Medical Liability and the Burden of Proof

An analysis of recent Quebec jurisprudence

The nature of the relationship between a doctor and his patient and the grave consequences of malpractice warrant the application of special rules of evidence to establish the liability of a doctor for damages caused in the execution of his work. The traditional requirement that plaintiff prove fault, damage and causality is inadequate in the case of a malpractice suit.

Several recent decisions have accepted the proposition that medical liability must be subject to different rules. The courts have had to formulate these rules to meet two opposing requirements: on the one hand, there is the recognition that a patient cannot be expected to prove that the doctor has actually committed a fault in the performance of his duties; on the other hand, courts realize that the medical practitioner cannot be expected to guaranty the results of the treatment and that rules of strict liability would, in all probability, impede the medical profession by requiring a standard of excellence that could not be attained. What the courts have in effect attempted to achieve is a balance of these considerations — not by an application of strict law, but rather by the use of the rules of evidence to allow the patient to recover damages yet not impose upon the doctor a standard of care which would be too onerous.

In adjudicating upon any particular set of facts, a court will have to consider the nature of the relationship between the doctor and his patient. What can the patient expect and what are the legal consequences resulting from the obligation that the doctor assumes? Furthermore, what must be proved to establish the liability of the doctor and how can he exonerate himself from this? An analysis or recent jurisprudence will show how and why the rules of evidence play a crucial role in the determination of medical liability.[1]

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[1] For an analysis of the general rules of civil responsibility of the medical practitioner and of hospitals, as well as a review of jurisprudence before 1960, see P. A. Crépeau, *La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente*, (1960), 20 R. du B. 433.

It is presently generally accepted that the legal relationship between a doctor and his patient is contractual;[2] this leads to certain consequences, such as a prescriptive term of 30 years as opposed to a one year term for delicts causing personal injury, which can be of great effect in the determination of the case. However, the fact that it is the rules of contract that regulate the relationship does not "exclude the possibility that the doctor, in discharging his duties, may be guilty of delictual fault."[3] This theory of cumul was accepted by Mr. Justice Rinfret who concluded that an action by a patient against his doctor could be either based on contract or delict or both.

Also important for the purposes of imposing liability is the issue of standard of care expected of a doctor. There is no doubt that because of the present state of technology and medical knowledge, the doctor cannot guaranty the recovery of his patient. The courts have, therefore, to examine the duty of the practitioner and determine liability on that basis.

The civil law principle of 'bon père de famille' has been adapted to suit the purposes in such cases.[4] Fault such as to result in civil responsibility is determined by a consideration of the general accepted practice, and the standard of proficiency that a doctor must conform to is that of the "ordinary competent medical practioner".[5]

While the decisions of the courts accept the criterion of the average doctor's standard of care, it is interesting to note that various courts have used different factors to determine what the patient was entitled to receive; these factors range from an expectation that the surgeon "would abstain from acts of negligence"[6] to a right to demand that the doctor be aware of and use the most recent medical practices and modern techniques and equipment.[7]

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[2] *X.* v. *Mellen*, [1957] B.R. 389, at p. 410; *Godbout* v. *Marchand*, [1960] B.R. 1132, at p. 1137; *Martel* v. *Hôtel-Dieu St-Vallier*, [1968] B.R. 389, at p. 398, reversed in part on other grounds, [1969] S.C.R. 745; *G.* v. *C. and De Coster*, [1960] B.R. 161, at p. 164; *Vézina* v. *D.*, [1961] C.S. 245, at p. 247.

[3] *Godbout* v. *Marchand*, *supra*, n. 2 at p. 1134; in this case, the issue was of considerable importance as plaintiff wished to have a trial by jury which was available, according to art. 421 of the *Code of Civil Procedure*, "in all actions for the recovery of damages resulting from personal wrongs or from offences or quasi-offences against noveable property."

[4] *Beausoleil* v. *La Communauté des Soeurs de la Charité de la Providence*, [1965] B.R. 37, at p. 45.

[5] W. C. J. Meredith, *Malpractice Liability of Doctors and Hospitals*, (1956), at pp. 62-63.

[6] *G.* v. *C. and De Coster*, *supra*, n. 2 at p. 163.

[7] *St. Hilaire* v. *S.*, [1966] C.S. 249, at p. 269.

