NOTE

Automatic Consumer Protection Act Recovery For Lack Of Informed Consent: *Quimby v. Fine*

I. INTRODUCTION

In *Quimby v. Fine*,[1] the Washington Court of Appeals, Division I, ruled for the first time "that [a] lack of informed consent claim[2] against a health care provider may be within the scope of the Consumer Protection Act,[3] *if it relates to the entrepreneurial aspect of the medical practice.*"[4] The court noted that "whether [defendant's] conduct meets the other prongs [sic][5] of the *Hangman*[6] test is a question of fact to be resolved at the trial level."[7] But the court apparently failed to recognize the parallel structures of the informed consent statute[8] and the test articulated in *Hangman Ridge Training Sta-*

1. 45 Wash. App. 175, 724 P.2d 403 (1986), *reconsideration denied, review denied*, 107 Wash. 2d 1032 (1987).

2. A lack of informed consent claim is based on a violation of WASH. REV. CODE § 7.70.050 (1987). *See infra* note 8.

3. WASH. REV. CODE ch. 19.86 (1987).

4. 45 Wash. App. at 181, 724 P.2d at 406 (emphasis added).

5. "Entrepreneurial aspects" is not a prong of the *Hangman* test. *See infra* note 49 and accompanying text.

6. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986). *See infra* notes 49-65 and accompanying text.

7. 45 Wash. App. at 182, 724 P.2d at 406.

8. WASH. REV. CODE § 7.70.050 (1987). This statute provides:

> Failure to secure informed consent—Necessary elements of proof—Emergency situations:
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> (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of duty to secure informed consent by a patient or his representatives against a health care provider:
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> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
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> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
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> (c) That a reasonably prudent patient under similar circumstances would

bles v. Safeco Title Ins. Co. for a "private dispute"[9] under the Consumer Protection Act.[10] This parallelism effectively forces the conclusion that a plaintiff who establishes the elements of his lack-of-informed-consent action has also satisfied the elements of private Consumer Protection Act action.

In addition, the requirement that the lack of informed consent "relate" to the "entrepreneurial aspects" of the medical practice is inherently problematic. First, the standard is difficult to interpret. Second, virtually every lack-of-informed-consent action will fall within the purview of the Consumer Protection Act *automatically*. By providing a test that does not differentiate claims, the court has given no guidance concerning the rightful application of the punitive aspects of the Consumer Protection Act. This guidance is necessary if the Consumer Protection Act is to achieve its dual purposes of protecting the public and fostering fair and honest competition.[11] As it stands, the test announced by the *Quimby* court will grant Consumer Protection Act damages for merely negligent failure to obtain informed consent. These damages should be available only when the health care provider profits *because* he failed to obtain informed consent.

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not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provision of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including non treatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.

9. *See infra* notes 49-65 and accompanying text.

10. WASH. REV. CODE ch. 19.86 (1987).

11. *Id.* § 19.86.920. In fact, adherence to the implied result of *Quimby* defeats these announced purposes. First, the public loses protection because doctors will be more hesitant to provide services with the increased potential for liability. Second, fair and honest competition cannot be promoted by a rule that effectively forces physicians to limit practice.

This Note will demonstrate the need to refine the entrepreneurial aspects test as it applies to medical professionals and suggest a rationale for identifying those lack-of-informed-consent actions to which the Consumer Protection Act rightfully applies. Specifically, this Note seeks to: 1) demonstrate that satisfaction of the statutory elements of a lack-of-informed-consent claim[12] necessarily satisfies the five prongs of the *Hangman* private dispute test;[13] 2) show that the additional requirement that the lack of informed consent "relate to the entrepreneurial aspects of the medical practice" has not been definitively interpreted, and that it may be unintelligible in context;[14] 3) identify the practical difficulties of distinguishing entrepreneurial activity from professional activity within the framework of informed consent in health care,[15] and suggest a plausible interpretation of the "entrepreneurial aspects test" that may aid in identifying those types of lack-of-informed-consent actions to which the Consumer Protection Act should apply;[16] and 4) consider the policies justifying this suggested interpretation.[17]

II. FACTS AND HOLDING OF *QUIMBY V. FINE*

Quimby was an appeal from a denial of defendant-physician Fine's motion for summary judgment in a wrongful birth action. Plaintiffs' allegations included medical negligence, lack of informed consent, and a consumer protection claim. Rose Quimby had consented to a particular sterilization procedure. Dr. Fine, however, performed an alternate procedure[18] without advising the patient of, or obtaining her consent for, the substitution.[19] The procedure, a tubal ligation, failed. As a result, Mrs. Quimby became pregnant and delivered an infant with

12. *See infra* notes 66-68 and accompanying text.

13. *See infra* text accompanying notes 49-65.

14. *See infra* text accompanying notes 99-128.

15. *See infra* text accompanying notes 185-96.

16. *See infra* text accompanying notes 137-46.

17. *See infra* text accompanying notes 147-202.

18. The patient had consented to a Pomeroy tubal ligation, and Dr. Fine substituted the somewhat less reliable, but also less time consuming and therefore more economical, Hulka Clip procedure. Brief for Respondent at 1, Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403 (1986) (No. 83-2-13762-4). This tactic is reminiscent of the classic "bait and switch" tactic used by some less reputable used-car dealers.

19. Mrs. Quimby executed a blank consent form that was later completed by Dr. Fine. Telephone interview with Rick Ockerman, plaintiffs' attorney (Feb. 5, 1988). The patient first learned of the substitution after she became pregnant. Brief for Respondent at 3. Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403.

multiple birth defects. The child died eleven months later.[20]

Dr. Fine moved for summary judgment contending, *inter alia*, that the Consumer Protection Act was inapplicable to plaintiffs' causes of action because it could not apply to either medical negligence or lack of informed consent.[21] In affirming the denial of summary judgment and remanding for trial,[22] the court re-examined the application of the Consumer Protection

20. The alleged wrongful birth of Kari Quimby occurred on August 11, 1981. The child spent the first six months of her short life in the hospital, mostly in intensive care. For the next five months, Mrs. Quimby attended the child's constant needs, which included hourly feedings by eyedropper. During those five months, the plaintiff had virtually no sleep or rest. When the child then developed a fever and was taken to the hospital, the mother slept for 36 uninterrupted hours. On awaking she called the hospital. After learning of her child's condition, she left the telephone number of a friend's house where she could be reached. Relaxing for the first break from the constant demands of the last months, she received a telephone call from the hospital informing her of her child's death.

Ultimately, Mrs. Quimby's marriage could not withstand the stress of these and the surrounding events and was dissolved. Telephone interview with Rick Ockerman, plaintiffs' attorney (Feb. 5, 1988).

21. 45 Wash. App. at 179, 724 P.2d at 405.

22. The trial on remand was complicated when Dr. Fine died in June, 1987, just three days before his scheduled deposition. His death effectively shut down avenues of discovery that could have provided evidence to support the plaintiffs' Consumer Protection Act claim. The court would not allow examination of Dr. Fine's other patient records because of the physician-patient privilege. The testimony of Mrs. Maryanne Bruh, another patient of Dr. Fine who had undergone a similar substitution of surgical procedures, lacked sufficient credibility to establish the basis for the claim. *See* Brief for Respondent at 29, Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403. The court apparently was willing to permit the claim to be established in one of two ways: either 1) that the surgery was performed on a "profit-oriented basis", or 2) that the procedure was a matter of "routine performance for profit," but the court was not willing to infer either of these without supporting testimony. Telephone interview with Rick Ockerman, plaintiffs' attorney (Feb. 5, 1988).

Trial finally began in September 1987. The results were reported as follows:

Medical Malpractice

Death (Infant)

12/28/79—Plff. Rose, female age 33, Secretary. Decedent Def. doctor performed a Holka [sic] clip sterilization on Plff. Rose; sterilization failed and Plff. Rose bore a child (Kari) with severe defects. Plffs. [sic] contended Def. doctor never told her about Holka [sic] clips or the failure rates of respective tubal ligations; that clips have a substantially higher technical failure rate compared to the Pomeroy method. Def. contended that all tubal ligations have same failure rate; that Plff. would have followed Defendant doctor's advance [sic] and that she knew and signed consent forms that he was using clips.

Injuries: Birth of baby girl with two-chamber heart, no spleen, abnormal liver and

Act to the "learned profession" of law in *Short v. Demopolis*[23] and found "no basis to distinguish the legal practice from the medical practice"[24] in applying a consumer protection statute.

Noting that the elements of a private Consumer Protection Act claim had been enumerated in *Hangman*, the court acknowledged that the requirements of the *Hangman* test[25] must also be satisfied. The court concluded that the Consumer Protection Act was applicable to Mrs. Quimby's lack-of-informed-consent claim stating that "a lack-of-informed-consent claim can be based on dishonest and unfair practices used to promote the entrepreneurial aspects of a doctor's practice, such as when the doctor promotes an operation or service to increase profits and the volume of patients, then fails to adequately advise the patient of risks or alternative procedures."[26]

To review, the holding in *Short* impliedly brought health care professionals within the reach of the Consumer Protection Act. The *Hangman* court enumerated the elements of such a Consumer Protection Act claim, and the *Quimby* court extended Consumer Protection Act coverage to lack-of-informed-consent claims, provided that the lack-of-informed-consent claim relate to the entrepreneurial aspects of a medical practice.

III. *SHORT V. DEMOPOLIS*: THE INEVITABLE APPLICATION OF THE CONSUMER PROTECTION ACT TO MEDICAL PROFESSIONALS

The Washington Supreme Court first applied the Consumer Protection Act to a learned profession in *Short v. Demo-*

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hiatus [sic] hernia. Externally perfect but internal defects led eventually to her death eleven months after birth.

Specials: Med. $71,351.59; Lost Wages-$1,914; Days Work Lost - 2 months; Days in Hosp. - 2 days.

Settlement: Demand: $100,000. Plff. asked jury for $324,000. Offer: $50,000. No settlement conference.

Result: Plaintiff Verdict for $160,000. (No new trial pending.)

1987 Jury Verdicts Northwest 556 (Nov. 1987).

Assuming a "standard" one-third contingency fee, subrogation of the recovery of medical damages, and estimating costs at about 10% of the verdict, Rose Quimby could have "netted" about $20,000. Had the Consumer Protection Act claim been proved, she would have netted about *$79,000 more* ($10,000 treble damages, $16,000 costs, $53,000 attorneys' fees).

23. 103 Wash. 2d 52, 691 P.2d 163 (1984).

24. *Quimby*, 45 Wash. App. at 180, 724 P.2d at 406.

25. *See infra* notes 49-65 and accompanying text.

26. 45 Wash. App. at 181, 724 P.2d at 406.

polis.[27] In *Short*, the defendant-client counterclaimed against plaintiff-attorney who was suing for collection of fees for legal services rendered. Remarking that the Consumer Protection Act contains no language expressly excluding attorneys from its purview, the court concluded that *some* conduct within the practice of law did fall within the Consumer Protection Act. The court held that the term "conduct of any trade or commerce" does not exclude all conduct of the profession of law,[28] since "[w]hatever else it may be . . . the exchange of such a service for money is 'commerce' in the most common usage of that word."[29] The court specifically left open the question of whether the Consumer Protection Act applies to every aspect of the practice of law as to the performance of legal services.[30]

By contrast, the claims amounting to allegations of negligence or malpractice were held as a matter of law to be exempt from the Consumer Protection Act.[31] These claims were "not chiefly concerned with the entrepreneurial aspects of the legal practice; rather, they concern[ed] the *actual* practice of law."[32] The only claims that were allowed to go forward were those that "primarily challenge the *entrepreneurial aspects* of legal practice—how the price of legal services is determined, billed and collected and the way a law firm

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27. 103 Wash. 2d 52, 691 P.2d 163 (1984). *See generally* Note, *Recent Development: Washington Lawyers Under the Purview of the State Consumer Protection Act: The "Entrepreneurial Aspects" Solution*, 60 WASH. L. REV. 925 (1985) [hereinafter Note, *Washington Lawyers*].

28. 103 Wash. 2d at 66, 691 P.2d at 170. The court also disposed of the argument that regulation of attorneys by the judiciary precluded application of the Consumer Protection Act. *Id.* at 62-66, 691 P.2d at 169-171.

Cf. Comment, *The Scope of the Regulated Industries Exemption Under the Washington Consumer Protection Act*, 10 GONZ. L. REV. 415 (1975) (after the 1974 amendment by the legislature, the burden of proof is on defendant to show that his act or practice is specifically *permitted* by the appropriate regulatory body).

