LEGAL REGULATION OF THE PHYSICIAN–PATIENT RELATIONSHIP
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EXECUTIVE SUMMARY

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Common Law Obligations

Negligence
Negligence law governs responsibility for conduct that poses risks to others and that results in injury. Negligence liability requires the plaintiff to prove that the defendant owed him/her a duty of care. In their relationships with patients, physicians operate under a presumptive duty of care. In determining whether physicians have violated their duty of care, a court will assess their conduct by an objective and heightened standard of care — namely, whether it is consistent with the conduct of a reasonable or prudent professional colleague in similar circumstances. For physicians to be held liable, patients must prove that the physician's negligent act was, on a balance of probabilities, the cause of a recognizable injury.

Battery and the Extended Tort of Negligence
The law of battery protects our freedom from physical interference. A defendant (e.g., physician) commits battery when he/she physically interferes with the plaintiff's (e.g., patient's) bodily security (e.g., by performing a medical procedure) without valid consent. For consent to be valid, the decision-maker must have the capacity to consent (i.e., he/she must be able to understand the nature and purpose of the procedure and any alternatives) and the consent provided must be fully informed (i.e., based on adequate information regarding the material risks and benefits of the proposed procedure and any alternatives), specific (i.e., regards specified procedures to be performed by a particular physician) and voluntary (i.e., provided in circumstances free of coercion, undue influence, fraud or misrepresentation).

Since Reibl v. Hughes, violation of the requirement that consent be fully informed gives rise to a claim in negligence. Modified principles of negligence law require the patient to prove a violation of the standard of care by bringing expert evidence on information disclosure, and to prove causation by arguing that a reasonable patient in his/her circumstances would not have undergone the procedure had he/she been properly informed.

Breach of Fiduciary Duty
Fiduciary law governs relationships in which one person has discretionary power over the significant practical interests of another. In Canada, the physician–patient relationship has long been recognized as one amongst other traditionally recognized categories of fiduciary relationship. Liability is most commonly founded on a breach of the fiduciary's duty of loyalty, a duty that requires the fiduciary to avoid or properly manage conflicts of interest. This duty encompasses situations where the interests of the beneficiary (e.g., patient) may conflict with the self-interest of the fiduciary or with the fiduciary's duty to serve the interests of a third-party.

Fiduciaries are also said to operate under duties of care, discretion, disclosure and confidentiality. The duty of care requires the fiduciary to show reasonable care, diligence and skill in the exercise of judgment and any action taken pursuant to it. The duty of discretion requires the fiduciary to exercise judgment in the best interests of the beneficiary. The duty of disclosure requires the fiduciary to disclose conflicts of interest, mistakes, records and other information that is material to the exercise of his/her power. Finally, the duty of confidentiality limits the fiduciary's use and disclosure of the beneficiary's confidential information, and requires him/her to take reasonable steps to protect its confidentiality.

Civil Responsibility in Québec Civil Law
Assessing medical liability in Québec civil law requires an investigation into whether the defendant committed a fault, and whether this fault caused an injury to the plaintiff.
Physicians’ Obligations

A fault occurs where a person fails to meet one of his/her legal obligations. Legal authorities in Québec have attributed four broad obligations to physicians. First, a physician must obtain the patient’s voluntary and informed consent before proceeding with any medical intervention. A physician must thus supply all of the information that is relevant to the particular patient being treated (a subjective standard).

Second, physicians are obliged to provide prudent and diligent care. Because they are held to an “obligation of means,” the legal analysis of fault turns on the use of reasonable means or procedures to treat the patient, rather than on the outcome attained. Where a physician’s professional conduct is impugned, a court will evaluate this conduct with reference to that of a “prudent and diligent doctor” in the same circumstances.

Third, once a physician has undertaken a medical examination, intervention or treatment, he/she bears an ensuing obligation not to abandon the patient. This requires the physician to: disclose and explain test results; signal follow-up requirements; inform the patient about the potential complications or side effects of an administered treatment; and evaluate the treatments administered.

Fourth, physicians in Québec are obliged to maintain the confidentiality of their patients’ medical information. While this is a general requirement, the disclosure of patient information is permitted in some situations, for example, when authorized by the patient or required by statute or by a court order. Québec’s Code of Ethics of Physicians also permits physicians to reveal confidential information where “there are compelling and just grounds related to the health or safety of the patient or of others.”

Finally, it should be noted that, in some limited contexts, a physician might also be responsible for injury caused by the fault of persons working under his/her charge.

Injury

In addition to establishing the commission of a fault, a plaintiff must also show that this fault caused an injury. This injury must flow directly from the defendant’s fault and must be certain, rather than only possible or hypothetical. The analysis of the plaintiff’s injury is oriented toward determining the nature and extent of the loss caused by the defendant’s fault and, thus, the quantum of damages the plaintiff is owed. A defendant might also be ordered to pay punitive damages if the fault amounted to an “unlawful and intentional interference” with a recognized right under the Québec Charter.

