Malette v. Shulman et al.

Indexed as: Malette v. Shulman
(Ont. C.A.)

72 O.R. (2d) 417
[1990] O.J. No. 450
Action No. 29/88

ONTARIO
Court of Appeal
Robins, Catzman and Carthy JJ.A.
March 30, 1990.

Professions -- Physicians and surgeons -- Consent to treatment -- Unconscious patient carrying card declaring her to be Jehovah's Witness and refusing consent to blood tranfusions -- Physician administering blood liable for damages for battery.

Damages -- Assault and battery -- Consent to treatment -- Unconscious patient carrying card declaring her to be Jehovah's Witness and refusing consent to blood transfusions -- Physician administering blood transfusion -- $20,000 awarded for mental distress.

Torts -- Assault and battery -- Consent -- Unconscious patient carrying card declaring her to be Jehovah's Witness and refusing consent to blood transfusions -- Physician administering blood -- Saving patient's life -- Action nevertheless constituting battery.

The plaintiff was severely injured in an automobile accident and was taken unconscious to the defendant hospital where she was examined by the defendant physician in the emergency department. He concluded that a blood transfusion was indicated

but a nurse discovered a card in the plaintiff's purse identifying her as a Jehovah's Witness and requesting on the basis of her religious convictions that she be given no blood transfusion under any circumstances. Having formed the opinion that the plaintiff's condition made a blood transfusion necessary to preserve her life and health, the defendant physician personally administered transfusions to her and later refused to follow the instructions of the plaintiff's daughter who sought to terminate the transfusions. The physician believed that it was his professional responsibility to give his patient a transfusion and he was not satisfied that the card expressed her current view. The plaintiff recovered and brought an action against the physician, the hospital, its executive director and four nurses, alleging that the administration of blood constituted negligence and assault and battery. The trial judge awarded the plaintiff $20,000 by way of damages for battery. The defendants appealed to the Court of Appeal.

Held, the appeal should be dismissed.

The plaintiff had a right to control her own body. The tort of battery protects the interest in bodily security from unwanted physical interference. Any non-consensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable. A competent adult is generally entitled to reject a specific treatment or all treatment or to select an alternate form of treatment even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion it is the patient who has the final say on whether to undergo the treatment. While in an emergency the doctrine of necessity may protect the physician who acts without consent, the doctor is not free to disregard a patient's advance instructions. The plaintiff had conveyed her wishes in the only way possible.

While the interest of the state in protecting and preserving the lives and health of its citizens may override the individual's right to self-determination in order to eliminate a health threat to the community, it does not prevent a

competent adult from refusing life-preserving medical treatment.

The fact that the physician had no opportunity to offer medical advice could not nullify instructions intended to cover any circumstances where advice was not possible. Any doubts about the validity of the card were not rationally founded on the evidence.

The cross-appeal against dismissal of the action against the hospital and the order with respect to costs should be dismissed.

Cases referred to

Schloendoff v. Society of New York Hospital, 211 N.Y. 125 (1914); Videto v. Kennedy (1981), 33 O.R. (2d) 497, 125 D.L.R. (3d) 127, 17 C.C.L.T. 307; Reibl v. Hughes (1980), 114 D.L.R. (3d) 1, [1980] 2 S.C.R. 880, 14 C.C.L.T. 1, 33 N.R. 361; Marshall v. Curry, [1933] 3 D.L.R. 260, 60 C.C.C. 136; Parmley v. Parmley, [1945] 4 D.L.R. 81, [1945] S.C.R. 635; Mulloy v. Hop Sang, [1935] 1 W.W.R. 714; In re Estate of Brooks, 205 N.E. 2d 435 (1965); Randolph v. City of New York, Sup. Ct. N.Y., July 12, 1984, Index No. 17598/75 (unreported); revd 501 N.Y.S. 2d 837 (1986); vard 514 N.Y.S. 705 (1987)

Statutes referred to

Public Hospitals Act, R.S.O. 1980, c. 410

Rules and regulations referred to

O. Reg. 518/88 (Public Hospitals Act,) s. 25

APPEAL by defendant physician and CROSS-APPEAL by plaintiff from a judgment of Donelly J., 63 O.R. (2d) 243, 47 D.L.R. (4th) 18, 43 C.C.L.T. 62, awarding the plaintiff damages against the physician for battery and dismissing the action against the hospital.

Michael E. Royce and Harry C.G. Underwood, for appellant.

W. Glen How, Q.C., and John M. Burns, for respondent.

The judgment of the court was delivered by

ROBINS J.A.:-- The question to be decided in this appeal is whether a doctor is liable in law for administering blood transfusions to an unconscious patient in a potentially life-threatening situation when the patient is carrying a card stating that she is a Jehovah's Witness and, as a matter of religious belief, rejects blood transfusions under any circumstances.

