SOURCEBOOK ON

MEDICAL JURISPRUDENCE

Professor B.M. Dickens

1995/96

FACULTY OF LAW

UNIVERSITY OF TORONTO
SOURCEBOOK ON
MEDICAL JURISPRUDENCE
Professor B.M. Dickens
1995/96

FACULTY OF LAW
UNIVERSITY OF TORONTO
# TABLE OF CONTENTS

## PART I COURSE OUTLINE

1.1

## PART II REFERENCES

2.1

### Articles

2.2

## PART III TEXTS

Canadian Medical Protective Association: Revenue Statement and Statistical Summary 3.1

The Medical Malpractice Problem in the United States and Canada 3.3

Patients' Interests and Clients' Wishes: Physicians and Lawyers in Discord 3.8

Understanding Variations in What Doctors Do: Globe & Mail, November 22, 1993 3.16

Legal and Medical Professional Orientations 3.17

The Prichard Report—Liability and Compensation in Health Care 3.23

Implications of Health Professionals' Legal Liability 3.59

The Choice of Contrast Media: Medical, Ethical and Legal Considerations 3.65

The Modern Law on Informed Consent 3.69

The Doctrine of "Informed Consent": Informed Choice in Medical Care 3.74

Liability Concerns about the Implementation of Advance Directives 3.85

Adolescents and Medical Care Decisions 3.90

Legal Limits of AIDS Confidentiality 3.94

Confidentiality and the Duty to Warn 3.97

From Letting Die to Inducing Death—The Legal Transition 3.106

Case Comments: Medically Assisted Death: Nancy B v. Hôtel-Dieu de Québec 3.113
PART IV LEGISLATION

Canada Health Act, Chapter C-6 4.1
Ontario Human Tissue Gift Act, R.S.O. 1990, c. H20 4.8
Health Disciplines Act, R.S.O. 1980, c. 196 (excerpt) 4.11
Hospital Management, Regulation 965 of the Public Hospitals Act 4.14
Ontario Bill 108 (1992) 4.22
Ontario Bill 109 (1992) 4.50
Regulated Health Professions Act (1991) (excerpt) 4.64
Health Professions Procedural Code 4.68
PART I

COURSE OUTLINE

Medical Jurisprudence is offered as a lecture course, but its structure is kept loose in order to accommodate class discussion and/or seminar presentations from interested students. Students are encouraged, but not required, to give seminars; those writing term papers may find it useful to present their work in progress to the rest of the class for comment, perspective and provisional assessment. Evaluation in the course will be based on the term paper (which satisfies the law school's writing requirement), on a final examination or on a take-home assignment, at the student's option. In exceptional circumstances a longer term paper, for three hours' credit, can be arranged.

Students are advised to pay careful initial attention to the lists of recent articles that follow (Part II, infra.). They indicate significant topics addressed in the literature and the thematic dimensions of medical jurisprudence itself, disclosing well-trodden paths still worthy of pursuit, new matters coming to attention and points of interest available for further exploration. The whole list should be read soon after acquisition. It is divided into subject areas, but they are only general and provisional. Most articles affect a number of issues and may be of use in a number of differently directed studies.

A firm sequence of topics to be addressed in class cannot be predetermined; much will depend on the interests of class members and on the subjects chosen for any seminar presentations. The sequence below may, however, serve as a loose model.

- medical negligence and malpractice -- background issues
- malpractice litigation and the law
- informed patient decision-making
- medical treatment of minors
- confidentiality
- the right to die: natural death, non-treatment decisions (defective newborns, severely injured patients, etc.)
- legally protected life, wrongful birth and wrongful life
- criteria for the determination of death: brain death
- medical experimentation
- transplantation law and the control of body materials
- reproduction control, including contraception, sterilization and abortion
- reproduction promotion, including artificial insemination, "test tube" fertilization, surrogate motherhood and embryo transplantation
- acquired immunodeficiency syndrome (AIDS) and HIV infection.
- genetic knowledge: developments, applications and implications
PART II

REFERENCES
ARTICLES

For convenience, articles are grouped under nine topic headings, but most articles are relevant to two or more headings. A brief definition of the types of articles under each topic heading is provided below. However, reference to a specific subject should not be confined only to one topic heading. Articles preceded by the notation [incl.] are included in these materials.

