The Bequest of Human Organs for Purposes of Homotransplantation

by
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I – Introduction

Since perhaps the earliest period of mankind's existence, when Adam gave up one of his ribs for the purpose of a noble experiment,[1] the results of which have been of a mixed nature, medical science has conceived the notion of some type of transplantation as a means of remedying physical deficiencies. However, it was not until after the Second World War that substantial results were produced, especially in the areas of skin grafts, bone grafts, and keratoplasty.[2] More recently, the Washkansky and Blaiberg heart transplants performed by Dr. Christiaan Barnard seized the imagination of the public by way of the rather excessive publicity generated by the popular press. At the same time these spectacular happenings increased the pressure on jurists around the world who were examining the implications of this type of experimentation in the light of legal systems which, for a large part, were developing when blood-letting was a popular form of medical treatment.[3] All these problems were brought squarely home to Quebec by the heart transplants performed at Montreal's *Institut de Cardiologie* by Dr. Pierre Grondin.

Medical science has and is examining transplants operations from various approaches and classifies them as follows:[4]

a) Autotransplants – The tissue or organs transplanted are transferred from one area of the patient's body to another. This technique is most often employed in plastic and orthopaedic surgery.[5]

b) Isotransplants – The tissue or organs are obtained from one twin and grafted to the other. The advantage of isotransplantation, (especially popular in the area of kidney transplantation), is that the high level of histocompatibility virtually eliminates the rejection phenomenon.[6]

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1. It would seem that Adam had not consented to this operation. On the contrary, he was not even consulted; cf. Genesis 2: 20-22.
2. J.-G. Castel, *Some Legal Aspects of Human Organ Transplantation in Canada,* (1968) 46 C.B.R. 346. For a brief history of Corneal transplantation, one may consult: P. V. Rycroft, *A Recently Established Procedure: Corneal Transplantation* published in *Ethics in Medical Progress* edited by G. E. W. Wolstenholme and M. O'Connor, London, J. & A. Churchill Ltd., 1966, p. 43 et seq. As regards to kidney transplants, it is worthwhile examining, C. E. Wasmuth, *Law for the Physician,* Philadelphia, Lea and Febiger, 1966, p. 445 et seq.
3. It would be inaccurate to leave the impression that there has been no discussion by jurists of the problems involved in transplantation before the events referred to e.g. A. Decocq. *Essai d'une théorie générale des droits sur la personne,* Paris, Librairie Générale de Droit et de Jurisprudence, 1960, p. 45 et seq.; R. Dierkens, *Les droits sur le corps et le cadavre de l'homme,* Paris, Masson, et Cie, p. 149 et seq. Nevertheless, it may be stated that a sense of urgency has now been added.
4. Castel, *loc. cit.* p. 349; M. F. A. Woodruff, *Transplantation: The Clinical Problem* in *Ethics in Medical Progress, op. cit.* p. 8.
5. Woodruff, *ibid.*
6. *Ibid.* p. 9.

The disadvantage of isotransplantation is that organs vital to the donor, such as the heart, cannot be transplanted without causing death to said donor. One could add that statistically, isotransplantation is relatively rare.[7]

c) Heterotransplants – Are tissues or organs transferred from one animal species to another, including man. At present, we may disregard this process from a legal point of view since the severity of the immunological reaction by the recipient species renders very negligeable any possibility of success.[8]

d) Homotransplants – Are transplants from one person to another and may be further classified according to the sources from which the transplant material is obtained: In effect, tissue may be given by living donors who willingly consent to submit to an operation solely for this purpose. On the other hand, pieces of tissue may become available as a by-product during surgery on another patient, e.g. a person's illness requires that he be operated upon in order to have a certain organ or some tissue removed. This source of transplant material would appear to be highly limited due to the simple fact that if the tissue or organs were sound, they would not have been removed in the first place.[9] The third and most prolific source is the human cadaver since, unlike the situation of living persons, the amount and nature of the tissue and organs to be removed will not compromise the health of the donor.

With the recent advances in immuno-suppressive techniques, rejection of the foreign tissues has been retarded, if not entirely eliminated. Thus, the feasibility of homotransplantation as a remedial procedure has been increased.

This leads directly to the juridical problems involving consent – Who has legal possession or ownership in the cadavers once death is ascertained? Who may consent to, and who may prevent the removal of tissue from the body of the deceased? Can the deceased, in his lifetime give a valid consent to the use of his remains, either by testament or otherwise? Are the last wishes of the testator in this domain binding on his next of kin?

In the next few pages we shall attempt to discuss these questions.

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7. i.e. One may examine the number of births of identical twins in proportion to those of individual children. The odds are further increased by the fact that the tissue or organs which may be donated by the healthy twin are limited.
8. Woodruff, *op. cit.* p. 9.
9. Castel, *loc. cit.* p. 350.

II – The Juridical Situation of Cadavers

The one fact upon which all religions and civilizations agree is that the dead must be treated with respect.[10] For Christians, the rationale for this aura of reverence surrounding mortal remains would appear to be the writings of St. Paul, which state:

> "Know ye not that ye are the temple of God, and that the Spirit of God dwelleth in you?
> If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple ye are".[11]

Indeed, this attitude is reflected in article 2217 C.C. which stipulates that dead bodies are things "sacred by their nature". Nevertheless, for Roman Catholics, the potential conflict between medical practices involving transplantation and religious beliefs were resolved in 1956 by the celebrated declaration of Pope Pious XII which provided that:

> "A l'égard du défunt, dont on enlève la cornée, on ne l'atteint dans aucun des biens auxquels il a droit, ni dans son droit à ses biens. Le cadavre n'est plus, au sens propre du texte, un sujet de droit. . . Cela ne signifie pas du tout qu'à l'égard du cadavre d'un homme, il ne pourrait y avoir ou il n'y ait pas, en fait, des obligations morales, des prescriptions ou des prohibitions. . . Un corps était la demeure d'une âme spirituelle et immortelle, partie constitutive essentielle d'une personne humaine dont il partageait la dignité, quelque chose de cette dignité s'attache encore à lui: le corps du mort est destiné à la résurrection et à la vie éternelle! . . . D'une part il est vrai que la science médicale et la formation des futurs médecins exigent une connaissance détaillée du corps humain et qu'on a besoin du cadavre comme sujet d'étude. Nos réflexions ne s'y opposent pas; on peut poursuivre cette fin légitime.[12]

Nevertheless, as we shall see by examining summarily two major legal systems, the law has not been able to adapt itself to this aspect of modern medicine with the same case as has the Church.

