valley Waterbeds v Herm Hughes & Son, 782 P.2d 188, 191-92 (Utah 1989).

Under the first part of the analysis, it appears that the substitute remedy contemplated would be something similar to the worker's compensation and no fault insurance provisions. Berry, 717 P.2d at 677. In this case, there is no alternative statutory

remedy like worker's compensation or no fault insurance that would compensate a person for a nonconsensual surgery.

Defendant will likely argue that the legislature has established a remedy for failure to obtain consent under Section 78-14-5(1). However, as discussed below, that remedy is wholly inadequate to compensate the plaintiff for an unwanted invasion of his body when the surgery may have been successful. The substitute is not substantially equal to the one at common law.

The second prong of the Berry analysis is whether there is any reasonable or justifiable legislative purpose behind the statute in question. The stated objective of the Utah Health Care Malpractice Act, which includes Section 78-14-5, is to reduce malpractice premiums and insure the availability of malpractice insurance, thereby making health care more available to the public in general. Utah Code Ann. § 78-14-2 (1987). That justification is simply not appropriate under the facts of this case.

First, insurers, including malpractice insurers, rarely provide coverage for intentional torts such as assault and battery. Even if an insurance policy did somehow insure against intentional torts, it would likely be void as against public policy because it would encourage intentional, even criminal, injury against persons. Accordingly, allowing an action for common law battery would have no effect whatsoever on the stated policy of reducing and making available malpractice insurance.

Second, an action for common law battery would derogate another state interest in regulating the wrongful and improper conduct of physicians. By abrogating the action for common law battery, the legislature is, in effect, saying to physicians: "You may perform surgeries without consent and will not be liable, as long as you do not cause any personal injury to the patient and as long as you can show that the patient would have consented anyway if you had asked him." Certainly, the legislature did not intend to give physicians such a free hand.

Because there is no justifiable legislative purpose behind abrogation of an action for common law battery, Section 78-14-5(1) cannot, constitutionally, be applied to prevent Plaintiff's claim in this case.

B. Due Process

In Berry, this court stated as follows:

To a degree, the open courts provision is an extension of the due process clause. Indeed, the open courts provision and the due process clause also have an overlapping function, to some extent, with respect to the abrogation of causes of action. If the Legislature were to abolish all causes of action for injuries to one's person or property caused by defective products and provide no substitute equivalent remedy, we have little doubt that it would violate Section 11, and perhaps even the due process clause of Article I, Section 7.

Berry, 717 P.2d at 679, quoted in, Condemarin v. University Hospital, 775 P.2d 348, 357 (Utah 1989) (Durham, J., lead opinion).

It appears that the criteria for determining whether abrogation of the cause of action for common law battery is a denial of substantive due process is virtually identical to the criteria under the Open Courts Provision as set forth in Berry. Consequently, Plaintiff has addressed the due process analysis only briefly.

A few courts have determined that laws denying causes of action constitute a deprivation of property without due process of law and, therefore, are unconstitutional. See, e.g., Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930) (judgment denying relief from discrimination for failure to first seek an administrative remedy is an unconstitutional deprivation of property without due process); Morris v. Gross, 572 S.W.2d 902, 905 (Tenn. 1978) (vested rights of action are property which cannot be deprived without due process of law); Buttrey v. Guaranteed Securities Co., 78 Utah 39, 300 P. 1040, 1045 (1931) (repeal of statute would be unconstitutional deprivation of property without due process of law for rights under statute that have vested prior to repeal).

C. Equal Protection and Uniform Operation of Laws

Article I, Section 24 of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Similarly, the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

This court has recently construed the application of both of the above provisions in Malan v. Lewis, 693 P.2d 661 (Utah 1984). There, this court struck down as unconstitutional the Utah Automobile Guest Statute. This court established the following criteria for determining whether a provision is an unconstitutional denial of equal protection:

Article I, § 24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable.

. . . .

When persons are similarly situated, it is unconstitutional to single out one person or a group of persons from among a larger class on the basis of a tenuous justification that has little or no merit.

Id. at 670-71 (citations omitted). Accord, Condemarin v. University Hospital, 775 P.2d 348, 352 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 889-90 (Utah 1988).

