Revue de droit de l'Université de Sherbrooke

RDUS

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Volume 5, 1974

URI : https://id.erudit.org/iderudit/1110826ar
DOI : https://doi.org/10.17118/11143/19403

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Éditeur(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (imprimé)
2561-7087 (numérique)

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Citer cet article

Kouri, R. P. (1974). BLOOD TRANSFUSIONS, JEHOVAH'S WITNESSES AND THE RULE OF INVIOLABILITY OF THE HUMAN BODY. *Revue de droit de l'Université de Sherbrooke*, *5*, 156–176. https://doi.org/10.17118/11143/19403

BLOOD TRANSFUSIONS, JEHOVAH'S WITNESSES AND THE RULE OF INVIOLABILITY OF THE HUMAN BODY

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INTRODUCTION

A few months ago, a young married woman in her early twenties was admitted to a local hospital in order to give birth to her second child. Shortly after delivery of a normal baby, she began to hemorrhage quite heavily and the physicians in attendance felt it imperative that she be transfused with whole blood in order to compensate the quantities of blood already lost. Both the patient, who was still conscious and lucid, and her husband refused to consent to the transfusions on the grounds of their religious beliefs as Jehovah's Witnesses[1]. As the woman lapsed into unconsciousness, her husband, eventually reinforced by a number of co-religionists, sat in vigil to make certain that her final wishes would be respected by the hospital staff. Within a matter of hours, she died.

Naturally, the immediate reaction among the persons aware of the situation as it unfolded, was one of shock and frustration since two very young children were now motherless, in spite of the availability of life-saving measures. Eventually, however, they began to question whether a person in danger of death could legally refuse medical aid[2]. Since this controversy appears to be far from settled, it is to this, and to related problems that we will address ourselves during the next few pages.

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1. The Biblical authority for their beliefs may be found in Leviticus 17:10: "And whatsoever man there be of the House of Israel, or of the strangers that sojourn among you, that eateth any manner of blood, I will even set my face against that soul that eateth blood, and will cut him off from among his people". See also Deuteronomy 12:33 and Acts 15:20. Perhaps the best medico-legal article outlining the position of the Jehovah's Witnesses is that of W. Glen HOW, *Religion, Medicine and Law*, (1960) 3 C.B.J. 365. How argues that the forcible administration of blood to a patient is not only a violation of one's liberty , but also a contradiction of divine teaching. He also questions the merits of blood transfusions as good medical practice.

2. Problems of this nature are not limited to Jehovah's Witnesses. Take, for example, the refusal of a Roman Catholic woman with severe heart trouble to submit to a therapeutic abortion, or that of a Christian Scientist to undergo surgery for an inflamed appendix. Without wishing to stray too far from the subject at hand, a certain analogy could be made with the controversial subject of "death with dignity" where a suffering terminally-ill patient refuses any life-prolonging treatment.

I

THE INVIOLABILITY OF THE HUMAN PERSON

(a) The rule of inviolability

Aside from the superior interests of society as a whole, which can require the imposition of treatment upon persons suffering from contagious diseases or mental illnesses potentially hazardous for the community[3], the basic rule concerning corporeal integrity is expressed by article 19 C.C.:

> "The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so"[4].

At first glance these provisions would seem sufficient to supply a tentative answer to our problem concerning a sane capable adult's refusal to submit to a life-preserving transfusion, since in the fact situation related above, neither legal authorization nor consent were apparent. The conflict, however, is more profound than at first evident since the absolutism of the rule of inviolability is put in doubt by some jurists.

Subject to the risk of oversimplifying the situation, it is perhaps fair to state that there are three different schools of thought as to the extent of the inviolability rule. These may be qualified as the absolute view, the relative view and the expedient view; the latter regrouping elements of the first two attitudes.

According to tenants of the absolute view-point, a person's wishes are supreme, and no matter what the consequences for himself, the capable adult's decision as to his physical self

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3. Cf. *Public Health Protection Act*, 1972 S.Q., ch. 42, arts. 8-24; *Mental Patients Protection Act*, 1972 S.Q., ch. 44, art. 13; E. DELEURY, *Le sujet reconnu comme objet du droit*, (1972) 13 C. de D. 529 at p. 535; A. MAYRAND, *L'Inviolabilité de la personne humaine, Wainwright Lectures*, Montreal, Wilson et Lafleur Ltée, 1975, par. 66. I wish to acknowledge the kindness of the authorities of the McGill University Faculty of Law, and more particularly, Professor P.-A. Crépeau for having furnished this writer with a copy of Judge Mayrand's manuscript. Since, at the time of writing, Judge Mayrand's remarkable book had not yet been published, we will refer only to paragraph numbers in order to avoid confusion arising out of differences in page numbers in the final printed text.

4. The word "harm" would not appear to have as many nuances as the word *"atteinte"* in the French version. For this reason, the latter is preferable.

-determination must be respected[5]. Probably the most forceful affirmation of this point of view is that expressed by Mr. Justice Owen in *Hôpital Notre-Dame v. Dame Villemure* when he states:

> "People are killing themselves at various rates by excesses in eating, consumption of alcohol, use of tobacco, use of drugs, by violent acts of immediate self-destruction, and in other ways. From a legal point of view, as distinct from a religious point of view, it may be asked whether a person has the legal obligation, or even the right to prevent another person from shortening or terminating his own life"[6].