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10. It is interesting to note that according to one's ethnic origins, the "respectful" disposal of the dead may include cremation, burial, abandonment to carrion, mumification, and even consumption by the next of kin. One could also compare the burial rituals of Ancient Egypt with those of modern North America (described in great detail by Jessica Mitford in her book, *The American Way of Death*). The Egyptians protected their tombs with elaborate curses; Canadians achieve the same result by means of the Criminal Code, sec. 167 – "Everyone who (a) neglects, without lawful excuse, to perform any duty that is imposed upon him by law or that he undertakes with reference to the burial of a dead human body or human remains, or (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not, is guilty of an indictable offence and is liable to imprisonment for five years".
11. Cf. Corinthians 3: 16-17; also 6: 19-20.
12. Cited by P. J. Doll in *Les problèmes juridiques posés par les prélèvements et les greffes d'organes en l'état actuel de la législation française*, J. C. P. 1968.1.2168. This position would appear to be held by most Christians except for certain sects as the Jehovah's Witnesses.

1. The Cadaver as viewed by the Common Law

The early English Common Law, based on the doctrine established by Coke (to the effect that, "The burial of the cadaver [that is *caro data vermibus*] is *nullius in bonis"), refused to acknowledge proprietary rights* in a human corpse.[13] The immediate result of said doctrine was to reduce unemployment by giving rise to the new trade of "Ressurectionist" – i.e. since the law refused to attribute ownership in cadavers, persons could remove the dead from their graves and sell the remains to anatomists, students and medical practitioners with impunity.[14] Eventually the English Courts put a stop to this trade by declaring it a crime to interfere with the dead.[15] The fact that the body was to be used for scientific purposes would not alter the nature of the act.[16]

Nevertheless, to this day, the common law of England still refuses to acknowledge a right of ownership in cadavers.[17]

Oddly enough, the Commonwealth countries declined to follow the English lead. In an Australian case[18] involving an action in detinue against a person who had purchased from the estate of a doctor, a bottle containing the preserved remains of a two-headed child, the High Court held that it was possible to own a cadaver, or parts of a human body. One

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13. Cf. Coke's *Institutes of the Laws of England,* third part, p. 203; Wasmuth, *op. cit.* p. 452.
14. In the case of *Dr. Handyside* (cited in 2 Easts Pleas of the Crown 652) it was held that an action in trover would not lie against a medical practitioner who had obtained possession and preserved the remains of siamese twins.
15. Cf. *Rex v. Lynn,* (1788) 2 T.R. 733; 100 Eng. Rep. 394.
16. *Ibid* at p. 395; *Regina v. Sharpe,* (1857) D. & B. 160, 160 Eng. Rep. 959 at p. 960 Erle, J: "Although we are fully sensible of the estimable motives on which the defendant acted, namely filial affection and religious duty, still neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemanor if the motive for the act deserved approbation. A purpose of anatomical science would fall within that category. . .".
17. Cf. *Williams v. Williams,* (1882) 20 Ch. D. 659 at p. 665; *Regina v. Price* (1884) 12 Q. B. D. 247 at p. 252; *In re Dixon,* (1892) Prob. D. (Consistory Court of London) 386 at p. 391.
18. *Doodeward v. Spence* (1908) 6 C. L. R. 406. The notes of Griffith, C. J. contain the following interesting statements: (p. 413). "It is idle to contend in these days that the possession of a mummy, or of a prepared skeleton, or of a skull, or other parts of a human body, is necessarily unlawful; if it is, the many valuable collections of anatomical and pathological specimens or preparations formed and maintained by scientific bodies, were formed and are maintained in violation of the law.

    (P. 414) If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law protects that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property.

    I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course to any positive law which forbids its retention under the particular circumstances."

may also attach significance to the fact that the Privy Council refused to consider an appeal from this judgment.[19] In *Miner v. Canadian Pacific Railroad*, Beck, J. of the Supreme Court of Alberta, citing the Australian precedent, decided that:

> ". . . The law recognizes property in a corpse, a property, of course, which is subject, on the one hand, to the obligations, for example, of proper care and prima facie of decent burial appropriate to its condition and the condition of the individual in his life-time . . . and to the restraints upon its voluntary or involuntary disposal and use provided by law . . . or arising out of the fact that the thing in question is a corpse. . ." .[20]

The American courts, in seeking a means to ensure protection against outrages or indignities to corpses by granting an action to the living relatives, evolved the notion of "quasi-property", which could be described as a type of trust. In the leading case of *Pierce v. Proprietors of Swan Point Cemetary*, Potter, J. resumed the law as follows:

> "Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi-property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may, from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed".[21]

A true indication of how little quasi-proprietary rights resemble those of pure and simple ownership may be found in the method of sanctioning such violations: Whereas the owner of an object may recover the value of the actual damages caused, the quasi-proprietor cannot claim for disturbance or mutilation of the dead body; he may only claim a type of *solatium* for the grief and anquish occasioned by these acts upon the remains of a loved one.[22]

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19. The refusal is dated the December 16th, 1908.
20. (1910) 15 W. L. R. (Alberta) 161 at p. 167.
21. (Rhode Island) (1872) 14 Am. Rep. 667 at p. 681. See also *Larson v. Chase* (Minn.) (1891) 50 N. W. 238 at p. 239; *Medical College of Georgia v. Rushing*, (Georgia) (1907) 57 S. E. 1083 at p. 1084; *Painter v. U. S. Fidelity & Guaranty Co.* (Maryland) (1914) 91 Atl. 158 at p. 160; *Simpkins v. Lumbermen's Mutual Casualty Co.* (South Carolina) (1942) 20 S. E. (2nd) 733.
22. *Medical College of Georgia v. Rushing, ibid.*, p. 1084 (Hill C. J.) ". . . In this country it has been universally held that there is a quasi-right of property in a dead body which the law will protect; and it would be discreditable to any system of law not to provide a remedy for the violation of such a right.

