

## Preface

Medical law is an established discipline in modern jurisprudence. Just as other areas of law, such as labour law and commercial law, have acquired distinct juridical integrity, so has medical law become a discrete body of issues, doctrines and, to some extent, rules. Yet the province of medical law remains largely undetermined, and new categories are continually opened as problems in medical care force the law to provide reason and guidance.

The complexity of medical law has also attracted the kind of enthusiasm that may propel this discipline to such intense specialization that it will become opaque to the examining eye of the general practitioner in law or medicine, to say nothing of the curious layman. The significance of medical law in contemporary jurisprudence is as evident in the proliferation of relevant legislation and case-law as it is in specialized books, periodical publications and academic courses on the topic. The Editorial Board of the *McGill Law Journal* hopes that the contents of this issue on medical law will be of interest to experts and unspecialized readers alike. It is neither a primer nor an encyclopedia on medical law in Canada, but a selection of papers that are variously general, speculative and highly analytical.

Many fundamental matters in medical law are unresolved. Hence this special number includes an array of articles on such well-worked but unexhausted themes as informed consent, experimentation and research on human beings, the liability of hospitals and the autonomy of mentally disabled or terminally ill patients. There is also a fair balance of theoretical and practical discussion, as is shown in the two contributions by Mr Bernard Starkman. One is a note on the history and interpretation of section 45 of the *Criminal Code*,<sup>1</sup> and the other a comment on *Re Eve*,<sup>2</sup> a complicated case which concerns the proposed sterilization of a mentally retarded woman and which, at the time of writing, is on appeal before the Supreme Court of Canada.<sup>3</sup> The confidentiality of medical re-

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<sup>1</sup> R.S.C. 1970, c. C-34.

<sup>2</sup> (1980, 1981) 115 D.L.R. (3d) 283 (P.E.I.S.C. *in banco*), *rev'g* (1979) 10 R.F.L. (2d) 317 (P.E.I.S.C.) *per* C.R. McQuaid J. This curious citation to the appellate decision is intended to denote that supplementary reasons to the decision rendered in July, 1980 were issued by the same Court in January, 1981.

<sup>3</sup> Leave to appeal to the Supreme Court of Canada granted by the Supreme Court of Prince Edward Island on 29 May 1981; notice of appeal filed in the Supreme Court of Canada on 18 June 1981.

cords and the administration of public health insurance schemes are major topics not considered in this number.

The complexity of issues in medical law reflects their ethical gravity and their controversy in public opinion. Ethical questions are taken up throughout these pages, not least in the article by Professor Jean-Louis Baudouin and the comment by Mr E.W. Keyserlingk, but the scope and gravity of medical ethics are most poignantly illustrated in the play that is the focus of our theatre section. This section not only demonstrates the innovative approach to legal publishing at McGill but it affirms that art, "nature to advantage dress'd", can epitomize the challenges commonly faced by law and medicine and force them to a crisis for instruction and aesthetic pleasure.

This special issue was long and hard in gestation, partly as a function of its size. The Editorial Board extends sincere thanks to its contributors, some of whom have been waiting more than nine months to see the publication of their work. The Journal's staff has attempted to ensure that citations are current to 1 July 1981.

The Editors also wish to express their appreciation to the Faculty of Law, McGill University, The Samuel and Saidye Bronfman Family Foundation and The Social Sciences and Humanities Research Council of Canada for their generous financial assistance; and to Professor Paul-A. Crépeau, Director of the Institute of Comparative Law at McGill University, and Professor Margaret Somerville of McGill's Faculty of Law and Faculty of Medicine, for their keen cooperation and assistance in the organization of this number.

Finally, it is a pleasure to acknowledge the patience and kind support of Professor Y.-M. Morissette and Dean J.E.C. Brierley of the Faculty of Law, McGill University, without which this enterprise might have foundered.

Patrick Healy  
Editor-in-Chief, 1980-81

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# La responsabilité civile de l'établissement hospitalier en droit civil canadien

Paul-A. Crépeau, o.c., c.r.\*

Le rôle de l'établissement hospitalier, ses devoirs et responsabilités, ont considérablement évolué au cours des dernières décades.

— M. le juge Lajoie<sup>1</sup>

## Synopsis

### Introduction

#### Première partie: Le cadre juridique de la responsabilité hospitalière

##### I. La notion d'entreprise hospitalière

A. *Conception traditionnelle de l'établissement hospitalier: une auberge spécialisée*

B. *Conception nouvelle de la fonction hospitalière: une entreprise de soins médico-hospitaliers*

1. *Reconnaissance juridique de l'entreprise hospitalière*

a. *Consécration législative*

b. *Consécration jurisprudentielle*

2. *Origines sociologiques de l'entreprise hospitalière*

a. *Motifs d'ordre scientifique*

b. *Motifs d'ordre social*

##### II. Le fondement juridique de la responsabilité hospitalière

#### Deuxième partie: Les régimes juridiques de la responsabilité hospitalière

##### I. Le régime contractuel de responsabilité hospitalière

A. *Conditions de la responsabilité hospitalière contractuelle*

1. *Existence du contrat hospitalier*

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<sup>1</sup> Voir *Hôpital général de la Région de l'amiante Inc. v. Perron* [1979] C.A. 567, à la p. 574.