IN FACT AND IN LAW

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Gabriel Lessard v. *Fernand Labrie et al.*
The Court of Appeal Confirms the Jurisdiction of the Committee on Discipline of the CHUQ

By Hélène Gauvin and Louis Rochette*

In an important judgment, rendered on November 5, 2001, the Quebec Court of Appeal unanimously decided to overturn a judgment rendered by the Honourable Claude Rioux on February 23, 2000, regarding the activities of disciplinary committees. The Rioux judgment had re-opened the debate on how disciplinary committees function within health care institutions and removed any possible recourse to disciplinary measures for persons participating in clinical trial programs in health care institutions because, according to Mr. Justice Rioux, such persons are neither users nor recipients of medical acts within the meaning of section 38 of the *Act respecting health services and social services*.

The Facts

In April 1991, Mr. Gabriel Lessard became a participant in a medical research program for the early detection of prostate cancer administered by the Centre de dépistage de la prostate affiliated with the CHUQ.

In 1998, Mr. Lessard died of prostate cancer. In July 1997, he had filed a complaint with the Quebec City Regional Health and Social Services Board against some doctors working in the early detection centre, including Dr. Fernand Labrie, director of the research centre, and Dr. José Luis Gomez, a researcher who had met with Gabriel Lessard on two occasions. The complaint had been forwarded to the person in charge of complaints for the CHUL who had in turn forwarded it to the Council of physicians, dentists and pharmacists (the "CPDP").

The respondents, Drs. Labrie and Gomez, contested the disciplinary process instituted against them, claiming that medical research in a hospital setting is not governed by the usual rules of discipline. The Superior Court ruled in favour of the respondents and terminated the disciplinary process.

Therefore, the issue of the disciplinary framework applicable to medical research activities in a hospital setting was at the heart of the debate before the Superior Court.

The Rioux Judgment

In his judgment, Mr. Justice Rioux drew conclusions having a considerable impact in two specific areas: the disciplinary process and research activities.

As regards the disciplinary process, Mr. Justice Rioux was of the opinion that the 1991 *Act respecting health services and social services* (the "ARHSSS")[1] limited the powers of the CPDP. He was also of the opinion that sections 106 to 109 of the *Organization and Management of Establishments Regulation* (the "O.M.E.R.") regarding the disciplinary process were incompatible with the provisions of the ARHSSS, because, henceforth, the jurisdiction of the CPDP and the board of directors over disciplinary matters was governed by section 38 of the ARHSSS which requires that one determine whether the complainant is a user and whether his complaint relates to a medical act. He also ruled that there had been a breach of the rules of procedural fairness because the respondents had not been sent a copy of the complaint.

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[1] R.S.Q., c. S-4.2.

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As regards research activities, Mr. Justice Rioux ruled that a research program does not form part of the services offered by hospital centres within the scope of their institutional mission.

He was also of the opinion that the disciplinary measures provided for in the ARHSSS do not apply to researchers, who answer only to the Research Ethics Board (hereafter the "R.E.B.") which assesses the research and ensures that it complies with research ethics.

Finally, Mr. Justice Rioux concluded that research participants are not users of the establishment and no medical acts are performed in their regard.

The Court of Appeal Judgment

The Court of Appeal unanimously decided that Mr. Justice Rioux's judgment was incorrect as regards its analysis of the disciplinary process as well as its view of research activities in a hospital setting.

The Disciplinary Process

As regards the disciplinary process, the Court of Appeal first referred to the legal relationship between a hospital centre and a physician: in order to practice his profession in a hospital setting, a physician must be granted a certain status and certain privileges by the board of directors. The granting of such privileges does not confer the status of employee or servant upon a physician.

The respondents, Drs. Labrie and Gomez, had been granted such a status and such privileges by the board of directors. They were members of the CPDP and came under the purview of the clinical medicine department.

According to the Court of Appeal, the CPDP is the focal point for controlling the activities of physicians in a hospital centre (s. 214), and the foundation for its disciplinary power rests in section 249 of the ARHSSS.