Likewise, Professor P.-A. Crépeau has had occasion to categorically affirm:

> "Une personne majeure peut, en connaissance de cause, refuser pour elle un traitement même si cela peut entraîner la mort..."[7].

In the same vein, Mr. Justice Hugesson refused to permit authorities armed with a search warrant to impose surgery upon an accused bank robber in order to recover a policeman's bullet lodged in the presumed fugitive's shoulder[8]. In weighing the right of a person to personal integrity in comparison with the interests of the state in proving the guilt of an accused felon by way of ballistics tests, Hugesson J., opted firmly in favour of the individual.

Professor Dierkens best summarizes the reasons which justify the absolute view when he writes:

> "Le droit sur le corps n'est pas seulement un droit de défense contre le monde extérieur. Il se rapporte aussi et même primordialement au droit de l'homme de pourvoir librement et souverainement à sa propre destinée. La liberté, élément essentiel et fondamental de la dignité humaine, consiste primairement dans la liberté d'agir et de vivre conformément à ses conceptions sociales, philosophiques et religieuses.

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5. R. SAVATIER, J. SAVATIER, J.M. AUBY, H. PEQUIGNOT, *Traité de droit médical,* Paris, Librairies Techniques, 1956, p. 223, no. 247; J. CARBONNIER, *Droit civil,* Paris, Presses universitaires de France, 1955, vol. 1, pp. 159 *et seq.*

6. (1970) C.A. 538 at p. 552. The Supreme Court reversed the Court of Appeal without commenting the Owen J., *obiter,* cf. (1973) S.C.R. 716.

7. P.-A. CREPEAU, *Le consentement du mineur en matière de soins et traitements médicaux ou chirurgicaux selon le droit civil canadien,* (1974) 52 C.B.R. 247 at p. 251, note 10.

8. *Laporte v. Laganière J.S.P. et al,* (1972) 18 C.R.N.S. 357, at pp. 368, 369.

> L'homme est plus qu'un organisme vivant. Il est surtout et primordialement un être libre qui honore certaines valeurs. En se mettant au service de celles-ci, il peut parfois y subordonner son intégrité physique et même sa vie"[9].

The relative view-point, described by its principal proponent, Mr. Justice Albert Mayrand, as *"la théorie de l'intervention forcée justifiée par l'état de nécessité"*[10] , holds that when a choice has to be made between respect for a person's wishes and the preservation of his life, the latter must predominate. As Mayrand J., so ably puts it:

> "C'est précisément dans le principe de l'inviolabilité de la personne que l'on puise la justification d'une intervention imposée. L'inviolabilité de la personne aurait pour but sa protection, or, les droits doivent être exercés dans le sens de leur finalité. Ce serait fausser le droit à l'intégrité corporelle d'un malade que de lui permettre de l'invoquer pour faire échec à ce qui peut conserver sa vie et, par là même, son intégrité essentielle.
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> . . .
>
> Entre le droit du malade de refuser le secours du médecin et le droit du médecin de guérir son patient malgré lui, le choix n'est pas toujours facile. Le médecin n'a pas le droit d'imposer à son patient une opération ou un traitement pour la seule raison qu'il est utile. Mais la nécessité de l'intervention pour sauver le malade d'une mort prochaine nous paraît une raison suffisante pour faire échec à son refus. Encore faudrait-il que cette nécessité soit indiscutable et que la survie du malade grâce à l'intervention soit un résultat suffisamment assuré. La règle de la raison proportionnée doit toujours s'appliquer. La volonté du malade est une valeur qu'il faut respecter; on ne peut la mettre de côté que pour atteindre un avantage supérieur"[11].

Thus, the crux of the matter for Mayrand is that the right of corporeal integrity, which he perceives as being only relative, must always give way to an absolute duty weighing upon everyone of staying alive as long as possible, provided of course that the wherewithal for maintaining life is available. As Mayrand takes great pains to point out, the application of such a rule becomes quite difficult as we retreat from situations in which the life or death choice has to be made in emergency situations, (which would

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9. R. DIERKENS, *Les droits sur le corps et le cadavre de l'homme,* Paris, Masson et Cie, 1966, p. 42, no 49.

10. *Op. Cit.,* par. 40.

11. *Ibid.*

occur for example, in the case of a person bleeding to death). As he admits, we cannot force people, slowly eating or smoking themselves into their graves, to assume more healthful habits. Instead, Mayrand would reserve the right for medical treatment to be imposed (by force if necessary) only in cases of imminent death. In light of this standard, how then would we deal with a person who refuses surgery to repair an aortic aneurism which could burst at any time? What about the woman with a malignant tumour who refuses to undergo a mastectomy which could likely prevent the cancer from metastasizing? The various borderline situations are innumerable.

Still, the difficulty in application of a rule is no reason for setting it aside. On the contrary, our objection to the theory of relative inviolability goes deeper than to mere issues of difficulty in application; it strikes at the problem of individual liberty and its constant erosion.

As we have endeavoured to point out on a previous occasion[12], the sane, capable adult who enters into a *contrat de soins* with a physician and/or a hospital center must not only pay the required fees or proffer a Quebec Health Insurance card[12a], he must also actively co-operate in order to secure the best possible results from treatment. The contrary is also true: If, as a consequence of a lack of co-operation, the treatment is ineffectual or indeed detrimental, the burdens resulting therefrom must be assumed by the patient. In other words, if one is given the freedom of choice, one must accept both the advantages of a wise choice and the inconveniences of a foolish one. How far can the state go in order to protect its citizens from themselves? Indeed, perhaps the only really secure people are madmen in asylums and prisoners in solitary confinement since they do not have to make any decisions. Obviously, freedom has its price which can be truly onerous at times.