In this case, it would appear that Section 78-14-5(1) is not unconstitutional under the first criteria established in Malan. All plaintiffs who have brought an action for common law battery against a health care provider are treated the same and all

plaintiffs who have brought an action for common law battery against other defendants are treated the same. In other words, it is the type of defendant, whether a health care provider or otherwise, that determines the class into which a particular plaintiff falls. Consequently, under the second criteria established in Malan, in order for the abrogation of an action for common law battery to pass constitutional muster, there must be some reasonable legislative justification and objective that is fulfilled by the classification. Indeed, it appears that the analysis is essentially the same as in Berry.³

For the same reasons stated in the analysis of the Open Courts Provision, above, any justification or rationale offered for applying Section 78-14-5(1), to deprive Plaintiff of a cause of action for common law battery, is irrational, tenuous and not justified. Therefore, such an application amounts to a denial of equal protection and/or uniform operation of laws.

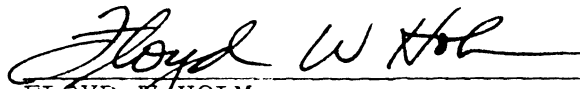
³In Condemarin, two justices in the majority expressed some dissatisfaction in using the equal protection analysis rather than a due process analysis (or open courts analysis) for determining the constitutionality of a governmentally immunity provision, Condemarin, 775 P.2d at 357-60 (Durham, J., lead opinion), 366-68 (Zimmerman, J., concurring in part). On the other hand, the third justice concurring in the majority and both dissenting justices believed the equal protection approach to be the more appropriate. Id. at 369-70 (Stewart, J., separate opinion), 378-380 (Hall, C.J., dissenting). Because of this apparent divergence in the court, Plaintiff has presented for review analyses under both approaches.

CONCLUSION

Based upon the above discussion, this court should reverse the lower court's directed verdict and order of dismissal and remand the case to the lower court for trial before the trier of fact.


RESPECTFULLY SUBMITTED this 25th day of July, 1990.

CHAMBERLAIN & HIGBEE


FLOYD W. HOLM
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 1990, four (4) copies of the within and foregoing BRIEF OF APPELLANT were served upon Elliott J. Williams and Elizabeth King Brennan at SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, P.O. Box 45000, Salt Lake City, Utah 84145.


FLOYD W. HOLM

ADDENDUM

78-14-5. Failure to obtain informed consent — Proof required of patient — Defenses — Consent to health care.

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

- (a) that a provider-patient relationship existed between the patient and health care provider; and
- (b) the health care provider rendered health care to the patient; and
- (c) the patient suffered personal injuries arising out of the health care rendered; and
- (d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and
- (e) the patient was not informed of the substantial and significant risk; and

- (f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and
 - (g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.
- (2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if:
- (a) the risk of the serious harm which the patient actually suffered was relatively minor; or
 - (b) the risk of serious harm to the patient from the health care provider was commonly known to the public; or
 - (c) the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed; or
 - (d) the health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition; or
 - (e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.
- (3) Nothing contained in this act shall be construed to prevent any person eighteen years of age or over from refusing to consent to health care for himself or his person upon personal or religious grounds.
- (4) The following persons are authorized and empowered to consent to any health care not prohibited by law:
- (a) any parent, whether an adult or a minor, for his minor child;
 - (b) any married person, for a spouse;
 - (c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward;
 - (d) any person eighteen years of age or over for his or her parent who is unable by reason of age, physical or mental condition, to provide such consent;

- (e) any patient eighteen years of age or over;
- (f) any female regardless of age or marital status, when given in connection with her pregnancy or childbirth;
- (g) in the absence of a parent, any adult for his minor brother or sister;
- and
- (h) in the absence of a parent, any grandparent for his minor grandchild.

(5) No person who in good faith consents or authorizes health care treatment or procedures for another as provided by this act shall be subject to civil liability.

DIXIE MEDICAL CENTER
544 South 400 East • (801) 673-9681
St. George, Utah 84770

10/10/84
injection accident / "broken back"
compression fx.