Causation

Once it has been established that a physician has failed to meet one of his/her obligations to a patient and that the patient suffered an injury, it must be shown that the physician’s fault (i.e., breach of obligation) was the direct cause of the patient’s injury. For physicians in Québec, two of the most relevant elements pertaining to causation are: factual presumptions; and proof of causation where the alleged medical fault involves the failure to obtain informed consent.

Factual presumptions serve as an evidentiary tool. Where there is no direct evidence establishing causation but the evidence remains compelling, a court has the discretion to infer that the defendant’s fault caused the plaintiff’s injury. This discretion is limited, however, in that the Civil Code of Québec allows courts to consider only “serious, precise and concordant” presumptions. Once a court draws a presumption of causation, it is up to the defendant to rebut the presumption with contrary evidence.

Where a physician fails to provide the patient with the information necessary to make an informed decision about whether to proceed with a particular medical intervention, this generally constitutes a fault. However, it will only lead to liability if the patient can demonstrate that he/she suffered an injury and that, if he/she had been given the requisite information, he/she would not have consented to the intervention. Québec courts apply a predominantly subjective analysis to this issue, and thus will ask whether that particular patient, if informed of all the risks of the treatment that would have been pertinent to him/her, would have consented to the intervention. If so, causation is not established and liability will not ensue.

Legislative Constraints

Consent and Capacity Legislation

Ontario’s Health Care Consent Act (HCCA) is a typical example of legislation on consent to treatment. Under the HCCA, physicians cannot administer treatment without the consent of the patient or of an authorized substitute. Patients are to be presumed capable unless there are reasonable grounds to believe otherwise, where capacity is the ability “to understand the
information that is relevant to making a decision … [and] to appreciate the reasonably foreseeable consequences of a decision or lack of decision.” Capacity requires cognitive ability, not comprehension or appreciation. For consent to be valid it may be express or implied, but it must be specific, informed and voluntary. Consent is informed where it is based on information that a reasonable person would require to make the decision, and where requests for additional information have been met.

Under the HCCA, substitute decision-makers must generally decide in accord with the expressed wishes of the incapable person. Otherwise, they are obliged to decide in the incapable person’s best interests, taking into consideration factors including their values and beliefs, whether the treatment is likely to improve or stabilize their condition or well-being, the impact of non-treatment, and the balance of benefits and harms of the treatment.

The HCCA allows treatment to be administered to incapable persons without consent, provided the physician believes there is an emergency and that delaying treatment for consent or refusal by a substitute will prolong suffering or put the patient at risk of serious bodily harm. Treatment can be continued only as long as the person remains incapable, or until substitute consent can be obtained.

Where the patient is capable, the HCCA allows treatment without consent provided the physician believes there is an emergency, adequate communication has proven impossible, delay will prolong suffering or put the patient at risk of serious bodily harm and there is no reason to believe the patient does not want treatment. Treatment may be continued only as long as adequate communication remains impossible.

The Power of Attorney for Personal Care
Ontario’s Substitute Decisions Act (SDA) recognizes a legal instrument called a “power of attorney for personal care,” through which one person may grant another the legal authority to make health-care decisions on his/her behalf should he/she become incapable. Decision-making under the power of attorney is subject to any conditions in the document that confers the power. Furthermore, the powers must be performed diligently and in good faith.

Attorneys must abide by HCCA provisions that are applicable to substitute decision-makers where the HCCA applies. They are also obliged to encourage participation in decision-making by the incapable person, to foster regular contact between the incapable person and friends and family, to consult with caregivers and supportive family and friends, to foster the independence of the incapable person, to adopt the least restrictive or intrusive course of action and to avoid where possible the use of confinement, monitoring devices, and physical and chemical restraints.

Privacy of Health Information
In Ontario, the Personal Health Information Protection Act (PHIPA) governs the collection, use and disclosure of the identifying personal health information (PHI) of patients. It protects patients’ PHI in part through obligatory information practices. Physicians and other health information custodians (HICs) are obliged to take reasonable steps to ensure that PHI that is retained or disclosed to others is accurate, complete and up-to-date. They are also obliged to take reasonable steps to ensure that PHI in their custody is secure and to promptly notify the patient if security is breached. Security must be maintained in the transfer and disposal of information.

PHIPA requires consent for the collection, use and disclosure of PHI. For consent to be valid it must be given by a capable individual in an informed, specific and free manner. HICs are entitled to presume capacity, unless where they have reasonable grounds to believe otherwise. PHIPA requires substitute decision-makers to consider factors including the wishes, values and beliefs of the incapable person, the balance of possible benefits and harms, and whether the collection, use or disclosure of the information is truly necessary.

Under PHIPA, HICs must refrain from the collection, use or disclosure of PHI, except where consent has been obtained and a lawful purpose is being served, or where PHIPA permits or requires it. PHIPA expressly forbids the collection, use or disclosure of PHI where other information will suffice. It additionally requires HICs to collect, use or disclose no more PHI than is reasonably necessary.