We prefer to think that in drafting article 19 C.C., the Quebec legislator has not abridged a right but rather, has made a clear statement of principle which can be set aside only in formally recognized exceptional circumstances, i.e. when the person

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12. R.P. KOURI, *The Patient's Duty to Co-Operate,* (1972) 3 R.D.U.S. 43.

12a. Cf. *Health Insurance Act,* 1970 S.Q., ch. 37.

consents, or when the law distinctly allows encroachments upon one's corporeal integrity without the necessity of consent[13].

Mayrand raises three other basic arguments to support his point of view: Firstly, although the *Criminal Code* no longer retains the crime of attempted suicide, it still permits peace officers to arrest persons about to commit suicide[14]. Secondly, the exoneration provisions of section 45 Cr. C. do not allude to the question of consent[15]. The answer to these objections with regards to Jehovah's Witnesses is that they do not seek nor do they desire death[16]. Aside from blood transfusions, they readily accept all other available medical treatments[17]. Granted, by refusing blood they are perhaps decreasing their chances of survival, but is this not also true of the potential rescuer who places himself in perilous situations in order to save another? As for section 45 Cr. C., a blood transfusion cannot be considered a "surgical operation" and therefore, with regards to the question under discussion, would not be pertinent[18].

Mayrand's third argument in support of his thesis is based upon article 37 of the *Public Health Protection Act*[19] which asserts that:

> "An establishment or a physician shall see that care or treatment is provided to every person in danger of death; if the person is a minor, the consent of the person having paternal authority shall not be required".

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13. Even in the case of consent, one must not overlook the requirements of public order and good morals. Thus one cannot consent to a useless mutilation, as for example the amputation of an arm in order to earn sympathy as a beggar.

14. Sec. 449. Cr. C.

15. Sec. 45 Cr. C.: "Everyone 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 of the operation is performed and to all the circumstances of the case".

16. Dierkens gives the example of a woman who refuses a therapeutic abortion on religious grounds. He states that in this type of case there can be no question of suicide since: "Le sacrifice de la vie n'est que la conséquence de l'exercice de son droit". *Op. cit.*, p. 42, no 49.

17. HOW, *loc. cit.*, p. 367.

18. See Sec. 45 Cr. C. which would not be so easily disposed of if in fact we were dealing with a person refusing a lifesaving operation.

19. 1972 S.Q., ch. 42.

This article, Mayrand notes, does not establish as prerequisite that the patient in danger must request, or at least refuse care, before it can be applied. In other words, he views article 37 as creative of reciprocal obligations, i.e. that the patient in danger must accept medical aid and that an establishment or a physician must provide aid to a mortally-ill person. If this were the situation, then article 37 would be truly innovative as regards previously existing *droit commun*. However, to a suggestion made before the *Commission Permanente des Affaires Sociales* that the projected article 36 of the *Public Health Protection Act* (Bill 30) be modified so that physicians would be obliged to, rather than simply "could" treat minors, the then Minister of Social Affairs, Claude Castonguay replied:

> "Nous avons l'art. 37. On mentionne dans la Loi du Collège des médecins, aussi dans la Loi de l'assurance-maladie, le libre choix du patient et le libre choix du médecin, la liberté du médecin; mais à l'art. 37, *nous lui faisons l'obligation dans les cas d'urgence.* Ici, nous n'avons pas voulu, malgré ce souci de clarifier la situation, changer les règles du jeu vis-à-vis de ce que les médecins considèrent comme étant des principes fondamentaux du libre exercice de la médecine"[20].

In addition, the Minister reiterated before the National Assembly that the *Public Health Protection Act* was not truly innovative, but merely a long overdue *mise à jour* of the various health laws then existing[21]. Even as regards the treatment of minors he invoked the fact that this projected law simply formalized, for the peace of mind of hospital administrators, legal principles which were, on the whole, already generally admitted[22].

Thus, we return to the primary bone of contention - that the right of corporeal integrity implies either a right of physical self-determination, (the freedom of choice being supreme), or else it

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20. *Journal des débats, Commissions parlementaires,* 3e session, 29e législature, Commission permanente des Affaires sociales, Jeudi le 14 décembre 1972, p. B-7926 (emphasis added). For a good resumé of the status of the law regarding the duty of submitting to treatment, see the comments by Camille LAURIN, member for Bourget, cf. *Journal des débats,* 3e session, 29e législature, Mardi 21 novembre 1972, vol. 12, no 74, pp. 2653-2654.

21. *Journal des débats,* 3e session, 29e législature, Mardi 21 novembre 1972, vol. 12, no 74, p. 2640.

22. *Ibid.*

signifies a right, or even a duty of physical self-preservation, (the physical integrity of a person being paramount). In our opinion, the former view is more in keeping with the spirit of the law.