29. *Short*, 103 Wash. 2d at 57, 691 P.2d at 166 (quoting Goldfarb v. Virginia, 421 U.S. 773 (1975)).

30. 103 Wash. 2d at 66, 691 P.2d at 170-71.

31. *Id.* at 61-62, 691 P.2d at 168. *But see* DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Ct. App. 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (court noted that claims against *physicians* based on negligence are specifically exempted from Texas' Deceptive Trade Practices Act, while claims against lawyers are *not*).

The residual exemption has been criticized. "The court should have concluded that all aspects of the practice of law are trade or commerce as defined by the [Consumer Protection Act], but that certain acts, such as professional negligence, may not be classified as "unfair or deceptive." Note, *Washington Lawyers*, *supra* note 27, at 926.

32. 103 Wash. 2d at 61, 691 P.2d at 168 (emphasis added).

obtains, retains, and dismisses clients."[33] The court recognized that failure to extend the Consumer Protection Act generally to the learned professions in Washington had been criticized as based on the "myth of the learned profession exemption to the Consumer Protection Act."[34] This criticism contributed to the application of the Consumer Protection Act to the learned profession of law in *Short*.[35]

Commentators have approved the extension of the Consumer Protection Act to the legal profession.[36] Some have argued, however, that *Short* should have extended the Consumer Protection Act's protection to virtually all aspects of the professional's practice, not merely those deemed "entrepreneurial."[37] Indeed, this blanket application was suggested to the *Short* court.[38] But while the majority opinion in *Short* left open the question of comprehensive application of the Consumer Protection Act to the legal profession,[39] a concurring opinion emphasized the sentiment that *Short* "necessarily decided that the [Consumer Protection Act] does not

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33. *Id.* (emphasis added).

34. *See* Comment, *The Washington Consumer Protection Act vs. The Learned Professional*, 10 GONZ. L. REV. 435, 438 (1975) [hereinafter Comment, *Learned Professional*].

35. *Short*, 103 Wash. 2d at 62, 691 P.2d at 168-69 (citing Comment, *Learned Professional*, *supra* note 34, at 436-38).

36. *See generally* Note, *Washington Lawyers*, *supra* note 27, at 925 n.3.

37. *Id.* at 937.

38. "[D]ifficulty does arise in construing *negligent* behavior as unfair . . . . Nevertheless, it is feasible and certainly preferable to employ the Act in all cases of professional misconduct inclusive of mere negligence, for the simple reason that any conduct which is detrimental to the public interest is unfair to the injured victim." Comment, *Learned Professional*, *supra* note 34, at 452-53.

The Consumer Protection Act applies to the learned professional's prohibited acts, and acts neither prohibited nor specifically permitted *and* that are unfair or deceptive. *Id.* at 449. *"[O]nly* where the ultimate ramifications of the professional's act or practice are *entirely* within the scope of his professional field will the 'learned professional exemption' apply. *Id.* at 442-43 (latter emphasis added).

The plain definition of trade and commerce in WASH. REV. CODE § 19.86.010(2) (1987) includes "the sale of . . . services . . ." and arguably contemplates the entire spectrum of professional services, entrepreneurial or not. The court also has adopted a definition of services:

> In ordinary usage the term 'services' has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed. The general definition of 'service' as given in Webster's New International Dictionary is 'performance of labor for the benefit of another'; 'Act or instance of helping or benefitting.'

Skrivanich v. Davis, 29 Wash. 2d 150, 161, 186 P.2d 364, 370 (1947) (quoting Creameries of America v. Industrial Comm'n., 98 Utah 571, 572, 102 P.2d 300, 304 (1941)).

39. *See supra* note 30 and accompanying text.

apply to every aspect of the practice of law in this state."[40]

But the supreme court, in construing the Consumer Protection Act,[41] followed the intent of the legislature that the courts be guided by final decisions of the federal courts.[42] The court then cited numerous federal cases in which the "learned professional" exception was of no avail to various health care professions.[43] This construction effectively demolished any bar to the application of the Consumer Protection Act to at least *some* aspects of the medical profession.[44]

Other states have applied their Consumer Protection Acts to the health care professions,[45] and at least one court has considered whether the negligent acts of a physician are within the scope of a Consumer Protection Act,[46] but none has applied its Consumer Protection Act to a lack-of-informed-consent claim.

Relying on the reasoning in *Short*, the *Quimby* court found "no basis to distinguish the legal practice from the medical practice."[47] And, like the supreme court in *Short*, the court of appeals in *Quimby* carefully excluded plaintiff's negligence claim from the purview of the Consumer Protection Act "because it relates to the actual competence of the medical practitioner."[48] Although *Short* made the extension of the Consumer Protection Act to the health care professions inevitable, the addition of a Consumer Protection Act claim to a

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40. *Short*, 103 Wash. 2d at 71, 691 P.2d at 172.

41. "It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters . . . . To this end this act shall be liberally construed that its beneficial purposes may be served." WASH. REV. CODE § 19.86.920 (1987).

42. *Short*, 103 Wash. 2d at 56, 691 P.2d at 166.

43. *Id.* at 58-59, 691 P.2d at 167. *See also* American Medical Ass'n v. Federal Trade Comm'n., 638 F.2d 443, 448 (2d Cir. 1980) (the business aspects of medical practice fall within the scope of the FTC Act even if secondary to the charitable and social aspects of physicians' work).

44. At least with regard to antitrust violations, federal courts may have fashioned a post-*Goldfarb* exemption for commercial aspects of practice. *See* Annotation, *"Learned Profession" Exemption in Federal Antitrust Laws* 39 A.L.R. FED. 774, 781 (1978).

45. Commonwealth v. Sigafoose, 11 Pa. Commw. 565, 315 A.2d 642 (1974) (chiropractors falsely advertising); Little v. Rosenthal, 376 Mass. 573, 382 N.E.2d 1037 (1978) (alleging unfair trade practices by a physician and nursing home).

46. DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Ct. App. 1980).

47. 45 Wash. App. at 180, 724 P.2d at 406.

48. *Id.* Comparably, lack-of-informed-consent claims related to "actual competence" should be excluded. The *Quimby* court's entrepreneurial aspects test, however, fails to make this distinction clear.

lack-of-informed-consent claim is troublesome because the generic facts that support a lack-of-informed-consent claim ostensibly satisfy the test for a private Consumer Protection Act claim under *Hangman*. The result will be to increase the amount of recovery for a lack-of-informed-consent claim by allowing additional recovery under the Consumer Protection Act.

IV. *HANGMAN RIDGE*: THE TEST FOR A PRIVATE DISPUTE CONSUMER PROTECTION ACT CLAIM

To prevail in a private Consumer Protection Act action, the plaintiff must prove the five distinct elements or "prongs" enumerated by the *Hangman* court:[49] 1) an unfair or deceptive act or practice; 2) an occurrence of that act in trade or commerce; 3) a public interest impact; 4) an injury to the plaintiff's business or property; and 5) a causal link between the unfair or deceptive act complained of and the injury suffered.

In order to establish an unfair or deceptive act[50] or practice in a private dispute, it is not necessary to show that the act in question was *intended* to deceive, but merely that the act had the capacity to deceive.[51] "The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs."[52]

The term "trade or commerce" is broadly defined to include the sale of professional service.[53] "The [Consumer Protection Act], on its face, shows a carefully drafted attempt to

49. 105 Wash. 2d at 784, 719 P.2d at 535-39. For an analysis of the requirements for a private Consumer Protection Act action prior to *Hangman*, see Comment, *The Consumer Protection Act Private Right of Action: A Re-Evaluation*, 19 GONZ. L. REV. 673 (1984) [hereinafter Comment, *A Re-Evaluation*].

50. In order for an act to be deceptive, it need not constitute fraud, and the claimant need not actually be defrauded. In Fell v. FTC, 285 F.2d 879 (9th Cir. 1960), the court held that the Federal Trade Commission could prevent the use of deceptive acts or practices if there was a mere likelihood that the acts might deceive; existence of bad intent is immaterial. It would follow, then, that under the Washington Consumer Protection Act, a professional whose acts have the capacity to deceive and which result in some injury to his client or patient will be subject to potential liability under the Act. Comment, *Learned Professional*, *supra* note 34, at 453.

51. 105 Wash. 2d at 785, 719 P.2d at 535. *See, e.g.*, Grayson v. Nordic Constr. Co., Inc., 22 Wash. App. 143, 149, 589 P.2d 283, 286 (1978), *rev'd on other grounds*, 92 Wash. 2d 548, 599 P.2d 1271 (1979). *See also* Comment, *Private Suits Under Washington's Consumer Protection Act: The Public Interest Requirement*, 54 WASH. L. REV. 795, 807 n.87 (1979) [hereinafter Comment, *Private Suits*].

52. 105 Wash. 2d at 785, 719 P.2d at 535. *See also* WASH. REV. CODE § 19.86.020 (1987).

53. *Short*, 103 Wash. 2d at 61, 691 P.2d at 168.

bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce."[54]

The public interest requirement is by far the most complex of the five *Hangman* prongs of a private Consumer Protection Act claim. The *Hangman* court thinly veiled its invitation to the legislature to remove Washington from the minority of jurisdictions that demand a showing of public interest in a private Consumer Protection Act claim.[55] Its language seems almost apologetic for being "compelled" to persist in the requirement.[56] The court relaxed the more stringent test it had previously applied to this element.[57]

Under the new standards, whether the public has an interest in any given action is to be determined by the trier of fact from several factors.[58] These factors will vary according to the context in which the act was committed. As an example of a "private dispute," the *Hangman* court used the attorney-client dispute in *Short*.[59] Noting that it is the likelihood that additional plaintiffs have been or will be injured in exactly the

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54. *Id.* at 61, 691 P.2d at 168.

55. *See* Comment, *On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act*, 10 U. PUGET SOUND L. REV. 143, 171 (1986). The public interest requirement has been criticized as "superfluous." *Id.* at 156. *But see* Comment, *Private Suits*, *supra* note 51, at 807 (Washington's requirement of a public interest serves the same purpose as the statutory requirement of intentional violation in other states.).

56. 105 Wash. 2d at 789, 719 P.2d at 537.

57. *Id.* ("[T]he plaintiff need no longer meet the three prongs of this test," that is, the "inducement-repetition-damage" test promulgated in Anhold v. Daniels, 94 Wash. 2d 40, 614 P.2d 184 (1980)). See McCrae v. Bolstad, 101 Wash. 2d 161, 676 P.2d 496 (1984) in which the *Anhold* test was met when defendant's real estate agent failed to disclose significant facts. Plaintiff acted in reliance, and was damaged as a result. The *Anhold* test ostensibly required only potential for repetition, but the court never established the exact meaning of "potential for repetition." *See* Eastlake Constr. Co. v. Hess, 102 Wash. 2d 30, 52, 686 P.2d 465, 477 (1984) (potential for repetition must be real and substantial and not a mere hypothetical possibility). One way to prove potential for repetition was by proving *actual* repetition of injury to other consumers. *Cf.* Rouse v. Glascam Builders, 101 Wash. 2d 127, 134-35, 677 P.2d 125-30 (1984) (no potential for repetition of defendant condominium builder's unfair acts to one owner when there was no proof of unfair acts to any other owner in a common development). The potential could also be proved by showing that the defendant engaged in a protracted course of unfair or deceptive conduct. *See, e.g.*, *Eastlake*, 102 Wash. 2d at 52, 686 P.2d at 477. Potential could be shown by showing that defendant used widespread advertising. *See, e.g.*, Luxon v. Caviezel, 42 Wash. App. 261, 268-69, 710 P.2d 809, 813 (1985). Neither of these latter is applicable to any but the smallest minority of attorney/client or physician/patient transactions. Thus, in order to prove potential for repetition, private transaction plaintiffs are forced, as a practical matter, to prove actual repetition.

58. 105 Wash. 2d at 789-91, 719 P.2d at 537-38.

59. *Id.* at 790, 719 P.2d at 538.

same manner[60] that causes a private dispute to affect the public interest,[61] the court considered the following factors: "1) Were the alleged acts committed in the course of defendant's business? 2) Did defendant advertise to the public in general? 3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? and 4) Did the plaintiff and defendant occupy unequal bargaining positions?"[62]

It is important to emphasize that no single factor is dispositive and that not all factors must be present to satisfy the public interest prong.[63] The court left itself wide latitude to find the presence of a "public interest" in a private dispute.