    In such an action, a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved." See also Wasmuth *op. cit.* p. 454.

To summarize the different points of view advanced in the various common law juridictions, we may readily observe the close affinities between the American position and that of the Canadian common law. Since the American notion of "quasi-property" may, at best, be described as a trust placed upon certain persons to see to the lawful disposal of the remains; and the Canadian concept of "property" in the body, as a very limited right of ownership circumscribed by the duties and obligations imposed by the law as well as by the last will and testament of the deceased, therefore the main distinction between the two would be one of nomenclature.

Nevertheless, the American and Canadian approach may be somewhat distinguished from the English common law, in that the former acknowledges that there is an "interest in the dead body vesting in the relatives or in the next of kin which can be protected by an action at law".[23] The main reason why there occurred this divergence of attitude would appear to be due to the fact that in England, matters pertaining to burial usually fell under the authority of ecclesiastic law.[24]

2. The Cadaver as Viewed by the Civil Law

As a general rule, the right to a cadaver must be considered extra-patrimonial in nature since:

> "... Elle (la personne humaine) est placée, avec ses différents attributs, au dessus des conventions. Son intégrité, physique et morale, son indépendance, sa dignité sont d'ordre public; ce ne sont point là des valeurs patrimoniales; et d'ailleurs, comment les estimerait-on? "[25]

However, French doctrine admits to some attenuations of this principle in the areas, for example, of human remains uncovered as archeological and scientific specimens.[26] In cases such as these, the cadavers become objects of pecuniary value and may be dealt with juridically, with the same facility as any other moveable object.

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23. Wasmuth, *ibid.* p. 455. *Regina v. Sharpe, loc. cit.* (1857) 160 Eng. Rep. 959 at p. 960: (Erle, J.) "Our law recognises no property in a corpse, and the protection of the grave at common law...".
24. *In re Dixon loc. cit.* (1892) Prob. D. 386 at p. 391; 22 Am. Jur. (2nd) "Dead Bodies" no 4.
25. L. Josserand, *La personne humaine dans le commerce juridique,* D. 1932. Chron.1, no 1; see also R. Savatier, *Les problèmes juridiques des transplantations d'organes humains,* J.C.P. 1969. 2247 no 4; Dierkens *op. cit.* no 208, p. 134 and no 269 p. 158.
26. M. Planiol; G. Ripert, *Traité pratique de droit civil français,* 2e éd.; Paris, Librairie Générale de Droit et de Jurisprudence, 1957, tome 5 (*Donations et testaments* par A. Trasbot, Y. Loussouarn) no 603 p. 756.

The law of the Province of Quebec would appear to be more hesitant in admitting the exception just described, for the simple reason that not only are cadavers *extra-commercium* due to their being beyond pecuniary value; they are also granted the quality of "*chose sacrée*" under the terms of art. 2217. The second paragraph of said article stipulates that:

> "Burial-grounds, considered as sacred things, cannot have their destination changed, so as to be liable to prescription, until the dead bodies, sacred by their nature, have been removed."

Notwithstanding the extra-patrimonial nature of a dead body, both Franco-Belgian law on the one hand, and Quebec law on the other would appear to grant similar rights to the next of kin. The continental position on this subject is described by Dierkens as follows:

> "Le droit sur le cadavre n'est pas un droit de propriété, mais un droit extrapatrimonial qui trouve son principe dans les liens du sang et de l'affectivité. Il ne revient pas à ceux qui succèdent *in bona,* mais à ceux qui succèdent in *personam defuncti,* aux continuateurs de la personne, et ce *non jure successionis, sed jure sanguinis.* Il leur appartient, même s'ils sont exclus de la succession. Il s'agit d'une prérogative de la parenté".[27]

A not dissimilar conclusion was reached by Davidson J., in the Quebec case of *Philips v. The Montreal General Hospital,*[28] involving an action for damages by the widow following an unauthorized autopsy practised upon her late husband. The defence pleaded that the plaintiff invoked neither physical injury to herself nor damage to her reputation. It was also pleaded that she suffered no loss to her purse because there is no property in a dead body. The Court held that the ". . . almost reverential feelings with which a family safe-guards the body of its dead. . . "[29] constituted in a large sense a right of property which was sufficient to justify an action in compensatory damages.

This decision was subsequently followed by Archambault J., who wrote that:

> "Il n'y a aucun doute que le cadavre d'une personne demeure la propriété du conjoint et de la famille du défunt, et que ceux-ci ont droit d'action en réparation d'injure ou d'outrage contre ceux qui, sans leur consentement, soumettent ce cadavre à une autopsie. . .".[30]

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27. *Op. cit.* no 269, p. 158. This attitude follows closely the Roman Law under which the right to the custody, control and disposition of the corpse was given to the heir for the purposes of decent burial. cf. T. W. Price, *Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections,* (1951) 68 S.A.L.J. 403 at p. 405. See also Seine 26 juillet, 1951; G.P. 1951. 2.344 (which discusses the right of the widow to the remains of her late husband, following an air crash).
28. (1908) 33 S.C. 483.
29. *Ibid* p. 490.
30. *Dame Ducharme v. Hôpital Notre-Dame;* (1933) 71 S.C. 377. See also *Religieuses Hospitalières de l'Hôtel-Dieu de Montréal v. Dame Brouillette;* 1943 Q.B. 441 at p. 455.

Thus we may conclude that in spite of this insistence on a *sui generis* type of ownership in a body, this is nothing other than a fiction enabling relatives to claim for unauthorized or disrespectful acts committed upon the remains. In reality, one could say that aside from the Criminal law aspect, the law does not protect the body, but rather protects the members of the family from anguish and other injury to their feelings occasioned by illicit acts upon their loved ones. This is further established by the fact that in the two Quebec cases cited above, the damages were sought, not as reparation for injury or disfigurement to the bodies but as moral damages for the added grief of the widows.