There has also been put forward a third school of thought, the so-called "expedient" view, which is essentially an amalgam of the absolute and the relative concepts already described. In the words of Meredith:

> "If a patient who has refused treatment, e.g. an operation or blood transfusion, later loses consciousness and his condition becomes critical, it is submitted that the hospital and doctors are justified in proceeding with the operation or other treatment, notwithstanding the patient's attitude before his condition deteriorated... While the law is clear that no surgeon has the right to perform an operation against the patient's will, so long as he preserves 'consciousness and will', the situation changes in my opinion when he is no longer in a condition to be consulted and his life is in danger. Under these circumstances, I cannot conceive of any court condemning a hospital or surgeon for doing their best to save the patient's life"[23].

Another writer, Rozovsky, is much of the same opinion, arguing that the signed cards refusing transfusions, carried by Jehovah's Witnesses are an invalid form of refusal, because when they are completed, the patient is not immediately confronted with the particular emergency in question and is not in a situation where an informed consent can be given[24]. In other words, one has to be confronted with a true emergency before one can supply an informed consent or indeed, an informed refusal.

Strictly speaking, if we were to follow these viewpoints with regards to transfusions, would it not necessarily follow that all authorizations, consents or decisions destined to take effect while one is incapacitated would be invalid? If we can give a valid mandate to a business associate to administer our affairs during a period of surgery and recovery, or if we can validly restrict consent only to one particular type of surgery of a limited extent, or indeed if we can, in a burst of altruism, fill in an organ-transplant

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23. W.C.J. MEREDITH, *Malpractice Liability of Doctors and Hospitals,* Toronto, The Carswell Co., 1956, pp. 155-156.

24. L.E. ROZOVSKY, *Canadian Hospital Law,* Toronto, Canadian Hospital Association, 1974, pp. 39-40.

form so that all transplantable organs can be removed upon death[25], then why can't one expressly forbid the use of blood transfusions? A valid consent must stand or fall on its own merits; it cannot be judged only with regards to the desirability of potential results or consequences. In the absence of formal legislation or of violations of the rules governing public order and good morals, society cannot pick and choose decisions which are generally admired or acceptable to the majority, and set aside those which are less popular on the facile grounds of consent.

In summary, therefore, we reiterate our position that the sane, capable adult can validly refuse life-saving blood transfusions. We also feel that this refusal can be made either at the moment when the patient is confronted with an actual need for treatment, or else beforehand, in the form of a written document, destined to inform medical authorities of his refusal, should the patient be physically unable to make his wishes known[26].

(b) Exceptions to the rule of inviolability

In addition to the public health considerations alluded to above, which can require the treatment of a non-consenting patient, there are categories of persons who, by reason of age or mental incapacity, are not allowed to refuse potentially life-saving treatment:

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25. Art. 21 C.C. See for example the pamphlets entitled *The Organ Donor Program*, with detachable consent forms put on display by the Kidney Foundation of Canada.

26. For interesting discussions concerning the right of a patient to refuse treatment in American law, see Notes - *Informed Consent and the Dying Patient*, (1974) 83 Yale L.J. 1632 and S. COX, *The Qualified Right to Refuse Medical Treatment and its Application in a Trust for the Terminally Ill*, (1973-74) 13 J. of Family Law 153. The *Application of the President and Directors of Georgetown College* case, (1964) 331 F. 2d 1000 is particularly interesting in its approach. In this matter, a 25 year-old married Jehovah Witness woman with a seven month-old child refused blood transfusions although she had already lost two-thirds of her blood through a ruptured ulcer. One of the reasons invoked by Circuit Judge Wright for ordering the transfusions was that by allowing herself to die, the patient would be abandoning her child (*ibid.*, p.1008). Certiorari was denied by the Supreme Court (1964) 84 S.Ct. 1883. In arriving at a different conclusion in the *Osborne* case, (1972) 294 A. 2d 372 (D.C.C.A.), Nebeker, A.J., took into consideration the fact that the children of a 34 year-old male would be well provided for financially in case of their father's death. In *J.F.K. Memorial Hospital v. Heston*, (1971) 279 A. 2d 670 (Supreme Ct. N.J.), Weintrub, C.J., ordered blood to be given to a 22 year-old spinster injured in an auto accident, arguing that the preservation of life is a matter of compelling state interest (at p. 673). He also affirmed (at p. 672) that there is no constitutional right to die, even when following one's religious beliefs.

i) Minors

Articles 36 and 37 of the *Public Health Protection Act* expressly deal with the issues of minority and consent in matters of medical treatment. After much debate and three different versions presented to the National Assembly, the final draft eventually established that capacity as regards consent to medical care would be acquired at the age of fourteen[27] . This figure, so arbitrarily chosen by our legislators, was put forward as a reasonable compromise between the fact that at a certain age, minors are presumed to have acquired sufficient discernment or understanding to seek out indispensable treatment on their own initiative, and the apprehensions of many that paternal authority would be eroded[28] . As a result, two categories of minors, those under fourteen and those fourteen or over (described by Crépeau as the *infans* and the *adolescens* respectively) are subject to different legal rules[28a] .

As regards the *infans*, in non-emergency situations, i.e. where there is no danger of death, the child cannot be treated without the authorization of the person having paternal authority. If the consent of such person is arbitrarily withheld contrary to the child's best interests, then a judge of the Superior Court may act *in loco parentis*[29] . In cases where there is immediate danger of death, medical people may give aid without any prior parental or judicial consent being required[30].