Topics

1. **Standard of Care and Malpractice**: general articles on medicine and the law; types of liability and duty; who may be liable for malpractice.

2. **Consent**: the modern law of "informed consent; substitute consent; right to refuse treatment (excluding life-saving treatment); rights of minors; experimentation

3. **Confidentiality**: access to medical records, immunity and privilege.

4. **Right to Die**: right to refuse life-saving treatment; euthanasia.

5. **Mental Health**: rights of the mentally incompetent; substitute consent; involuntary committal and sterilization; behaviour modification.

6. **Genetics and Eugenics**: policy proposals and legislation; population policy; "wrongful life" and "wrongful birth" actions.

7. **Time Factors**: Brain death; rights of the unborn; limitation periods.

8. **Biotechnology**: New reproductive technology; organ transplants; transsexual surgery; new micro-organisms.

9. **Acquired Immunodeficiency Syndrome (AIDS)**
2.2

I. STANDARD OF CARE AND MALPRACTICE


5. R.J. Basil, "Clergy Malpractice: Taking Spiritual Counselling Conflicts Beyond Intentional Tort Analysis" 19(2) Rutgers Law J. 419-450.


20. T.K. Feng, "Failure of Medical Advice: Trespass or Negligence?" 7(2) Legal Studies 149-168.


40. R.C. Macaulay, Jr., "Health Care Cost Containment and Medical Malpractice: On a Collision Course" 21 Suffolk Univ. Law Rev. 91-118.

2.5


69. K. Terrel, "St. Elizabeth Hospital v. Garrard: Case Comment" 29(2) South Texas Law Rev. 461-486.

70. J.C. Thornton, "The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labelling
and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers" 76(2) Kentucky Law J. 569-596.


**Standard of Care: 1989/90 Supplement**


3. K. Blaner, "Physician, Heal Thyself: Because the Cure, the Health Care Quality Improvement Act, May be worse than the Disease" 37(4) Catholic Univ. Law Rev. (Summer 1988) 1073-1112.


2.9


2.10

Standard of Care: 1990/91 Supplement


2.11


2.12


2.13

**Standard of Care: 1991/92 Supplement**


Standard of Care: 1992/93 Supplement


2.19


2.20


60. I.B. Vertinsky and D.A. Wehrung, "Risk Perception and Drug Safety Evaluation" 2(4) Issues in Health & Safety (Fall 1991) 281-311.


Standard of Care: 1993/94 Supplement


8. T.P. Hagen, "'This May Sting A Little' -- A Solution to the Medical Mapppractice Crisis Requires Insurers, Doctors, Patients and Lawyers to Take Their Medicine" XXVI(1) Suffolk Univ. L.R. (1992) 147-189.


2.24


Standard of Care: 1994/95 Supplement


2.25


2.26


2.28


Standard of Care: 1995/96 Supplement


23. M. Ennis & C. Vincent, "The Effects of Medical Accidents and Litigation on Doctors and Patients" 16(2) Law & Policy 97-121.

2.30


2.31


54. A. Leone, "Is ADR the Rx for Malpractice" Dispute Resolution J. (September 1994) 7-21.


77. P.D.G. Skegg, "Omissions to Provide Life-Prolonging Treatment" 8(2) Otago Law Rev. (1994) 205-238.


81. D. Truscott, "The psychotherapist’s duty to protect: an annotated bibliography" J. Psychiatry & Law (Summer 1993) 221-244.