Most judges, however, simply rely on the general obligation applicable to all cases of breach of contractual duty; in effect, a doctor who was prudent, diligent, capable and provided consciencious care, conforming to the 'règles de l'art',[8] will generally not be held liable for damages. A doctor cannot be expected to comply with a stricter obligation of result since it is clearly admitted by medical science that even with the best possible care, accidents entirely beyond the control of the doctor will still occur.[9] The courts have taken this into consideration and this is why they have not imposed a more onerous duty of care upon the doctors.

The decision of Mr. Justice Casey, in *Beausoleil* v. *La Communauté des Soeurs de la Charité de la Providence* is a thorough summary of the present law:

> The relationship between a doctor and his patient is contractual; the doctor, representing himself as having the required skill, undertakes to use his best efforts in attempting to achieve the desired results; the patient, by putting himself in the hands of his doctor, agrees to exact no more. If the doctor in fulfilling his end of the bargain proves to be incompetent or if he is careless, negligent or imprudent he will be responsible if damages result; this is malpractice as I understand the term. If on the other hand the required skill exists and is employed and there is no proof of such negligence the patient will have no recourse; in these circumstances any accident that may occur will of necessity be part of the risks that are unavoidable in matters of this sort.[10]

Once the courts have established the obligation of the doctor, there remains a determination of whether that obligation was in fact executed. This is where the inadequacy of the traditional requirement that plaintiff prove fault, damages and causality is most evident. Very often, the patient will not have the expertise and knowledge necessary to understand the intricacies of medical science. The courts have, therefore, attempted to use the laws of evidence to alleviate plaintiff's burden of proof. However, it seems that while the courts are agreed that there must be some derogation from the evidentiary and procedural rules, there is no agreement as to the exact method to achieve this. The jurisprudence of the past decade on the point indicates a lack of consensus and often even disagreement on the shifting of the burden of proof and the effects of this.

Several cases dealing with medical liability refer to the Supreme Court decision in *Parent* v. *Lapointe*, which, while dealing with an action resulting from a car accident, does contain dicta applicable

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[8] *Lafrenière* v. *Hôpital Maisonneuve et autres*, [1963] C.S. 467, at p. 472; *X.* v. *Mellen*, *supra*, n. 2 at p. 416.

[9] *Cardin* v. *Cité de Montréal*, [1961] S.C.R. 655, at p. 658.

[10] [1965] B.R. 37 at p. 40.

to malpractice cases. It is worth quoting at length since the reasoning of Chief Justice Taschereau has become the basis of many subsequent decisions:

> When in the normal course of things, an event ought not to take place, but happens just the same, and causes damage to another, and when it is evident that it would not have happened if there had not been any negligence, then it is for the author of this fact to show that there was an unknown cause, for which he cannot be held responsible and which is the source of the damage.[11]

This dicta in effect seems to introduce the common law principle of *res ipsa loquitur* into the civil law of evidence. As will later be shown, judges have rationalized this by equating the doctrine with the proof by presumption of Articles 1238-1242 of the *Civil Code.*

The applicability of the dicta in *Parent* v. *Lapointe* to medical liability was accepted in the Supreme Court decision in *Cardin* v. *Cité de Montréal,*[12] where Chief Justice Taschereau quotes his previous decision and bases his reasoning on it. The equity and rationale of the dicta are evident and need no further elaboration. However, the method by which the courts have attempted to apply it is less than consistent. The main difficulty that the courts have to face is to decide not *whether,* but rather *when* the burden of proof shifts to the doctor so that he may exonerate himself from the presumption of fault. Furthermore, does the burden of proof shift only as regards fault or does it also involve a presumption of causality?

How much does the plaintiff have to prove before the burden shifts? This question has now been decided by the Supreme Court in *Martel* v. *Hôtel-Dieu St-Vallier.*[13] In accordance with that decision, the plaintiff would have to bring *prima facie* evidence that in all probability, the damages would not have occurred unless there existed a negligence or fault. It must be remembered that all that is required is the reasonable probability sufficient in all cases of civil responsibility. Once this evidence has been brought, it is upon the doctor to show that he was not negligent or incompetent in the practice of his profession.

Various situations can arise where the determination of medical liability is the main issue. The clearest cases involve an instrument left inside a patient during an operation. In such cases, the courts have no hesitation to state that:

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[11] [1952] 3 D.L.R. 18 at p. 20; [1952] 1 S.C.R. 376 at p. 381.
[12] *Cardin* v. *Cité de Montréal, supra,* n. 9 at p. 659.
[13] [1969] S.C.R. 745 at p. 749.