I

In the early afternoon of June 30, 1979, Mrs. Georgette Malette, then age 57, was rushed, unconscious, by ambulance to the Kirkland and District Hospital in Kirkland Lake, Ontario. She had been in an accident. The car in which she was a passenger, driven by her husband, had collided head-on with a truck. Her husband had been killed. She suffered serious injuries.

On arrival at the hospital, she was attended by Dr. David L. Shulman, a family physician practising in Kirkland Lake who served two or three shifts a week in the emergency department of the hospital and who was on duty at the time. Dr. Shulman's initial examination of Mrs. Malette showed, among other things, that she had severe head and face injuries and was bleeding profusely. The doctor concluded that she was suffering from incipient shock by reason of blood loss, and ordered that she be given intravenous glucose followed immediately by Ringer's Lactate. The administration of a volume expander, such as Ringer's Lactate, is standard medical procedure in cases of this nature. If the patient does not respond with significantly increased blood pressure, transfusions of blood are then administered to carry essential oxygen to tissues and to remove waste products and prevent damage to vital organs.

At about this time, a nurse discovered a card in Mrs. Malette's purse which identified her as a Jehovah's Witness and in which she requested, on the basis of her religious convictions, that she be given no blood transfusions under any circumstances. The card, which was not dated or witnessed, was printed in French and signed by Mrs. Malette. Translated into English, it read:

NO BLOOD TRANSFUSION!

> As one of Jehovah's Witnesses with firm religious convictions, I request that no blood or blood products be administered to me under any circumstances. I fully realize the implications of this position, but I have resolutely decided to obey the Bible command: "Keep abstaining ... from blood." (Acts 15:28, 29). However, I have no religious objection to use the nonblood alternatives, such as Dextran, Haemaccel, PVP, Ringer's Lactate or saline solution.

Dr. Shulman was promptly advised of the existence of this card and its contents.

Mrs. Malette was next examined by a surgeon on duty in the hospital. He concluded, as had Dr. Shulman, that, to avoid irreversible shock, it was vital to maintain her blood volume. He had Mrs. Malette transferred to the X-ray department for X-rays of her skull, pelvis and chest. However, before the X-rays could be satisfactorily completed, Mrs. Malette's condition deteriorated. Her blood pressure dropped markedly, her respiration became increasingly distressed, and her level of consciousness dropped. She continued to bleed profusely and could be said to be critically ill.

At this stage, Dr. Shulman decided that Mrs. Malette's condition had deteriorated to the point that transfusions were necessary to replace her lost blood and to preserve her life and health. Having made that decision, he personally administered transfusions to her, in spite of the Jehovah's Witness card, while she was in the X-ray department and after she was transferred to the intensive care unit. Dr. Shulman was

clearly aware of the religious objection to blood manifested in the card carried by Mrs. Malette and the instruction that "NO BLOOD TRANSFUSION!" be given under any circumstances. He accepted full responsibility then, as he does now, for the decision to administer the transfusions.

Some three hours after the transfusions were commenced, Mrs. Malette's daughter, Celine Bisson, who had driven to Kirkland Lake from Timmins, arrived at the hospital accompanied by her husband and a local church elder. She strongly objected to her mother being given blood. She informed Dr. Shulman and some of the other defendants that both she and her mother were Jehovah's Witnesses, that a tenet of their faith forbids blood transfusions, and that she knew her mother would not want blood transfusions. Notwithstanding Dr. Shulman's opinion as to the medical necessity of the transfusions, Mrs. Bisson remained adamantly opposed to them. She signed a document specifically prohibiting blood transfusions and a release of liability. Dr. Shulman refused to follow her instructions. Since the blood transfusions were, in his judgment, medically necessary in this potentially life-threatening situation, he believed it his professional responsibility as the doctor in charge to ensure that his patient received the transfusions. Furthermore, he was not satisfied that the card signed by Mrs. Malette expressed her current instructions because, on the information he then had, he did not know whether she might have changed her religious beliefs before the accident; whether the card may have been signed because of family or peer pressure; whether at the time she signed the card she was fully informed of the risks of refusal of blood transfusions; or whether, if conscious, she might have changed her mind in the face of medical advice as to her perhaps imminent but avoidable death.

As matters developed, by about midnight Mrs. Malette's condition had stabilized sufficiently to permit her to be transferred early the next morning by air ambulance to Toronto General Hospital where she received no further blood transfusions. She was discharged on August 11, 1979. Happily, she made a very good recovery from her injuries.