PHIPA provides that physicians and other HICs may indirectly collect PHI where: the individual consents; the information is reasonably necessary for providing health care to the individual and accurate information cannot be directly collected in a timely way; the person disclosing it is permitted or required to do so by law; or the HIC is permitted or required by law to collect it. Direct collection of PHI without consent is allowed where reasonably necessary for the provision of health care and where consent cannot be obtained in a timely manner.
PHIPA provides that HICs are permitted to use PHI without consent for the purpose for which the information was collected or created (except where the individual expressly instructs otherwise): for a purpose permitted or required by law; for health-care education purposes; or for obtaining payment or processing claims for payment.

PHIPA provides that HICs may disclose PHI without consent to selected other HICs where reasonably necessary for the provision of health care and consent cannot be obtained in a timely manner (except where the individual expressly instructs otherwise): to enable determination of funding or payment for health-care provision; or to contact a relative, friend or potential substitute decision-maker where the individual is injured, incapacitated or ill and unable to provide consent, etc. Disclosure is also permitted without consent in certain circumstances, such as for public health purposes or where disclosure is necessary to eliminate or mitigate a significant risk of serious bodily harm to a person or group of persons.

PHIPA provides patients with a right of access to their records. The right is not absolute. HICs are permitted to refuse requests that are frivolous, vexatious or made in bad faith. Furthermore, the right does not extend, amongst other things: to information that is subject to a legal privilege; where granting access could result in a risk of serious physical harm to the individual or another person; or where granting access could lead to the identification of a person who was either legally obliged to provide the information or who provided it in confidence.

PHIPA recognizes an individual’s right to the accuracy of records containing his/her PHI. HICs are obliged to grant requests for correction or supplementation of a record that is incorrect or incomplete, and the individual provides the information necessary for the required completion or correction. HICs are permitted to refuse requests that are frivolous, vexatious or made in bad faith, provided they give the individual notice explaining the refusal and their entitlement to make a complaint to the Information and Privacy Commissioner.

Public Health
The Québec Public Health Act (PHA) is an example of a provincial statute that governs public health, setting out specific obligations for physicians in this respect. The PHA obliges physicians to assist public health authorities in monitoring public health. For example, the PHA requires physicians and nurses report any "unusual clinical manifestation" associated with vaccination. PHA also requires physicians to report patients with clinical signs of an "intoxication, infection or disease" in a published schedule of conditions that have been "medically recognized as capable of constituting a threat to the health of a population and as requiring vigilance on the part of public health authorities or an epidemiological investigation."

The PHA obliges physicians to administer compulsory treatment to patients presenting with listed “contagious diseases or infections that are medically recognized as capable of constituting a serious threat to the health of a population and for which an effective treatment that would put an end to the contagion is available,” or to refer the patient to an institution able to provide such treatment. Where patients refuse examination or treatment, physicians are obliged to notify public health authorities. Physicians are also required to administer prophylactic measures necessary to prevent the spread of contagious diseases or conditions that represent serious threats to public health.

The PHA also requires physicians to assist public health authorities in their investigations of specific public health threats and ongoing surveillance of population health. For instance, physicians may be obliged to provide non-identifiable patient information for a public health surveillance plan. They might also be required to contribute to or cooperate with epidemiological investigations of public health threats, and to comply with orders emanating from such investigations. Finally, physicians have obligations under the PHA in relation to the management of public health emergencies. They may, for instance, be required to participate in emergency compulsory treatment and/or prophylaxis plans. They may also be otherwise obliged to contribute to coordinated response efforts.

Rules of Professional Competence and Conduct
Medicine is a self-regulated profession. Enforced by provincial Colleges of Physicians, regulations establish standards for professional competence and conduct. The provisions of Alberta’s Medical Profession Act (MPA) are typical.

The MPA establishes a Committee of the College of Physicians and Surgeons of Alberta that is charged with periodic assessment of the standard of care provided by physicians. Where the Committee is concerned about a physician's performance, it may direct that the physician participate in a more focused assessment or take a specific (e.g., corrective) action. The Committee possesses extensive investigatory powers, including the power to inspect the office of the physician and to require the physician to produce documents relating to patient care. The matter will be referred to the Investigation Chair when the Committee
is of the opinion that the physician may be guilty of criminal or unbecoming conduct, is lacking the requisite skill or judgment, or is otherwise incapable or unfit to practice. “Any matter, conduct or thing that in the judgment of the investigating committee … is such as to be inimical to the best interests of the public or the profession, whether or not the act or conduct is disgraceful or dishonourable, is unbecoming conduct.”

The Investigation Chair may recommend that the matter be subject to preliminary investigation or pursued in full by an Investigating Committee that is vested with considerable powers to compel and hear evidence. If the Investigating Committee finds the physician guilty of incompetence or unbecoming conduct, it may recommend that the physician be fined, suspended or reprimanded, that the physician’s name be struck from the list of registered physicians or that conditions be imposed on his/her registration.

References

1. Readers are advised that relevant legal authority is cited only in the full primer; additionally, coverage of applicable law is highly selective.