PREOPERATIVE INFORMATION

Have you had:

Heart trouble Yes ☒ No
Asthma Yes ☒ No
Epilepsy Yes ☒ No
Jaundice Yes ☒ No
Kidney disease Yes ☒ No
Other illnesses Yes ☒ No
Back trouble Yes ☒ No
Bleeding tendency Yes ☒ No
Allergies Yes ☒ No
False teeth or loose teeth Yes ☒ No
Caps or bridges Yes ☒ No
Abnormal chest x-ray Yes ☒ No
Abnormal ECG Yes ☒ No
Age 26
Present weight 185
Height 5'11"

Have you had:

Broken bones of face
Broken bones of neck or back
Previous anesthesia
Bad reaction to anesthesia
Relatives with bad reactions
to anesthesia

Do You:

Take medicine or drugs
Wear contact lenses
Smoke 12 pk/yr.
Drink Alcohol

Are you pregnant

Yes No R jaw broken 13 places
Yes No back
Yes No jaw 1980
Yes ☒ No

Yes No Vicodin q 2h.
Yes No
Yes No
Yes ☒ No
Yes ☒ No
Yes ☒ No

I understand that there can be complications with any anesthetic and those complications have been discussed with me.

Patient's Signature Janet L. Lunsbury

C.N.S. ✓ R.S. Smoke

C.V.S. ✓ Other ✓

Lab results _____

For: ☒ GA ☐ SAB ☐ Epidural ☐ Local

P.S. 1 Complications explained yes Risk accepted yes

NOTES:

① Decuramus Laminectomy L4/5 5/5

M. L. Lunsbury 14 May 87
(Anesthesia) 1435

DIXIE MEDICAL CENTER

544 South 400 East, St. George, Utah 84770, 801-673-9681

CONSENT TO OPERATION, ANESTHETICS,
AND OTHER MEDICAL SERVICES

I authorize and request the performance upon

Michel Sean Lounsbury
(patient name)

of the following operation: Decompression and Disc
Excision L4-5 or L5-S1

to be performed by Dr. Neal Capel with any associates or
assistants of his/her choice.

I acknowledge that my physician(s) has explained my condition, the nature and purpose of the proposed health care or surgical procedure, as well as alternative treatment(s), and that all questions asked about the health care and its attendant risks have been answered in a satisfactory manner. I hereby accept the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of the health care.

I also understand that the proposed care may involve possibilities of complications and that certain complications have been known to occur following the procedure to which I am consenting even when the utmost care, judgement and skill are used. I understand that there have been no guarantees made to me as to the results of the surgical procedure.

I recognize that during the course of the procedure unforeseen conditions may require additional or different procedures than those explained. I, therefore, authorize and request that my physician and any associates or assistants of his/her choice perform such procedures as, in their professional judgement, are necessary and desirable for my well-being. I further consent to the administration of such anesthesia as may be necessary or appropriate for such procedure.

I further consent to the examination of any tissues or parts which may be removed from my body by the hospital authorities, and further consent to the disposal of such tissues and parts by hospital authorities.

For purposes of advancing medical education, I consent to the admittance of medical personnel to the operating room.

I HAVE READ AND UNDERSTAND THIS DOCUMENT AND AUTHORIZE AND ACCEPT THE PROPOSED CARE REGARDLESS OF THE RISK.

10/15/87 2:00
Date Time

Janet Lounsbury
Patient's Signature

L. Leslie Low
Witness

Wife
Relationship to Patient
(To be used only if patient is a minor
or unable to sign)

FILED
FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY

'90 MAR 22 AM 8 25

CLERK
DEPUTY *H. Agatlocky*

ELLIOTT J. WILLIAMS (A3483)
ELIZABETH KING BRENNAN (A4863)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

MICHEL LOUNSBURY,
Plaintiff,

vs.

NEAL C. CAPEL, M.D.,
Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Civil No. 89-2550
Judge J. Philip Eves

This action came on regularly for jury trial on January 29, 1990, before the above-entitled Court, the Honorable J. Philip Eves presiding. The plaintiff appeared personally and by and through his counsel, Floyd W. Holm, Esq. of Chamberlain & Higbee, and defendant appeared personally and by and through his counsel, Elliott J. Williams, Esq. and Elizabeth King Brennan, Esq. of Snow, Christensen & Martineau. The parties selected a jury and presented opening statements.

