

# THE PHYSICIAN AND CANADIAN LAW (2nd)

By T. David Marshall  
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In his preface to *The Physician and Canadian Law (2nd)*, T.D. Marshall sets out three goals: (1) to give doctors a basic outline of the laws potentially affecting them in practice, (2) to offer means of preventing legal problems from arising in the practice of medicine, and (3) to provide a basic handbook for both legal and medical practitioners. This excellent work by Marshall is very likely to fulfill each of these goals remarkably well.

The text begins with a concise overview of such varied considerations as the Canadian legal system (i.e. the interactions of civil, common and statute law in this country), the rules of evidence in the court system, medical ethics, testamentary capacity, euthanasia and many others. Throughout the first Chapter — in fact, throughout the entire book — Marshall repeatedly stresses the vital importance of timely and accurate note-taking and record-keeping by members of the medical profession. He sees this as the primary method of avoiding problems with the law. For example, such records are indispensable when attempting to justify medicare bills, defending a malpractice suit, or aiding a patient who is suing another party for personal injuries. Numerous suggestions are given as to exactly how these records should be made, along with the legal reasons for each particular stage in the record-making process.

Chapter 2 presents an excellent discussion of a topic which has, over the years, caused untold grief and ethical turmoil in the medical profession, namely, the issue of informed consent in the context of medical malpractice. The author sets out in detail the things a doctor *must* do in order to avoid liability for not obtaining the proper consent. He correctly points out that a signature on a so-called “consent form” is *not* sufficient to satisfy the law unless the patient has been adequately informed of all aspects of the proposed medical treatment — both pleasant and unpleasant — *before* the consent form is signed. In addition, he strongly suggests that written forms always be used (even if not required by statute) and that a witness be present at both the briefing and the signing. In light of the ever-increasing number of medical malpractice suits in both Canada and the United States which are based on this very matter, Marshall’s advice and suggestions are timely and should be well-taken by all medical practitioners.

The author goes on to briefly discuss a number of circumstances requiring particular caution by the physician. These include, among others, dealings with minors and spouses, emergency treatment, religious objections, experimental therapy and new drugs, sterilization and autopsies. The Chapter closes with a concise list of eleven “Rules on Consent” which provide an effective summary of the preceding material.

The third Chapter deals briefly with negligence in the doctor-patient setting. Marshall stresses — and correctly so — that the *conduct* (i.e. *not* the results) involved is examined to determine whether a doctor has been negligent by failing to meet the standard of the medical community in which

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he practices. He discusses the so-called "Locality Rule" and points out that its application today is restricted to actual working conditions. He further discusses elements of vicarious liability with respect to partnerships and to the delegation of duties by a doctor to para-medics, nurses and other such personnel. Finally, he touches on other "danger" areas, such as consultations, writing prescriptions, Good Samaritan laws and limitation periods. In summary there is included a list of twelve "Rules on Negligence".

Chapter 4 contains an extensive review of the privilege which may be invoked by the medical profession, focusing on the privilege given by statute in Quebec and several American states. He points out there is *no* common law privilege with respect to medical personnel. He remarks on the need for a privilege of sorts in psychiatric cases — arguing that it would in no way subvert the cause of justice in situations where it is invoked — but his discussion seems to indicate that he is somewhat confused as to the nature of the solicitor-client privilege which he claims justifies a psychiatric privilege. He seems to feel that the privilege attaches to the solicitor when in fact it is the *client* who is entitled to enjoin disclosure of communications between himself and his lawyer. Marshall goes on to give recognition to the numerous practical problems which could arise from a privilege in psychiatric cases. In the final analysis he voices support for a general *denial* of such privilege, with a general discretion to allow it in meritorious cases. He suggests that the courts could be guided by Dean Wigmore's oft-quoted four conditions concerning confidentiality.<sup>1</sup>

The Chapter concludes with a brief summary of how to avoid problems relating to the issues of consent and negligence, and how to foster and maintain good public relations in order to reduce the likelihood of legal action when something does go wrong. Finally, there is included a detailed sample form to be filled in by a doctor examining a victim of an alleged sexual assault.

Chapter 5 consists of a review of the 1972 Ontario High Court case of *MacDonald v. York County Hospital*.<sup>2</sup> Marshall uses this case to highlight such things as the importance of note-taking and record-keeping, the standard of care owed, and burdens and methods of proof in a civil malpractice case.

The final Chapter deals extensively with the coroners' system. There is a discussion of the evolution of the function of the coroner firstly, in England, and secondly, in Canada. In Canada, the system is basically English, with some statutory expansion and supplementation. Marshall comments that the procedures and functions (i.e. the investigation of sudden and suspicious deaths) of the office have remained virtually unchanged since it was instituted several centuries ago. He points out, however, that since procedure is a provincial matter, it varies slightly from province to province. He continues with a very good overview of the "nuts and bolts" of the duties and the extent of the jurisdiction of a coroner. Also discussed is the unique nature of the inquest itself (i.e. inquisitorial) and the extremely wide discretion possessed by the coroner in the initiation and conduct of the proceedings. In closing, Marshall points out the detrimental effect an

1. Wigmore, *Evidence*, (McNaughton Rev.), 1961, Vol. 8, at 527, para. 2285.

2. (1972), 28 D.L.R.(3rd) 521 (Ont. H.C.).

inquest can have on the reputation of a practitioner and he suggests procedures a doctor should follow when involved with a questionable death and, perhaps more importantly, how to avoid becoming involved in such an inquiry.

The entire text is extremely well-indexed and well-footnoted. It contains a substantial table of cases, a bibliography and a glossary of relevant legal terms. In summary, *The Physician and Canadian Law (2nd)* is a very readable, well-written manual which can prove useful to a medical practitioner, a legal practitioner, or a researcher from either discipline.