II

In June, 1980, Mrs. Malette brought this action against Dr. Shulman, the hospital, its executive director and four nurses, alleging, in the main, that the administration of blood transfusions in the circumstances of her case constituted negligence and assault and battery and subjected her to religious discrimination. The trial came on before Donnelly J. who, in reasons now reported at 63 O.R. (2d) 243, 47 D.L.R. (4th) 18, 43 C.C.L.T. 62, dismissed the action against all defendants save Dr. Shulman. With respect to Dr. Shulman, the learned judge concluded that the Jehovah's Witness card validly restricted his right to treat the patient, and there was no rationally founded basis upon which the doctor could ignore that restriction. Hence, his administration of blood transfusions constituted a battery on the plaintiff. The judge awarded her damages of $20,000 but declined to make any award of costs.

Dr. Shulman now appeals to this court from that judgment. Mrs. Malette cross-appeals the judge's dismissal of the action against the hospital and his order with respect to costs.

In his reasons for judgment, Donnelly J. fully and carefully set out the facts of this case as he found them. I see no need to restate those facts in any greater detail than I already have. Nor do I see any need to repeat the arguments that were advanced in both the appeal and the cross-appeal by which the parties seek to impugn the judge's findings in certain particulars. I think it sufficient to say that I am of the opinion that the judge's factual conclusions are unassailable. His findings were properly made within his province as the trier of fact and are supported by the evidence. It is not this court's function to weigh conflicting evidence or to determine the relative effect of contradictory medical opinions with respect either to bloodless medicine or to the benefits and risks of blood transfusions. The legal issues to be determined in this appeal must be dealt with on the basis of the findings made at trial.

I should perhaps underscore the fact that Dr. Shulman was not found liable for any negligence in his treatment of Mrs.

Malette. The judge held that he had acted "promptly, professionally and was well-motivated throughout" and that his management of the case had been "carried out in a competent, careful and conscientious manner" in accordance with the requisite standard of care. His decision to administer blood in the circumstances confronting him was found to be an honest exercise of his professional judgment which did not delay Mrs. Malette's recovery, endanger her life or cause her any bodily harm. Indeed, the judge concluded that the doctor's treatment of Mrs. Malette "may well have been responsible for saving her life".

Liability was imposed in this case on the basis that the doctor tortiously violated his patient's rights over her own body by acting contrary to the Jehovah's Witness card and administering blood transfusions that were not authorized. His honest and even justifiable belief that the treatment was medically essential did not serve to relieve him from liability for the battery resulting from his intentional and unpermitted conduct. As Donnelly J. put it at p. 268 O.R., p. 43 D.L.R.:

> The card itself presents a clear, concise statement, essentially stating, "As a Jehovah's Witness, I refuse blood". That message is unqualified. It does not exempt life threatening perils. On the face of the card, its message is seen to be rooted in religious conviction. Its obvious purpose as a card is as protection to speak in circumstances where the card carrier cannot (presumably because of illness or injury). There is no basis in evidence to indicate that the card may not represent the current intention and instruction of the card holder.
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> I, therefore, find that the card is a written declaration of a valid position which the card carrier may legitimately take in imposing a written restriction on her contract with the doctor. Dr. Shulman's doubt about the validity of the card, although honest, was not rationally founded on the evidence before him. Accordingly, but for the issue of informed refusal, there was no rationally founded basis for the doctor to ignore that restriction.

On the issue of informed refusal, Donnelly J. said at pp. 272-3 O.R., pp. 47-8 D.L.R.:

> The right to refuse treatment is an inherent component of the supremacy of the patient's right over his own body. That right to refuse treatment is not premised on an understanding of the risks of refusal.
>
> However sacred life may be, fair social comment admits that certain aspects of life are properly held to be more important than life itself. Such proud and honourable motivations are long entrenched in society, whether it be for patriotism in war, duty by law enforcement officers, protection of the life of a spouse, son or daughter, death before dishonour, death before loss of liberty, or religious martyrdom. Refusal of medical treatment on religious grounds is such a value.
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> If objection to treatment is on a religious basis, this does not permit the scrutiny of "reasonableness" which is a transitory standard dependent on the norms of the day. If the objection has its basis in religion, it is more apt to crystallize in life threatening situations.
>
> The doctrine of informed consent does not extend to informed refusal. The written direction contained in the card was not properly disregarded on the basis that circumstances prohibited verification of that decision as an informed choice. The card constituted a valid restriction of Dr. Shulman's right to treat the patient and the administration of blood by Dr. Shulman did constitute battery.

III

What then is the legal effect, if any, of the Jehovah's Witness card carried by Mrs. Malette? Was the doctor bound to honour the instructions of his unconscious patient or, given the emergency and his inability to obtain conscious instructions from his patient, was he entitled to disregard the

card and act according to his best medical judgment?

To answer these questions and determine the effect to be given to the Jehovah's Witness card, it is first necessary to ascertain what rights a competent patient has to accept or reject medical treatment and to appreciate the nature and extent of those rights.