The obvious repercussions of these provisions for the Jehovah's Witness family is that the refusal of the parents will not prevent the medical establishment or physicians from administering necessary transfusions to their children[31] . As the American Supreme Court had occasion to state:

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27. For a description of the sequence of events surrounding adoption of this legislation, we recommend Crépeau's article *Le Consentement du mineur en matière de soins et traitements médicaux ou chirurgicaux selon le droit civil canadien, loc. cit.*, pp. 248-254.

28. Cf. Interventions of Claude Castonguay before the Commission permanente des Affaires sociales, *loc. cit.*, pp. B-7925-7926.

28a. Majority in the Province of Quebec is set at eighteen, cf. art. 324 C.C.

29. Art. 36, second paragraph of the *Public Health Protection Act.*

30. Art. 37 *Public Health Protection Act.*

31. MAYRAND, *op. cit.*, paragraphs 48, 49.

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children..."[32].

When we consider the issue of the *adolescens,* the solution is not quite as easy to discern. Article 36 of the *Public Health Protection Act* provides that a minor of fourteen or more can validly contract for medical care (or put in another sense, can validly consent to violations of his corporeal integrity), without the need of approval from the person holding paternal authority. The only acknowledgment of the existence of paternal authority is the requirement that the person having it be merely *informed* in cases where hospitalization must last more than twelve hours. Thus, the *adolescens* enjoys a *juris tantum* presumption of capacity and discernment[33] in cases where care and treatment are required by his state of health. Conversely, the *adolescens* cannot autonomously consent to any intervention not serving a therapeutic purpose.

Thus, it appears to be admitted that an *adolescens* not of the Jehovah's Witness persuasion may consent to an indispensible blood transfusion in spite of the objections of his parents of that faith[34]. But can the *adolescens* invoke his religious beliefs to refuse a blood transfusion, with or without the moral and legal support of his parents?

At first glance, one would be tempted to agree to this proposition due to the fact that the *Public Health Protection Act* (art. 36) has, in Crépeau's words, provided us with "... un âge de majorité en matière médicale"[35]. Yet, as article 36 itself stresses,

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32. *Prince v. Commonwealth of Massachusetts,* (1944) 321 U.S. 158 at p. 170, or 64 S. Ct. 438 at p. 444. In the United States, the Supreme Court reaffirmed this position in *Jehovah's Witnesses in the State of Washington v. King County Hospital Unit No. 1,* (1967) 390 U.S. 598 confirming (1967) 278 F. Supp. 488. In most jurisdictions, the legal technique involved is to have the child declared "neglected" under relevant statutes aimed at protecting children, administer the treatment and/or transfusion, and then restore the child to the parents. For example, see *In the Matter of Sampson,* (1972) 328 N.Y.S. (2d) 686 (N.Y.C.A.) affirming 323 N.Y.S. 2d 253, and in Canada, *Forsyth v. Children's Aid Society of Kingston and County of Frontenac,* (1963) 1 O.R. 49. Under our Criminal law, parents can be prosecuted for manslaughter, if as a result of refusing to obtain medical aid for their children, death occurs. Cf. *The King v. Lewis,* (1903) 7 C.C.C. 261 (C.A. Ont.) and *Rex v. Elder,* (1925) 3 D.L.R. 447 (C.A. Manitoba).

33. Which, as in the case of an adult, can be rebutted, cf. MAYRAND, *op. cit.,* par. 50.

34. MAYRAND, *ibid.,* par. 52.

35. *Loc cit.,* p. 254.

the care and treatment sollicited and agreed to by the *adolescens* must be required by the state of health of the patient. Obviously, in cases of non-therapeutic treatment, one must refer to the *droit commun* respecting minors unless experimentation or the alienation of portions of the body for transplants is involved; in which situations one would have to turn to article 20 C.C.. When we reconcile the restrictions of article 36 of the *Public Health Protection Act* concerning the state of health of the patient with the numerous safeguards surrounding experiments or gifts of portions of the human body under article 20 C.C., we may perceive quite readily that as a rule, the law seeks to protect the *adolescens* and his corporeal integrity. As a result, the *adolescens* alone cannot, for instance, consent to a purely contraceptive sterilization or to a non-therapeutic cosmetic operation[36] . If he wishes to submit to an exclusively scientific experiment which could have certain deleterious repercussions, then the approbation of both the person holding paternal authority as well as that of a judge of the Superior Court would have to be obtained. Even so, they are able to consent only in cases where "... no serious risk to (the minor's) health results therefrom"[37].

Therefore, it would seem that the *adolescens* is legally capable of entering into a *contrat de soins* only when his state of health so requires, and only with regards to treatments which are directed towards his medical problems[38] . As soon as he steps outside these parameters, or commences to arbitrarily accept some forms of treatment while rejecting others which are equally essential for rectifying or stabilizing a medical problem, the *adolescens* ceases to enjoy full capacity and must be treated, according to *droit commun* as any other minor. Put in other perhaps more juridical terms, the capacity given to minors of fourteen or more is only relative, and can be enjoyed only in certain circumstances provided for by article 36 of the *Public Health Protection Act*.

In this light, it would appear that the *adolescens* Jehovah's Witness would not be able to refuse an essential blood transfusion.

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36. MAYRAND, *op. cit.*, par. 51.

37. Art. 20 C.C.

38. Naturally, we would include in this category, periodic check-ups, vaccinations and other such measures which help preserve good health.