Therefore, we may see a great similarity of approach by both legal systems in the effort to find some form of remedy for violations of cadavers. The quasi-proprietary rights granted to the next of kin constitute rights of ownership which are protected by the common law of torts on the one hand, or by the "*droit commun*" applying to delicts or quasi-delicts on the other. It would appear that the English common law, in a desire to be strictly logical, recognizes only the right of the next of kin to possess the body solely for the purposes of burial.[31] As a result, the recourse of said next of kin would be in trespass to the chattel in order to protect said possession, rather than for *solatium* as compensation for grief caused by mutilation if an object which they own and which they view with reverence.[32]

In analyzing the Civilian as well as the Common law respecting cadavers, it is obvious to see the pains with which the courts and legal writers are trying to define some type of regime to be applied to bodies. A partial view of the outcome may be contemplated while dealing with the manner in which organs of human cadavers may be alienated.

III – The "Gift" of Human Organs

1. In the Common Law

As we have already established, the Common law of England, in refusing to acknowledge rights of ownership in human bodies, favours the

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31. *Williams v. Williams, Loc. cit.* (1882) 20 Ch. D. 659 at p. 665.
32. Clerk & Lindsell *On Torts*, 12th ed. edited by A. L. Armitage, London, Sweet & Maxwell Ltd. 1961 no. 948 p. 527: "In the dead body of a human being there is no property, but the executors or administrators of the deceased or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried. Any violation of that right to possession, such as an unauthorized post-mortem examination, is a trespass for which an action lies".

right of the executors or next of kin to the cadaver until actual burial[33]. As a result, since a person cannot dispose by will, of anything which is not the subject of ownership, it follows that a man cannot bequeath his body or a part of it.[34]

In order to circumvent these difficulties, special legislation has been enacted in order to allow either the deceased, or after his death, those persons in possession of his body, to consent to dissection or to removal of organs for transplantation. Under the terms of *The Human Tissue Act (1961)* [35] a person may, either orally or in writing, donate his body or a part of it for therapeutic or educational purposes. Said statute also empowers the person legally in possession of the body to authorize the removal of any part of same.[36]

However, certain aspects of *The Human Tissue Act (1961)* must be observed with attention. To begin with, the oral permission, (unlike the written authorization) can only be given during the last illness of the donor. Secondly, even though the deceased, during his lifetime, has consented to the removal of tissue or the dissection of his body, the statute only provides that the person in possession of the body "may" (and not "must") authorize the operation previously consented to. Thus, the wishes of the executor or of the next of kin may override those of the deceased. The third aspect worthy of examination is the fact that if the deceased remained silent during his lifetime, the person in possession may permit

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33. *In re Dixon loc. cit.* (1892) Prob. D. 386 at p. 391.

34. T. Jarman, *A Treatise on Wills*, 8th ed., by R. Jennings, J. Harper, London, Sweet and Maxwell, 1951, vol. 1, p. 61. *In Williams v. Williams (loc. cit.* (1882) 20 Ch. D. 659), Kay J. states (at p. 665): "If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of (. . .). It follows that the direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void".

35. 9-10 El. II, ch. 54.

36. It would be perhaps preferable to quote the pertinent text due to the various reservations and limitations provided for in the Act: "1 (1) If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part, or, as the case bay be, the specified part for use in accordance with the request. (2) Without prejudice to the foregoing subsection, the person lawfully in possession of the body of a deceased person may authorise the removal of any part from the body for use for the said purposes if, having made such reasonable enquiry as may be practicable, he has no reason to believe –

a) that the deceased had expressed an objection to his body being so dealt with after his death, and had not withdrawn it; or

b) that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with".

It should also be noted that this Act (s. 4) repealed the *Corneal Grafting Act* (1952), 15-16 Geo. II, 1 El. II, ch. 28.

removal of only part of the body, provided that the surviving consort or other relatives do not object.[37]

To conclude the English solution to this question, it may be stated that although one cannot, strictly speaking, bequeath organs, the fact that a will contains such a bequest may achieve the same ends since said "legacy" would constitute written authorization as required by *The Human Tissue Act (1961)*. Nevertheless the difficulty involved in consenting to transplantation in a will is the fact that hours or even days may elapse before the will is found, thus rendering impracticable, kidney, heart and other transplant operations in which the measure of success depends upon the amount of time elapsed between the death of the donor and the transplantation of the organ. The only other alternative would be to obtain the consent of the executor as well as of the surviving consort or next of kin. In the case of relations to the deceased, it is quite dangerous to act on the basis of a consent obtained during a period of severe emotional shock or distress, such as that immediately following the death of a relative.

Under the common law of the Anglo-Canadian provinces, the solution would be quite similar to that of England. In effect, a testamentary provision as to the disposal of the whole or part of the cadaver cannot be binding on the person(s) entitled to said body; whether he be an executor,[38] the surviving spouse,[39] or the next of kin.[40] Consequently, (and unless otherwise provided), those persons wishing to remove organs for transplantation would have to determine, who has "ownership rights" to the corpse and then obtain his consent to the operation.[41]

In many Provinces, the legislator has not only intervened in order to remove the ambiguities surrounding gifts of tissue or organs, but also in order to enable a person to dispose of his own body. In the event of the failure of the deceased to make provisions of this nature in his lifetime, most of these Acts[42] determine the persons who may do so after his death.