The two remaining Consumer Protection Act prongs may be stated simply. There must be an injury to plaintiff's business or property, but the injury need not be great.[64] Finally, there must be a "causal link" between the unfair or deceptive act(s) and the injury suffered by the plaintiff.[65]

V. SUBSTANTIAL SIMILARITY: THE ELEMENTS OF A LACK-OF-INFORMED-CONSENT CLAIM AND THEIR CONGRUENCE WITH THE *HANGMAN* PRONGS

In order to obtain an award for *any* cause of action for injury resulting from health care,[66] plaintiff must establish that defendant failed to follow the accepted standard of care, or that defendant promised the patient that the injury suffered would not occur, or that defendant failed to obtain informed consent.[67] The elements of a lack-of-informed-consent claim[68]

60. Mrs. Quimby offered to prove that Dr. Fine had performed substitution of the identical procedures on Mrs. Maryanne Bruhn. Brief for Respondents at 29, Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403.

61. 105 Wash. 2d at 790, 719 P.2d at 538.

62. *Id.*

63. *Id.*

64. *Id.* at 793, 719 P.2d at 539.

65. *Id.*

66. WASH. REV. CODE § 7.70.010 (1987) provides:

> Declaration of modification of actions for damages based upon injuries resulting from health care. The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in WASH. REV. CODE § 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, *or otherwise*, for damages for injury occurring as a result of health care which is provided after June 25, 1976.
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> Thus, a cause of action under the Consumer Protection Act also falls under the provisions of this section.
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> (Emphasis added).

67. WASH. REV. CODE § 7.70.030 (1987) provides:

are: 1) that defendant failed to disclose a material fact 2) of which a reasonably prudent patient[69] was unaware 3) concerning a procedure to which the patient would not have consented had he known the fact withheld 4) that proximately caused the injury in issue.

Each element of a lack-of-informed-consent claim must be satisfied before the plaintiff can recover under the Consumer Protection Act.[70] But, if the lack-of-informed-consent ele-

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No award shall be made in any action or arbitration for damages occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;

(2) That a health care provider promised the patient or his representative that the injury suffered would not occur;

(3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

68. WASH. REV. CODE § 7.70.050 (1987) provides for the following elements of a lack-of-informed-consent action:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately cause injury to the patient.

Washington has explicitly adopted the "objective patient" standard for the material fact test. *See* Miller v. Washington, 11 Wash. App. 272, 289-90, 522 P.2d 852, 864 (1974), *aff'd per curiam*, 85 Wash. 2d 151, 530 P.2d 334 (1975). If it had not done so, *Quimby* would allow the patient's "subjective" 20/20 hindsight to activate the Consumer Protection Act in lack-of-informed-consent actions resulting in virtual strict liability.

69. While this "objective" test for materiality of the undisclosed risk may seem to insulate the health care provider from the hindsight of an unreasonable plaintiff, it nevertheless exposes the provider to the hindsight of a jury. Miller v. Kennedy, 11 Wash. App. at 288-89, 522 P.2d at 864 (1974); *see also* Smith v. Shannon, 100 Wash. 2d 26, 32, 666 P.2d 351, 355 (1983); Woolley v. Henderson, 418 A.2d 1123, 1131 (Me. 1980) (acknowledging "potential danger that a jury, composed of laymen and gifted with the benefit of hindsight, will define the breach of a disclosure obligation largely on the basis of the unfortunate result"); Brown v. Dahl, 41 Wash. App. 565, 574-75, 705 P.2d 781, 788 (1985). (WASH. REV. CODE § 7.70.050(3)(d) (1987) does not require expert testimony that the risks of proposed treatment be greater than risks of available alternatives.)

70. Perhaps the most interesting question raised by *Quimby* is whether an "injury" cognizable under the Consumer Protection Act, but not adequate in itself to satisfy the statutory "injury" element of lack of informed consent will nevertheless afford plaintiff a recovery for "injury resulting from health care." For example, assume the *Quimby* facts with the following variation: Mrs. Quimby does not become

ments *are* satisfied, then the elements of a private dispute Consumer Protection Act claim are satisfied as well. This congruence can lead to the result that a merely negligent act invokes a series of penalties neither intended nor desired.

Because a "failure to disclose a material fact," the first element of a lack-of-informed-consent claim, is per se deceptive,[71] it automatically constitutes the "unfair or deceptive act" required by the first prong of *Hangman*. The "trade or commerce" requirement of the second prong of the Consumer Protection Act private action test is easily met by applying the analysis in *Short* that a learned professional (here a health care professional) is engaged in commerce.[72]

An examination of the factors of the *Hangman* public interest requirement, in the context of a lack-of-informed-consent claim, leads to the conclusion that the third prong of the *Hangman* test will also be satisfied.[73] First, the act supporting a lack-of-informed-consent claim invariably occurs during the course of the medical professional's business.[74] Second, a defendant health care provider likely performs at least minimal advertising by placing a listing in the yellow pages.[75] Third, a defendant health care provider "solicits" the patient when he invites a patient to undergo a therapeutic or diagnostic procedure.[76] Finally, there is an obvious inequality of bargaining position in the physician-patient relationship.[77]

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pregnant. Does she have a compensable injury? This question is beyond the scope of the present inquiry.

71. Tallmadge v. Aurora Chrysler-Plymouth, 25 Wash. App. 90, 605 P.2d 1275 (1975); Testo v. Dunmire Olds, 16 Wash. App. 39, 554 P.2d 349 (1976).

72. *See supra* note 29 and accompanying text.

73. *See supra* notes 58-62 and accompanying text.

74. This first factor is somewhat redundant in light of the "trade or commerce" requirement of the second prong. *See supra* notes 53-54 and accompanying text.

75. *See* Comment, *Private Suits*, *supra* note 51, at 812 ("[I]t is difficult to see why the standard of solicitation/public offering should be applied differently to merchants than it is to professionals . . . .").

The Comment suggests that merely hanging out a shingle and placing a listing in the yellow pages ought to satisfy this prong.

76. To "solicit" is to awaken or excite to action, or to invite. *In re* Winthrop, 135 Wash. 135, 138, 237 P. 3, 4-5 (1925). *See also* Comment, *Private Suits*, *supra* note 51, at 811.

77. It has been observed that "the patient is rarely in a position to propose treatment. He consults a physician because he lacks the knowledge to diagnose or the ability to cure whatever malady has befallen him," and that "legal protection of the patient's right to receive information is prompted by the *unequal informational status* of the parties." (emphasis added). Comment, *Informed Consent in Washington: Expanded Scope of Material Facts that the Physician Must Disclose to his Patient*, 55

Recall that it is not necessary for all of these factors to be present to satisfy the public interest requirement,[78] and that the *Hangman* court seemed inclined to find this prong more easily satisfied than under earlier formulations of the test for the presence of a public interest.[79] It is apparent that in almost every case each factor will be present to some extent, and that the business, solicitation, and bargaining factors will be present in every medical injury case. Given the magnitude of the disparity in bargaining positions between a health care provider and his patient, this bargaining position factor could possibly suffice alone in all instances. Thus, there is sufficient public interest in a generic lack-of-informed-consent cause of action to satisfy this prong in essentially every case.

In a lack-of-informed-consent claim, the injury prong of *Hangman*, is satisfied if plaintiff's "property" suffers "mere financial injury."[80] This financial injury can consist simply of the legal expenses of bringing the action.[81] Financial injury can also be proved by any additional medical or other expenses arising from the alleged act.[82]

Finally, while the *Hangman* test requires a causal link,[83] lack-of-informed-consent claims require proof of proximate

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WASH. L. REV. 655, 657 (1980) [hereinafter Comment, *Informed Consent in Washington*].

78. *See supra* notes 58-63 and accompanying text.

79. *See supra* notes 55-63 and accompanying text. Plaintiff would be well advised to continue to analyze and perhaps to argue his case under the earlier *Anhold* inducement-damage-repetition test. Presumably, because the *Hangman* court relaxed this latter test, if plaintiff can satisfy it, he will also have satisfied the *Hangman* public interest requirement. The *Anhold* formula for finding a public interest in a private transaction, that is, proof of actual repetition, was pled in *Quimby*. Brief for Respondent at 27-29, Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403. *But see supra* note 22.

80. Tallmadge v. Aurora Chrysler-Plymouth, 25 Wash. App. 90, 93-94, 605 P.2d 1275, 1278 (1979). *See also* St. Paul Ins. v. Updegrave, 33 Wash. App. 653, 658-59, 656 P.2d 1130, 1133 (1983) (plaintiff need show no specific money damages and can recover attorneys' fees without any award of pecuniary damages. Recoverable damages include the consumer's inconvenience, loss of time in helping prepare the case, time spent in court, attorneys' fees, filing fees, investigation expenses and expert witness fees).

81. *Tallmadge*, 25 Wash. App. at 93-94, 605 P.2d at 1278.

82. "A consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of . . . the Consumer Protection Act." Reiter v. Sonotone Corp., 442 U.S. 330 (1979), *quoted in* Keyes v. Bollinger, 31 Wash. App. 286, 296, 640 P.2d 1077, 1084 (1982). The *Keyes* court also acknowledged that personal injury might cause financial injury to property. "Should 'mental distress, embarrassment, and inconvenience', in fact entail pecuniary loss, we discern no reason under the [Consumer Protection Act] to exclude such damages." *Id.* at 296, 640 P.2d at 1084.

83. For numerous causal "links" in the lack of informed consent causal claim, see

cause in order to succeed.[84] The proximate cause requirement in the doctrine of informed consent functions to insure that recovery cannot be obtained for injuries unconnected to the physician's breach of his duty to disclose.[85] Given proximate cause of the injury by the failed disclosure in the underlying lack-of-informed-consent claim, there is a sufficient "causal link" to sustain the Consumer Protection Act action.[86]

As a result of this simultaneous satisfaction of the elements of the lack-of-informed-consent statute and the prongs of the *Hangman* private dispute test, one who prevails in an action for lack of informed consent is just one short step from recovery under the Consumer Protection Act.[87] This latter recovery may include attorneys' fees, costs, and treble damages to a limit of $10,000.00.[88] When ordinarily a plaintiff pays his own fees and costs, the Consumer Protection Act shifts this burden to a losing defendant.[89] While the court retains some discretion in awarding these items,[90] there is no possibility of a

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Comment, *Informed Consent in Washington*, *supra* note 77, at 666 *passim* with five "links" listed at 670.

84. WASH. REV. CODE § 7.70.050(1)(d) (1987).

85. Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

86. A successful suit under informed consent theory requires some *causal connection* between the undisclosed material fact and the injury to the patient. Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 643-46 (1969). If there is "connection," there is "link." Thus, the "link" is required for success in the underlying lack of informed consent claim.

87. *Short* indicated that an area of conduct would not be excluded from the Consumer Protection Act based solely upon the existence of other remedies at law. 103 Wash. 2d at 65, 691 P.2d at 170. For example, a plaintiff can recover under the Consumer Protection Act and separately in tort. *See* Sherwood v. Bellevue Dodge, Inc., 35 Wash. App. 741, 669 P.2d 1258 (1983). There is no explicit prohibition on recovery under either the Consumer Protection Act or WASH. REV. CODE § 7.70.050 (1987) (Failure to Secure Informed Consent), or under the plain language of WASH. REV. CODE § 7.70.010 (1987).

88. WASH. REV. CODE § 19.86.090 (1987).

89. Plaintiff's legal fees and costs are far from insubstantial in the typical lack-of-informed-consent case in which considerable time is spent and expense generated by the requirement for expert testimony and discovery. Recovery of these expenses under the Consumer Protection Act, or more correctly, avoidance of having the simple lack-of-informed-consent recovery reduced by these amounts, is by far the most attractive feature of this theory for plaintiff.

90. Safeco Ins. Co. of Am. v. JMG Restaurants, 37 Wash. App. 1, 19, 680 P.2d 409, 420 (1984) (judge, not jury, establishes the attorney's fees to be awarded); Ivan's Tire Service Store, Inc. v. Goodyear Tire & Rubber Co., 10 Wash. App. 110, 128, 517 P.2d 229, 240 (1973) (contingent fee established between the attorney and client is not binding); Bowers v. Transamerica Title Ins. Co., 100 Wash. 2d 581, 593, 675 P.2d 193, 201-02 (1983) (analytical framework developed in Lindy Bros. Blds. v. American

reciprocal award of fees to a prevailing defendant.[91] That portion of the Consumer Protection Act award characterized as "punitive" or "exemplary" by defendant's liability carrier will not be covered under the typical malpractice policy.[92] In addition, because the Consumer Protection Act claim is not a "tort" action,[93] plaintiff may be able to circumvent any limita-

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Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) is the appropriate formula by which to calculate reasonable attorneys' fees).