After the parties' opening statements, the parties stipulated that plaintiff could present a proffer of evidence which the Court could then rely upon to determine whether a

sufficient factual and legal basis had been shown to submit the case to the jury. Plaintiff, through his counsel, presented a proffer on the record of evidence he anticipated his witnesses would offer should they be called to testify. At the conclusion of the proffer, defendant made a Motion to Dismiss based on the insufficiency of the evidence presented in light of the statutory requirements of the Health Care Malpractice Act, §78-14-1, et seq., Utah Code Ann. (1953, as amended).

The Court now makes the following:

FINDINGS OF FACT

1. The plaintiff, Michel Lounsbury was injured in an industrial accident on October 10, 1986.
2. Plaintiff was admitted to Dixie Medical Hospital for surgery on May 14, 1987.
3. On the morning of surgery, a consent form authorizing surgery was signed by plaintiff's wife.
4. The surgical consent form authorized surgery by Dr. Capel for Michel Lounsbury.
5. The surgery authorized was the surgery performed by Dr. Capel.
6. There is no evidence of fraudulent concealment or fraudulent omission to state material facts on the part of Dr. Capel.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This action is a medical malpractice action against a health care provider which is governed by the Utah Health Care Malpractice Act, §78-14-1 et seq., Utah Code Ann. (1953 as amended).

2. Mrs. Lounsbury was authorized and empowered by the provisions of Section 78-14-5(4)(b) to consent to health care rendered to her husband.

3. The consent form the plaintiff's spouse, Janet Lounsbury, signed on her husband's behalf complied with the provisions of Section 78-14-5(2)(e), Utah Code Ann. (1953, as amended).

4. Dr. Capel was authorized as a matter of law to rely on said consent in performing the surgery.

5. When a person submits to health care rendered by a health care provider, it is presumed that what the health care provider did was either expressly or impliedly authorized to be done. Section 78-14-5(1), Utah Code Ann. (1953, as amended).

6. The consent form executed by the plaintiff's spouse provides a complete defense to plaintiff's claim of alleged failure to obtain his consent to the surgery.

7. Plaintiff also failed as a matter of law to establish the other elements of a claim for lack of informed consent as outlined in Section 78-14-5(1), Subsections (a) through (g). To prevail on a claim for lack of informed consent, plaintiff must establish each and every element of said section. However, in this case plaintiff offered no evidence that he suffered personal injuries arising out of the health care rendered, as required by subsection (c); nor that a reasonable prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all the facts relevant to the decision to give consent as required by subsection (f); nor that the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the plaintiff, as required by subsection (g).

8. Further, by failing to produce evidence of physical damages which were proximately caused by Dr. Capel's conduct, plaintiff's claim for lack of informed consent fails as a matter of law.

9. In a negligence action against a health care professional, plaintiff must establish, usually through expert testimony, that the defendant's conduct deviated from recognized and accepted standards and that said conduct was a proximate cause of the damages as alleged by the plaintiff. Based on plaintiff's proffer, the court finds as a matter of law that the

evidence does not establish negligence on the part of the defendant, nor that defendant's conduct proximately caused physical damages.

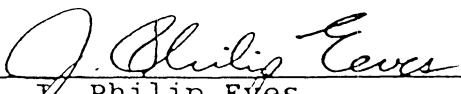
10. The plaintiff in this medical malpractice action cannot recover for emotional or psychological damages because there is no evidence establishing proximate causation. Thus, defendant Dr. Capel can not be held accountable for unforeseeable psychological consequences of his surgery, whether it be successful or unsuccessful.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law as well as on the Stipulation and evidence proffered by the parties, the court grants the defendant's Motion to Dismiss and orders that plaintiff's Complaint be, and the same is hereby, dismissed with prejudice pursuant to Rule 41(b) Utah Rules of Civil Procedure, with each party to bear its own costs.

DATED this 21st day of March, 1990.

BY THE COURT:



J. Philip Eyes
District Court Judge