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37. Nevertheless, said party may dispose of the entire corpse for the purpose of anatomical study under the terms of the *Act for Regulating Schools of Anatomy (1832)* 2-3 William IV ch. 75 s. 7, 8.
38. *Hunter v. Hunter,* (1930) 4 D.L.R. (Ont.) 255.
39. *Edmonds v. Armstrong Funeral Home Ltd.,* (1931) 1 D.L.R. (Alta.) 676.
40. *Miner v. Canadian Pacific Railroad, loc. cit.* (1910) 15 W.L.R. (Alta.) 161.
41. Castel *loc. cit.* p. 381. It goes almost without saying that this process can be very time-consuming.
42. Ontario – *The Human Tissue Act,* (1962-63) S.O. (11 and 12 El. II) ch. 59 as amended by *The Human Tissue Amendment Act,* (1967) S.O. (15 and 16 El. II) ch. 38;
New-Brunswick – *Human Tissue Act.* (1964) S.N.B. ch. 4;
Nova-Scotia – *Human Tissue Act,* (1964) S.N.S. ch. 5;

Generally speaking, the *Human Tissue Acts* in force provide that a person may dispose of his body at any time in writing, or orally in the presence of witnesses during his last illness.[43] In Manitoba, a person may consent in writing only, to the use of his body "for the purposes of anatomical or other scientific instruction or requirements".[44]

Thus, the same comment made above (in reference to English law), concerning the written consent contained in the will, would apply here with the same force. Consequently, although the testamentary form may be used as a means of disposing of organs for transplantation; for the reasons mentioned previously, this course should be avoided by practitioners.[45]

Except for recent developments in the United States, the American solution would have been identical to that of England and Canada. In effect, the American courts have continously acknowledged the rights of the spouse or relatives to the body, for the purpose of preservation or burial.[46]

Nevertheless, modifications to traditional American Common law are being brought about in two ways; by legislation, and by a change in judicial attitudes. For example, an Arkansas law provides that the deceased may dispose of his body by will or by an instrument executed in the same manner as a deed. The only qualification is that the cadaver must be use, ". . . for other advancement of medical science, or for the replacement or rehabilitation of diseased or worn-out parts or organs of other humans".[47] Another example of legislation may be found in s. 7100 of the *California Health and Safety Code* (1952):

> "A decedent prior to his death may direct the preparations for, type or place of interment of his remains, either by oral or written instructions. If such

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Newfoundland – *The Human Tissue Act,* (1966-67) S. Nfd. vol. 2 no. 78;

Alberta – *The Human Tissue Act,* (1967) S.A. (16 El. II) ch. 37;

In Manitoba, different solutions were arrived at by amending the *Anatomy Act,* cf. (1954) R.S.M. ch. 5; *An Act to amend The Anatomy Act,* (1959) S.M. 2nd sess. (8 El. II) ch. 5 s. 5.

43. Ontario, *The Human Tissue Act, ibid.* s. 1 (a); N.B. *Human Tissue Act, ibid.* s. 1 (2); N.S. *Human Tissue Act, ibid.* s. 1 (a); Nfd *The Human Tissue Act* s. 3 (1); Alberta *The Human Tissue Act* s. 2 (1).

44. Cf. *Anatomy Act, op. cit.* s. 7 (1); *An Act to amend the Anatomy Act, op. cit.* s. 5 (more particularly the added section 4a).

45. For detailed discussion of the *Human Tissue Acts* one should consult Castel (*loc. cit.* p. 393 et seq.).

46. Cf. *Larson v. Chase op. cit.* (1891) 50 N.W. 238; *Burney v. Children's Hospital in Boston,* (1897) 47 N.E. (Mass.) 401 at p. 402; *Darcy v. Presbyterian Hospital in the City of New York,* (1911) 95 N.E. (N.Y.) 695 at p. 696; *Painter v. U.S. Fidelity & Guaranty Co. loc. cit.* (1914) 91 Atl. (Md) 158; *Simpkins v. Lumbermen's Mutual Casualty Co. loc. cit.* (1942) 20 S.E. (2nd) (S.C.) 733; *Trammell v. City of New York,* (1948) 82 N.Y. Sup. (2nd) 762. C. E. Wasmuth, *op. cit.,* p. 455.

47. *Ark. Stat. Ann.* (1947) no. 82-408, quoted in Wasmuth, *ibid.* p. 451.

> instructions are in a will or other written instrument, he may direct that the whole or any part of his remains be given to a teaching institution, university, college, legally licensed hospital, or to the state director of public health, and the person or persons otherwise entitled to control the disposition of such remains under the provisions of this section shall faithfully carry out the directions of the decedent subject only to the provisions of this chapter with respect to the duties of the coroner."[48]

In spite of many statutes now in force in the United States, it may be affirmed that the vast majority of States do not provide for the testamentary disposition of the body of the deceased.[49] However, it would appear to be a recent trend for the courts to honor the deceased's directions as to the disposition of his body.[50] Said directions, even though they may be contained in a will, are not considered testamentary in nature.[51] In a recent New Hampshire case dealing with the last wishes of Grace Metalious, the authoress of *Peyton Place,* the Court declared that:

> "In the ordinary case, instructions by a decedent, by will or otherwise, with respect to disposition of his body or funeral services or burial, should be respected and followed in preference to opposing wishes of his survivors"[52]

Viewing the Common law as a whole, one may state that more and more importance is being attached to the last wishes of the deceased, either by providing a statutory framework within which said desires may be expressed, or, (as is happening in the United States) by means of a more liberal approach by the courts to the subject of the alienation of human remains. We shall pass on to the Civil law to see whether a similar development has taken place.

2. In the Civil Law

In Franco-Belgian law, since the human cadaver is extrapatrimonial in nature, efforts on two different levels have and are being made to establish a legal background upon which the gift of organs, tissues or cadavers may be validly made.