As in the case of the *infans*, martyrdom would seem to be the exclusive preserve of the adult[39] . The only possible exception would be that of the emancipated minor who, by reason of marriage or judicial order, is no longer subject to parental authority[40] . In this case, the protection which the law affords him relates essentially to patrimonial rights[41] . For all other purposes, he is presumed to enjoy full capacity, and consequently, may be viewed in a medico-legal context, as an adult.

ii) Adults suffering from mental incapacity

Persons entering into a medical contract must be capable of giving an informed consent. By inference, it would seem proper to state that persons refusing essential medical treatment may do so only if they are able to grasp the consequences of their refusal with regards to their health or life. For this reason, the insane, the retarded, (whether interdicted or not), persons interdicted for alcoholism or drug addiction, or any other person who is incapable of giving a valid consent due to shock, hysteria or intoxication cannot decline life-saving treatment.

How should one react to a situation where an interdicted or retarded person carrying a card refusing blood transfusions is admitted for emergency care? The safest solution would be to disregard the written instructions since one should not be made a victim of one's own incapacity. Lacking the capability of mature lucid reflection, his mental status prevents any possible changes of mind, although the card may have been completed while the patient still enjoyed full capacity[41a]. Nevertheless, we may argue, could we not draw an analogy between an insane person and an ordinary capable adult who is unconscious due to accident or illness, whose written wishes we are prepared to respect? In our opinion, such an

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39. Mayrand arrives at the same conclusion but on different grounds. His argument is based on the opinion that since adults cannot refuse life-saving treatment, then certainly a minor of fourteen or more cannot do otherwise. Cf. *op. cit.*, par. 53.

40. Art. 243 C.C.; MAYRAND, *ibid.*, par. 51.

41. E.g. arts. 319-322 C.C.

41a. As a rule, consents given before interdiction are valid notwithstanding subsequent interdiction. Cf. art. 335 C.C.: "Acts anterior to interdiction for imbecility, insanity or madness may nevertheless be set aside, if the cause of such interdiction notoriously existed at the time when these acts were done".

analogy would be somewhat forced since a capable person is always free to change his mind at any time until unconsciousness strikes, whereas the mentally incapable person may not be able to enjoy this possibility.

iii) Unborn children

In an American case, *Raleigh Fitkin - Paul Morgan Memorial Hospital v. Anderson* [42], the question in issue was whether a pregnant woman could refuse blood transfusions on religious grounds, and thereby place both her own and her unborn child's lives in jeopardy. The New Jersey Supreme Court unanimously decided that since the unborn child was entitled to the law's protection, and since its existence was so intertwined and inseparable from that of the mother, then she could be compelled to submit to the transfusions[43].

Before the dearth of legislation and jurisprudence on problems of this nature in Quebec, would a solution similar to that adopted by the New Jersey Supreme Court avail in our jurisdiction? Crépeau certainly favours this point of view. In discussing the rights of the unborn child, he affirms:

> "Ne jouit-il pas, lui aussi, ainsi que le proclame l'article 18 C.C., du plus fondamental des droits: le droit à la vie? Il y a ici un tel conflit d'intérêts que l'un doit céder devant l'autre. Lequel? Nous optons pour le droit à la vie. En ce qui concerne l'enfant, ce refus est aussi injustifié que celui prévu à l'article 36 de la Loi pour la protection de la santé publique et nous croyons que le curateur (au ventre) pourrait, par analogie, s'adresser à la Cour supérieure en vue de faire autoriser les traitements malgré l'opposition de la mère"[44].

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42. (1964) 201 A. 2d 537.

43. The U.S. Supreme Court refused to grant certiorari. Cf. (1964) 84 S. Ct. 1894. It is interesting to note that W.G. HOW, Q.C., was one of the attorneys of record for the Andersons. J.L. BAUDOUIN, in his article *L'incidence de la biologie et de la médecine moderne sur le droit civil,* (1970) 5 Thémis 217 at p. 225, alludes to the legal difficulties involved in authorizing surgery upon unborn babies.

44. CREPEAU, *loc. cit.,* p. 251, note 10. The Anglo-Canadian provinces also appear to adhere to the view-point that a pregnant woman cannot compromise the life of the unborn child. Cf. Gilbert SHARPE, *Consent to Medical Treatment,* (1974) 22 Chitty's Law Journal 319 at p. 320.

The strongest argument against this stand is the belief that until the child is born, it does not exist, but is merely an extension of its mother (no pun intended)[45]. Yet, Quebec law recognizes the unborn child as a distinct legal entity, subject of course, to the requirement that the child be born viable. For instance, the conceived but unborn child can receive donations[46] or bequests[47]. In addition, there is also a mechanism of protection established in our law to safeguard the unborn child's interests[48]. Moreover, the Supreme Court, on an appeal from Quebec, has had occasion to decide that the unborn child injured *in utero* could claim damages after its birth from the responsible party[49]. These considerations notwithstanding, we believe, with Crépeau, that in case of doubt, life should be preserved[50].

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45. See *Lavoie v. Cité de Rivière-du-Loup,* (1955) S.C. 452, *contra: Langlois v. Meunier,* (1973) S.C. 301.