Failure to allow discovery deposition costs and costs of expert appearances is not an abuse of the court's discretion. *Safeco*, 37 Wash. App. at 19, 680 P.2d at 420. Defendant may argue these costs are properly allocable only to the underlying lack of informed consent claim. But see *Keyes*, 31 Wash. App. 286 at 296, 640 P.2d at 1084, in which, having found the damages awarded under the underlying claim to be within the scope of the Consumer Protection Act, the court "need not consider the circumstances under which such segregation [of legal fees for the different claims] may be required."

91. Only plaintiff, not defendant, is entitled to attorneys' fees under a Consumer Protection Act action. Sato v. Century 21 Ocean Shores Real Estate, 101 Wash. 2d 599, 603, 681 P.2d 242, 245 (1984).

92. The leading case holding that insurance against punitive damages is contrary to public policy is Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). *But see* Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. App. 1981); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn 639, 644, 383 S.W.2d 1, 5 (1964).

If there is a financial interest involved, negligence begins to blur into willful torts. Therefore, punitive damages will attach. *See* Bloom, *Risk Management in Health Maintenance Organizations*, 6 WHITTIER L. REV. 683, 683-88 (1984) (predicting uninsurability for punitive damages for willful torts committed with apparent financial motive).

Recovery of punitive damages is contrary to public policy in Washington and will not be allowed unless expressly authorized by statute. Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 421, 635 P.2d 708, 711 (1981).

Numerous courts continue to find that insurance coverage [for punitive damages] is against public policy as long as punitive damages are regarded as punishment and deterrence. J. GHIARDI & J. KIRCHNER, PUNITIVE DAMAGES LAW AND PRACTICE § 7.14 (1985).

The author of this Note has a professional liability insurance policy that includes (in "plain English") the following language:

> Liability. To be covered, claims must be based on events that arise out of the profession named in the Coverage Summary.
>
> Defending Lawsuits. We'll defend any suit brought against any protected person for covered claims . . . .
>
> Individual [protected person]. If you are an individual shown in the Coverage Summary, you're protected against claims that result from:
>
> Professional services that you provided or should have provided. Form No. #43562 Ed. 1-85, Insuring Agreement 42B, Liability Coverage, St. Paul Fire and Marine Insurance Co., 1985.

Since any Consumer Protection Act Recovery cannot arise out of "professional" activities, they are probably not covered. They may also be uninsurable as a matter of public policy.

93. However, the Consumer Protection Act has been said to sound in tort. *See* Comment, *A Re-Evaluation*, *supra* note 49, at 676. *See, e.g.*, Nuttall v. Dowell, 31 Wash. App. 98, 639 P.2d 1349 (1978); Wilkinson v. Smith, 31 Wash. App. 1, 639 P.2d 768 (1982).

tions imposed on his recovery by "tort reform" legislation.[94] A full spectrum of "actual damages," including pain and suffering,[95] and emotional distress,[96] can be recovered under the Consumer Protection Act.

All these potential damages are consequences to defendants who, before *Quimby*, were liable only for general and special damages under what was essentially a negligence theory. The act of the health care provider has not changed, the injury to the patient has not changed, but the potential recovery for the plaintiff has changed dramatically. It would seem that the successful lack-of-informed-consent plaintiff has received a windfall.

But, before the plaintiff can take advantage of the benefits of a recovery under the Consumer Protection Act, he must clear one additional hurdle imposed by *Quimby*—relate the lack of informed consent to the entrepreneurial aspects of the medical practice.[97] In effect, the court has added a sixth prong to the *Hangman* test or, perhaps better conceptually, a fifth

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94. *See* S.B. 4630, the Washington Tort Reform Act of 1986. The bill was passed and codified in WASH. REV. CODE § 4.56.250 and § 4.56.260, among other sections, as ch. 305, 1986 WASH. LAWS. *See id.* § 301, Limitations on Non-Economic Damages.

Since § 4.56.250 limits, or "caps" damages for "personal injury or death," its provisions may also apply to personal injury damages alleged under the Consumer Protection Act, although technically any recovery under the Consumer Protection Act is for injury to "business or property." This semantic distinction could still exempt the Consumer Protection Act from the statutory recovery limitations. Analysis of this proposition is beyond the scope of this article.

It is worth noting that § 4.56.250 has come under heavy criticism and has been characterized as "the height of unconstitutionality." Wiggins, Harnitiaux and Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 226 (1986-87).

In at least one current case, WASH. REV. CODE § 4.56.250 (1987) has been ruled unconstitutional. Foster v. Fiberboard Corp., King County Cause No. 87-2-05629-5. *See* Zeder, *4630 Cap Held Unconstitutional*, TRIAL NEWS 23:2, October 1987, at 1.

While undoubtedly the supreme court will eventually decide the issue, if the question of Consumer Protection Act inclusion within the Tort Reform cap is not moot, it is intriguing.

95. Actual damages include mental distress, embarrassment, and inconvenience. *See Keyes*, 31 Wash. App. at 295, 640 P.2d at 1084. *See also* Ellingson v. Spokane Mortgage Co., 19 Wash. App. 48, 58, 573 P.2d 389, 394 (1978) construing "actual damages" as compensatory for all injuries in fact, as opposed to exemplary, nominal, or punitive damages. The phrase "actual damages" appears in the Consumer Protection Act, WASH. REV. CODE § 19.86.090 (1985). Actual damage is synomymous with general or compensatory damages, and in distinction to nominal, exemplary or punitive damages. BLACK'S LAW DICTIONARY 467 (5th ed. 1979).

96. *Keyes*, 31 Wash. App. at 297, 640 P.2d at 1083 (mental distress, embarrassment, and inconvenience are compensable if they entail pecuniary loss).

97. *See supra* note 4 and accompanying text.

element to a lack-of-informed-consent action. Thus, if plaintiff's claim passes the entrepreneurial aspects test he will avail himself of Consumer Protection Act remedies. But where these aspects come from, nobody knows.[98]

VI. "ENTREPRENEURIAL ASPECTS"

The phrase "entrepreneurial aspects" as used in *Short* and *Quimby* seems to have an intuitive meaning, but it does not provide a bright-line standard for courts to use in analyzing cases. This situation is unfortunate because it is apparent that the court did not intend all lack-of-informed-consent defendants to be saddled with Consumer Protection Act liability.[99] In fact, the court attempted to articulate a test that would distinguish certain defendants for additional monetary sanctions. At best, the test fails to address the practical problems of separating the professional and entrepreneurial aspects of the process of obtaining informed consent. Moreover, the test is founded on a phrase that has no fixed meaning.[100]

It has been said that courts use the terms "entrepreneurial aspects," "business aspects," and "commercial aspects" interchangeably when referring to liability of professionals under consumer protection statutes.[101] However, the phrase invariably appears in case law without definition.[102] Black's Law Dictionary omits the phrase, but defines an entrepreneur as "one

98. Paraphrasing the *Seven-Up Man* from a widely broadcast television advertisement in which he said, in pertinent part: "Once upon a time there was a soft drink said to be made with the juice of 'lymons.' Where these 'lymons' come from, nobody knows."

99. The courts in *Quimby* and *Short* took great pains to specifically exclude claims of professional negligence from the purview of the Consumer Protection Act. *See supra* notes 31-35 and accompanying text.

100. The supreme court passed on a recent opportunity to elaborate on the definition of "entrepreneurial aspects" in Haberman v. WPPSS, 109 Wash. 2d 107, 744 P.2d 1032 (1987). However, by rejecting "bald assertions" that "professionals" were by definition engaged in the "entrepreneurial aspects" of their practice, the court may also have rejected the troubling rationale that professionals are engaged in "entrepreneurial aspects" whenever their continuing fee income depends upon the activities in question. *See* Brief for Intervenors at 116, Haberman v. WPPSS, 109 Wash. 2d 107, 744 P.2d 1032 (1987) (No. 52559-5). The case is distinguishable from the present context for a number of reasons, perhaps the most important of which is that the professionals were not directly employed by the injured parties.

101. Note, *Tolling the Death Knell on the "Learned Profession" Immunity Under the Consumer Protection Act: Short v. Demopolis*, 21 WILLAMETTE L.J. 899, 904 n.35 (1985). No authority is offered for this proposition, but the Note does seem to state the semantic problem succinctly. In *Short*, the court used all three phrases. *See Short*, 103 Wash. 2d at 61, 691 P.2d at 171 (Pearson, J., concurring).

102. Research disclosed no case law definition of "entrepreneurial aspects." The

who, on his own, initiates and assumes the financial risks of a new enterprise and who undertakes its management."[103] Thesaural synonyms are offered as "manager, contractor, producer," or "businessman."[104] Webster defines an entrepreneur as "one who organizes and directs a business undertaking, assuming the risk *for the sake of the profit.*"[105] From this definition, the "entrepreneurial aspects" of a medical practice consist of those activities that affect "profits,"[106] and in particular those that are attributable to a profit motive.

It is this loose association with "profit" that is particularly troublesome because the medical professional earns his profit, and hence his living, by performing services to which the patient has (or has not) given informed consent.[107] Therefore, if "entrepreneurial aspects" refer to the profit opportunities of the medical practice, these aspects would seem almost inextricably bound to informed consent, or lack thereof. Both Washington[108] and federal courts,[109] however, have resisted the temptation to classify opportunities for profits within

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phrase appears in numerous N.L.R.B. decisions, *see infra* note 117, but again without definition, and without the authority of formal court adoption.

The only case law construction of the phrase "entrepreneurial *aspects*" of a [business], if that can be said to be the equivalent of "entrepreneurial *activities*," comes from the Workmen's Compensation Commission of Maine in Callahan v. Callahan, 444 A.2d 401, 403 n.7 (Me. 1982). There, the Commission concluded as a matter of law that entrepreneurial activities *constitute profit* other than "wages, earnings or salary, including specifically profit from the labor of others . . . ." (emphasis added).

Were the Washington courts to adopt such a definition for the entrepreneurial aspects of a medical practice, some curious results might accrue. For example, a sole proprietor physician employing a receptionist would probably be making a profit from the labor of others, while a doctor who operated his practice in a "shell" corporation drawing a salary as an employee would not; the corporation would have the profit. On the other hand, if the courts were to look at the profit *motive*, more reasonable and consistent results might be achieved.

103. BLACK'S LAW DICTIONARY 498 (5th ed. 1979).

104. WEBSTER'S NEW WORLD THESAURUS, 142 (Warner Books Ed. 1982).

105. WEBSTER'S NEW 20TH CENTURY DICTIONARY (unabridged 2d ed. 1975) (emphasis added).

106. Whether these profits are gross, net, after-tax, etc. is irrelevant.

107. The health care provider is under a statutory duty to obtain informed consent from his patients. WASH. REV. CODE § 7.70.050 (1987). The duty attaches at many points in the doctor-patient relationship and has been observed to give rise to a potential conflict of interest. *See generally* President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research: Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship, U.S. G.P.O. (1982). *See also* Comment, *Informed Consent in Washington*, *supra* note 77.

108. Entrepreneurial aspects of a subcontractor's business were implicitly distinguished from the potential for loss or profit and the proprietary interest in the

entrepreneurial "aspects" or "activities." But most of the decisions employing the phrase are concerned with whether an individual was an employee or an independent contractor,[110] which bears faint resemblance to the present inquiry.

Other writers have struggled to define the test. One Note discussing *Short*[111] recognized that the Consumer Protection Act focuses on the act of deceiving the client, rather than the attorney's breach of due care. Once deception is established, liability attaches under the Consumer Protection Act.[112] To counterbalance this result, the "reasonable practice" exemption under section 19.86.920 of the Revised Code of Washington[113] is advanced. Ostensibly, this exemption would re-

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business by listing them in the conjunctive. Service Emp. Health & Welfare v. AAA Bldg. and Maintenance, Inc., 41 Wash. App. 328, 704 P.2d 644 (1985).

109. *See* Brown v. N.L.R.B., 462 F.2d 699, 703 (9th Cir. 1972), implicitly distinguishing "entrepreneurial aspects" from the risk of loss and opportunity for profit, and a proprietary interest: "The Board has emphasized three factors, each including various factual considerations: (1) the 'entrepreneurial aspects' of the dealer's business, including 'right to control'; (2) the risk of loss and opportunity for profit; and (3) the dealer's proprietary interest . . . ." *Accord*, Sida of Hawaii, Inc. v. N.L.R.B., 512 F.2d 354 (9th Cir. 1975); Merchant's Homes Delivery Serv. Inc. v. N.L.R.B., 580 F.2d 966 (9th Cir. 1978). States have blurred the distinction. *Cf.* State v. Daquino, 56 N.J. Super. 230, 152 A.2d 377 (1959) ("entrepreneurial aspects" were implicitly *equated* with proprietary aspects by considering the two in the disjunctive).