Section 249 does not refer to the notion of "user" or "medical acts". The legislative text contains no ambiguity: any person may file a complaint against a physician.

In contrast to the analysis of Mr. Justice Rioux, the Court of Appeal concluded that section 38 of the ARHSSS is not at all the foundation for the disciplinary power; at the very most, this section refers a complaint to the CPDP if the complaint originates from a user and relates to a medical, dental or pharmaceutical act.

Moreover, the Court of Appeal ruled that sections 106 to 109 of the O.M.E.R. are compatible with the new Act introduced in 1991, the legislature having expressed its will to ensure a continuity between the two Acts by adopting the transitional provision set forth in section 619.41 of the ARHSSS.

As regards procedural fairness, the respondents deplored the fact that the person in charge of handling complaints had taken more than two months before sending them the complaint, thereby denying them the ability to file grounds for inadmissibility with the senior management officer in charge of applying the complaint review process.

Firstly, the Court of Appeal stated that it is the committee on discipline which must rule on any alleged breach of the rules of procedural fairness. If the user's complaint relates to a medical act, it is up to the committee on discipline, and not the senior management officer, to rule on that matter.

Secondly, the Court of Appeal ruled that the delay in transmitting the complaint was not fatal. The Court proposed a three-step process to determine whether the breach of a rule of procedural fairness must result in the nullity of the process:

- the court must identify the rule of procedural fairness at issue;
- the court must evaluate the objective sought by the rule of procedural fairness; and
- the court must examine the alleged breach in light of the objective sought and the damage resulting from the failure to abide by the rule in question.

Basing itself upon these criteria, the Court of Appeal concluded that the respondents had not presented any evidence of damage caused by the delay in the transmission of the complaint. The respondents had been advised in due time of the complaint and of its content. Their right to a full defence had never been compromised.

As regards the disciplinary process, the Court of Appeal concluded as follows:

> **[TRANSLATION]" In summary, I conclude firstly that the Act grants to the board of directors of a hospital centre a general power of management over all of the centre's activities; secondly, I conclude that this general power is accompanied by a disciplinary power over any physician or dentist. This disciplinary power results from an extension of the status and privileges conferred upon the said physician or dentist.**
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> **The complaints are first examined by the person's peers (s. 214) in accordance with the procedure set forth in the O.M.E.R. The existence of a review process for complaints filed by users with respect to medical acts cannot have the effect of suppressing clear legislative provisions and impairing the functioning of the mechanisms devised for controlling medical activities within the institution." (paragraphs 60-61)**

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Research Activities

As regards research activities, the Court of Appeal was of the opinion that the operation of a research centre is part of the mission of a university hospital centre.

The Court of Appeal further confirmed that research activities, just as all other health care activities or other activities performed by an establishment, are subject to management by the board of directors of the establishment (sections 170 and 171 of the ARHSSS). The ARHSSS does not reserve any specific autonomy for services or activities which would fall outside the general management power of the board of directors.

Moreover, contrary to the claims of the respondents Drs. Labrie and Gomez, the R.E.B. does not have the power to impose sanctions in respect of their conduct as researchers. According to the Court of Appeal, the R.E.B.s are essentially multidisciplinary councils responsible [TRANSLATION] "*for approving, modifying, halting or refusing any proposal or continuing project involving the use of human subjects, based upon rules of ethics*". (paragraph 68)

Moreover, the legislature has not conferred any disciplinary role upon the ethics boards.

The User and Medical Acts

In order to determine whether or not the complaint was admissible, the Court of Appeal found that it would first be appropriate to decide whether or not Gabriel Lessard was a user. However, the Court specified that the existence of a medical act or the lack thereof is useful only for determining the procedure to be followed in handling the complaint.