The right of a person to control his or her own body is a concept that has long been recognized at common law. The tort of battery has traditionally protected the interest in bodily security from unwanted physical interference. Basically, any intentional nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable. Of course, a person may choose to waive this protection and consent to the intentional invasion of this interest, in which case an action for battery will not be maintainable. No special exceptions are made for medical care, other than in emergency situations, and the general rules governing actions for battery are applicable to the doctor-patient relationship. Thus, as a matter of common law, a medical intervention in which a doctor touches the body of a patient would constitute a battery if the patient did not consent to the intervention. Patients have the decisive role in the medical decision-making process. Their right of self-determination is recognized and protected by the law. As Justice Cardozo proclaimed in his classic statement: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages": Schloendoff v. Society of New York Hospital, 211 N.Y. 125 (1914). See also, Videto v. Kennedy (1981), 33 O.R. (2d) 497, 125 D.L.R. (3d) 127, 17 C.C.L.T. 307 (C.A.); Linden, Canadian Tort Law, 4th ed. (1988), at pp. 40-3 and p. 59 et seq.; Prosser & Keeton, The Law of Torts, 5th ed. (1984), at pp. 39-42; and Fleming, The Law of Torts, 7th ed. (1987), at pp. 23-4.

The doctrine of informed consent has developed in the law as the primary means of protecting a patient's right to control his or her medical treatment. Under the doctrine, no medical

procedure may be undertaken without the patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options. The doctrine presupposes the patient's capacity to make a subjective treatment decision based on her understanding of the necessary medical facts provided by the doctor and on her assessment of her own personal circumstances. A doctor who performs a medical procedure without having first furnished the patient with the information needed to obtain an informed consent will have infringed the patient's right to control the course of her medical care, and will be liable in battery even though the procedure was performed with a high degree of skill and actually benefitted the patient.

The right of self-determination which underlies the doctrine of informed consent also obviously encompasses the right to refuse medical treatment. A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment. The patient is free to decide, for instance, not to be operated on or not to undergo therapy or, by the same token, not to have a blood transfusion. If a doctor were to proceed in the face of a decision to reject the treatment, he would be civilly liable for his unauthorized conduct notwithstanding his justifiable belief that what he did was necessary to preserve the patient's life or health. The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others: see generally, Prosser & Keeton, op.cit., p. 112 et seq.; Harper, James & Gray, The Law of Torts, 2nd ed. (1986), c. III; Linden, op.cit., p. 64 et seq.; and Reibl v. Hughes (1980), 114 D.L.R. (3d) 1, [1980] 2 S.C.R. 880, 14 C.C.L.T. 1.

The emergency situation is an exception to the general rule requiring a patient's prior consent. When immediate medical treatment is necessary to save the life or preserve the health of a person who, by reason of unconsciousness or extreme illness, is incapable of either giving or withholding consent, the doctor may proceed without the patient's consent. The delivery of medical services is rendered lawful in such circumstances either on the rationale that the doctor has implied consent from the patient to give emergency aid or, more accurately in my view, on the rationale that the doctor is privileged by reason of necessity in giving the aid and is not to be held liable for so doing. On either basis, in an emergency the law sets aside the requirement of consent on the assumption that the patient, as a reasonable person, would want emergency aid to be rendered if she were capable of giving instructions. As Prosser & Keeton, op.cit., at pp. 117-18 state:

> The touching of another that would ordinarily be a battery in the absence of the consent of either the person touched or his legal agent can sometimes be justified in an emergency. Thus, it has often been asserted that a physician or other provider of health care has implied consent to deliver medical services, including surgical procedures, to a patient in an emergency. But such lawful action is more satisfactorily explained as a privilege. There are several requirements: (a) the patient must be unconscious or without capacity to make a decision, while no one legally authorized to act as agent for the patient is available; (b) time must be of the essence, in the sense that it must reasonably appear that delay until such time as an effective consent could be obtained would subject the patient to a risk of a serious bodily injury or death which prompt action would avoid; and (3) under the circumstances, a reasonable person would consent, and the probabilities are that the patient, would consent.

See also Marshall v. Curry, [1933] 3 D.L.R. 260, 60 C.C.C. 136 (N.S.S.C.); Parmley v. Parmley, [1945] 4 D.L.R. 81, [1945]

S.C.R. 635; Mulloy v. Hop Sang, [1935] 1 W.W.R. 714 (Alta. C.A.); Picard, Legal Liability of Doctors and Hospitals in Canada, 2nd ed. (1985), at p. 45; Restatement of the Law of Torts, Second, s. 892 D (1979); and s. 25 of O. Reg. 518/88 under the Public Hospitals Act, R.S.O. 1980, c. 410.