Brown is the case used by most courts that discuss the phrase, but that case does not define the term. Among NLRB decisions per se there seems to be a cavalier parroting of the phrase or its equivalent without considering its definition. For example, "genuine" entrepreneurial activity impliedly allows one "economic latitude." Standard Oil Company, 230 NLRB 967 (1977); P.Q. Beef Processors, 231 NLRB 1076 (1977). Entrepreneurial aspects of business are impliedly distinct from the ability to make "numerous decisions affecting . . . economic fortunes." Prentiss & Carlisle Co., 230 NLRB 373, 375 (1977). Proprietary interests are implicitly distinct from "other factors, such as the "entrepreneurial aspects," risks of loss, and opportunities for profit . . . ." The Virginian-Pilot Ledger Star, 241 NLRB 575 (1979).

But there is a persistent reference to profit. *See* Standard Oil Co., 231 NLRB at 968, 971 ("[d]istributors operate on a profit basis with considerable opportunity to influence their earnings by their own entrepreneurial efforts;" "[d]ecisions of an entrepreneurial nature . . . affect profit or risk of loss . . . .").

110. *See supra* notes 108-09.

111. Note, *Washington Lawyers*, *supra* note 27. While calling the entrepreneurial aspects test a "solution," the author consistently characterized it as a commercial/non-commercial test. *Id.* at 931 n.35. The Note goes on to give examples of problems making that distinction in the practice of law. *Id.* at 939 & n.77. While the author argued for wider application of the Consumer Protection Act to the legal profession, he too was searching for a clearer delineation of precisely when the Consumer Protection Act should apply.

112. *Id.* at 944.

113. WASH. REV. CODE § 19.86.920 (1987) provides in pertinent part: "It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest."

introduce an element of fault on the part of the professional.[114] However, this protection breaks down in the context of medical lack of informed consent. Violation of a statutory duty to obtain informed consent can scarcely be a "reasonable" practice that falls within this exception. It can be forecefully argued that failure to obtain informed consent is per se unreasonable.

And there is no solace in the Note's observation that deceptive acts generally refer to advertising or other representations used to induce a sale.[115] The only proper way to sell health care services is to obtain informed consent for their provision. Further, there is no solace in the Note's conclusion that Washington courts restrict application of the Consumer Protection Act to violations occurring only in the inducement stage of a transaction.[116] During the consent conference, the patient is induced to undergo the procedure through the required disclosure of both the risks of failing to undergo a procedure[117] and the benefits of the proposed procedure.[118] If the conference is either negligently or deliberately[119] "stacked"[120] to insure a particular choice by the patient, then the alleged violation of the Consumer Protection Act occurred during the inducement.[121]

Before abandoning the search for a useful definition of entrepreneurial aspects, it may be helpful to attempt to glean a

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114. Note, *Washington Lawyers*, *supra* note 27, at 944.

115. *Id.* at 945 n.108.

116. *Id.* at n.111 (citing Comment, *A Re-Evaluation*, *supra* note 49).

117. Truman v. Thomas, 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980); Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979).

118. *See* Comment, *Informed Consent in Washington*, *supra* note 77.

119. Your author hastens to add to the quandary by noting that a *deliberate* manipulation of the consent conference can occur with either an innocent or malicious motive. An example of an innocent manipulation might be the withholding of a risk that the physician thought was immaterial, but that might frighten the patient into refusing needed care.

120. This "stacking" of the conference is easily accomplished by emphasizing the risks of refusing a procedure and the benefits of accepting it. The order of presentation, tone of voice, and personal recommendation of the provider are all tools to manipulate the unwary patient. (Health care providers can even attend tax-deductible seminars to learn precisely these skills for precisely the purpose of "selling" patients particular health care services.)

121. Note, *Washington Lawyers*, *supra* note 27, at n.110. The author also observed that "a distinction limited solely to 'entrepreneurial aspects' does not encompass a motivation test." Yet the distinction in *Quimby* is based on entrepreneurial aspects. If not a motivation test, it is still the test with which one must distinguish cases. The solution offered by the Note was a "bad faith" test. Negligence would not satisfy this test.

definition of the phrase from the context in which it was first applied to the learned professions in Washington. Since the *Quimby* court relied on *Short*, the contextual meaning of the phrase in *Short* should be given deference. Presumably, even if the *Quimby* court had no precise definition of entrepreneurial aspects in mind, it intended those words to have the same meaning as in the supreme court's earlier decision.

The examples of entrepreneurial aspects enumerated in *Short* are "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains and dismisses clients."[122] In dicta, the *Quimby* court indirectly suggested how entrepreneurial aspects might trigger a cause of action under the Consumer Protection Act:[123]

> [A] lack-of-informed-consent claim can be based on dishonest and unfair practices used to promote the entrepreneurial aspects of a doctor's practice, such as when the doctor promotes an operation or service to increase profits and the volume of patients, then fails to adequately advise the patient of risks or alternative procedures.[124]

Grafting the *Quimby* dicta onto the *Short* language suggests that the entrepreneurial aspects of a doctor's practice will relate to the failure to obtain informed consent if: 1) a doctor's decision to perform a particular operation (or procedure) is influenced by how the price of services is determined, billed, and collected, and by how the medical practice obtains, retains and dismisses patients; 2) a doctor promotes a service to increase profits or volume and fails to advise the patient of risks or alternative procedures; or 3) the consent a doctor obtains is related to how the price of services is determined, billed and collected, or to how a medical practice obtains, retains and dismisses patients.

Any of these examples ostensibly satisfies the *Quimby* court's interpretation of entrepreneurial aspects. The first two examples generally identify reprehensible conduct—therapeutic decisions made for economic reasons.[125] But it is not at all

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122. 103 Wash. 2d at 61, 691 P.2d at 168.

123. 45 Wash. App. at 181, 724 P.2d at 406.

124. *Id.*

125. *See* Marjorie Webster Jr. College, Inc. v. Middle States Assn. of Colleges and Secondary Schools, Inc., 432 F.2d 650, 655 n.21 (1970) (there may be situations in which a traditional noncommercial activity would be conducted with a commercial motive,

clear that the third example represents anything but ethical, good faith medical practice.[126] That the health care provider obtains consent to perform procedures for which he charges and bills fees[127] certainly seems to relate to how the medical practice obtains and retains patients. Therefore, the difficulty lies not so much in distinguishing those lack-of-informed-consent claims that do relate to the entrepreneurial aspects of a medical practice as in determining which claims do not.[128] This seems to be a "test" plaintiff cannot fail.

The plaintiff who successfully establishes the elements of his lack-of-informed-consent claim has not only satisfied the applicable *Hangman* test,[129] but has also found that lack of informed consent always relates to the entrepreneurial aspects of the defendant's medical practice. In effect, plaintiff has automatically qualified for relief under the Consumer Protection Act by stating a lack-of-informed-consent claim.

Since the courts set out to establish a test, however, there must be a presumption that the test will differentiate between cases and fact patterns, applying the Consumer Protection Act here, but not there. Washington courts have not provided a useful interpretation of this test, but the test exists and its proper role and use can be explained.

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thus rendering it commercial). The case concerned a refusal of an accrediting body to extend certification to the college because the school was not a "non-profit" institution. The court found that it was not unreasonable to conclude that the desire for profit might influence educational goals in subtle ways. Thus, there was no violation of the school's asserted fifth amendment right to accreditation when the association withheld certification.

126. The doctrine of informed consent allows a patient to recover damages from a health care provider despite having received non-negligent medical diagnosis and treatment. Holt v. Nelson, 11 Wash. App. 230, 237, 523 P.2d 211, 216-17 (1974). Thus, a lack-of-informed-consent claim based on a negligent (unintentional) failure to disclose would afford plaintiff a recovery under the Consumer Protection Act if plaintiff could pass the entrepreneurial aspects test. The reader should note carefully that the Consumer Protection Act does not attach to injuries from intentionally substandard treatment. That is, if a health care provider intentionally deviates from the standard of care in the actual delivery of services, the plaintiff recovers only "negligence" damages. Thus, the patient recovers less, and the provider is exposed to less personal financial risk, if the procedure is intentionally botched than if the procedure is perfectly performed but the consent is defective.

127. *See supra* note 107 and accompanying text.

128. After the *Short* decision, commentators remarked upon the problems in using the test to differentiate between types of activities of the practice of law. For an exposition on the parallel difficulty of distinguishing reprehensible acts with the entrepreneurial aspects test in the practice of *law*, see Note, *Washington Lawyers*, *supra* note 27, at 938-39. *See also supra* notes 111-121 and accompanying text.

129. *See supra* text accompanying notes 49-88.

In *Little v. Rosenthal*, the Massachusetts Supreme Judicial Court considered the interaction of a consumer protection act with a statute that required "every action for malpractice, error or mistake against a provider of healthcare" to be submitted to a screening tribunal.[130] In *Little*, the court first interpreted the language of the screening statute to indicate that all treatment-related claims fell under the statute.[131] The court distinguished consumer protection actions that allege unfair trade practices in medical *treatment* from those that merely raise such questions as fraudulent or deceptive billing practices by a health care provider.[132]

The *Little* court argued that in a deceptive billing case, the screening "procedure would be inappropriate since there would be no issue of *medical* 'malpractice, error or mistake.' No such problem, however, [was] presented by the instant cases. Since the plaintiff herself admit[ted] that the *same set of facts supports both her malpractice claims and her [Consumer Protection Act] claims . . .* ,"[133] the screening statute controlled the procedural disposition of her case.[134] Failure to satisfy the requirements of that statute resulted in a dismissal of all of plaintiff's claims.

Thus, the Massachusetts "all claims" medical injury statute construed in *Little*, which is analogous to Washington's "all claims for injuries from healthcare" statute,[135] was outcome determinative of the Consumer Protection Act claims. Like the Washington courts in *Quimby* and *Short*, the Massachu-

130. Little v. Rosenthal, 376 Mass. 573, 576, 382 N.E.2d 1037, 1040 (1978). The patient sued a nursing home alleging medical malpractice, breach of contract, and violation of the Consumer Protection Act because of unfair trade practices. She submitted her claims to the medical screening tribunal, but objected to its consideration of her consumer claims. The tribunal found no legitimate judicial question and ordered posting of a bond for continuance of the actions in court. When the patient failed to post the bond, the actions were dismissed. The issue on appeal was whether the tribunal erred in considering the consumer claims. Held: No error because the actions alleged unfair trade practices in medical *treatment*. The court reached this conclusion because the same set of facts supported both the consumer claims and the malpractice claims. Consumer claims that raised such questions as fraudulent or deceptive billing practices by a health care provider would have been allowed to circumvent the screening tribunal.

131. *Cf.* WASH. REV. CODE § 7.70.010 (1987). *See supra* note 66 and accompanying text.

132. 376 Mass. at 577, 382 N.E.2d at 1041. *Cf. Short*, 103 Wash. 2d at 70-71, 691 P.2d at 172 (Pearson, J., concurring in part).

133. 376 Mass. at 577, 382 N.E.2d at 1041 (latter emphasis added).

134. *Id.*

135. WASH. REV. CODE § 7.70.010 (1987).

setts court carefully segregated the Consumer Protection Act and "malpractice" claims. The *Little* court did not indicate whether a separate Consumer Protection Act cause of action could have gone forth simultaneously with the accompanying negligence claim had the procedural posture been correct. Nevertheless, the case parallels *Quimby* in the sense that an "all claims" statute interfaced with a Consumer Protection Act cause of action. Further, as in *Quimby*, something more than mere satisfaction of the "all claims" statute was required to support the Consumer Protection Act claim.[136]

A test modeled after *Little* would read like this: If the *identical* set of facts supports both the plaintiff's lack-of-informed-consent and Consumer Protection Act claims, the informed consent statute is exclusively controlling. For the policy reasons outlined below,[137] this result affords the plaintiff an adequate remedy at law. This situation is to be distinguished from a common nucleus of facts supporting both a lack-of-informed-consent claim and a Consumer Protection Act claim to which *additional* facts can be added to further the Consumer Protection Act claim.