II. **CONSENT**


2.37


Consent: 1989/90 Supplement


<table>
<thead>
<tr>
<th></th>
<th>Author</th>
<th>Title</th>
<th>Journal</th>
<th>Year</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>A. DiSomma</td>
<td>&quot;In Re Drabick&quot;</td>
<td>4 Issues in Law &amp; Med.</td>
<td>1989</td>
<td>519-524</td>
</tr>
<tr>
<td>10</td>
<td>J. Fortin</td>
<td>&quot;Sterilization, the Mentally Ill and Consent to Treatment&quot;</td>
<td>51 Modern Law Rev.</td>
<td>1988</td>
<td>634-642</td>
</tr>
<tr>
<td>13</td>
<td>A. Holder</td>
<td>&quot;Disclosure and Consent Problems in Pediatrics&quot;</td>
<td>16(3-4) Law, Med. &amp; Health Care</td>
<td>1988</td>
<td>219-228</td>
</tr>
<tr>
<td>15</td>
<td>C. Kazin</td>
<td>&quot;'Nowhere to Go and Choose to Stay': Using the Tort of False Imprisonment To Redress Involuntary Confinement of the Elderly in Nursing Homes and Hospitals&quot;</td>
<td>137 (3) Univ. of Penn. Law Rev.</td>
<td>Jan. 1989</td>
<td>903-927</td>
</tr>
</tbody>
</table>
2.39


Consent: 1990/91 Supplement


2.41

Consent: 1991/92 Supplement


2.43


32. D.M. Oyler, "Interspousal Tort Liability for Infliction of a Sexually Transmitted Disease" 29(2) J. Family Law (1990/91) 519-537.


2.44


Consent: 1992/93 Supplement


11. J. Eekelaar, "The Importance of Thinking that Children Have Rights" 6(1) Int’l J. of Law and the Family (1992) 221-244.


2.46


2.47

Consent: 1993/94 Supplement


5. B.M. Dickens, Human Rights in Medical Experimentation" in General Problems of Human Rights ??


2.48


2.49


Consent: 1994/95 Supplement


2.50


2.51


28. Laura M. Plastine, "'In God We Trust': When Parents Refuse Medical Treatment for their Children Based Upon Their Sincere Religious Beliefs" 3(1) Constitutional L.J. (1993) 123-160.


Consent: 1995/96 Supplement


III. CONFIDENTIALITY


11. B.S. Murphy, B.S., "How to Protect Employees Who are Tested for Drug and Alcohol Abuse" 33(1) The Practical Lawyer 27-40.


2.56


Confidentiality: 1989/90 Supplement


Confidentiality: 1990/91 Supplement


Confidentiality: 1991/92 Supplement


5. R. Slovenko, "The Therapist's Duty to Warn or Protect Third Persons" J. Psychiatry & Law (Spring 1988) 139-209.


Confidentiality: 1992/93 Supplement


Confidentiality: 1993/94 Supplement


Confidentiality: 1994/95 Supplement


Confidentiality: 1995/96 Supplement


IV. RIGHT TO DIE


2.62


Right to Die: 1989/90 Supplement


2.64


Right to Die: 1990/91 Supplement


15. N. Hentoff, "The Church, the Law, and the Advancing Armies of Death" 33(1) Catholic Lawyer 1-11.


Right to Die: 1991/92 Supplement


2.68


2.69


Right to Die: 1992/93 Supplement


2.71


25. Y. Kamisar, "When is there a Constitutional 'Right to Die'? When there is No Constitutional 'Right to Live'?" 25(5) Georgia Law Rev. (Summer 1991) 1203-1242.


27. J. Kevorkian, "A Fail-Safe Model for Justifiable Medically-Assisted Suicide ('Medicide')" 13(1) Amer. J. of Forensic Psychiatry (1992) 7-41. (Commentaries on Dr. Kevorkian's Article infra, 43-81.)


2.73


Right to Die: 1993/94 Supplement


2.76


2.77


57. J.A. Zina., "Assisted Suicide: Society's Response to a Plea for Relief or a Simple Solution to the Cries of the Needy?" 23(2) Rutgers L.J. (1992) 387-408.

Right to Die: 1994/95 Supplement


2.79


Right to Die: 1995/96 Supplement


19. D. Morgan, "Odysseus and the binding directive: only a cautionary tale?" 14(3) Legal Studies 411-42.


2.81


V. **MENTAL HEALTH**


**Mental Health: 1989/90 Supplement**


Mental Health: 1990/91 Supplement


Mental Health: 1991/92 Supplement


2.88


Mental Health: 1992/93 Supplement


Mental Health: 1993/94 Supplement


2.92


Mental Health: 1994/95 Supplement


2.93


Mental Health: 1995/96 Supplement


2. A.R. Callahan, "Will the 'Real'Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome" 3 J. Gender & the Law (1994) 117-52.