On the facts of the present case, Dr. Shulman was clearly faced with an emergency. He had an unconscious, critically ill patient on his hands who, in his opinion, needed blood transfusions to save her life or preserve her health. If there were no Jehovah's Witness card he undoubtedly would have been entitled to administer blood transfusions as part of the emergency treatment and could not have been held liable for so doing. In those circumstances he would have had no indication that the transfusions would have been refused had the patient then been able to make her wishes known and, accordingly, no reason to expect that, as a reasonable person, she would not consent to the transfusions.

However, to change the facts, if Mrs. Malette, before passing into unconsciousness, had expressly instructed Dr. Shulman, in terms comparable to those set forth on the card, that her religious convictions as a Jehovah's Witness were such that she was not to be given a blood transfusion under any circumstances and that she fully realized the implications of this position, the doctor would have been confronted with an obviously different situation. Here, the patient, anticipating an emergency in which she might be unable to make decisions about her health care contemporaneous with the emergency, has given explicit instructions that blood transfusions constitute an unacceptable medical intervention and are not to be administered to her. Once the emergency arises, is the doctor none the less entitled to administer transfusions on the basis of his honest belief that they are needed to save his patient's life?

The answer, in my opinion, is clearly no. A doctor is not free to disregard a patient's advance instructions any more than he would be free to disregard instructions given at the time of the emergency. The law does not prohibit a patient from withholding consent to emergency medical treatment, nor does

the law prohibit a doctor from following his patient's instructions. While the law may disregard the absence of consent in limited emergency circumstances, it otherwise supports the right of competent adults to make decisions concerning their own health care by imposing civil liability on those who perform medical treatment without consent.

The patient's decision to refuse blood in the situation I have posed was made prior to and in anticipation of the emergency. While the doctor would have had the opportunity to dissuade her on the basis of his medical advice, her refusal to accept his advice or her unwillingness to discuss or consider the subject would not relieve him of his obligation to follow her instructions. The principles of self-determination and individual autonomy compel the conclusion that the patient may reject blood transfusions even if harmful consequences may result and even if the decision is generally regarded as foolhardy. Her decision in this instance would be operative after she lapsed into unconsciousness, and the doctor's conduct would be unauthorized. To transfuse a Jehovah's Witness in the face of her explicit instructions to the contrary would, in my opinion, violate her right to control her own body and show disrespect for the religious values by which she has chosen to live her life: see In re Estate of Brooks, 205 N.E. 2d 435 (1965, Ill.); and Randolph v. City of New York an unreported judgment of the Supreme Court of New York released July 12, 1984, Index No. 17598/75; reversed 501 N.Y.S. 2d 837 (1986); varied 514 N.Y.S. 2d 705 (1987).

V

The distinguishing feature of the present case -- and the one that makes this a case of first impression -- is, of course, the Jehovah's Witness card on the person of the unconscious patient. What then is the effect of the Jehovah's Witness card?

In the appellant's submission, the card is of no effect and, as a consequence, can play no role in determining the doctor's duty toward his patient in the emergency situation existing in this case. The trial judge, the appellant argues, erred in holding both that the Jehovah's Witness card validly restricted

the doctor's right to administer the blood transfusions, and that there was no rationally founded basis for ignoring the card. The argument proceeds on the basis, first, that, as a matter of principle, a card of this nature could not operate in these circumstances to prohibit the doctor from providing emergency health care and, second, that in any event, as a matter of evidence, there was good reason to doubt the card's validity.

The appellant acknowledges that a conscious rational patient is entitled to refuse any medical treatment and that a doctor must comply with that refusal no matter how ill-advised he may believe it to be. He contends, however, to quote from his factum, that "a patient refusing treatment regarded by a doctor as being medically necessary has a right to be advised by the doctor, and the doctor has a concomitant duty to advise the patient of the risks associated with that refusal". Here, because of the patient's unconsciousness, the doctor had no opportunity to advise her of the specific risks involved in refusing the blood transfusions that he regarded as medically necessary. In those circumstances, the appellant argues, it was not possible for the doctor to obtain, or for the patient to give, an "informed refusal". In the absence of such a refusal, the argument proceeds, Dr. Shulman was under a legal and ethical duty to treat this patient as he would any other emergency case and provide the treatment that, in his medical judgment, was needed to preserve her health and life. In short, the argument concludes, Mrs. Malette's religiously motivated instructions, prepared in contemplation of an emergency, directing that she not be given blood transfusions in any circumstances, were of no force or effect and could be ignored with impunity.

In challenging the trial judge's finding that there was no rationally founded evidentiary basis for doubting the validity of the card and ignoring the restriction contained in it, the appellant puts forth a number of questions which he claims compel the conclusion that he was under no duty to comply with these instructions. He argues that it could properly be doubted whether the card constituted a valid statement of Mrs. Malette's wishes in this emergency because it was unknown, for

instance, whether she knew the card was still in her purse; whether she was still a Jehovah's Witness or how devout a Jehovah's Witness she was; what information she had about the risks associated with the refusal of blood transfusion when she signed the card; or whether, if she were conscious, she would refuse blood transfusions after the doctor had an opportunity to advise her of the risks associated with the refusal.