A requirement of additional facts acknowledges that securing informed consent is inextricably bound with the economic, if not the entrepreneurial, aspects of every medical practice, and presumes that the legislature contemplated this in fashioning Washington's statutes controlling claims based on injuries resulting from health care. For additional, separate Consumer Protection Act recovery, additional, separate facts *relating* the entrepreneurial aspects of the medical practice to the lack-of-informed-consent claim would be necessary. It is not the mere lack of informed consent that justifies application of the Consumer Protection Act, but something within the *process* leading to the failed consent that can be characterized as a deceptive or surreptitious act, motivated by profit, that validates the harsh sanctions of the Consumer Protection Act.[138]

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136. In *Quimby*, of course, the statute in question is WASH. REV. CODE § 7.70.050 (1987), the informed consent statute. The "something more" is that the claim must "relate to the entrepreneurial aspects of the medical practice." *See supra* notes 4-6 and accompanying text.

137. *See infra* text accompanying notes 147-64.

138. Unlike when alternative theories might allow recovery if one theory fails and the other succeeds, though both are supported by the same fact pattern, in this situation plaintiff can recover under *both* theories, and the damages are essentially cumulative. Requiring additional facts to support an enlarged claim does not seem an unreasonable burden for plaintiff. Recall that before there can be any recovery for

A requirement of additional facts is *not* a simple reiteration of *Quimby*. Rather, it requires that the relationship between the lack of informed consent and the "entrepreneurial aspects" of a medical practice be hyperrelated—that is, but for the health care provider's profit motive, lack of informed consent would not have occurred. It is insufficient to sustain both a lack-of-informed-consent and Consumer Protection Act claim to assert that defendant made a profit *and* he did not secure informed consent. Instead, the requirement must be that defendant made a profit *because* he did not secure informed consent.[139] Thus, the court should look to an economic or profit motive[140] as the real arbiter of its "entrepreneurial aspects" test.[141]

This recommendation is compatible with the suggestion made earlier[142] that "entrepreneurial aspects" of a medical practice, or any business for that matter, involve profit motivation.[143] Additionally, it focuses more on *how* the

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injury resulting from health care under the Consumer Protection Act, plaintiff must prove a claim of lack of informed consent. Therefore, plaintiff has already proved a claim for damages and seeks to increase that claim by appending the Consumer Protection Act cause of action.

139. Compare this with the suggestion that "bad faith" ought to be found on the part of an attorney before applying the Consumer Protection Act. *See* Note, *Washington Lawyers*, *supra* note 27, at 945.

140. This Note suggests that the profit motive should be implied by any effort to obtain additional income, reduce costs, or decrease the practitioner's effort. This suggestion encompasses the motive of the "non-profit" provider who fails to obtain informed consent because he did not wish to perform a particular procedure. It encompasses inducement of a defective consent to a more expensive procedure, generating increased cash flow, as well as consent to a less expensive, but less costly procedure that generates increased *net* cash flow. It also encompasses what is far more likely to be the most typical abuse of informed consent: the practitioner induces a defective consent to undergo the only type of procedure he has the ability, equipment, or license to perform. This suggestion obviates knee-jerk determinations based only on the expense to the patient; substitution of even a less expensive procedure can still be a profit-making event for the physician.

141. The *Quimby* court may have been alluding to this profit motive in dicta referring to "entrepreneurial motives" and stating that "a lack of informed consent claim can be based in *dishonest and unfair practices* used to promote the entrepreneurial aspects . . . ." 45 Wash. App. at 182, 724 P.2d at 406 (emphasis added). It remains painfully necessary to define "entrepreneurial aspects" before it is possible to determine if unfair or dishonest practices were used to promote them.

142. *See supra* text accompanying notes 105-07.

143. A profit motivation can be supplied by an opportunity to increase cashflow, increase net cashflow, increase patient base, decrease or contain expenses, or reduce physical effort. Little emphasis should be applied to the "bottom line" that one usually associates with profit. The jingle, "maximum income for minimum output" perhaps best illustrates the range of ways in which a profit motivation can be shown.

One somewhat more insidious way in which a failed consent can relate to the

"entrepreneurial aspects" of a medical practice relate to the lack-of-informed-consent claim and less on how to determine simply *what* those aspects are. It must be accepted that a lack-of-informed-consent claim may relate to a practitioner's profit, and perhaps even his motivation. But by requiring that lack of informed consent be hyperrelated to the practitioner's profit motive, culpable, "dishonest and unfair"[144] conduct is separated from otherwise professional, albeit negligent, activity. The Consumer Protection Act is thus invoked only when its remedial or protective functions are necessary.[145]

In effect, an entrepreneurial aspects test focusing on profit motive reinserts into private Consumer Protection Act claims the need to show intentional deception. This requirement is necessary to counterbalance *Hangman's* facile deceptive act prong and to protect the medical professional from Consumer

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entrepreneurial aspects of a medical practice occurs when the health care provider does not take sufficient time to cover all the information to be disclosed because the time could be spent more remuneratively on other, professional activities. This failure to take the time to accomplish informed consent has been noted as an illegitimate objection to the need to obtain informed consent in both the legal and medical contexts. *See* Strauss, *Toward a Revised Model of Attorney-Client Relationship: the Argument for Autonomy*, 65 N.C.L. REV. 315, 334-35 (1987) [hereinafter Strauss, *Argument for Autonomy*].

144. 45 Wash. App. at 181, 724 P.2d at 406.

145. Intent is not a required element for a Consumer Protection Act claim in Washington. *See supra* notes 50-52 and accompanying text. However, in other jurisdictions courts will not award exemplary or punitive damages without a finding of an intentional act.

In New York, treble damages are allowed only when the plaintiff can prove that the violation was intentional. N.Y. GEN. BUS. LAW § 350-d(3) (McKinney Supp. 1986); Beslity v. Manhattan Honda, 120 Misc.2d 848, 467 N.Y.S.2d 471 (1983) (inadvertent error by a third party will not result in an award of treble damages for false advertising).

Texas distinguishes between innocent and intentional deceit and allows treble damages only when there is proof that the deceit was intentional. TEX. BUS. & COM. CODE ANN. § 17.50(b)(i) (Vernon 1986); *see also* Pennington v. Singleton, 606 S.W.2d 682, 690-91 (Tex. 1980) (imposition of treble damages on seller who knowingly made misrepresentations); Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985) (two of the legislative goals behind the 1979 amendments to the Deceptive Trade Practices Act were to eliminate mandatory treble damages against sellers who make innocent misrepresentations and to give the trier of fact discretion to award treble damages for knowing violations).

The proposed test reintroduces the requirement of intent under the euphemism of an "entrepreneurial aspects" test. Since the announced intention of the Consumer Protection Act is to *deter* deceptive conduct before it occurs (*see supra* text accompanying notes 50-52), it is difficult to see how this objective can be accomplished by imposing punitive damages on unintentional acts. Deterring negligence may also be an objective of the Consumer Protection Act, but it has not been announced as such, and is of questionable practical merit.

Protection Act liability for conduct that is merely negligent.[146] The commercial defendant needs less protection against the deceptive act prong because many commercial claims are smaller than those in a private dispute against a medical professional. Perhaps the court would have been better advised to have required a higher level of proof to show a deceptive act in a private dispute claim. It may be that the *Quimby* court did the best it could to accommodate these considerations within the holding of *Hangman* as binding authority.

VII. POLICY JUSTIFICATIONS FOR "HYPERRELATED" ENTREPRENEURIAL ASPECTS

As stated in *Short*, the remedy of the Consumer Protection Act is needed in actions against learned professionals to fill "gaps left vacant by existing . . . law . . . "[147] because of the expense of attorneys' fees and costs that can be recovered under the Consumer Protection Act and the shortcomings of remedies available to victims of professional malpractice.[148] The court rightly apprehended that the magnitude of those costs, in relation to the amount of damages potentially recoverable, may effectively foreclose a plaintiff's ability to pursue a remedy at law.[149] The Consumer Protection Act erases the disincentive to bring claims that those costs represented. It even encourages some "private attorney general"[150] activity with its

146. "The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages." *ABA Commission Releases Report on Ways to Improve the Tort Liability System*, The Brief, Winter 1987 at 5.

147. 103 Wash. 2d 52, 62, 691 P.2d 163, 169, *citing* Comment, *The Learned Professional*, *supra* note 34, at 437. The widest "gap" results from the futility of bringing a lawsuit to recover relatively insignificant actual damages. There is no remedy if the costs of bringing suit approach or exceed the potential recovery. Thus, unfair or deceptive acts of minor financial consequence to any individual plaintiff, while reprehensible, are irremediable without the Consumer Protection Act. *See* Comment, *The Learned Professional*, *supra* note 34, at 436 ("The classic malpractice action is typically expensive, requiring costly preparation and expert testimony. Because of the requisite extensive litigation, this form of action is seldom worthwhile where potential damages do not reach into the several thousands of dollars.").

148. *Short*, 103 Wash. 2d at 62, 691 P.2d at 168-69.

149. *Id.* For arguments that plaintiffs will not seek remedies, see Note, *Medicare's Prospective Payment System: Can Quality Care Survive?*, 69 IOWA L. REV. 1417, 1434 (1984) ("[C]ompensation may be unavailable . . . if contingent fees and medical bills are likely to exceed any award.").

"Because attorneys have an average fee rate of about one-third of the amount received, many refuse cases when it appears that the settlement or award will not exceed $10,000. Annas, Katz & Trakinas, *Medical Malpractice Litigation Under National Health Insurance: Essential or Expendable?*, 1975 DUKE L.J. 1335, 1344.

150. *See* St. Paul Ins. Co. v. Updegrave, 33 Wash. App. 653, 658-59, 656 P.2d 1130,

promise of an award of punitive or exemplary damages. The Consumer Protection Act, for example, affords treble damages up to a limit of $10,000.00 in addition to fees and costs.[151]

But, in the typical medical injury case, the proportion of potentially recoverable damages to fees and costs associated with bringing a lawsuit are reversed; the magnitude of the damages overshadows the attendant costs and legal fees. Since most of these actions are brought on a contingent fee basis,[152] plaintiffs are not foreclosed from pressing their claims by the specter of losing money on a winning claim.[153] Although the plaintiff ultimately bears the cost of litigation, payment of one's own civil legal expenses is rooted in the system of American jurisprudence.[154] Thus, much of the justification for application of the Consumer Protection Act is simply not present in a medical injury claim.

In the Tort Reform Act of 1986, the legislature clearly attempted to limit the size of personal injury awards.[155] At the same time, there appears to be no cap on pain and suffering damages under the Consumer Protection Act, and actual damages are recoverable.[156] Further, it is worth noting that had the legislature ever intended[157] the Consumer Protection Act

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1133 (1983) (treble damages, costs, and attorneys' fees recovered under the Consumer Protection Act serve not only to enable plaintiff to pursue his claim, but also to reimburse private "attorney general" activity).

151. WASH. REV. CODE § 19.86.090 (1987).

152. U.S. Dept. of Health, Educ. and Welfare, *Medical Malpractice—Report of the Secretary's Commission on Medical Malpractice* 32 (1973) ("[V]irtually all plaintiff attorneys use a contingent fee arrangement in medical malpractice cases"). A lack-of-informed-consent claim is different from a "malpractice" claim, but the client is unlikely to perceive the difference, and the same reasons for the predominance of the contingent fee arrangement attach.

153. *See* Salois v. Mutual of Omaha Insurance Co., 90 Wash. 2d 355, 360, 581 P.2d 1349, 1351 (1978) ("[T]he necessity to employ and pay her attorneys has deprived plaintiff of an adequate recovery. Her victory is a pyrrhic one, if a victory at all.").

154. WASH. REV. CODE § 4.84.010(5) (1987) excludes attorneys' fees from recoverable costs except for statutory attorneys' fees exempted under § (6), and reasonable attorneys' fees defending frivolous claims under § 4.84.185.

155. WASH. REV. CODE § 4.56.250-.260 (1987). For a symposium of articles on the provisions and implication of the act, see 22 GONZ. L. REV. (1987).

156. Ellingson v. Spokane Mortgage Co., 19 Wash. App. 48, 573 P.2d 389 (1978); St. Paul Fire & Marine Ins. Company v. Updegrave, 33 Wash. App. 653, 656 P.2d 1130 (1983).

157. The court in State v. Schwab, 103 Wash. 2d 542, 693 P.2d 108 (1985) looked beyond the "explicit link" veneer to deduce any legislative intent to apply the Consumer Protection Act to landlord-tenant law. Finding in the legislative history a rejection of an amendment that would have provided an explicit link, the court concluded that it was the legislature's intent not to link the statutes. Note, *New*

to be automatically actionable in lack-of-informed-consent cases, it could have declared a "public interest" in all informed consent cases by writing a preamble to the informed consent statute, as it has done with other statutes, providing a "specific link" to the Consumer Protection Act.[158]

While the legislature has differentiated actions founded on medical negligence from lack of informed consent,[159] lack of informed consent sounds in negligence.[160] Further, while

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Limits to the Application of the Consumer Protection Act, 61 WASH. L. REV. 275, 279-80 (1986) [hereinafter Note, *New Limits*].