VI. GENETICS AND EUGENICS


Genetics and Eugenics: 1989/90 Supplement


30. R. Macklin, "Is There Anything Wrong with Surrogate Motherhood?: An Ethical Analysis" 16(1-2) Law, Med. & Health Care (1988) 57-64.


2.99

Genetics and Eugenics: 1990/91 Supplement


2.100


**Genetics and Eugenics: 1991/92 Supplement**


2.101


2.102


2.103


Genetics and Eugenics: 1992/93 Supplement


2. R. Boland, "Recent Developments in Abortion Law in Industrialized Countries" 18(4) Law, Med. & Health Care (Winter 1990) 404-418.


2.105

Genetics and Eugenics: 1993/94 Supplement


**Genetics and Eugenics: 1994/95 Supplement**


**Genetics and Eugenics: 1995/96 Supplement**


2.108


24. P. Mostow, "'Like Building on Top of Auschwitz': On the Symbolic Meaning of Using Data from the Nazi Experiments, and on Non-use as a Form of Memorial" 10(2) J. Law & Religion 403-31.


2.110


VII. TIME FACTORS


5. V.L. Bor, "Fetal Protection Policies & Title VII" 2(4) The Labor Lawyer 683-693.


26. C. Overall, "Pluck a Fetus from its Womb: A Critique of Current Attitudes Toward the Embryo/Fetus" 84(1) Univ. of Western Ont. Law Rev. 1-14.


2.113


Time Factors: 1989/90 Supplement


9. S. Martin, "Morgentaler v. The Queen in the Supreme Court of Canada (Case Comment) 2 Canadian J. of Women and Law (1987-88) 422-431."
2.114


Time Factors: 1990/91 Supplement


2.115


Time Factors: 1991/92 Supplement


2.119


38. D.M. Korver, "The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The


49. C.L. Neff, "Woman, Womb and Bodily Integrity" 3(2) Yale J. Law & Feminism" (1991) 327-353.


2.121


**Time Factors: 1993/94 Supplement**


**Time Factors: 1994/95 Supplement**


**Time Factors: 1995/96 Supplement**


VIII. BIOTECHNOLOGY


10. R.S. Eisenberg, "Proprietary Rights and the Norms of Science in Biotechnology Research" 97(2) Yale Law J. 177-231.


2.129


2.130


33. J. Taitz, "The Law Relating to the Consummation of Marriage where one of the Spouses is a Post Operative Transsexual" 15(2) Anglo-American Law Rev. 141-149.


Biotechnology: 1989/90 Supplement


Biotechnology: 1990/91 Supplement


2.136

**Biotechnology: 1991/92 Supplement**


2.139


2.140

Biotechnology: 1992/93 Supplement


2.142


2.143


53. J. Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations" 2(2) J. of Environmental Law & Practice 149-188.


Biotechnology: 1993/94 Supplement


37. A. Wertheimer, "Two Questions about Surrogacy and Exploitation" 21(3) Phil. and Pub. Affairs 211-239.


Biotechnology: 1994/95 Supplement


2.149


2.150


Biotechnology: 1995/96 Supplement


2. N.M.C. Bell, "Regulating transfer and use of fetal tissue in transplantation procedures: The ethical dimensions" 20 American J. Law & Medicine (1994) 277-94.


2.153


IX. ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS)


2.158

Acquired Immunodeficiency Syndrome (AIDS): 1989/90 Supplement


2.159


Acquired Immunodeficiency Syndrome (AIDS): 1990/91 Supplement


2.161


2.162


**Acquired Immunodeficiency Syndrome (AIDS): 1991/92 Supplement**


13. M.S. Cecere, "Working with AIDS" 16(4) Brief (Summer 1987) 6-42.


46. L.A. Polito, "Containing the AIDS Virus...Testing...Reporting...Confidentiality...Constitutional Considerations" 37(2) Cleveland State Law Rev. (1990) 369-392.


**Acquired Immunodeficiency Syndrome (AIDS): 1992/93 Supplement**


Acquired Immunodeficiency Syndrome (AIDS): 1993/94 Supplement

2.170


Acquired Immunodeficiency Syndrome (AIDS): 1994/95 Supplement


2.172


Acquired Immunodeficiency Syndrome (AIDS): 1995/96 Supplement


