

1-1-1996

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Recommended Citation

Laureen Nowlan-Card, "The Doctor and the Law: A Practical Guide for the Canadian Physician, 3rd Edition" (1996) 5 Dal J Leg Stud 296.

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The Doctor and the Law: A Practical Guide for the Canadian Physician, 3rd Edition

H.E. Emson

Markham: Butterworths Canada Ltd., 1995, 282 pp.

Reviewed by Lauren Nowlan-Card[†]

With the advent of new technologies, medications, and treatments, our society has become heavily medicalized. At the same time, we have also become more legalized. The law, whether by legislation or common law, now impacts on almost all facets of medicine—providing licensing requirements, consent requirements, and guidelines for ethical practice. *The Doctor and the Law* is an overview of the law as it affects health care professionals, primarily doctors. The author, H.E. Emson, is an experienced physician and his book is meant to be a practical guide for Canadian physicians (preface). It begins by explaining how the law functions and then delves more deeply into important areas of medical practice that are impacted by the law in Canada. The aim of the book is to inform the health care profession about their legal duties and make them aware of potential legal pitfalls.

The author displays significant knowledge of both the law and medical practice. As a practical guide, the book covers many topics. Chapter One provides a general overview of the law and its underpinnings and examines the differences and similarities between medicine and the law. Dr. Emson contends that the medical profession and the legal profession are based on fundamentally different principles. For example, law tends to “reason from the general to the particular, and medicine from the particular to the general”(at 11). Medicine needs to be administered in an environment of immediacy, while the law rarely moves so quickly. Dr. Emson also compares the adversary system of justice to the cooperative approach of medicine, the specificity of

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the problems dealt with by the law and the more general problems encountered in medicine, and the general tendency of the law to look backwards, while medicine is primarily forward looking. The author also critiques many of the flaws in the way the law functions.

In Chapter Two the author explains how specific laws and institutions affect the practice of medicine. In particular he discusses the role of the Provincial Colleges of Physicians and Surgeons, Provincial Councils, and Medical Boards with respect to licensing and discipline. He also briefly describes the functions of the Provincial Medical Association. The author then examines the interface of Federal and Provincial legislation with medicine and briefly discusses patients' rights and the responsibilities of various health care providers.

An overview of medical ethics is provided in the third chapter. Specifically, Dr. Emson explores the growth of bioethics and briefly discusses the philosophical underpinnings of ethical thinking. The author outlines some of the ethical problems that arise out of advances in medicine and discusses how ethics become entrenched in the law and in quasi-legal boards such as Ethics Committees. Finally, in this chapter, Dr. Emson stresses that "there is an ethical dimension to every aspect of and every procedure in medical practice"(at 56) and emphasizes the importance of physicians considering these ethical dimensions.

Chapter Four gives the reader a helpful overview of the structure of the law and courts. The author's purpose is to provide an elementary understanding of the legal system, especially for doctors who may be asked to provide expert testimony. His overview is concise, informative, and achieves its intended purpose.

Having laid the foundation for understanding the structure of the courts, in the fifth chapter the author turns his attention to the specific issue of doctors as expert witnesses in court. His discussion of this issue combines an examination of the law and the role and expectations of the expert witness with practical concerns of doctors who may be requested to appear as expert witnesses. Chapter Six provides a rather extensive examination of the law as it affects coroners and medical examiners in Canada. The author examines both systems by providing a historical overview, detailing the duties of coroners and medical examiners, and discussing investigations, inquests, and autopsies. He also briefly compares and contrasts the medical examiner system with the coroner system.

In the seventh chapter, the author discusses the important issue of consent in various medical situations and suggests how physicians should approach the obtaining of informed consent. Dr. Emson discusses how the medico-legal problem of consent has increased in importance in Canada in recent years. The requirements of a valid consent are detailed for the reader. There is a brief discussion of the situations in which a physician may proceed without consent and the role of consent forms. The author examines some of the more difficult consent situations, such as consent for experimental or research procedures, consent to additional procedures, consent by spouses, the age of consent, refusal of parental consent, consent on behalf of incompetents, consent to bodily intrusion for legal purposes, and consent to body and organ donation. Dr. Emson also discusses developments in the law with respect to advance directives, the right to refuse treatment, and demands for futile treatment.

Malpractice and negligence are discussed in particular detail in Chapter Eight. The author provides an extensive and comprehensive discussion of malpractice and negligence law. He also suggests various practice techniques that should be used by physicians to meet the standards expected of them, thus avoiding potential legal claims against them. The physician is also armed with some practical advice about what to do when facing such a claim. Working from the assumption that malpractice claims have increased greatly in Canada in recent years (at 170), the author suggests reasons for this increased litigiousness. This is an excellent discussion, likely reflecting the reality of the situation. However, the author does not cite any authority or statistics to support his assumption that such claims have in fact increased in recent years. Without such authority, the author's position is weakened.

