

MAKING TREATMENT DECISIONS

By: Graham Webb, Barrister & Solicitor, Staff Lawyer

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The Advocacy Centre for the Elderly (ACE) holds special expertise in the law of consent, capacity and substitute decision-making. ACE provides advice and representation in the area of treatment decisions. It also has taken a leading role in educating lawyers, health practitioners, service providers, and most importantly, older adults who are interested in these issues about the law of consent, capacity and substitute decision-making. Its intake staff would be pleased to speak with older adults about these issues at any time. There are many areas of substitute decision-making, and many subtle and complex legal issues within the realm of substitute treatment decisions. The following is designed to assist the general public in understanding the framework and general rules which go into decision making and substitute decision making in Ontario.

TREATMENT

Under Ontario law, a "treatment" is anything that is done by a "regulated health practitioner" ("HP") for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose. It does not include an assessment of capacity, a general assessment or examination, the taking of a person's health history, the communication of a diagnosis, an admission to hospital or another facility, or a "treatment" that poses little or no risk of harm to the person. Even with these exceptions, "treatment" has a very broad definition that includes most medical procedures advised and recommended by HPs of all types.

RULES FOR CONSENT TO TREATMENT

It is important that older adults understand the fundamental aspects of the law that relates to consent to treatment in Ontario. Most of this law is set out in the *Health Care Consent Act* ("HCCA"), which has been in place since 1996, and by the common law principles which were developed prior to the enactment of statute law. The HCCA contains the following elements with respect to consent to treatment:

- It gives a legally-binding definition for "capacity" to make treatment decisions.
- It requires that informed consent be obtained before treatment can be administered, except in defined emergencies.
- It describes the elements and meaning of informed consent.
- It accommodates the giving of informed consent for a course or plan of treatment.
- It allows for substitute consent to be given on behalf of an incapable person, and it provides authority to administer emergency treatment without consent in limited circumstances where the need arises.

Older adults, who are highly interested in the delivery of health care in Ontario, should also understand in general terms how the principles of consent to treatment operate under Ontario law.

MENTAL CAPACITY FOR TREATMENT DECISIONS

Capacity is a legal, not medical, issue. The *HCCA* defines mental “capacity” for treatment decisions as the ability to understand information that is relevant to a treatment decision, and the ability to appreciate the reasonably foreseeable consequences of making or not making a decision. When evaluating capacity, one looks at mental function only. It is not determined by one’s age and it is not affected by any physical or mental disabilities that do not affect one’s judgment or reason. If a person has the mental capacity to understand information and appreciate consequences about a particular treatment decision, then the person is at law mentally “capable” of making that decision.

The *HCCA* also provides that a person may be capable with respect to some treatments, and incapable with respect to others, at a single point in time. Also, with respect to a single treatment, a person may be incapable at one time and regain capacity at a later time. One’s mental “capacity” for treatment decisions is determined on a decision-by-decision basis, and can change from decision to decision and from time to time.

NO TREATMENT WITHOUT CONSENT

A fundamental rule of the *HCCA* is that the HP proposing a treatment shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered by someone else, unless the HP believes:

- The person is capable and has given informed consent; or,
- The person is not capable, and informed substitute consent has been given on the person’s behalf.

ASSESSMENT OF CAPACITY

It is up to the HP to determine whether or not the person is mentally capable of making the decision. There is no formal process set out in law for the assessment by the HP of the mental capacity of a person to give or refuse informed consent for a proposed treatment. The HP must apply the correct legal test, which requires the person to be able to understand the information and appreciate the consequences. If, after speaking with the person, the HP believes the person is mentally capable, they must obtain consent from that capable person for that treatment. If the practitioner does not believe the person is mentally capable of making that treatment decision, then they must seek the consent of the incapable person’s substitute decision-maker (“SDM”).

THE MEANING OF INFORMED CONSENT

A legally-valid “consent” to treatment must:

1. Relate to the treatment that has been proposed;
2. Be informed;
3. Be given voluntarily; and not be obtained through misrepresentation or fraud; and
4. Not be obtained through misrepresentation or fraud.

Of these four elements, the meaning of informed consent has further elaboration under Ontario law.

“Informed” consent means that the person is given the information that a “reasonable person” needs to make a decision about the proposed treatment, including information about:

- The nature of the treatment;
- The expected benefits of the treatment;
- The material risks of the treatment;
- The material side effects of the treatment; and
- Alternative courses of action; and, the likely consequences of not having the treatment.

“Informed” consent also means that the person has received informative, responsive answers to questions or requests for further information. Informed consent does not need to be in writing, although it can be; however, the key is that it must be the end product of a meaningful exchange of pertinent information between the HP and the person making the treatment decision(s).

COURSES OF TREATMENT AND PLANS OF TREATMENT

Ontario law demands that, outside of an emergency situation, informed consent must be obtained before any treatment is administered by a HP. However, it does not necessarily require that informed consent be given individually for each individual treatment.

The *HCCA* describes a “course of treatment” as a series or sequence of similar treatments administered to a person over a course of time for a particular health problem. Rather than proposing a single treatment, a HP might propose a “course of treatment” and obtain informed consent at once for a series of similar treatments all of which are proposed for a health problem the person is actually experiencing.

