

Is a Hospital Shielded From Legal Proceedings When It Suspends or Withdraws a Physician's Privileges?

By Monique Brassard and Jocelyne Forget

Insofar as a hospital's board of directors acts within the limits of the authority conferred upon it by laws and regulations and insofar as the exercise of its discretion is not unreasonable, the hospital will not be held liable if it decides to apply disciplinary measures to a physician. This is the principle that emerges from the decision rendered by the Quebec Court of Appeal on March 13, 2001 in *Montambault v. Hôpital Maisonneuve-Rosemont*.¹

The Facts

Some time after he was appointed chief of the geriatric assessment department, Dr. Montambault began to exhibit psychiatric problems, including serious relational problems with his colleagues and the nursing staff. Some of his altercations with hospital personnel occurred in the presence of patients. In light of this situation, it was suggested to Dr. Montambault that he take a sick leave and he agreed.

In March 1988, Dr. Montambault returned earlier than scheduled from his leave of absence. His return gave rise to a great deal of tension among the hospital staff. After having met with Dr. Montambault, the chairman of the Council of physicians, dentists and pharmacists (CPDP) decided this was an emergency situation and immediately suspended him. Three days later, the board of directors adopted the following resolution: first, it asked the CPDP's executive committee to create a



disciplinary committee and to make such recommendations to the board as the committee deemed appropriate regarding Dr. Montambault's situation; secondly, it upheld the emergency suspension until a final decision could be made regarding the physician's case.

After the disciplinary committee issued its report, the executive committee recommended that Dr. Montambault's emergency suspension be cancelled retroactively, that he be removed from his position as chief of the geriatric

assessment department and that his right to practise be limited to the community health department.

The board of directors heard Dr. Montambault and his lawyer and read the disciplinary committee's report and the recommendations of the CPDP's executive committee. In a written decision, but with few reasons, the board of directors relieved Dr. Montambault of his duties as chief of the department and, contrary to all expectations, cancelled his status as an active member of the CPDP and revoked his rights to practise at the hospital centre.

Dr. Montambault appealed this decision to the Commission des affaires sociales [CAS - which became the Administrative Tribunal of Quebec on April 1, 1998]. The CAS retroactively cancelled the emergency suspension and replaced the final revocation of privileges with a three-month suspension as of June 27, 1988. Hôpital Maisonneuve-Rosemont filed an application for judicial review of this decision before the Superior Court. On August 13, 1990, the Superior Court dismissed the hospital's application.

¹ *Montambault v. Hôpital Maisonneuve-Rosemont*, 500-09-001357-953, Justices Marie Deschamps, Michel Robert and Marc Beaugard. The majority opinion was rendered by Madame Justice Deschamps. Accordingly, this bulletin refers to her opinion. An application for leave to appeal to the Supreme Court of Canada was filed on May 10, 2001.

Monique Brassard has been a member of the Quebec Bar since 1987 and specializes in Health Law



In the meantime, Dr. Montambault's health continued to deteriorate and he became unable to work. At that point, Dr. Montambault's lawyer asked the hospital centre to reinstate him, but to consider him as being on sick leave; the hospital refused.

Dr. Montambault instituted proceedings for damages against the hospital centre. On April 29, 1993, before the Superior Court could rule on Dr. Montambault's action, he committed suicide. His mother and brother continued the suit in their capacity as liquidators of his succession.

The Superior Court Ruling

The Superior Court was of the opinion that the chairman had acted negligently in not carrying out an inquiry before deciding on the CPDP's emergency suspension and in failing to disclose to Dr. Montambault all the criticisms that had been made against him or his intention to suspend him. In ratifying the decision of the chairman, the hospital centre also engaged its liability.

As for the withdrawal of Dr. Montambault's privileges, the Superior Court considered that the board of directors had acted wrongly (1) by allowing the hospital centre's lawyer to make a presentation to the members of the board in the absence of Dr. Montambault or his lawyer, (2) by failing to provide sufficient in the absence of reasons for its decision, and (3) by refusing to reinstate Dr. Montambault.

Consequently, the Superior Court allowed the action in damages and ordered Hôpital Maisonneuve-Rosemont to pay \$54,092.56 to the succession of Dr. Montambault, with the additional indemnity and costs.

The Quebec Court of Appeal Ruling

Writing for the majority of the Court, Madam Justice Deschamps recalled certain principles.

The Principles Involved

A physician is not an employee of a hospital

At the outset, Madam Justice Deschamps stated a now clearly established principle in Quebec law: the relationship between a physician and the hospital centre where he practises is not one of employee and employer.

In matters of liability, hospitals are subject to public law and, exceptionally, to the civil law of Quebec

Madam Justice Deschamps noted that the *Act respecting Health Services and Social Services* [R.S.Q., c. S-4.2] does not grant any immunity to the members of the board of directors in the exercise of their duties. Consequently, relying upon a Supreme Court of Canada decision², she was of the opinion that it is public law that determines the applicable rules of civil liability in such a case and, exceptionally, private law, namely, Quebec civil law.

In order to determine the circumstances justifying court intervention, Madam Justice Deschamps, after analyzing British, American and Canadian case law regarding the liability of public bodies, proposed an approach that drew upon the rules which apply to judicial review in administrative law matters.

Intervention of the Courts and the Applicable Rules

Insofar as a public body acts within the scope of the discretion and powers conferred upon it by law and exercises those powers in a reasonable manner, the courts will not intervene in its policy decisions, because it is not the judiciary's role to assess the social and economic objectives underlying such decisions. In that sense, Madam Justice Deschamps suggested that with respect to such decisions, public authorities, including hospitals, benefits from a certain immunity.