With deference to Mr. Royce's exceedingly able argument on behalf of the appellant, I am unable to accept the conclusions advocated by him. I do not agree, as his argument would have it, that the Jehovah's Witness card can be no more than a meaningless piece of paper. I share the trial judge's view that, in the circumstances of this case, the instructions in the Jehovah's Witness card imposed a valid restriction on the emergency treatment that could be provided to Mrs. Malette and precluded blood transfusions.

I should emphasize that in deciding this case the court is not called upon to consider the law that may be applicable to the many situations in which objection may be taken to the use or continued use of medical treatment to save or prolong a patient's life. The court's role, especially in a matter as sensitive as this, is limited to resolving the issues raised by the facts presented in this particular case. On these facts, we are not concerned with a patient who has been diagnosed as terminally or incurably ill who seeks by way of advance directive or "living will" to reject medical treatment so that she may die with dignity; neither are we concerned with a patient in an irreversible vegetative state whose family seeks to withdraw medical treatment in order to end her life; nor is this a case in which an otherwise healthy patient wishes for some reason or other to terminate her life. There is no element of suicide or euthanasia in this case.

Our concern here is with a patient who has chosen in the only way possible to notify doctors and other providers of health care, should she be unconscious or otherwise unable to convey her wishes, that she does not consent to blood transfusions. Her written statement is plainly intended to express her wishes when she is unable to speak for herself. There is no suggestion

that she wished to die. Her rejection of blood transfusions is based on the firm belief held by Jehovah's Witnesses, founded on their interpretation of the Scriptures, that the acceptance of blood will result in a forfeiture of their opportunity for resurrection and eternal salvation. The card evidences that "as one of Jehovah's Witnesses with firm religious convictions" Mrs. Malette is not to be administered blood transfusions "under any circumstances"; that, while she "fully realize[s] the implications of this position", she has "resolutely decided to obey the Bible command"; and that she has no religious objection to "nonblood alternatives". In signing and carrying this card Mrs. Malette has made manifest her determination to abide by this fundamental tenet of her faith and refuse blood regardless of the consequences. If her refusal involves a risk of death, then, according to her belief, her death would be necessary to ensure her spiritual life.

Accepting for the moment that there is no reason to doubt that the card validly expressed Mrs. Malette's desire to withhold consent to blood transfusions, why should her wishes not be respected? Why should she be transfused against her will? The appellant's answer, in essence, is that the card cannot be effective when the doctor is unable to provide the patient with the information she would need before making a decision to withhold consent in this specific emergency situation. In the absence of an informed refusal, the appellant submits that Mrs. Malette's right to protection against unwanted infringements of her bodily integrity must give way to countervailing societal interests which limit a person's right to refuse medical treatment. The appellant identifies two such interests as applicable to the unconscious patient in the present situation: first, the interest of the state in preserving life and, second, the interest of the state in safeguarding the integrity of the medical profession.

VI

The state undoubtedly has a strong interest in protecting and preserving the lives and health of its citizens. There clearly are circumstances where this interest may override the individual's right to self-determination. For example, the

state may in certain cases require that citizens submit to medical procedures in order to eliminate a health threat to the community or it may prohibit citizens from engaging in activities which are inherently dangerous to their lives. But this interest does not prevent a competent adult from refusing life-preserving medical treatment in general or blood transfusions in particular.

The state's interest in preserving the life or health of a competent patient must generally give way to the patient's stronger interest in directing the course of her own life. As indicated earlier, there is no law prohibiting a patient from declining necessary treatment or prohibiting a doctor from honouring the patient's decision. To the extent that the law reflects the state's interest, it supports the right of individuals to make their own decisions. By imposing civil liability on those who perform medical treatment without consent even though the treatment may be beneficial, the law serves to maximize individual freedom of choice. Recognition of the right to reject medical treatment cannot, in my opinion, be said to depreciate the interest of the state in life or in the sanctity of life. Individual free choice and self-determination are themselves fundamental constituents of life. To deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life. This state interest, in my opinion, cannot properly be invoked to prohibit Mrs. Malette from choosing for herself whether or not to undergo blood transfusions.

Safeguarding the integrity of the medical profession is patently a legitimate state interest worthy of protection. However, I do not agree that this interest can serve to limit a patient's right to refuse blood transfusions. I recognize, of course, that the choice between violating a patient's private convictions and accepting her decision is hardly an easy one for members of a profession dedicated to aiding the injured and preserving life. The patient's right to determine her own medical treatment is, however, paramount to what might otherwise be the doctor's obligation to provide needed medical care. The doctor is bound in law by the patient's choice even though that choice may be contrary to the mandates of his own

conscience and professional judgment. If patient choice were subservient to conscientious medical judgment, the right of the patient to determine her own treatment, and the doctrine of informed consent, would be rendered meaningless. Recognition of a Jehovah's Witness' right to refuse blood transfusions cannot, in my opinion, be seen as threatening the integrity of the medical profession or the state's interest in protecting the same.

