

USING RESTRAINTS IN LONG-TERM CARE FACILITIES:

DOES THE CHARTER OF RIGHTS MEAN THAT LONG-TERM CARE FACILITIES MUST CHANGE THEIR PRACTICES?

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The use of restraints in a long-term care facility is one of the most controversial issues in connection with the care of the elderly. Most of us rebel at the thought that we might ourselves be tied in to a chair or bed, be locked in a room, or be sedated with medication to the point that we can no longer function as a human being. Yet these things happen to elderly residents in some facilities on a regular basis.

This is the first in a series of articles on the legal aspects of the use of restraints in long-term care facilities. It is not the intent of this series to examine the broad question of whether the use of restraints is ever morally justifiable. Here we examine the much narrower question of when it may not be legally justifiable to use restraints.

There are five main areas of law that have relevance to the use of restraints in facilities.

- 1. policies of the Ministry of Health and Long-Term Care that are binding on long-term care facilities (most are found in a publication known as the "Long-Term Care Facility Program Manual" ("Program Manual"));**
- 2. statutes and regulations of Ontario that govern the use of restraints in facilities (the *Charitable Institutions Act*, the *Nursing Homes Act*, the *Homes for the Aged and Rest Homes Act*, and the regulations thereunder);**
- 3. the common law, which includes among various civil wrongs the torts of battery, assault, and false imprisonment;**
- 4. the *Criminal Code of Canada*, which includes criminal offences such as assault and forcible confinement;**

5. the Canadian Constitution, which includes the *Canadian Charter of Rights and Freedoms* ("the Charter").

In Part I of this series we examine some implications of the Charter of Rights for the use of restraints.

PART I

The Charter of Rights and the Use of Restraints

The use of restraints in Ontario appears to be sanctioned by Ontario laws that apply to long-term care facilities. These laws generally give health care workers discretion to use restraints subject to certain restrictions. But does following the letter of Ontario law guarantee that the use of restraints is legal? I will argue that it does not because, among other things, Ontario laws do not provide sufficient procedural protections to residents of long-term care facilities. As a result, the use of restraints in long-term care facilities in Ontario is subject to challenge under the Canadian Charter of Rights and Freedoms.

What are "restraints"?

A restraint is anything intentionally used to limit the movement or behaviour of a resident and over which the resident has no control. Restraints may be one of three main types: physical restraints - devices that prevent or limit movement; environmental restraints - locked rooms or barriers which confine a resident to a specific space; and chemical restraints - drugs used to inhibit and control behaviour or movement. A resident is restrained if he or she cannot remove a physical device, leave a specific area, or refuse a chemical restraint.

The Four Starting Points for a Charter Challenge to the Use of Restraints

(1) **Section 7 of the Charter** states that everyone has the right to life, liberty, and security of the person and the right to not to be deprived of these except in accordance with the principles of fundamental justice. The use of a restraint interferes with the liberty of a person and it may also be argued that it violates the security of the person. The question of whether restraint use is in accordance with the principles of fundamental justice is a complex one, raising many of the same issues as are discussed in connection with section 10 violations (see below).

(2) **Section 9 of the Charter** says that everyone has the right not to be arbitrarily detained or imprisoned. The use of restraints is a form of detention, although it is not detention in the sense of arrest or imprisonment. A detention is "arbitrary" if there are no criteria which govern when a person can be detained and when not. If the use of a restraint is left to the absolute discretion of a nurse, doctor, or other health care worker, it can be argued that the use is arbitrary.

(3) **Section 10 of the Charter** states that everyone has the right on arrest or detention (a) to be informed promptly of the reasons, (b) to retain and instruct counsel without delay and to be informed of that right, and (c) to have the validity of the detention determined by a court and to be released if the detention is not lawful. Section 10(c) refers to the old common law remedy of *habeus corpus* which is the remedy allowing one to have a court decide whether a detention is valid. Section 10(c) simply captures what has been possible at common law for centuries.

The main issue here, as with section 9, is whether the use of restraints is a form of detention.

The Supreme Court of Canada in the *Therens* decision has said that "detention" refers to a restraint of liberty other than arrest in which a person may require legal assistance but might be prevented from obtaining it but for the Charter (*R. v. Therens* (1985), 18 D.L.R. (4th) 655 at 679). This description certainly fits the use of a restraint on a resident of a long-term care facility.

(4) **Section 12 of the Charter** states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. This section raises important and interesting questions regarding the use of restraints. Is the use of a restraint a form of treatment that is in and of itself cruel and unacceptable to contemporary standards of morality? If so, then this would appear to violate section 12.