The court also noted the hazard of relying on legislative history. The difficulty has been remarked upon elsewhere. *See generally* Comment, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571 (1983). The informed consent statute is a case in point of difficult research because it was passed in a *second* extraordinary session in 1975, and usual references have been found to be unhelpful. However, the legislative history in question is moot since, unlike the landlord-tenant act, the informed consent statute post-dates the Consumer Protection Act and thus *could* have included an explicit link. It does not, and the courts, post-*Schwab*, presume that omission to be intentional. *Hangman* also stiffened the requirement for finding a per se public interest, weakening this tack. On the other hand, there is less reason for recourse to per se application of the Consumer Protection Act or its elements when its direct application is now apparently available.

158. *Hangman*, 105 Wash. 2d at 786, 719 P.2d at 536. *See, e.g.*, WASH. REV. CODE § 18.35.180 (1987) (Hearing Aids Dispensing); § 19.09.340 (1987) (Charitable Solicitations); § 19.100.190 (1987) (Franchise Investments); § 19.102.020 (1987) (Chain Distributor Schemes); § 19.105.500 (1987) (Camping Clubs). *See also* statutes amended to invoke Consumer Protection Act application: WASH. REV. CODE § 19.16.440 (1987) (Collection Agencies); § 49.60.030(3) (1987) (Laws Against Discrimination); § 19.52.036 (1987) (Interest-Usury). This list is not exhaustive.

Arguments to overcome any "sub-silentio" preclusion of the Consumer Protection Act by failure to write a preamble to the informed consent statute, WASH. REV. CODE § 7.70.050 (1987) or its "purpose" section, § 7.70.010 (1987), as advanced in Note, *New Limits*, *supra* note 157, are mooted here since the Consumer Protection Act antedates the informed consent statute. The legislature is presumed to have been aware of its ability to apply the Consumer Protection Act to the statute, had that been its intent. Note the dates these statutes were passed. The Legislature passed WASH. REV. CODE § 7.70.050 (the informed consent statute) in 1975-76.

Schwab put the legislature on notice that per se application of the Consumer Protection Act depends on an explicit link, inviting legislative response much as *Hangman* did with the public interest requirement. A comparison of the *Schwab* requirements with the elements for lack of informed consent leads one to conclude that, but for lack of an explicit link, a successful informed consent claim would trigger a per se violation of the Consumer Protection Act. Plaintiffs would have been spared the vagaries of proving the public interest element of the factors. *See supra* notes 55-62 and accompanying text.

159. *See* WASH. REV. CODE § § 4.24.290, 7.70.030 (1987).

160. Watkins v. Parpala, 2 Wash. App. 484, 490-91, 469 P.2d 974, 978 (1970). Watkins was the seminal case recognizing a lack-of-informed-consent cause of action in Washington. *See also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 189-93 (1984) [hereinafter PROSSER & KEETON] (informed consent is a subcategory of negligence). Katz, *Informed Consent—A Fairy tale? Law's Vision*, 39 U. PITT. L. REV. 137, 146 (1977) ("[T]he law of informed consent

much, if not all, of the requirement for intent has been stripped away from Consumer Protection Act causes of action,[161] that law's antecedents trace back to common law fraud,[162] which had an element of knowledge or intent.[163] This higher level of culpability explains the essentially punitive aspects of damages recoverable under the Consumer Protection Act. Damages under the informed consent statute should suffice to "make the plaintiff whole." Additional awards can serve only to punish, or to deter, conduct before injury.[164]

But failure to obtain informed consent occurs in three varieties: intentional, negligent, and non-negligent.[165] The

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denotes a cause of action based on negligent failure to warn, i.e., failure to disclose pertinent medical information").

161. "A plaintiff need not show that the act in question was intended to deceive . . . ." *Hangman*, 105 Wash. 2d at 785, 719 P.2d at 535.

162. Fraud is "[a]n intentional . . . false representation of a matter of fact . . . or . . . concealment of that which should have been disclosed, which deceives, and is intended to deceive another so that he shall act upon it to his legal injury." BLACK'S LAW DICTIONARY 788 (5th ed. 1979). At least one jurisdiction deals with the entire concept of lack of informed consent under a fraud analysis. *See* Leagan v. Levine, 158 Ga.App. 293, 293, 279 S.E.2d 741, 742 (1981), *cited in* Verre v. Allen, 175 Ga. App. 749, 750, 334 S.E.2d 350, 350 (1985) ("In cases involving a relation of trust and confidence, such as a physician and patient, silence on the part of the physician when he should speak, or his failure to disclose what he ought to disclose, is as much a fraud in law as an actual affirmative false representation."). The informed consent doctrine has been judicially declared to be non-existent in Georgia. Young v. Yarn, 136 Ga. App. 737, 222 S.E.2d 113 (1975).

163. *See* Anhold v. Daniels, 94 Wash. 2d 40, 49, 614 P.2d 184, 190 (in passing the Consumer Protection Act the legislature's intent was to protect the public against consumer fraud).

164. Ironically, this is the reason the court gives for abolishing intent to deceive. *Hangman*, 105 Wash. 2d at 785, 719 P.2d at 535.

165. Non-negligent lack of informed consent is rare. It occurs when the health care provider has not breached his duty to disclose. That is, he has conformed to the standard of care for his profession, but the consent is defective for some other reason. One such reason is that a jury will find that some undisclosed fact or risk or some undisclosed alternative "material." Another reason is that a new standard of disclosure is suddenly, and retroactively, judicially imposed. Washington is often on the cutting edge of extending the provider's duty to disclose. *See* Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979) (failure to obtain consent *not* to perform additional diagnostic tests after borderline test result indicating possible glaucoma). *See also* Archer v. Galbraith, 18 Wash. App. 369, 379, 567 P.2d 1155, 1161 (1977) (failure to disclose the alternative of no treatment). *Archer* has been called one of "only a few cases" that "squarely hold a doctor liable for failure to disclose alternatives." Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 241 n.85 (1985). The surgeon in *Archer* operated and earned a fee, which he would not have earned had the alternative of no treatment been disclosed. A lack-of-informed-consent claim can stand despite delivery of non-negligent, uninjurious care. Holt v. Nelson, 11 Wash. App. 230, 237, 523 P.2d 211, 216-17 (1979). When there has been non-negligent disclosure and non-negligent care should there be punitive Consumer Protection Act sanctions?

Washington statute[166] is phrased in such a way as to impose a duty of disclosure, to define how that duty may be breached, and, to provide a remedy if there is injury and proximate cause.[167] This phrasing comprises a classical statutory negligence formula. The informed consent statute[168] does not distinguish between negligent or even non-negligent[169] failure to secure informed consent and the very real possibility that in some instances, such failure is intentional.[170] It is only this intentional misconduct that would seem the proper province for additional remedies and punitive damages under the Consumer Protection Act. The harsh result for the merely negligent medical professional is that these damages are uninsurable.

There is no case law on the insurability of punitive damages in this state because Washington is one of four jurisdictions that reject punitive damages.[171] Statutory damages under

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166. WASH. REV. CODE § 7.70.050 (1987).

167. See *supra* note 68 in which the full text of the statute is reproduced.

168. WASH. REV. CODE § 7.70.050 (1987).

169. WASH. REV. CODE § 19.86.920 (1987) from the Consumer Protection Act provides in part: "this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business . . . ." Of course, negligent failure to obtain consent can never be "reasonable" unless the lack-of-informed-consent claim itself fails, in which case the Consumer Protection Act cannot apply because of the structure of the *Quimby* holding and because there was no negligence.

Another purpose behind the Consumer Protection Act seems to go right to the heart of the difficulty of its application to the informed consent statute. "If regulation . . . is required, it should be limited to the absolute minimum essential to *maintaining a fair bargaining position for the consumer, with the least possible interference with freedom of commercial enterprise* because business and industry in this state and in the nation are fundamentally legitimate and honest." O'Connell, *Washington Consumer Protection Act—Enforcement Provisions and Policies*, 36 WASH. L. REV. 279, 284-85 (1961) (emphasis added). Legitimate and honest health care providers, to whom Consumer Protection Act sanctions should not apply, can still be negligent in failing to obtain informed consent as well as in directly providing services. Why should there be punitive sanctions for negligent lack of informed consent and not for negligent care?

170. *See supra* note 126. *See also* Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1982) (when plaintiff alleged *total* lack of consent, the action was removed from negligence and treated as an action for battery, an intentional tort. That is, total lack of consent is *not* the equivalent of a lack of *informed* consent.).

171. Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981) (Stafford, J., dissenting). This case involved a question of comity with California law that provided for punitive damages. The majority opinion found that California law, and therefore California damages, governed the case. *Id.* at 423, 635 P.2d at 712. The dissent asked the following question: "What kind of civil remedy for the plaintiff is the punishment of the defendant?" *Id.* at 435, 635 P.2d at 719. This question ignores the reality that general and special damages do not "make plaintiff whole." If money

the Consumer Protection Act include punitive damages,[172] which are intended to serve a deterrent function.[173] Most liability policies do not expressly exclude punitive damages as a kind of damage for which the policy will not respond.[174] But a person has no right to expect the law to allow him to place responsbility for his reckless and wanton acts on someone else.[175] This shifting of responsibility would thwart the deterrent purposes of punitive damages.[176] By shifting responsibility to insurers, defendants would defy the sanction of punitive damages.[177] If it is the policy of punitive damages to deter similar misdeeds,[178] then the words of the court in *American Surety Co. of New York v. Gold*[179] strongly suggest that Washington courts would find the damages uninsurable:

> The question is not so much the efficiency of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy.[180]

But, enforcing this punitive damage policy reopens causes of action that have been foreclosed by section 7.70.030 of the Revised Code of Washington, which lists the only three permissible causes of action stemming from health care injuries.[181]

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can be said to do the job at all, plaintiff is made whole minus attorneys' fees and costs. Thus, these elements of punitive damages under the Consumer Protection Act are, in fact, part of plaintiff's civil remedy. The question is less clear for the treble damages provision.

172. Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 360, 581 P.2d 1349, 1351 (1978) (Consumer Protection Act damages referred to as "exemplary"); Levy v. North American Ins., 90 Wash. 2d 846, 586 P.2d 845 (1978) (remedy under WASH. REV. CODE § 19.86.090 (1987) includes specified "punitive" damages).

173. Ghardi, *The Case Against Punitive Damages*, 8 FORUM 411, 411 (1972).

174. *Id.* at 420 (citing *Punitive Damage Dilemma: A Possible Response*, THE NATIONAL UNDERWRITER 51 (May 5, 1972)).

175. Nicholson v. American Fire and Cas. Inc. Co., 177 So. 2d 52, 54 (Fla. App. 1965).

176. *Id.*

177. Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. App. 1964).

178. *See supra* text accompanying note 52.

179. 375 F.2d 523 (10th Cir. 1966).

180. *Id.* at 527.

181. For the full text of this statute, see *supra* note 67. An ineffective consent may be viewed as the equivalent of no consent at all. Therefore, the physician's treatment constitutes an unpermitted touching, or battery. *See* Berkey v. Anderson, 1 Cal. App. 3d 790, 803, 82 Cal.Rptr. 67, 76-77 (1969). Battery is an intentional tort, yet in the province of injury from health care, it is actionable in Washington only if characterized as lack of informed consent. *But see* Lojuk v. Quandt, 706 F.2d 1456 (7th

As stated in the pleadings in *Quimby*, Dr. Fine used a surgical procedure other than that for which he had secured consent, an act traditionally actionable at common law as the intentional tort of battery.[182] Section 7.70.030 of the Revised Code of Washington subsumes such actions within the three propositions left available to plaintiff as a matter of legislative intent.[183] In Washington, not only is there no longer any medical battery, there is also no cause of action without injury.[184]

An injury resulting from the provision of health care services will, at least to some extent, be physical. On the other hand, an injury actionable under the Consumer Protection Act resulting from the entrepreneurial aspects of the provision of legal services is necessarily pecuniary. This difference is but one of many differences between the learned professions of law and medicine that both *Quimby* and *Short* failed to recognize.

While there may be no reason to distinguish between the professions of law and medicine on whether they are subject to the Consumer Protection Act, differences do exist between the two that highlight the difficulty of distinguishing entrepreneurial aspects of the respective profession's normal activities.[185] For instance, while an attorney will be compen-

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Cir. 1982) (plaintiff's action for total lack of consent removed from negligence and treated as battery).