In doctrine, the theory has been advanced that each person is granted an extrapatrimonial right to determine the ultimate destination of his

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48. See also Iowa Code (1954) no. 141.35; *Kansas Gen. Stat. Ann.* (1949) no. 19-1025; *Minnisota Stat.* (1953) no. 525. 18 (2); *Montana Rev. Codes* (1947) no. 69-2308; *North Dakota Rev. Code* (1943) no. 23-0601; *Utah Code Ann* (supp. 1953) no. 26-15-18; *Washington Rev. Code* (1951) no. 68-08-100.
49. Wasmuth, *op. cit.* p. 452.
50. C. J. Stetter, A. R. Moritz; *Doctor and Patient and the Law,* 4th ed., St. Louis, C. V. Mosby Co. 1952, p. 174.
51. Cf. *Guerin v. Cassidy;* (1955) 119 Atl. (2nd) (N.J.) 780 at p. 782.
52. *Holland v. Metalious,* (1964) 198 Atl. (2nd) (N.H.) 654 at p. 656. See also *Guerin v. Cassidy, ibid.*

remains. This right does not result from the right of testation but rather from a final expression of human liberty.[53] However, as a condition of validity of an extraordinary manner of disposal such as transplantation or dissection, the alienation must be made for an altruistic purpose, the advantages of which greatly outweigh the inconveniences resulting from the mutilation of the body.[54]

Since said right is extrapatrimonial, it is not necessary to donate organs in a document in the form required for the validity of wills. On the contrary, this consent may be expressed in any manner; even verbally (subject of course to the difficulties of proof).[55]

Oddly enough, a discussion of these points has only been raised once, in a rather old case of the Belgian *Cour de Cassation* involving a conflict between the wishes of the deceased for his burial, and that of his relatives.[56] Some of the far-ranging statements by the Court bear repetition since they could apply directly to the donation of organs and tissues:

> "Attendu que l'homme, maître de sa personne pendant la vie, dispose librement de sa dépouille pour l'époque où il ne sera plus et règle ses funérailles comme il l'entend, à condition de respecter les lois et les bonnes moeurs;
> Que cette faculté, dont l'exercice n'entraîne pas par lui-même et nécessairement disposition de biens, ne dérive pas du droit de tester;
> Qu'elle découle de la personnalité et de la liberté humaine;
> Que bien qu'elle ne soit pas expressément reconnue et règlementée par la loi, elle a été de tout temps et universellement admise comme de droit naturel;
> Que le droit pour le défunt de régler le mode de ses funérailles constitue, en tant que manifestation de la liberté individuelle et de la liberté de conscience, non pas un simple intérêt moral, sans garantie et sanction, mais un véritable droit susceptible d'être poursuivi en justice;
> Que pour être obligatoire, la volonté du défunt ne doit pas se traduire expressément en une forme déterminée, mais qu'elle peut s'induire d'indices de toutes sortes dont l'appréciation est abandonnée à la prudence du juge. . . " .[57]

Therefore, it would appear that in Franco-Belgian doctrine, the wishes of the deceased as to the disposal of organs or tissues are incontestably

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53. Cf. Dierkens, *op. cit.* no. 252, p. 152.
54. Decocq. *op. cit.* no. 57 p. 46. See also Lyon, 27 juin 1913; D. 1914.2.73 (note Lalou) dealing with an old woman who, for a fee, allowed a surgeon to attempt a new method of plastic surgery on one of her breasts. It was intended that at the next surgical congress, the surgeon would reveal his new method with physical proof of "before and after" results. The Court of Appeal held; ". . . qu'une telle convention ne pourrait être admise comme compatible avec la dignité humaine, alors que, par l'appât d'un gain des plus minimes, l'appelante se déterminait à trafiquer de son corps. . . ."
55. Cf. Dierkens *op. cit.* no 261 p. 155.
56. Cass. 3 juin 1899; Pasic. Belge 1899.1.318.
57. *Ibid.* pp. 321, 322. See also Paris, 16 décembre 1961; G.P. 1962 1.410.

superior to the contrary wishes of the members of his family [58].On the other hand, if the deceased has not previously manifested a contrary opinion on the matter, his relatives may donate his organs or tissue after his death.[59]

The other means by which organs may be made available is through legislation. The evolution of this legislation in France is very interesting due to the fact that in many cases, the removal of organs for transplantation is being made under a decree which was passed before extensive transplantation practices came into being, and for a different purpose.

The first law to give the deceased some discretion over the mode of disposal of his own remains was the *Loi sur la liberté des funérailles* of the 15th of November, 1887. It provided in art. 3 that:

> "Tout majeur ou mineur émancipé, en état de tester, peut régler les conditions de ses funérailles, notamment en ce qui concerne le caractère civil ou religieux à leur donner et le mode de sa sépulture.
>
> Il peut charger une ou plusieurs personnes de veiller à l'exécution de ses dispositions.
>
> Sa volonté exprimée dans un testament ou dans une déclaration faite en forme testamentaire, soit par devant notaire, soit sous signature privée, a la même force qu'une disposition testamentaire relative aux biens; elle est soumise aux mêmes règles quant aux conditions de la révocation".

By decree in 1941, an authorization for cremation could be granted provided the deceased so requested or a written demand to this effect was made by a member of the family [60].

Due to advances in medical technology, a law, *permettant la pratique de la greffe de la cornée à l'aide de donneurs d'yeux volontaires* granted the right to persons to dispose of their eyes by will [61]. In commenting the

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58. Dierkens, *op. cit.* no. 271 p. 159. However, he goes on to state that the family may contradict the wishes of the deceased that his remains be handed over for the study of anatomy since (no. 291, p. 166) "La cession du cadavre constitue une décision très grave. Elle est indiscutablement de nature à toucher, à blesser même certains sentiments profonds et honorables. C'est pourquoi la famille pourra s'opposer à la cession de la dépouille mortelle décidée par le défunt". See also Doll *loc. cit.* no. 37.

59. *Ibid.* no. 290 p. 166. In order of preference, this consent must be given by the wife, or the mother and father, the children and finally the more distant relatives. However, this order is based on presumption and may be modified according to particular circumstances. Cf. H. Mazeaud, L. Mazeaud, J. Mazeaud, *Leçons de droit civil,* 2e éd., Paris, Éditions Montchrestien, 1963, vol. 4, no. 998, p. 799. See also Seine 26 juillet 1951; G.P. 1951.2.344; Seine 13 mars 1947, G.P. 1947.1.193.

60. Cf. Décret du 31 décembre 1941 *Codifiant les textes relatifs aux opérations d'inhumation, d'exhumation, d'incinération et de transport de corps,* titre IV, art. 15.