In sum, it is my view that the principal interest asserted by Mrs. Malette in this case -- the interest in the freedom to reject, or refuse to consent to, intrusions of her bodily integrity -- outweighs the interest of the state in the preservation of life and health and the protection of the integrity of the medical profession. While the right to decline medical treatment is not absolute or unqualified, those state interests are not in themselves sufficiently compelling to justify forcing a patient to submit to nonconsensual invasions of her person. The interest of the state in protecting innocent third parties and preventing suicide are, I might note, not applicable to the present circumstances.

VII

The unique considerations in this case arise by virtue of Mrs. Malette's aim to articulate through her Jehovah's Witness card her wish not to be given blood transfusions in any circumstances. In considering the effect to be given the card, it must, of course, be borne in mind that no previous doctor-patient relationship existed between Dr. Shulman and Mrs. Malette. The doctor was acting here in an emergency in which he clearly did not have, nor could he obtain, her consent to his intervention. His intervention can be supported only by resort to the emergency doctrine which I outlined in Part IV of these reasons.

Under that doctrine, the doctor could administer blood transfusions without incurring liability, even though the patient had not consented, if he had no reason to believe that the patient, if she had the opportunity to consent, would decline. In those circumstances, it could be assumed that the

patient, as a reasonable person, would consent to aid being rendered if she were able to give instructions. The doctor's authority to make decisions for his patient is necessarily a limited authority. If he knows that the patient has refused to consent to the proposed procedure, he is not empowered to overrule the patient's decision by substituting his decision for hers even though he, and most others, may think hers a foolish or unreasonable decision. In these circumstances the assumption upon which consent is set aside in an emergency could no longer be made. The doctor has no authority to intervene in the face of a patient's declared wishes to the contrary. Should he none the less proceed, he would be liable in battery for tortiously invading the patient's bodily integrity notwithstanding that what he did may be considered beneficial to the patient.

In this case, the patient, in effect, issued standing orders that she was to be given "NO BLOOD TRANSFUSION!" in any circumstances. She gave notice to the doctor and the hospital, in the only practical way open to her, of her firm religious convictions as a Jehovah's Witness and her resolve to abstain from blood. Her instructions plainly contemplated the situation in which she found herself as a result of her unfortunate accident. In light of those instructions, assuming their validity, she cannot be said to have consented to blood transfusions in this emergency. Nor can the doctor be said to have proceeded on the reasonable belief that the patient would have consented had she been in a condition to do so. Given his awareness of her instructions and his understanding that blood transfusions were anathema to her on religious grounds, by what authority could he administer the transfusions? Put another way, if the card evidences the patient's intent to withhold consent, can the doctor none the less ignore the card and subject the patient to a procedure that is manifestly contrary to her express wishes and unacceptable to her religious beliefs?

At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults, as I have sought to demonstrate, are generally at liberty to refuse

medical treatment even at the risk of death. The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority. I view the issues in this case from that perspective.

VIII

The appellant's basic position, reduced to its essentials, is that unless the doctor can obtain the patient's informed refusal of blood transfusions he need not follow the instructions provided in the Jehovah's Witness card. Nothing short of a conscious, contemporaneous decision by the patient to refuse blood transfusions -- a decision made after the patient has been fully informed by the doctor of the risks of refusing blood in the specific circumstances facing her -- will suffice, the appellant contends, to eliminate the doctor's authority to administer emergency treatment or, by the same token, to relieve the doctor of his obligation to treat this emergency patient as he would any other.

In my opinion, it is unnecessary to determine in this case whether there is a doctrine of informed refusal as distinct from the doctrine of informed consent. In the particular doctor-patient relationship which arose in these emergency circumstances it is apparent that the doctor could not inform the patient of the risks involved in her prior decision to refuse consent to blood transfusions in any circumstances. It is apparent also that her decision did not emerge out of a doctor-patient relationship. Whatever the doctor's obligation to provide the information needed to make an informed choice may be in other doctor-patient relationships, he cannot be in breach of any such duty in the circumstances of this relationship. The patient manifestly made the decision on the basis of her religious convictions. It is not for the doctor to second-guess the reasonableness of the decision or to pass judgment on the religious principles which motivated it. The fact that he had no opportunity to offer medical advice cannot

nullify instructions plainly intended to govern in circumstances where such advice is not possible. Unless the doctor had reason to believe that the instructions in the Jehovah's Witness card were not valid instructions in the sense that they did not truly represent the patient's wishes, in my opinion he was obliged to honour them. He has no authorization under the emergency doctrine to override the patient's wishes. In my opinion, she was entitled to reject in advance of an emergency a medical procedure inimical to her religious values.

