

A Defence to Criminal Responsibility for Performing Surgical Operations: Section 45 of the Criminal Code*

A number of writers commenting on the legality of surgical operations in England and Canada have criticized the undue emphasis on the element of consent to the neglect of other important considerations.¹ Section 45 of the Canadian *Criminal Code*,² which under certain conditions confers protection from criminal responsibility on persons performing surgical operations, does not mention consent. Protection is conferred for operations performed for the benefit of the patient. Here the element of benefit appears to replace that of consent, but the meaning of benefit is not clear. Accordingly, the question has been raised whether certain voluntary operations, for example, sterilization, would qualify for protection. This matches a concern in England — where a similar statutory defence is not available — with whether consent is relevant to the illegality of such operations. In the case of *Morgentaler v. The Queen*,³ the Supreme Court of Canada affirmed that section 45 of

* This comment is a revision of material taken from a report entitled *Preliminary Study on Law and the Control of Life*, which was prepared by the author for the Law Reform Commission of Canada in August, 1974. In addition to its use in the *Morgentaler* case (see note 6, *infra*), the material was presented orally by the author at the International Symposium on the Dying Human in Tel Aviv on January 17, 1978 and later printed in the proceedings of the Symposium. It was also presented to Ontario's Inter-ministerial Committee on Medical Consent and later cited in a paper published by that Committee entitled *Options on Medical Consent* (September, 1979). Further references to the material published here can be found in other writings by the author, in the Law Reform Commission's *Medical Treatment and Criminal Law and Consent to Medical Care* and in *Medical Interventions and the Criminal Law* (1980) 26 McGill L.J. 82. In view of the attention given to this material in its unpublished form, it is published here for general circulation among students, teachers and practitioners interested in the relationship between medical and criminal law. — Editor.

¹ See Hughes, *Two Views on Consent in the Criminal Law* (1963) 26 M.L.R. 233; Wright, "The Doctor's Civil Duties and Responsibilities" in *Blood Transfusions without Consent* (1961).

² R.S.C. 1970, c. C-34.

³ [1976] 1 S.C.R. 616. In this case a doctor was charged with performing an illegal abortion contrary to s. 251 of the *Criminal Code*. The patient had requested the abortion. The doctor was acquitted at trial, but an appeal by the Crown was allowed by the Quebec Court of Appeal which set aside the jury verdict of acquittal and entered a conviction without ordering a new

the *Criminal Code* is not available as a defence to a charge of procuring an abortion contrary to section 251. It will be suggested in this analysis that, as a general rule, other operations which meet with the general approval of Canadian physicians carry protection from criminal responsibility. References to the *Draft Code*, the *English Draft Code*, or *Stephen's Draft Code* mean the *Draft Code* appended to the Report of the English Criminal Code Commission, published in 1879.

I. Consent as an aspect of public policy

Section 45 provides that:

Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if:

- (a) the operation is performed with reasonable care and skill, and
- (b) it is reasonable to perform the operation having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

It is first found as section 67 in *Stephen's Draft Code* substantially in its present form, and was included in the *Canadian Criminal Code*, 1892⁴ as section 57. Since it does not mention consent, it does not purport to distinguish consensual operations from those performed without consent, and thus appears to be a defence which rests entirely on the public policy underlying the general wording of the elements comprising it. When may the physician or other person performing the surgery neglect to obtain the patient's consent, or even proceed despite his resistance? It is submitted that only the indications introduced by the controlling requirements of reason-

trial. The Supreme Court of Canada dismissed the appeal. In the course of the trial, Hugessen A.C.J. of the Quebec Court of Queen's Bench ruled that s. 45 was a defence available to the accused. The history of s. 45, which will be examined in this paper, indicates that since consent had been given, the section was not applicable. This objection does not appear to have been raised by counsel and it was not considered by the Court. Among other things, this oversight would lead to the premise that operations done with consent are illegal unless the conditions in the section are met, whereas Stephen assumed the legality of operations agreed to by patients upon the advice of their physicians. It should be no surprise that in the past some Canadian doctors have been reluctant to perform elective operations such as sterilization due to uncertainty as to whether the conditions in s. 45 would be met. Misunderstanding of the application of the section can also be seen in the *Report of the Royal Commission of Inquiry into Contraception, Sterilization and Abortion in New Zealand* (1977), 120-1, in its comments on the application to voluntary sterilization of s. 61 of the *New Zealand Crimes Act, 1961*, which is similar to s. 45 of the *Canadian Criminal Code*.

⁴ 55-56 Vict., c. 29.

ableness suggest a possible answer and that the section can be properly understood only in the light of its precursors in Stephen's *A Digest of the Criminal Law*,⁵ of which the 1887 edition is cited in the Parliamentary Debates, along with the English *Draft Code* and a Canadian *Digest* based on Stephen's, as a source of the Canadian *Criminal Code*. While public policy at all times played an important part in Stephen's formulation of the law in this area, in his *Digest* it was expressed in terms of consent. Examination of that expression furnishes answers to questions of consent and provides some useful hints regarding the public policy attitudes which underlie section 45.