61. Cf. Loi no 49-890 du 7 juillet 1949, reads in part as follows: "Article unique – Les prélèvements anatomiques effectués sur l'homme en vue de la pratique de la kératoplastie (greffe de la cornée) peuvent être effectués sans délai et sur les lieux mêmes du décès chaque fois que le *de cujus* a, par disposition testamentaire, légué ses yeux à un établissement public ou à une oeuvre privée, pratiquant ou facilitant la pratique de cette opération.

Dans ce cas, la réalité du décès devra avoir été préalablement constatée par deux médecins. . .".

law, Decocq (concurring with M. le Doyen Savatier's opinion expressed in 1955 *Cahiers Laënnec*), felt that it only rendered more explicit, a right already recognized by the "*droit commun*" and therefore:

> "Elle ne peut être regardée comme autorisant une opération qui, avant elle, eût été illicite, ni comme un texte limitatif interdisant *a contrario* les actes juridiques sur le cadavre, en vue d'autres fins que la kératoplactie".[62]

It should be noted, however, that the Mazeaud brothers maintain a contrary attitude and would apply these express provisions as exceptions to a general rule forbidding the disposal of human tissue or organs. As exceptions, said provisions must be interpreted strictly, and should receive application only when the life or health of another is at stake [63].

In the light of current Civilian doctrine, it would appear that the more liberal approach to this topic of organ transplantation is preferable, for the simple reason that the gratuitous cession of organs for the purposes of improving the situation of other persons is neither contrary to public order nor to good morals. Indeed, it would indicate a person possessing a superior sense of charity and goodwill towards others, and who should be encouraged.

Before terminating the discussion of French law, mention should be made of a very controversial decree, the application of which has been expanded beyond the goals originally envisioned at the time of its adoption. In effect, art. 1 of the *Décret du 20 octobre 1947* reads in part as follows:

> "Toutefois dans les établissements hospitaliers figurant sur une liste établie par le ministre de la santé publique et de la population, si le médecin chef de service juge qu'un intérêt scientifique ou de thérapeutique le commande, l'autopsie et les *prélèvements* pourront, *même en l'absence d'autorisation de la famille*, être pratiquée sans délai".

At the time, this decree aimed at permitting health authorities to take and keep specimens only for purposes of analysis and research. However, since this was not expressed in the text, many medical practitioners felt it would serve as a legal basis for the removal of organs for transplantation.[64] R. Savatier, in a recent article, strongly attacked this manner of approaching said problems, on the very reasonable grounds that if the

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62. *Op. cit.* no. 55, p. 45. This would also appear to be the position of *La Commission de Réforme du Code Civil* since art. 4 of its project dealing with rights attached to "la personnalité" introduces restrictions to the disposal of parts of the body only when it must be executed before the death of the donor cf. 1950-51 *Rapports des travaux de la Commission de réforme du Code civil p. 70.*

63. *Op. cit.* 1962, vol. 2 no. 236 p. 195.

64. J. Savatier, *Et in hora nostrae (Le problème des greffes d'organes prélevés sur un cadavre)*, D. 1968 (Chron. 15) 89 at p. 94.

legislator felt that in order to permit the removal of the eyes, the testamentary form would be required, then how, in the absence of a law, could a simple decree allow public hospital authorities to effect massive organ or tissue removals without family consent.[65] Savatier continues:

> "Ainsi est-il sûr que le décret de 1947 mette bien l'hôpital à l'abri d'une réclamation de la famille non consultée, quand elle constatera les mutilations du corps qu'on lui rend? Ne peut-elle même, alors, attaquer, pour excès de pouvoir, le décret de 1947? "[66].

In an effort to clarify an obviously confusing legal situation, M. le député Gerbaud presented *Proposition de Loi no 621* the 15th of december 1967. Art. 4 of said project stipulated that:

> "Les organes en vue de greffes à d'autres personnes ne peuvent être prélevés que sur présentation d'une décision écrite faite par le donneur, soit par testament, soit par don à une organisation, à une fondation ou à un établissement hospitalier agréé par décret. La même décision peut être prise par autorisation écrite de tous les ayants droit légaux:[67]

However, said project was never adopted, thus maintaining a rather imperfect *status quo*. Nevertheless, one must conclude that in France, the alienation of organs by a person in contemplation of death, or by the family of said person after his death, must be considered legally acceptable. Except where specific legislation otherwise stipulates, there would be no formal requirements for the validity of said alienation, provided the rules of evidence are satisfied. As for the removal of organs for transplantation by public hospital authorities without the permission of the next of kin, one must agree with R. Savatier that the legality of this *modus operandi* is quite dubious and should be remedied by legislation.[68]

In the Province of Quebec, there is no express guidance, either by the courts, or by the legislator upon which one may base a firm opinion concerning transplantation. However, it is safe to state that the principle of organ removal is acceptable, provided that we may discover who has the power to authorize said removal. Meredith refuses to opt between the donor and his next of kin and requires the consent of both.[69] Baudouin

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65. R. Savatier, *Les problèmes juridiques des transplantations d'organes humains*, J.C.P. 1969. 2247, no 6.
66. *Ibid.* See also J. Savatier *loc. cit.* D. 1968, 89 at. p. 94.
67. Cited in P. J. Doll, *loc. cit.* J.C.P. 1968.1.2168, no. 38.
68. *Loc. cit.* J.C.P. 1969. 2247 no. 7.
69. W. C. J. Meredith, *Malpractice Liability of Doctors and Hospitals*, Toronto, Carswell Co. Ltd., 1950, p. 173. In his text, Dean Meredith only refers to corneal transplants: "Since this delicate operation seldom succeeds unless performed shortly after death, I suggest that the necessary formalities as to consent be carried out while the patient is still alive, and that a written

would favor allowing as sufficient, the consent of the donor on the grounds that,

> "... Ne faut-il pas ... admettre ... (que) celui-ci peut disposer volontairement de tout ou partie de son corps ou en faire usage comme d'une chose ou d'une marchandise? Sur ce point, on en revient au principe suivant lequel le consentement librement donné par l'individu fait disparaître l'illicéité de l'atteinte à son intégrité physique".[70]

It is interesting to note that the only instance in which the legislative authority of Quebec recognized the right of the deceased to dispose of his own remains was in a 1901 law amending the charter of Mount-Royal Cemetery [71]. Art. 9 of said law permits cremation of the body provided, *inter alia* that the deceased has, by will or by codicil, expressed the desire that his body be dealt with in such a manner.