However, acts which are not based upon the exercise of a discretionary power are subject only to private law rules—in this case, the standard of conduct set forth in the *Civil Code of Québec* [art. 1457]. Based on this rule, a person will be entitled to compensation if the person can prove fault, damage and a causal link between the fault and the damage suffered. The existence of a fault must be determined according to the standard of conduct of a reasonable person in the same circumstances.

² *Laurentide Motels v. City of Beauport*, [1989] 1 S.C.R. 705

Jocelyne Forget has been a member of the Quebec Bar since 1980 and specializes in Health Law



In summary, the intervention of the courts will depend upon the scope of the discretion that is conferred upon the public authority in making its decisions. If the authority enjoys a great deal of discretion, the courts will intervene only if its decisions are unreasonable.

Once It Has Been Determined That Court Intervention is Possible, Liability Will Arise if the Act in Question is a Breach of a Civil Law Standard.

In Quebec, the standard of conduct is set forth in article 1457 of the *Civil Code of Québec*, which requires evidence of a fault—that is determined in light of what a reasonable person would have done under the same circumstances—as well as damage and a causal link between the fault and the damage.

Application To the Facts in the Case at Bar

The Emergency Suspension

Having analyzed the *Organization and Management of Institutions Regulation*, in particular section 110 thereof, Madam Justice Deschamps was of the opinion that the discretion granted to decision-makers regarding emergency suspensions is quite restricted because the decision-maker's conduct is strictly defined. Indeed, the decision is driven by the existence of an emergency and only one sanction is provided—the total suspension of the physician's privileges. The only flexibility given to the person in authority is in the evaluation of the circumstances. Thus, in matters of emergency suspension, the courts will be more ready to intervene because the decision involves the exercise of a limited discretion.

In the case at bar, Madam Justice Deschamps concluded that there was no evidence of a critical situation requiring an emergency suspension. Consequently, the hospital could not claim a public law immunity as a defense to the proceedings relating to the suspension.

Having so ruled, Madam Justice Deschamps considered the liability of the hospital in light of the applicable civil law standard. She concluded that by failing to conduct a proper inquiry and by suspending Dr. Montambault in the absence of a real emergency, the CPDP and the hospital's board of directors had committed a fault. A reasonably prudent director, in the same circumstances, would have ascertained that the safety of patients was really at risk and that an urgent situation made its intervention necessary.

The Withdrawal of Privileges

Madam Justice Deschamps once again analyzed the *Act respecting Health Services and Social Services* and the *Organization and Management of Institutions Regulation* and concluded that they confer a broad discretion upon the hospital's board of directors in matters of discipline. Indeed, a board of directors has no obligation to comply with the opinion of the disciplinary committee or the executive committee, and it may choose from among several possible sanctions. Moreover, an appeal process exists.

Madam Justice Deschamps noted that, in general, a board of directors has a degree of discretion that is commensurate with its heavy responsibilities, including the management of the hospital and the well-being of patients. Consequently, it must consider many factors in coming to its decision. The board of directors therefore must enjoy some protection against proceedings that are instituted by persons who are dissatisfied with decisions made by it within the scope of its authority and discretion.

Having considered the facts in the case at bar, Madam Justice Deschamps concluded that the hospital's board of directors had not abused its discretionary power. She reviewed the three criticisms levelled against the hospital by the Superior Court and dismissed them on the following grounds:

- (1) Given that the hospital's directors had already contacted legal advisors before the meeting of the board of directors, there was no violation of the *audi alteram partem* rule, contrary to the ruling of the Superior Court, nor was there an unreasonable exercise of the board's powers in not having invited Dr. Montambault to hear the hospital lawyer's presentation to the board of directors before the start of the hearing.

- 2) As regards the grounds for the board of directors' decision, Madam Justice Deschamps was of the opinion that Dr. Montambault must have been aware thereof. While the reasons given may have seemed cryptic, the hospital was trying to avoid disseminating information which could have been taken out of context. This approach was not unreasonable in the circumstances.
- 3) Finally, the decision not to reinstate Dr. Montambault was based on the hospital's assessment of its duties and obligations. In the case at bar, this was did not constitute an unreasonable exercise of those rights.

Thus, the majority of the Court of Appeal was of the opinion that there was no basis for court intervention regarding the board of directors' decision to revoke Dr. Montambault's status and his right to practise. In the words of Madam Justice Deschamps, this decision was not "justiciable".

The Damages

In light of the ruling regarding the withdrawal of privileges, no damages were awarded in that regard. As for the emergency suspension, given that a fault had been committed, damages were established at \$18,332.72.

Conclusion

This ruling makes it clear that before proceeding with the emergency suspension of a physician, an establishment must ascertain that there is truly an emergency and that the facts in support of the decision have been verified. Otherwise, a court may find that a fault has been committed. With respect to the decision on the disciplinary measures to be applied at the end of the process, it involves the exercise of discretion; the decision must be reasonable, it must be made in light of all the circumstances of the case and must take into account the duties and responsibilities that are imposed upon the directors of the establishment. The Court of Appeal's ruling suggests that if an establishment's decision is made in this manner, the courts will not intervene. An application for leave to appeal to the Supreme Court of Canada was filed on May 10, 2001 and it will be interesting to see what position the Supreme Court of Canada will adopt in this case.

Monique Brassard
Jocelyne Forget

You can contact any of the following members of the Health Group in relation with this bulletin.

at our Montréal office
Pierre Baribeau
Anne Boyer
Monique Brassard
François Charette
Jocelyne Forget
Isabelle Gosselin
Jean-François Lepage
Véronique Morin
Jacques Nols

at our Québec City office
Pierre Beaudoin
Jules Brière
Hélène Gauvin
Louis Rochette

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Québec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec, Québec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Québec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

Suite 1810
360, Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site

www.laverydebilly.com

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