The remaining question is whether the doctor factually had reason to believe the instructions were not valid. On this question, the trial judge held that the doctor's "doubt about the validity of the card ... was not rationally founded on the evidence before him". I agree with that conclusion. On my reading of the record, there was no reason not to regard this card as a valid advance directive. Its instructions were clear, precise and unequivocal, and manifested a calculated decision to reject a procedure offensive to the patient's religious convictions. The instructions excluded from potential emergency treatment a single medical procedure well known to the lay public and within its comprehension. The religious belief of Jehovah's Witnesses with respect to blood transfusions was known to the doctor and, indeed, is a matter of common knowledge to providers of health care. The card undoubtedly belonged to and was signed by Mrs. Malette; its authenticity was not questioned by anyone at the hospital and, realistically, could not have been questioned. The trial judge found, "[t]here [was] no basis in evidence to indicate that the card [did] not represent the current intention and instruction of the card holder" [p. 268 O.R., p. 43 D.L.R.]. There was nothing to give credence to or provide support for the speculative inferences implicit in questions as to the current strength of Mrs. Malette's religious beliefs or as to the circumstances under which the card was signed or her state of mind at the time. The fact that a card of this nature was carried by her can itself be taken as verification of her continuing and current resolve to reject blood "fully realiz[ing] the implications of this position".

In short, the card on its face set forth unqualified

instructions applicable to the circumstances presented by this emergency. In the absence of any evidence to the contrary, those instructions should be taken as validly representing the patient's wish not to be transfused. If, of course, there were evidence to the contrary -- evidence which cast doubt on whether the card was a true expression of the patient's wishes -- the doctor, in my opinion, would be entitled to proceed as he would in the usual emergency case. In this case, however, there was no such contradictory evidence. Accordingly, I am of the view that the card had the effect of validly restricting the treatment that could be provided to Mrs. Malette and constituted the doctor's administration of the transfusions a battery.

With respect to Mrs. Malette's daughter, I would treat her role in this matter as no more than confirmatory of her mother's wishes. The decision in this case does not turn on whether the doctor failed to follow the daughter's instructions. Therefore, it is unnecessary, and in my view would be inadvisable, to consider what effect, if any, should be given to a substitute decision, purportedly made by a relative on behalf of the patient, to reject medical treatment in these circumstances.

One further point should be mentioned. The appellant argues that to uphold the trial decision places a doctor on the horns of a dilemma, in that, on the one hand, if the doctor administers blood in this situation and saves the patient's life, the patient may hold him liable in battery while, on the other hand, if the doctor follows the patient's instructions and, as a consequence, the patient dies, the doctor may face an action by dependants alleging that, notwithstanding the card, the deceased would, if conscious, have accepted blood in the face of imminent death and the doctor was negligent in failing to administer the transfusions. In my view, that result cannot conceivably follow. The doctor cannot be held to have violated either his legal duty or professional responsibility towards the patient or the patient's dependants when he honours the Jehovah's Witness card and respects the patient's right to control her own body in accordance with the dictates of her conscience. The onus is clearly on the patient. When members of

the Jehovah's Witness faith choose to carry cards intended to notify doctors and other providers of health care that they reject blood transfusions in an emergency, they must accept the consequences of their decision. Neither they nor their dependants can later be heard to say that the card did not reflect their true wishes. If harmful consequences ensue, the responsibility for those consequences is entirely theirs and not the doctor's.

Finally, the appellant appeals the quantum of damages awarded by the trial judge. In his submission, given the findings as to the competence of the treatment, the favourable results, the doctor's overall exemplary conduct and his good faith in the matter, the battery was technical and the general damages should be no more than nominal. While the submission is not without force, damages of $20,000 cannot be said to be beyond the range of damages appropriate to a tortious interference of this nature. The trial judge found that Mrs. Malette suffered mentally and emotionally by reason of the battery. His assessment of general damages was clearly not affected by any palpable or overriding error and there is therefore no basis upon which an appellate court may interfere with the award.

IX

The cross-appeal against the hospital can be dealt with very shortly. The findings made by the trial judge applicable to this claim, which I have not reproduced but which I have indicated are not subject to attack, provide no basis for holding the hospital liable for the acts of the doctor. This ground of appeal is accordingly without merit.

The cross-appeal with respect to costs must also be dismissed. This is a matter within the discretion of the trial judge. In denying costs to the successful party for the reasons given by him, the trial judge made no error in law or in principle. There is therefore no warrant for this court's intervention in this matter.

X

In the result, for these reasons I would dismiss the appeal and the cross-appeal, both with costs.

Appeal and cross-appeal dismissed.