182. The leading case is Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905). Plaintiff had consented to an operation on her right ear, but at the time of the surgery, the physician determined the right ear to be in no need of surgery and opted to correct a condition of the left ear by a procedure to which the patient had not consented. Despite no showing of injury, or indeed despite a positive showing of benefit from the procedure, defendant was held liable for battery.

Battery, an intentional tort, invites assessment of punitive damages, but Washington is one of four jurisdictions that do not allow punitive damages. *See supra* note 181.

183. WASH. REV. CODE § 7.70.030 (1987). For full text of this statute, see *supra* note 67.

184. *See* WASH. REV. CODE § 7.70.010.-030 (1987), *supra* notes 66-67.

185. Compare the contingent fee of an attorney to a commission. *See* The Standard Oil Co., 241 NLRB Ann. Rep. 1248 (1979) (drivers compensated solely on a commission basis have no opportunity to engage in the entrepreneurial activities normally associated with independent contractors).

Compare also the *patient's* "right to control" his physician's activities through the medium of informed consent. *See* The Comedy Store, 265 NLRB Ann. Rep. (1982) (where the entrepreneurial aspects of an independent contractor's business can be so clear that the 'right to control' test becomes unimportant).

Thus, NLRB usage of the phrase can be stretched to distinguish the professions. Admittedly, the cases are inapposite, but it is from just such cases that the magic words "entrepreneurial aspects" found their way into *Quimby*.

sated on either an hourly or a contingent fee basis, the physician traditionally bills out a separate fee for each service; that is, there are many separate instances in a medical practice identifiable as distinct profitmaking events.[186] While the physician is under a statutory requirement to obtain informed consent (or risk liability), this duty will attach at many different decision points.[187] No comparable statutory requirement exists for attorneys.

Undeniably, informed consent has a role in the practice of law. Indeed, commentators have argued that informed consent should assume a much larger role than that to which it has been consigned.[188] However, the very fact that such arguments must be made is convincing evidence for the contention that informed consent does not occupy a position in law comparable to its present role in health care. Indeed, advocates of legal informed consent recognize this position openly.[189]

Attorneys are required to obtain written consent (presum-

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186. Each of these represents, to some extent, a conflict of interest for the physician, as has been remarked by some medical commentators. "The principal conflict of interest within the doctor-patient relationship derives from the fact that doctors' incomes rise when patients consume health care services that those same doctors recommend and provide." Relman, *Dealing with Conflicts of Interest*, 313 NEW ENG. J. MED. 749 (1985). Other motives are, of course, just as likely to give rise to a conflict of interest. *See, e.g.*, Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978) (In a DES case, what the doctors did not disclose were their research purposes. Thus, what gave rise to a battery action was not the nature of the intervention, but the *motivation* for intervening.).

187. For the proposition that the health care provider may be liable for failure to obtain consent *not* to perform a diagnostic test, see Gates v. Jensen, 99 Wash. 2d 246, 595 P.2d 919 (1979). Washington's expanded scope of required disclosure . . . may allow recovery for failing to disclose facts that are tenuously connected with the reasonable patient's choice to forego treatment and thus avoid injury." Note, *Informed Consent in Washington*, *supra* note 77, at 661-62.

> "First, the physician has a duty to disclose material risks inherent in a proposed treatment. Second, the physician has a duty to disclose alternative courses of treatment, including no action, and their attendant risks. Third, the physician has a duty to disclose the existence of a potentially dangerous physical abnormality and the diagnostic steps, including tests, available to ascertain the significance for that abnormality."

Id. at 657.

188. The first and most notable of these works is Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel]. *See also* Strauss, *Argument for Autonomy*, *supra* note 143; Ellman, *Symposium: Clinical Education: Lawyers and Clients*, 34 UCLA L. REV. 717, 720 n.8 (1987).

189. Strauss, *Argument for Autonomy*, *supra* note 143, at 317 (the informed consent model has not been applied to the legal profession).

ably informed consent) only in certain situations.[190] Consent is required for entering a business relationship or acquiring a pecuniary interest adverse to a client's interests. Consent is required to disclose confidential information to the disadvantage of the client.[191]

Under the traditional allocation of decisionmaking authority in the legal setting, the client decides the ends of a lawsuit while the attorney controls the means.[192] In health care, the ends are usually understood to be regaining or optimizing the patient's health. But by giving or withholding his consent, the patient has a great deal of control over the means to reach those ends.

Perhaps one of the fundamental differences between the legal and medical professions, at least with regard to informed consent, is simply this: A patient must consent, at least in some sense, in order for the doctor to perform treatment; in contrast, much of what an attorney does for a client is performed outside the client's presence.[193]

The practical difficulties of distinguishing professional from entrepreneurial aspects of a medical practice within the realm of informed consent place both courts and health care professionals in uncomfortable positions. Having stated that intent is not a requirement for a Consumer Protection Act claim,[194] the courts must now look for intent under the euphemism of "relating to entrepreneurial aspects."[195] Health care providers, faced with the prospect of coverage exclusions in their liability policies for punitive damages,[196] could face substantial personal liability for negligent failure to disclose risks.

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190. *See* WASHINGTON RULES OF PROFESSIONAL CONDUCT, Rules 1.7(b)(2), 1.8(b), 1.8(h), 1.9(a) and 2.2(a) (1988).

191. R. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 843 (1986) ("any information acquired in the course of representing a client may not be used to the disadvantage of the client . . . absent informed consent by the client.").

192. Strauss, *Argument for Autonomy*, *supra* note 143, at 318 (citing Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003, 1004).

193. Spiegel, *supra* note 188, at 49 n.31.

194. *See supra* notes 50-52 and accompanying text.

195. *See Quimby*, 45 Wash. App. at 181, 724 P.2d at 406.

196. The dilemma arising from *Quimby* has been anticipated, although it was predicted to arise not from the practitioner's profit motive directly, but rather from the efforts of third parties to contain medical costs. *See Entin, DGRs, HMOs, and PPOs: Introducing Economic Issues into the Medical Malpractice Case*, 20 FORUM 674 (1985).

In response they might overdisclose[197] or overdiagnose[198] in an attempt to avoid any lack-of-informed-consent claims. Although the patient would be nominally informed, he would be, as a practical matter, barraged with a mind-numbing quantity of unassimilable information rendering any resulting consent meaningless.[199]

VIII. CONCLUSION

Under the facts in *Quimby*, Rose Quimby suffered a common law battery,[200] an intentional tort no longer actionable under Washington's statutory formulation for health care injury causes of action.[201] Moreover, at least impliedly, the motive for the act was that of mercantile profit and was deliberate and intentional. One cannot hesitate to indict such behavior by a physician as reprehensible and deserving of punishment. The holding of *Quimby* seems both unavoidable and justified, if difficult to interpret. But the implication of Consumer Protection Act liability for merely negligent,[202] or even

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> "[D]efendants will soon be facing juries with the difficult task of explaining how their medical judgment was not incorrectly influenced by the new economic pressures imposed upon medical delivery." And: "the continuing trend of medical liability decisions do nothing but intensify the impression that physicians will be called upon to utilize every diagnostic tool available to avoid or at least mitigate liability for failure to diagnose. At the same time, the Prospective Payment System represents a powerful incentive to curtain the over-utilization of the very same diagnostic procedures."

Id. at 680.

197. Since whether a fact is "material" will not be known until the question is presented to a jury, and practitioners will desire to avoid even the remote possibility of liability under the Consumer Protection Act if they are not indemnified by malpractice insurance, there is great incentive to misallocate medical resources, i.e., physician-hours, disclosing information at best peripherally related to the central objective of providing the patient with adequate pertinent information enabling him to render a meaningful decision regarding what shall be done to him.

198. *See* Comment, *Informed Consent in Washington*, *supra* note 77, at 673 (encouragement of defensive medicine and an expanded role for written consent forms seems likely); Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939, 942 (1971) (defensive medicine consists of medically unjustified care provided by the physician for the purpose of reducing the possibility of a malpractice suit). Unnecessary care includes, of course, unnecessary diagnostic procedures.

199. As one commentator has indicated, physicians may seek to avail themselves of the procedural advantages (creation of a presumption of adequate disclosure and consent) afforded by a written consent form under WASH. REV. CODE § 7.70.060 (1987). *See generally* Comment, *Informed Consent in Washington*, *supra* note 77.

200. *See supra* notes 180-82 and accompanying text.

201. WASH. REV. CODE § 7.70.030 (1987).

202. Commentators have already apprehended "the most serious . . . possibility

non-negligent failure to secure informed consent seems unsupportable.

In summary, satisfaction of the elements of a lack-of-informed-consent claim also satisfies the prongs of the *Hangman* test for a private dispute action under the Consumer Protection Act. The holding of *Quimby* requires as an additional element or prong that the lack of informed consent "relate to the entrepreneurial aspects of the medical practice."[203] This Note has suggested that the entrepreneurial aspects test devolves into a de facto consideration of profit motive, and thereby reintroduces a requirement of intent[204] into Consumer Protection Act claims within the framework of lack-of-informed-consent actions. If the reason the consent was not obtained was for the profit of the health care professional who had a duty to disclose, then the punitive remedies of the Consumer Protection Act are appropriate and should attach.

Absent the analytical distinction of profit motivation, the entrepreneurial aspects test is in reality no test at all, and there is no reliable basis for distinguishing lack-of-informed-consent claims to which Consumer Protection Act remedies will attach from those to which they will not. Hence, all lack-of-informed-consent claims will afford plaintiffs Consumer Protection Act recoveries in addition to their other available remedies. Health care providers could protect their personal financial assets better by intentionally botching procedures than by negligently failing to disclose.[205] This state of the law does not and cannot make sense.

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that informed consent doctrine will supplant traditional malpractice doctrine. In particular, informed consent represents a vehicle for altering the rule against recovery for non-negligent failure to diagnose." Comment, *Informed Consent in Washington*, *supra* note 77, at 671. *See* Holt v. Nelson, 11 Wash. App. 230, 237, 523 P.2d 211, 216-17 (1970) (doctrine of informed consent allows a patient to recover damages from a physician despite having received non-negligent medical diagnosis and treatment.).

Of four recently identified "adverse trends" in tort, two are arguably aggravated by the facial results of *Quimby*: 1) movement toward no-fault liability, and 2) explosive growth of pain, suffering, and punitive damages. Of eight recommended "tort reforms," two may be thwarted by *Quimby*: 1) retention of fault as a basis of liability, and 2) limits on non-economic damages. Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications for the Current Crisis in Insurance Availability and Affordability, February 1986, *quoted in* Freeman, *Tort Law Reform: Superfund/RCRA Liability as a Major Cause of the Insurance Crisis*, 21 TORT AND INS. L.J. 517 (1986).

203. *Quimby*, 45 Wash. App. at 181, 724 P.2d at 406.

204. Commentators have been critical of requiring intent in private Consumer Protection Act claims. *See, e.g.*, Comment, *A Re-Evaluation*, *supra* note 49, at 699.

205. *See supra* note 126 and accompanying text.

With the denial of review by the Washington Supreme Court on March 4, 1987, *Quimby* remains the law of the state. Until such time as the holding is clarified, plaintiffs' attorneys will have a new theory on which they can, should, and no doubt will press for increased awards for their clients who have lack-of-informed-consent claims: Consumer Protection Act private dispute claims. Under plausible readings of *Quimby*, these plaintiffs would appear to have every expectation of prevailing once their informed consent claim has been established. Meanwhile, there is precious little that health care providers can do to insulate themselves from potential punitive damage awards[206] against which they are almost certainly uninsured and uninsurable.[207] It is almost beneath saying that every provider should attempt to procure valid, written informed consent for every procedure and diagnostic test as well as an "informed refusal" for every procedure and test recommended but not accepted by the patient. But until the courts adopt the test proposed in this Note, application of the Consumer Protection Act to medical lack-of-informed-consent cases is left in the hands of the individual trial courts.[208] Further, the ethical, well-meaning, merely negligent defendant will continue to be exposed to the same threat of liability in punitive damages as the most deceitful, reprehensible, and culpable of fraudulent quacks. It is hoped that this condition will not long endure.

Dr. Carroll Rusk, Jr.

206. Simple mechanisms to accomplish this insulation, at least partially, would be to set identical fees for alternate procedures when practical, and to offer alternative procedures that would require the provider himself to refer the patient to another practitioner and therefore lose income and profits, for example.

207. *See supra* notes 92 & 165-74 and accompanying text.

208. *See supra* note 22 (*Quimby* trial court's interpretation of the test).