Two articles in the *Digest* deal expressly with surgical operations. Article 204 provides:

Everyone has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

Article 205 provides:

(Submitted) — If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance.

Both sections are governed by article 203, which provides:

The consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 204-209, both inclusive. In each of these Articles the word "Consent" means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

To articles 204 and 205 Stephen appended this footnote: "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth." The articles are formulated in terms of consent, a concept which traditionally has played an important part in determining the legality of an act. Article 205 reveals that consent is only one aspect of a public policy which invokes other considerations. Article 205 does not deal with refusal of consent by a person capable of giving it, even though that person may be in great danger. This might be a case of necessity, yet presumably the law would protect

⁵ First published in 1877.

the person's right to determine what he believes to be in his own interest. However, in the absence of that capability, public policy protects the person performing the surgery in spite of the patient's resistance. Protection of self-determination may also be seen in article 204, where this right is recognized in the young, so long as they are able "to exercise a reasonable discretion in the matter". The policy supporting preservation of health through surgery yields to the right to self-determination where that right can be exercised by a capable person.

II. The meaning of benefit

Section 45 of the *Criminal Code* requires that the operation be for the benefit of the patient. The word benefit is not found in articles 204 or 205. What does it mean? Some guidance is afforded by the text of the articles and the footnote added by Stephen. The existence of the profession of surgery assumes that people who are capable may resort to the surgeon who will counsel them on the advisability of subjecting themselves to his skills. The decision will be made by them upon his advice. Should they ask him to proceed with surgery, article 217 of Stephen's *Digest* requires that he "employ in doing it a common amount of such knowledge, skill, attention and caution" which is "the legal duty of every person who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, and which requires special knowledge, skill, attention, or caution." Article 217 became section 162 of the *Draft Code*, and is now section 198 of the *Criminal Code*. Should the patient be incapable of giving consent, presumably the opinion of other surgeons may later be consulted as to whether surgery was necessary and whether the surgeon or other person undertaking it showed a common amount of knowledge, *etc.*, which would justify a finding that he discharged his legal duty. It is submitted that the decision-making process, which usually involves physician and patient, but which under certain circumstances will involve only the physician, is the sole criterion of benefit, and the subsequent opinion of other physicians is merely evidence of need, where the patient is incapable of giving consent, and of acceptable performance of the surgeon's work once undertaken. Articles 204 and 205 recognize surgery as lawful, and the exception in article 217 recognizes that extraordinary and perhaps untried measures may have to be resorted to in cases of necessity. Article 217 does not require that a surgeon perform the act, but holds the person performing the operation to the surgeon's standard, except in case of necessity.

In light of the above, it would appear that section 45 of the *Criminal Code* was intended to deal with the situation where the patient is not capable of consenting.⁶ If the patient is not capable, the person performing the operation is protected from criminal liability, provided the patient's condition necessitates surgery for the preservation of life or limb.⁷ If these conditions are met, the surgeon is protected even if the patient resists treatment. Support for this interpretation of section 45 is obtained from editions of the *Digest* published after the *Draft Code*, which state that section 67 of the *Draft Code*, which is now section 45 of the *Criminal Code*, is based on article 205 of the *Digest*.⁸ It was understood that where the patient was capable of giving consent, the surgeon must consult

⁶Dickson J., speaking for a majority of the Supreme Court in the *Morgentaler* case (*supra*, note 3), acknowledged that "[s]ection 45 may be available as an answer to a charge arising out of a surgical operation performed on an unconscious patient ..." (emphasis added). Toward the end of the proceedings in the Supreme Court, material dealing with the purpose of s. 45 which had been taken from the *Preliminary Study on Law and the Control of Life* was presented orally to the Court by respondent's counsel and later submitted in written form. Appellant's counsel subsequently asked the Court to receive a brief prepared by Prof. Cyril C. Means, Jr of New York Law School which counsel stated would show, contrary to the material submitted by the respondent, that s. 45 was on historical grounds applicable to operations, including abortion, where consent is given. In this regard, note 82 in Dickens, *The Morgentaler Case: Criminal Process and Abortion Law* (1976) 14 Osgoode Hall L.J. 229, 244 is incomplete and may therefore be misleading.

⁷The illustrations to art. 205 of the *Digest* involve threats to life or limb. S. 49 of Reg. 729 under *The Public Hospitals Act* of Ontario, R.S.O. 1970, c. 378, provides that consent to a surgical operation is not necessary "where the surgeon believes that delay caused by obtaining the consent would endanger the life or a limb or vital organ of the patient..."