Physicians' reports are often required for court proceedings. In Chapter Nine, the author provides very practical advice on how to write medico-legal reports, what they should contain, and the uses to which they may be put. Specimens taken by health care professionals are also often used as evidence in court, and this chapter contains a brief discussion of how medical practitioners should deal with specimens.

Chapter Ten, entitled "Sex and the Law," deals with a plethora of issues including sexual assault examinations of both the complainant and the alleged assailant, the doctor charged with

sexual assault, abortion, new reproductive technologies, and sexual asphyxia. As an overview of these issues the author's discussion is adequate, but, as the author advises, any health care professional involved in these situations should not rely solely on this book's discussion of these matters. For example, abortion is discussed in approximately three pages, leaving many aspects untouched. There is no discussion of particular hospital policies and guidelines which may significantly affect a physician's discretion to perform abortions. The author's discussion on sexual abuse in children focusses on the physical aspects of such abuse and provides no discussion of psychological symptoms of abuse to which a physician should be attuned. Oddly, this chapter is lacking any discussion about the provision of contraceptives or gynecological exams.

In Chapter Eleven, the author briefly discusses the uncertain state of the law surrounding the beginning and end of life, including issues surrounding the foetus-in-utero and intervention into pregnancy; tissue and organ donation; sudden death in children; child abuse; termination of treatment; assisted suicide, euthanasia; and dementia in the aged. This is an excellent discussion of the practical and ethical dilemmas arising out of these matters.

Chapter Twelve examines the interface of law and medicine with respect to testing for alcohol and prescription writing. The author outlines the *Criminal Code* sections involving drunkenness. Mr. Emson discusses the physician's role in testing for drunkenness and alcohol level in some detail and discusses the many variables that must be included in conducting such tests. This chapter closes with a discussion of the criminalization of illegal drugs with no medical use such as marijuana, heroin, cocaine, and other street drugs.

The final chapter discusses some practical issues for the doctor in the hospital and in the office. In particular, the author discusses the new phenomenon of regionalization of health care, the law as it relates to the hospital and its administration, and the responsibilities of a doctor who has his or her own office.

While the primary aim of the book is to inform, it often provides a critique of the current state of the law. These critiques are usually insightful and quite valid. However, while Dr. Emson is quick to critique the legal profession and the legal system, he does not turn such a critical eye on his own profession. In his first

chapter, "Medicine and the Law—General," Dr. Emson emphasizes that the legal profession and the medical profession are rooted in very different philosophies which has polarized them with "mutual suspicion and distrust." (at 2). While the author appears to advocate bridging the chasm between the two professions by increased understanding, his comments throughout the book tend to incite, rather than ameliorate, distrust. For example, the author appears to believe that increased litigation of medical matters is caused by lawyers. He says, "[t]he hungry lawyer looks round for other pastures, and the fat fees in medical malpractice cases are tempting indeed" (at 172). In discussing how lawyers are taught to think in adversarial terms, Dr. Emson states that "by the time students have been in law school for a month they are incapable of thinking in any other way" (at 13). While Dr. Emson's point that lawyers should be careful not to become too embroiled in adversarial thinking is a valid one, the way in which he makes the point is a harsh generalization which may not hold true for all lawyers or law students. It is always unfair to paint all people in one profession with the same tainted brush. In discussing the rise of "defensive medicine," the author refers to the "legal imbecility" of counsel searching for any test that a physician did not order and pointing to this as a negligent omission (at 164). While the author is entitled to state this opinion, the language the author uses is likely to further physicians' contempt for the law. This does not appear to be in keeping with a desire to increase mutual understanding between the legal and medical professions.

Throughout *The Doctor and the Law*, the author is acutely aware of issues such as rationing of health care services, the practical difficulties faced by physicians, and the ethical dimensions of many health care issues. However, having been written for use by physicians, the book sometimes lacks insight into the patient's perspective.

H.E. Emson skillfully combines a cohesive discussion of the common law and legislation with ethical and practical issues in the realm of medical practice. *The Doctor and the Law* is a current and practical guide for physicians. It is an excellent initial resource and can help lead physicians requiring more specific information to more detailed works and the applicable law. It also provides some excellent discussion about areas where the law is uncertain or confusing. Often the author is able not only to explain why

confusing law has arisen but also to offer the physician practical advice about how to deal with that confusion. Dr. Emson has skillfully canvassed a vast number of important medico-legal issues in a concise yet comprehensive manner.