46. Art. 771 C.C.

47. Art. 838 C.C.

48. Arts. 338, 345 C.C.

49. Cf. *Montreal Tramways Company v. Léveillé,* (1933) S.C.R. 456. In this case a woman seven months pregnant fell from a tramway. Her child was subsequently born with club feet as a result of the fall. In awarding damages to the child, Lamont J. made the following comments (at p. 463): "To the Company's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., the answer in my opinion, is that, although the child was not actually born at the time the Company by its fault created the conditions which brought about the deformity of its feet, yet, under the Civil law, it is deemed to be so for its advantage. Therefore, when it was subsequently born alive and viable, it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete". See also DIERKENS, *op. cit.,* pp. 35-38, nos 42-44.

50. In supporting Crépeau's position, we may derive comfort from the fact that our abortion laws (Cr. Code, art. 251) only allow an abortion when the life or the health of the mother is in danger. If, however, the Federal Parliament were to change policies as many pressure groups recommend, and grant abortion on demand or for purely socio-economic considerations then we would be placed in a dilemma: On the one hand a pregnant woman would be able to destroy the foetus without much difficulty whereas on the other, she could be forced to submit to a transfusion to save the life of the unborn baby.

II

CONSEQUENCES OF THE RULE OF INVIOLABILITY

We will examine the various situations from the point of view of the patient and from that of the physician or institution.

(a) For the patient

What occurs as regards the physician and/or medical institution if a Jehovah's Witness patient refuses blood transfusions, and a deterioration in physical status or even death occurs? Will there be any liability on the part of a physician who is willing to treat the patient without using blood transfusions, in circumstances where transfusions are medically indicated?

As a rule, a patient seeking treatment must allow the medical people with whom he is dealing to utilize all recognized medical means available, which could facilitate an improvement or cure[51] . If, as a result of restrictions placed by the patient for religious reasons, certain essential techniques or procedures were dispensed with, then all damages resulting therefrom logically would be assumed by the patient. Naturally, if this refusal to co-operate merely contributed to injuries caused by a negligent practitioner, then there would be shared liability[52]. As for physicians or institutions willing to treat Jehovah's Witnesses under the patients' terms, their legal liability would not be rendered more onerous even though the chances of obtaining good results were somewhat diminished.

Turning to a related problem, can a medical institution or a physician refuse to accept Jehovah's Witnesses as patients, probably in anticipation of unpleasant occurrences should the necessity of blood transfusions arise?

With regards to hospital centers and other kindred institutions, the law is explicit on the subject:

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51. R.P. KOURI, *The Patient's Duty to Co-Operate, loc. cit.* p. 52.

52. A. NADEAU, R. NADEAU, *Traité pratique de la responsabilité civile délictuelle,* Montréal, Wilson et Lafleur Ltée, 1971, pp. 501-503, no 540. As regards reduction of the amount of damages granted, if the victim refuses treatment which could rectify some of the injuries suffered, see *ibid.*, p. 551, no 589 and the jurisprudence therein cited.

> "Health services and social services must be granted without discrimination or preference based on the race, colour, sex, religion, language, national extraction, social origin, customs or political convictions of the person applying for them or of the members of their family"[53].

In addition, article 37 of the *Public Health Protection Act* clearly obliges all establishments to treat persons in danger of death. As for physicians, they are likewise bound to provide care to persons in mortal danger under article 37 of the *Public Health Protection Act*. Even under normal circumstances, they cannot discriminate against a person on the basis of his religion[54]. At the risk of being accused of hair-splitting, however, we are of the opinion that certain nuances should be made in this regard. We feel that aside from emergency situations, a physician cannot be forced to perform duties which are morally, philosophically, religiously or professionally repugnant to him. Thus, a devout Catholic may refuse to perform a therapeutic abortion. Similarly, a physician may be allowed to decline undertaking the care of a Jehovah's Witness, not because of the patient's religion *per se*, but due to a strong possibility that at some point in time, he could be forced to stand back and simply let his patient die unnecessarily. As illustrations of the subtle differences involved, a dermatologist, for instance, would not be able to refuse to take on a Jehovah's Witness patient on the basis of the latter's religion since this factor would have no bearing on the treatment. In the case of a surgeon, on the other hand, the circumstances would be different since the essential issue would not be discrimination due to religion but the refusal to accept blood transfusions. Under these circumstances, the surgeon would be entitled to refer the dossier to another *confrère*. Again, we emphasize the fact that this right of refusal could not occur in emergency situations where no alternative solution is available.

Once a physician has agreed to treat a particular patient, but for some reason later decides to terminate the relationship, it is recommended that reasonable notice be given in order to permit the patient to find a suitable replacement. Otherwise, merely

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53. *An Act Respecting Health Services and Social Services*, 1971 S.Q., ch. 48, art. 5.

54. Cf. *The Professional Code*, 1973 S.Q., ch. 43, art. 56: "No professional may refuse to provide services to a person because of the race, colour, sex, age, religion, national extraction, or social origin of such person".

dropping the patient could constitute a violation of one of the basic obligations of the *contrat de soins,* namely, *l'obligation de suivre*[55]. There is no doubt however, that a physician *does* enjoy a unilateral right of resiliation of his contract with the patient. As Mr. Justice Casey put it:

> "But when in cases in which there is no urgency the doctor for one reason or another is unwilling to render the services agreed upon by the patient, the only course of action open to him is to withdraw"[56].