⁸Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, 3rd ed. (1883), 141, n. 2; 4th ed. (1887), 148, n. 2. The fourth was the last edition prepared by the author. In the fifth edition (1894) the editors corrected what had become a citation error in the first part of note 2, at p. 164. In fact, the first part of note 2 simply refers the reader to the comment in note 1, which deals with what is art. 204 in the first four editions and is renumbered art. 225 in the fifth. The reference in the second part of note 2 to s. 67 of the *Draft Code* was added in the editions published after the *Draft Code*, and deals only with what is art. 205 in the first four editions and is renumbered art. 226 in the fifth. If this latter reference had been intended to apply to s. 204, it would have been added to note 1. With respect, the interpretation by Laskin C.J. in his dissenting judgment in *Morgentaler*, *supra*, note 3, 643, that "Stephen's *Digest of the Criminal Law* (5th ed. 1894) at p. 164 shows that s. 67 was deemed by him to apply both to consensual and non-consensual surgery", is clearly incorrect.

with him, and persistence in treatment in the face of the patient's refusal would render the surgeon liable to criminal responsibility.

III. The wide protection afforded surgical operations

The basic policy of self-determination, qualified by the right to operate to preserve life or limb, in certain circumstances, is partially revealed in the articles of the *Digest* discussed above. But surgery is treated as a special case, and it is this that provides an important clue to the purview of section 45 of the *Criminal Code*. Article 206 provides that:

Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

In an illustration which concludes with an obvious understatement, Stephen explains that "it is a maim to strike out a front tooth (because at one time it was an essential part of a common soldier's drill to bite cartridges). It is not a maim to cut off a man's nose. Castration is a maim." In a footnote he states: "[t]he positive part of this article is proved thus: Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent." In *R. v. Donovan*,⁹ where a man had caned a girl for the purpose of sexual gratification, the English Court of Criminal Appeal thought that the first statement of article 206 needed considerable qualification, and held that the girl's consent was not necessarily a defence, even though the injury to her did not amount to a maim. The facts of this case would have disclosed no crime to Stephen. Indeed, the informing principle of his concern regarding the legality of consent to injuries other than those likely to cause death seems to have been the tendency of the acts in question to lead to breaches of the peace. A note to article 207 indicates that even consent to a maim is permissible, provided it is not done for any purpose injurious to the public (*i.e.*, to avoid military service). The articles on surgical operations are not concerned with these niceties. Article 203 states the general rule: "[t]he consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 204-209." And article 207 clearly affirms the legality of consent to operations, even if the surgery may cause

⁹ [1934] 2 K.B. 489 (C.C.A.).

death. The dangers to the public posed by other assaults are not present in the case of surgical operations.

IV. The meaning of reasonable

The test in paragraph (b) of section 45 of whether it is reasonable to perform the operation depends on the two criteria stated therein. To which of the situations in Stephen's *Digest* do they refer? Article 204 of Stephen's *Digest* gives the general case where consent may be obtained. Article 205 deals with circumstances where the patient is incapable of giving consent. It seems clear that paragraph (b) of section 45 of the *Criminal Code* refers to the same circumstances. Editions of the *Digest* published after the *Draft Code* state that what is now section 45 of the *Criminal Code* is based on article 205 of the *Digest*. Article 204 expressly preserves the duties of a person performing a surgical operation, and this has been incorporated in paragraph (a) of section 45. Since article 204 recognizes surgery with consent as lawful, it is submitted that paragraph (b) of section 45, in again raising the question of legality, must be concerned with circumstances where consent cannot be obtained and where public policy must be consulted direct. That policy was suggested by Stephen in article 205 of his *Digest*, and it is that guidance which was obscurely formulated in paragraph (b) of section 45. Few would deny that in many cases, where the patient is incapable of giving consent, it would be reasonable to perform an operation, despite the patient's resistance.

Conclusion

Section 45 of the *Criminal Code* is ultimately derived from an article of the *Digest* dealing with circumstances where consent cannot be obtained. The legality of procedures which would ordinarily constitute assaults, and which were not protected under articles 204 and 205 of the *Digest* when the section was drafted, depends on the other provisions of the *Criminal Code*. Abortion is dealt with expressly. From the above, it appears that the policy of self-determination underlying section 45 does not discriminate among other operations. The word "benefit" in the section merely reflects the draftsman's concern that only those operations performed on those incapable of giving consent which are done to preserve life or limb will be free from criminal responsibility. Section 45, which does not mention consent, is very much concerned with its absence. This examination of section 45 also reveals an assumption that in the absence of legislative provisions dealing expressly with specific

operations, operations on those capable of giving consent which meet with the general approval of physicians afford protection from criminal responsibility. The process of gaining general medical approval of particular operations is not so clear.

Bernard Starkman*

* Special Adviser, Medical-Legal Policy, Department of Justice, Ottawa. The opinions expressed in this comment are not necessarily those of the Law Reform Commission of Canada or the Department of Justice.