Similarly, the *HCCA* allows a single informed consent to be given to a “plan of treatment”, which is developed by one or more HPs to deal with one or more health problems that a person has, or is likely to have given the person’s current health condition. It may include the administration of various treatments or courses of

treatments, or the withdrawal of treatment in light of the person's current health condition. However, despite the breadth of this description, informed consent can never be given to a "plan of treatment" in the abstract. Specifically, it cannot be given where it does not relate to the person's current health condition, or in respect of a "treatment" has not yet been proposed.

Informed consent to a "course of treatment" or a "plan of treatment" does not replace the legal requirement of informed consent to all non-emergency medical treatment in Ontario. Instead, it supplements that legal requirement by providing an expedient and convenient way to give informed consent, in cases where there is a defined set of treatment decisions required at one time; where all of the information needed to make a decision can be provided at once; and where all of the other legal requirements of for informed consent are met.

SUBSTITUTE CONSENT

A HP who determines that a person is not capable to make a treatment decision must tell the person of their finding and of the consequences, in the manner required by the HP's governing body (e.g.: for a physician, the College of Physicians and Surgeons of Ontario). One consequence of this decision is that the allegedly "incapable" person may ask the Consent and Capacity Board, an administrative tribunal, to review the HP's finding of incapacity. Another is that the HP may seek substitute consent from a SDM. In order to give valid consent, a SDM must be "capable" with respect to the specific treatment; be at least 16-years old; be "available" by some means of communication within a reasonable length of time; and be willing to make the treatment decision.

The *HCCA* sets out a list or "hierarchy" of potential SDMs, as follows:

- A court-appointed guardian of the person with authority to act;
- An attorney for personal care, with authority to act;
- A representative appointed by the Consent and Capacity Board;
- A "spouse" (which includes common-law or same-sex spouses, but does not include spouses who are living separate and apart as a result of a breakdown in their relationship) or a "partner" (which is either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives);
- A parent or child;
- An access-only parent of a minor;
- A brother or sister; or
- Any other "relative" by blood, marriage or adoption.

Within these categories of decision-makers, anyone named in a higher category will have authority to make a substitute decision in preference to another person named in a lower category.

In the unfortunate case that an incapable person should have no one “available” (by phone or any other means of communication, within Ontario or anywhere else in the world) the Public Guardian and Trustee’s Treatment Decisions Unit would make a decision on the incapable person’s behalf. All SDMs within the same category have equal decision-making authority. All SDMs within a category do not need to positively make a decision. If one SDM within a category makes a decision, either by giving or refusing consent, the other possible SDMs within the same category may acquiesce to that decision.

However, if more than one SDM within the same category asserts decision-making authority and disagree, then neither decision prevails over the other. This is true of any dissent, even if it is only one out of a number of equal-ranking SDMs who has a differing decision. In that case, no decision is made. The Public Guardian and Trustee’s Treatment Decisions Unit may then mediate between the SDMs to reach a consensus. If a consensus is not reached, the PGT has legal authority to make the treatment decision in place of the disagreeing SDMs, and must give or refuse consent applying the principles of substitute decision-making.

PRINCIPLES OF GIVING OR REFUSING SUBSTITUTE CONSENT

In making a substitute decision for treatment, all SDMs must apply the following two principles:

1. Comply with the incapable person’s last capable wish that would apply in the circumstances, unless it is impossible to do so; or,
2. If there is no last capable wish, to act in the incapable person’s “best interests”.

In deciding what is in the incapable person’s “best Interests”, an SDM is required by the *HCCA* to take into consideration:

- The incapable person’s values and beliefs;
- The incapable person’s incapable wishes;
- The likely outcome of the treatment, including the effects of:
 - The treatment being given or withheld;
 - The expected benefits and risks of harm; and,
 - Less restrictive or less intrusive alternatives.

INFORMATION

Before giving or refusing consent, an SDM is also entitled to have all the information the incapable person would need to give or refuse “informed consent” on one’s own behalf. This information would be essential in determining the incapable person’s “best interests”, in the event a last capable wish were not known, not applicable to the circumstances or were impossible to follow.

EMERGENCY TREATMENT

The *HCCA* allows treatment to be administered without consent in very limited circumstances where an emergency exists, and other legal criteria are also present. In this context, an “emergency” means the person in respect of whom a treatment is proposed is apparently under “severe suffering”, or is at risk of “serious bodily harm” without the prompt administration of the treatment.

One of the limited circumstances where emergency treatment may be given without informed consent is where the person is mentally incapable of giving or refusing consent to treatment, and the delay required to obtain substitute consent would prolong the person’s suffering or put the person at risk of serious bodily harm. Here, it is important to know that “available” does not mean physically present. If an SDM can be contacted within a time frame that is reasonable in the circumstances, that person is “available” to make a decision.

However, even where an SDM might be technically be “available” (whether physically present or not), but the delay necessary to obtain informed consent would be harmful, the law authorizes that the emergency treatment can be administered without informed consent.

As well, emergency treatment can be administered to an apparently capable person without informed consent if there is an “emergency”, and there is also a language or communication barrier that cannot reasonably be overcome. The following criteria must be met:

- The delay that would be needed to find a practical means of enabling communication would prolong the person’s suffering; or
- The delay would put the person at risk serious bodily harm, as long as there is no reason to believe the person does not want treatment.

CONCLUSION

Before making any treatment decisions, whether they be regarding medications, surgery, dental work, or any other health-related issue, for yourself or an incapable person, ensure that you understand your rights so that you are fully informed of whatever treatment is being proposed.