The Notion of User

As regards the notion of "user", it was clear to the Court of Appeal that Gabriel Lessard was a "user" within the meaning of the ARHSSS. This conclusion could be drawn from reading of the consent form signed by Mr. Lessard. The consent form authorized, among other things, an annual blood test and a digital examination of the prostate. The consent also provided for a whole series of examinations based upon the findings of the initial tests.

A Medical Act

As regards the notion of "medical act", the Court of Appeal cited section 31 of the *Medical Act* which refers to acts having as their object to "diagnose" or "treat". The Court sought to elaborate a working definition of "medical act" by considering two aspects: the author of the act and its purpose.

Firstly, the purpose of the research protocol was to diagnose prostate cancer. According to the Court of Appeal, this was undoubtedly a medical act. Furthermore, the research subjects were offered not only a system for detecting the illness, but also treatments; therefore, there was a therapeutic objective.

As regards the author of the medical act, there did not seem to be any problem with respect to Dr. Gomez, who saw Gabriel Lessard in a consultation and examined him. As for Dr. Labrie, in his capacity as director of the research centre, he had not met Gabriel Lessard. The Court of Appeal nonetheless concluded that the fact that Mr. Lessard had not met the respondent Dr. Labrie in person did not automatically lead to the conclusion that there had not been a medical act. The Court of Appeal was of the opinion that a person in charge of directing a research group and developing a research protocol containing diagnostic and therapeutic components performs a medical act. However, it hastened to add that it was not stating that biomedical research always constitutes a medical act.

Finally, the Court of Appeal indicated that it had not been called upon to decide whether or not Gabriel Lessard's allegations against the respondents were well founded. Its role was limited to determining the admissibility of the complaint before the CPDP.

At the time of drafting this bulletin, we did not know whether the respondents intended to ask for leave to appeal before the Supreme Court of Canada, because the 60-day time limit for doing so had not expired.

Without prejudice to the respondents' right of appeal, we can draw the following conclusions from the Court of Appeal's judgment.

Implications of the Court of Appeal Judgment

In our opinion, this judgment has three major implications:

- it reassures those persons involved in the sector of health care by legitimizing the disciplinary process already followed in all of the establishments since the coming into force of the 1991 ARHSSS;
- it confirms the general management power of the board of directors of an establishment as regards all the activities and services which are part of the establishment's organization, including research activities; and

- it confirms that persons participating in a research program who wish to file a complaint against a physician are entitled to a recourse under the provisions of the ARHSSS and the O.M.E.R. which deal with disciplinary measures.

What the Court of Appeal Judgment Has Taught Us

As regards the disciplinary process, the Court of Appeal stated or confirmed the following:

- the foundation for the disciplinary power of establishments is contained in section 249, not section 38 of the ARHSSS; this disciplinary power is conferred upon the board of directors;
- any person may file a complaint against a physician, whether or not that person is a user of the establishment and whether or not the complain relates to a medical act;
- the CPDP is in charge of monitoring the activities of physicians in hospital centres (s. 214);
- the rules of procedure for imposing disciplinary measures, as set forth in sections 106 to 109 of the O.M.E.R., are compatible with the new Act introduced in 1991;
- it is up to the disciplinary committee—not the person in charge of processing complaints or the senior management officer—to rule upon grounds for inadmissibility or disputes regarding breaches of procedural fairness; and
- the breach of a rule of procedural fairness does not automatically result in the nullity of the process. A professional who believes he has been aggrieved must show that he has suffered damage as a result of the alleged breach.

As regards research activities, the Court of Appeal clearly stated the following:

- they form part of the mission of every university hospital centre and they constitute an essential attribute thereof;
- they are subject to management by the board of directors of the establishment just as all other activities of the establishment;
- the Research Ethics Board does not play any disciplinary role;
- a participant in a research program is a user of the establishment; in the case at bar, the consent form signed by Mr. Lessard was evidence thereof;
- the lack of a face-to-face meeting between the physician and the user is not a deciding factor for determining whether or not a medical act has been performed; and
- a person who develops a research protocol containing diagnostic and therapeutic components performs a medical act.

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