However in the absence of express legislation along the lines of the *Human Tissue Acts* of certain other jurisdictions, we believe that one may rely on the Franco-Belgian doctrine to the effect that a person may donate his organs. Since the human body is extrapatrimonial in nature, said "gift" of the organs cannot be properly described as a legacy. Nevertheless, the mention of such a bequest in the will would constitute formal evidence of the deceased's intentions, (even though the form of the consent is immaterial, provided said consent may be proved).

IV – Conclusions

As T. W. Price very accurately wrote:

> "Matters affecting the disposal of a corpse are rarely subjects of litigation, with the result that there is very little modern guidance on the subject as a whole".[72]

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authorization be obtained from the relative who would normally be required to consent to an autopsy".

This would also appear to be the opinion of Forest, J. In the case of *Brouillette v. Religieuses de l'Hôtel-Dieu* (1941) 47 L.R. N.S. 408 at p. 414): "En vertu des lois de cette province, toute personne de quelque dénonciation religieuse qu'elle soit, catholique, protestante ou hébraique, a le droit de son vivant d'ordonner que son cadavre soit soumis à un examen interne anatomique par mutilation à la condition expresse que son conjoint ou tout autre parent par ordre de préséance ne révoque après sa mort semblable disposition pour prendre soin et possession de ses restes mortels (art. 831 c.c.)"

One must disagree with this statement due to the fact that the cadaver is extrapatrimonial and therefore, art. 831 c.c. dealing the "*liberté de tester*" could not apply.

70. L. Baudouin, *La personne humaine au centre du droit Québécois*, (1966) 26 R. du B. 66 at p. 67.

71. *Loi amendant l'acte 19-20 Vict. ch. 128 intitulé acte pour amender et consolider les différents actes qui incorporent la compagnie du cimetière du Mont-Royal*, (1901) 1 Ed. 7 ch. 92.

72. *Loc. cit.* (1951) 68 S.A.L.J. 403 at p. 405.

However, with the material at our disposal which we have examined above, it may be stated that whether, under the Common law, the relatives have possessory, proprietary or quasi-proprietary rights, or whether, under the Civil law, said rights constitute a *sui generis* right of ownership in the cadaver; in both systems the emphasis is not on the body *per se* but on the feelings of relatives who would be upset by violations to the integrity of a loved one's remains.

Unless legislation otherwise provides, the Common law jurisdictions generally do not recognize the validity of bequests of organs, if in fact such a bequest is contrary to the wishes of the family. In the United States, notice must be taken, however, of the growing tendency of the courts to prefer the wishes of the deceased over those of the next of kin.

In the Civil law, the desire of the deceased to alienate parts of the body for purposes of transplantation must prevail over the contrary wishes of his family and legal representatives. The form of such an alienation would not, for the reasons given earlier, necessarily have to be testamentary.

In many jurisdictions, the legal questions raised by transplantation as a modern form of medical treatment, have been settled by means of statutes, which tend to encourage the gift of tissue by clarifying the manner and conditions under which it may be done.

From the summary study of a single aspect of the whole field of transplantation one strong fact emerges – the medical profession as well as the general public are entitled to know in detail, the rights and duties of all persons involved with a transplant operation. Because of the risks involved, it is only fair that hospitals and surgeons be given legal guidelines within which they may act. In a Civilian system such as Quebec, these indications are best given in a formal provision of law.

V – Recommendations

The legislator may adopt one of two approaches to the problem of expressly regulating tissue and organ transplantation; he may either amend the Civil Code or else he may merely pass a simple statute resembling the *Human Tissue Acts* in force in many other provinces.

An amendment or addition to our present Civil Code would not be the proper manner of dealing with the problem since the human body is extrapatrimonial in nature and therefore, could not be the object of a legacy or donation in the strict sense. The insertion of a limited provision

applying only to a particular situation would tend to disturb the cohesiveness of the Code. Since a code constitutes an ensemble in which the provisions are interpreted and applied with regard to the general philosophy expressed by the whole, the disadvantages of incorporating extraordinary provisions deviating from this "internal philosophy" would greatly outweigh the advantages.

However, in view of the fact that the Quebec Civil Code is in the process of being completely revised, it would be advantageous for a clear line of demarcation to be established between the patrimonial and the extrapatrimonial rights which attach to a person. In this manner each régime would have a separate set of rules or principles which would not interfere with the other, and the internal unity of the new Code would be maintained. Naturally, among the extrapatrimonial rights which should be enjoyed by the fully capable person would be that of disposing of his remains for any purpose or in any manner not prohibited by public order or good morals. This right must be superior to the contrary wishes of the next of kin.

For the time being, Quebec could adopt a statute along the lines of the Model Act presented by the Conference of Commissioners on Uniformity of Legislation in Canada. Said Act permits a person of eighteen or over to give, in writing, or orally in the presence of two witnesses during the last illness all or part of his body for medical purposes[73].

Nevertheless, due to the many problems and special circumstances which attach to the practice of medicine as well as to the whole area of hygiene, one should not neglect the idea of a Health Code which would cover, in an integrated and logical manner, all aspects pertaining to health and medecine. All too often, legal advisors are required to depend on legislative provisions which were not destined to cover modern problems, in order to formulate opinions and advice. One may give as examples, the problem of artificial insemination, a definition of death, the situation of professionnal people employed by hospitals, professional secrecy and medical records, human experimentation, etc., etc.

The medical profession should only be preoccupied with medical problems when it enters the operating room. Prior to crossing this threshold, elementary justice requires that medical practitioners know the bounds within which they may act. In this way, the situation becomes clear, and it is mainly through clarity that litigation is avoided.

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73. Cf. Castel, *loc. cit.* p. 399.

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