> [once the plaintiff has] proved that... [a] clamp had been placed in his abdominal cavity and then left there his burden... [is] discharged and the defendant... [finds] himself in the position of having to explain.[14]

In cases of this nature, the courts have taken the view that since the *Code* allows proof by presumption, the most logical conclusion that can be reached from the fact of the presence of an instrument in the patient was that there was fault on the part of the physician.[15]

However, in most cases, the issues are not as clearly defined and the court must base its decision on other considerations. The next category of situations would involve a fact pattern in which there is a possibility that the alleged negligence is in fact not attributable to the doctor. Mention can here be made of the situation where a needle breaks and part of it remains in the patient causing some damage. The breaking in this case can be caused by either a negligent execution by the doctor, a sudden movement of the patient, the defect in the needle or any other possible source. In such eventuality, the court still places the onus upon the doctor since there is a belief that he is in a better position to understand and evaluate the events leading to the damage.

This 'présomption de simple négligence' [16] can place upon the doctor a burden he may have difficulty to rebut. However, the equity of the situation requires that the onus remain upon him. He is the expert and he should take all precautions necessary to assure himself that accidents will not happen. The court must appreciate the fact that accidents beyond the control of the doctor will occur and this must be taken into consideration in determining whether the presumption was rebutted rather than whether the presumption applies.

The situation most often faced by the courts involves a patient who, after a treatment or an operation, suffers damages which should not normally be a natural consequence of such treatment or operation — *e.g.*, where "le fait brutal demeure que le... [patient] est entré à l'hôpital plein de santé, et qu'il en est sorti infirme." [17] A patient who by the traditional rules of evidence is required to prove fault would very seldom receive compensation — he does not understand the treatment nor is he in a position to prove that there was some fault or negligence on the part of the doctor. It is in this fact pattern that the burden of proof has the greatest influence in determining liability.

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[14] *G.* v. *C. and De Coster, supra,* n. 2 at p. 163.
[15] *Elder et dame Elder* v. *King,* [1957] B.R. 87 at p. 92.
[16] *Vézina* v. *D., supra,* at p. 248.
[17] *Cardin* v. *Cité de Montréal, supra,* n. 9 at p. 658.

Unfortunately, the courts are not applying the rules of burden of proof with any consistency. One of the points of contention is whether the plaintiff must prove that the damage was actually caused by the negligence of the doctor, or whether the entire issue of causality is included in the presumption that is upon the doctor.

The Superior Court in *Lafrenière* v. *Hôpital Maisonneuve et Autres* decided that the patient must prove causality. In this case, an action against an anaesthesist was dismissed since there was no proof of causality made by the plaintiff. The court decided that:

> ...l'anesthésiste est le seul maître de son travail, c'est lui qui doit juger, au cours de son travail délicat, le genre d'anesthésie qu'il doit administrer pour atteindre le résultat voulu; l'anesthésiste serait en faute s'il n'avait pas administré l'anesthésie, soit locale, soit régionale, soit générale, s'il l'avait administrée contrairement aux règles de l'art et aux techniques reconnues en pareil cas; il aurait alors commis une faute bien caractérisée; il n'a pas été prouvé que l'anesthésie générale, jugée obligatoire par le médecin anesthésiste, ait été la cause du pneumothorax souffert par le demandeur après l'opération.[18]

Thus, applying the *Lafrenière* case would still leave the burden of proving causality on the plaintiff. However, the rationale for shifting the burden of proof with respect to fault is applicable to causality: if the patient is not competent to prove negligence or any other act or omission which constitutes fault, why is he in any better position to prove causality?

In the case in which the Court of Queen's Bench dealt with the issue of causality, the decision leads to a total negation of the requirement of causality as an element for imposing liability. The facts of the *Beausoleil*[19] case are as follows: plaintiff had requested a general anaesthetic but the doctors decided that a spinal was more appropriate under the circumstances. The anaesthesist administered the spinal against what the Court found to be the patient's orders, and this, the Court concluded, constituted fault under 1053 C.C. However, the part of the decision dealing with the connection between the fault and the damage is where the Court allowed the concept of equity to totally override the necessity of a causal link. In this case, the Court, by a three to two decision, stated that the fact that:

> there was no malpractice in connection with the administration of the spinal anaesthetic has... nothing to do with the responsibility of [the doctor]....[20]

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[18] [1963] C.S. 467 at p. 472.