(b) For the medical practitioner and/or the hospital

What would occur, legally speaking, if a physician or some other member of the health team disregarded the refusal of a sane capable adult Jehovah's Witness and forcibly administered blood? Naturally the repercussions would depend upon the results of treatment. If in fact the patient's life were saved by the transfusions, the persons acting against his will would still be technically liable for assault under article 1053 C.C.[57]. Although the amount of damages could vary according to circumstances, it is difficult to imagine judges being overly generous in compelling physicians or hospitals to compensate ex-patients whose very lives they have saved, especially where there remains no permanent disfigurement or mutilation[58]. Nevertheless, the perils of ignoring a patient's refusal to submit to treatment are much more serious than would at first be suspected because it is now settled law that in circumstances such as these presently being discussed, the medical practitioner is liable for all damages, irregardless of the quality of care afforded. In the words of Mr. Justice Casey:

> "He (the physician) may not overrule his patient and submit him to risks that he is unwilling and in fact has refused to accept. And if he does so and damages result he will be responsible without proof of

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55. Cf. A. BERNARDOT, *La responsabilité médicale,* Sherbrooke, Revue de droit de l'Université de Sherbrooke, 1973, pp. 98-100; *St-Hilaire v. S.,* (1966) S.C. 249; *Dame Bergstrom et vir v. G.,* (1967) S.C. 513.

56. *Beausoleil v. Soeurs de la Charité,* (1965) Q.B. 37, at p. 41.

57. *Ibid,,* p. 41.

58. In the case of *Dufresne v.* X., (1961) S.C. 119 on the other hand, more than nominal damages were granted when a dentist extracted a much greater number of teeth than was agreed upon, some of which were still healthy.

> negligence or want of skill. In these circumstances it is not a defence to say that the technique employed was above reproach or that what happened was pure accident"[59].

When we consider the dangers inherent in administering blood, such as the possibility of error in cross-matching, the transmission of communicable diseases like hepatitis, malaria, etc..., or especially the potential for hemolytic reactions which are often fatal[60], it is easy to see that the physician acting in contravention of the patient's refusal places himself in a particularly onerous legal situation[61].

CONCLUSION

It may be affirmed that in the Province of Quebec, the entire edifice of our medical law is based upon three basic notions: Firstly, that as stated in article 19 C.C., everyone enjoys a right of corporeal inviolability; secondly, that in ordinary circumstances, an informed consent must be obtained before treatment, and finally, that the care or treatment given must be reasonably diligent, competent and attentive. Indeed, it could be said that of the first two notions, the requirement of enlightened consent is but an application of the principle of inviolability, since without consent or legal authorization, one cannot lawfully cause harm to another. As a corollary of this statement, we may assert that the patient's right to an informed consent necessarily implies the patient's right to give an informed refusal[62].

Thus we conclude that the competent adult, duly informed of the consequences, can refuse blood transfusions. Persons suffering from temporary or permanent mental incapacity, or from a diminution of their mental faculties which clouds their judgment do not enjoy this right. As regards children, the terms of the *Public Health Protection Act* are quite explicit in requiring that the *infans* receive

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59. *Beausoleil v. Soeurs de la Charité, loc. cit.*, p. 41. See also *Mlle Bordier v. S.*,(1934) 72 S.C. 316 at p. 320.

60. J. CHILD, D. COLLINS, J. COLLINS, *Blood Transfusions*, (1972) 72 American Journal of Nursing, 1602 at pp. 1604-1605; HOW, *loc. cit.*, pp. 374-379.

61. Needless to say, a physician forcibly treating a reluctant patient under legal authorization, (e.g. V.D.) will be judged as to his liability in the same manner as any other physician acting in ordinary circumstances.

62. Notes - *Informed Consent and the Dying Patient, loc. cit.*, p. 1647.

treatment. The *adolescens,* although enjoying full capacity for all intents and purposes, cannot act to his own detriment according to the general thrust of the *Public Health Protection Act* and the *Civil Code* provisions of article 20. This would imply that the *adolescens* cannot refuse vital blood transfusions.

A physician or institution respecting the adult patient's refusal to receive blood does not assume any greater liability than under ordinary circumstances. Any unauthorized treatment, however, may render the health professional liable not only for assault, but also for all the risks inherent in the transfusions.

Doctors and nurses, by the very nature of their training, are imbued with the idea that their function is to cure or at least to aid the sick or injured. In these circumstances, it is easy to understand how that time-worn adage, "where there's life, there's hope" now enjoys the status of dogma. So is it with the general public which has come to expect cures, once held miraculous, as a matter of course. We are brought up to believe that life is the most precious "commodity" we possess. It is thus quite obvious how a person living in our North American context can be inclined to believe that only an individual of doubtful mental capacity would be willing to compromise life itself for religious principles. How ironic this is, when we realize the number of people who die accidentally while driving vehicles which could do justice to any motor speedway, merely because their seat-belts are not fastened, or because of an overindulgence in alcohol. Surely we are not wrong in presuming that sybaritic pleasures do not outweigh religious beliefs as a reason for compromising one's health? ! We should respect the rights of persons having the courage of their convictions whether we agree with them or not.

Addendum: In our comments concerning the unborn child and its right to life, we alluded to the capacity of the conceived child to receive bequests or gifts, subject to the condition that it be born viable. In all patrimonial matters, eventual viable birth is an essential condition. Since 1971, art 18 C.C. states that every human being possess juridical personality and enjoys civil rights. Since one of the most fundamental rights-the right to life-is extra-patrimonial in nature, it can also be argued that human life, which begins at conception, enjoys both intra-and extra-uterine protection.