A Closer Look at Section 10 of the Charter - Procedural Protections and the Use of Restraints

Section 10 is one of the most concrete sections in the Charter. It guarantees some very specific procedural rights. In connection with restraints, section 10 should guarantee the following:

- a. that a resident be informed promptly of the reasons for the use of a restraint;
- b. that a resident be immediately informed of the right to retain and instruct legal counsel;
- c. that a resident be permitted to retain and instruct legal counsel (this may mean that the facility will have to assist a resident in some cases to retain counsel); and
- d. that a resident has the right to go to a court to have the court decide whether the use of the restraint is valid, and the right to be released from restraint if the use of the restraint is not valid.

Section 10 of the Charter is very clear and concrete. The rights set out in it are not guaranteed under Ontario laws about the use of restraints in long-term care facilities. Ontario laws require facilities to only use certain kinds of restraints, to develop written policies about their use, and to only use them at the written order of a physician. Nursing homes are subject to very specific requirements as to how a restraint is used (there must be a reassessment every 12 hours, the person's position must be changed every hour, they should be used to give the least possible discomfort, etc.). While such restrictions and conditions are important and laudable, they are quite different from the procedural rights found in section 10 of the Charter.

The Residents' Bill of Rights, found in Ontario legislation, says that every resident being considered for restraints has the right to be fully informed about the procedures and the consequences of receiving or refusing restraints. Again, this is an important safeguard, but it is not the same as being informed of the reasons why the facility wants to use restraints. Neither does the Bill of Rights say that residents must be informed of the right to access legal counsel, or that they have the right to take the issue of the use of a restraint before a court.

The Program Manual produced by the Ministry of Health and Long-Term Care reinforces the requirements found in legislation mentioned above, prescribing how a restraint is to be used. However, the Program Manual also fails to refer to the rights guaranteed by section 10.

For these reasons, we can draw the conclusion that long-term care facilities in Ontario may follow the letter of Ontario laws regarding the use of restraints, but fall short of what is required by the supreme law of Ontario and of Canada, the Charter. It is of course possible for facilities to modify their practices in

using restraints to satisfy the requirements of section 10. This will require a shift in the way facilities think of the use of restraints. The practice of using restraints must be regarded as one in which the legal rights of residents are at stake. Their use is not just a matter of avoidance of liability or practical convenience.

Other Hurdles to Relying on the Charter to Challenge the Use of Restraints

To successfully challenge the use of a restraint based on the Charter, it is not enough to show that the use violates one of the basic rights guaranteed by the Charter. There are two other hurdles.

In the first place, it may be argued that the Charter does not govern the actions of long-term care facilities. The Charter is intended to place limits on the actions of government. A long-term care facility applying a restraint, it may be said, is not government action.

It is likely that this hurdle can be overcome. Decisions of the Supreme Court of Canada suggest that if an organization is acting as an agent of the government in providing services to the public, then the Charter applies (see especially the 1997 decision of *Eldridge v. British Columbia (Attorney-General) et al.* (1997), 151 D.L.R.(4th) 157 at 611). Long-term care facilities are heavily regulated and subject to inspections by government officials. The use of restraints is itself regulated. Facilities provide a service to the public at the request of the government. Our conclusion in light of these considerations is that the connection between government and the use of restraints is close enough and strong enough that the Charter applies to these situations.

The other main hurdle to surmount in a Charter challenge involves section 1 of the Charter. If a law or action is found to violate a section of the Charter, it may be possible to justify that law or action as a reasonable limit on a Charter guaranteed right. This is another way of saying that no Charter guaranteed right is absolute. For example, as a society we accept that it is a reasonable limit on the liberty of citizens that someone found guilty of a serious crime may be imprisoned, if convicted by a proper court with legally acceptable process. Section 1 of the Charter is the vehicle that allows arguments to be made to support the conclusion that certain limits on rights are appropriate.

The question is whether even if the use of a restraint violates section 7, 9, 10, or 12 of the Charter, can the violation be demonstrated to be reasonable in contemporary Canadian society? One of Canada's foremost constitutional scholars, Professor Peter Hogg, points out that out that Canadian courts have never concluded that a violation of basic procedural rights (such as are found in section 7, 10, and perhaps 9) can be saved by section 1. These rights, while perhaps not absolute, are so important to the operation of a civilized society, that it is very nearly impossible to imagine what would justify their violation. Commenting on section 12, which refers to cruel and unusual treatment or punishment, Professor Hogg remarks that this may be the only absolute right in the Charter. He finds it impossible to imagine a court saying that an action is cruel and unusual, but also finding it to be justifiable.

Section 1 of the Charter also requires that all limits on Charter guaranteed rights must be "prescribed by law". Because health care workers are given considerable discretion in Ontario laws and policies in deciding when to use restraints, it is likely to be impossible to justify a particular use of a restraint as being "prescribed by law".

In light of these considerations, it is unlikely that Canadian courts would find that the use of a restraint violates one of the Charter rights mentioned above, but also find that the use of the restraint is justifiable by reference to section 1 of the Charter.