[19] *Supra*, n. 10.

[20] *Ibid.*, at p. 51. Mr. Justice Owen, after admitting that there was no malpractice, goes on to say: "the basis of Dr. Forest's responsibility is not malpractice in the administration of the spinal anaesthetic but the very act of administering such anaesthetic against the will of the patient."

The majority decisions imply that once the doctor commits some fault, he is liable for any damage, whether this is a result of the fault or not; thus, there is no need to prove causality at all. This, it is submitted, cannot be accepted as representing the present state of the law. The court can, in its discretion, shift the burden of proof, but it should not totally do away with one of the fundamental requirements for establishing liability for damages. Once the defendant has brought conclusive evidence to show that the administration of the treatment was completely in accordance with accepted medical practice, he should be exonerated of liability regardless of whether he committed a fault totally unrelated to the damage.

In a strong dissenting opinion, Mr. Justice Taschereau states that the defendant had exonerated himself from the presumption of fault that rested on him, and this should be enough to free him of liability. Furthermore, it is upon the plaintiff to show that the damage was the direct consequence of the negligence or the incompetence of the practitioner. Medical evidence was brought to show that the type of anaesthetic used could not normally cause the damage. The best argument for the requirement of causality is stated by Mr. Justice Taschereau :

> En effet, même si le docteur Forest a commis une faute en employant la méthode rachidienne, contrairement à la volonté de la demanderesse, la demande doit être rejetée vu que de toute évidence le préjudice se serait également réalisé dans le cas où la demanderesse eût donné son consentement à l'emploi de ce mode d'anesthésie.[21]

The Court of Queen's Bench dealt again with the question of the role of presumptions in determining causality in *Hôtel-Dieu St-Vallier* v. *Martel*.[22] Mr. Justice Brossard cites the above quoted passage from *Parent* v. *Lapointe* in support of his view that, even with respect to the determination of causality, the presumption still applies. The decision of the Supreme Court in the *Martel*[23] case does not discuss the issue but the acceptance of the *Parent* dicta may imply approval of the Queen's Bench decision on that point.

This result is the one which seems most equitable and is the logical consequence of shifting the burden of proof with respect to fault. Since the patient cannot be expected to prove fault, he should not be expected to prove causality.

It must also be noted that the basis for shifting the presumption of causality cannot properly be the dicta in *Parent* v. *Lapointe*. This

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[21] *Ibid.*, at p. 55.
[22] *Supra*, n. 2 at p. 399.
[23] *Supra*, n. 2 at p. 749.

latter case refers to presumption of fault only where "it is evident that... [the damage] would not have happened if there had not been any negligence." [24] The application of the dicta to presumptions of causality would be valid only where there exists a *prima facie* evidence of such causality, and is therefore not applicable if there is no proof whatsoever of the causal link. It is therefore submitted that the Courts in *Martel* v. *Hôtel-Dieu St-Vallier*, as in other cases, have incorrectly interpreted *Parent* v. *Lapointe* and have extended the meaning of the above quoted phrase beyond what was originally intended by the Supreme Court.

What then, is the force of the doctrine of *res ipsa loquitur* in medical liability cases? In *X.* v. *Mellen*, the rule which has been followed, is stated by Mr. Justice Bissonnette:

> Aussi, du seul fait qu'il y ait eu atteinte, non autorisée, à l'intégrité corporelle du patient, faut-il se garder de conclure, sans preuve, à la responsabilité du chirurgien. C'est pourquoi si la règle *res ipsa loquitur* est appliquée comme signifiant une responsabilité sans faute, elle est, dans notre droit, irrecevable; par ailleurs, quand on lui donne l'effet qu'elle ne doit faire naître qu'une présomption de l'homme, elle est parfaitement admissible (art. 1238 et 1242 C.C.).[25]

The doctrine of *res ipsa loquitur* is therefore equivalent to the presumption of fact in civil law and is left to the discretion of the court. The court can, by using the rules of evidence available to it, render a decision based more on equity than on strict law.

The doctor against whom the presumption lies must bring proof to exonerate himself; the nature of the proof required has been defined in law. Generally,

> proof of proficiency is no defence to a malpractice suit if it is shown that the patient's injury was due to the doctor's failure to exercise the required degree of care.[26]

What then constitutes sufficient rebuttal? Since the criterion used to establish fault is whether the prudent medical practitioner would have acted in a similar fashion, proof of compliance with such a standard should be enough. In *Vezina* v. *D.*,[27] the doctor was exonerated by proving that he acted with diligence, and the Court concluded that this was sufficient since no more could be expected of him. Preponderance of proof to the effect that the treatment was appropriate and conformed with the rules of medical science was also held to be sufficient to rebut the presumption.[28]

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[24] *Supra*, n. 11.
[25] *Supra*, n. 2 at p. 413.
[26] Meredith, *op. cit.*, at p. 63.
[27] *Supra*, n. 2 at p. 250.
[28] *Gendron* v. *Dupré et un autre*, [1964] C.S. 617 at p. 625.

However, in a decision of the Court of Queen's Bench, Mr. Justice Tachereau stated that in certain circumstances, proof of conformity with established medical practice is not enough to rebut the presumption. In *G.* v. *C. and De Coster,* evidence was brought to show that at the time of the operation in question, it was not a practice of the profession to count the clamps after an operation. Thus, while defendant complied with the 'règles de l'art', the Court decided that he should have taken "une précaution que la plus élémentaire prudence indiquait." [29]

In the above mentioned case, the Court, it is submitted, erred in the interpretation of its role. The courts should not be the watchdog of the medical profession and should accept proof of compliance with established medical practice as sufficient evidence of diligence and competence. It is inconceivable that a court should dictate what constitutes proper practice by a practitioner. The medical profession sets its own standards and the courts should not interfere by imposing liability based on different standards. Such interference would have a very disturbing effect on the practitioner: he could never be certain that his actions, regardless of whether they conformed to the rules of the profession, would not later be condemned by a court and liability imposed.

One final topic to be considered is whether foreseeability is a factor in determining liability. In his dissenting decision in the *Beausoleil* case, Mr. Justice Taschereau relies on the general civil law rule that:

> the law does not require a prudent man to foresee everything possible that might happen. Caution must be exercised against a danger if such danger is sufficiently *probable,* so that it would be included in the category of contingencies normally to be foreseen.[30]

This rule is especially applicable to the medical profession. With the present state of medical knowledge, there is a risk involved in every operation and in all subsidiary treatment such as the anaesthetic. This being so, the doctor cannot be held responsible for events he could not predict, (applying the criteria of the competent medical practitioner).

This is another area where the courts have attempted to impose standards upon the profession. If medical evidence establishes that the doctor was not negligent or incompetent in his work, the presumption should be deemed rebutted. In fact, the Supreme Court

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[29] *Supra,* n. 2 at p. 167.

[30] [1965] B.R. 37 at p. 54, citing the headnote in *Ouellet* v. *Cloutier,* [1947] S.C.R. 521 at p. 522.

imposed a standard of diligence that had not been proved to have been accepted practice.[31] This decision reversed the Court of Queen's Bench [32] which had found that sufficient proof was brought to establish that there was no malpractice and that the doctor could not have done more to prevent the accident.

It is therefore submitted that in a field as highly technical and specialized as medicine, the court should accept the preponderance of medical expertise as the basis of its decision; only where experts do not agree should a court interfere, and even in such cases, only by appointing its own expert.

Conclusion

The shifting of the burden of proof is the best technique a court has available to aid the plaintiff in establishing the doctor's liability for damages. However, the courts should adopt some consistent method to decide how the rules of evidence should be applied. Certain standard rules must be established and these should be rigorously followed in order to assure that responsibility will be imposed according to similar criteria for all doctors.

A consistent basis must also be used in determining whether there was in effect negligence or incompetence in the treatment. It is also imperative that the proof sufficient to exonerate the doctor of liability be consistent with the rules that impose the presumption of liability — if the 'competent medical practitioner' is to be the standard for evaluating a treatment and imposing the presumption of fault, it should also be the standard for permitting rebuttal. The patient is entitled to expect a consistent standard of care; the doctors must not be subject to inconsistent rules of liability.

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[31] *Supra*, n. 9.

[32] *Cité de Montréal* v. *Cardin*, [1960] B.R. 1205.

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