

## Consent and Long Term Care

After many months, the operative provisions of *Ontario's Long-Term Care Homes Act, 2007* (LTCHA) will soon come into force. As of July 1, 2010, the *Nursing Homes Act*, *Charitable Institutions Act* and *Homes for the Aged and Rest Homes Act* will be repealed and replaced by the LTCHA. Extensive regulations under the LTCHA have also been developed and will come into force at the same time as the Act.

Among other changes, the LTCHA significantly enhances the rules relating to consent, including in relation to admission to long term care, plans of care and restraint. Some provisions, including those relating to admission to a secure unit, will be enacted at a later date, and will require long term care homes to ensure that a number of procedural safeguards and processes are in place.

### Consent principles and legislation

The law in Ontario relating to consent has evolved over the years. It has continued to move toward a client-centred or consent-based approach that recognizes individual rights and autonomy. This is reflected in the LTCHA.

For example, it is now well established in Canadian law that treatment cannot be provided, except in emergency situations, without consent from the individual. In the early 1980s, a series of decisions from the Supreme Court of Canada found that lack of informed consent may constitute negligence or battery. Ensuring informed consent from the individual was recognized as part of the standard of care owed by the health professional to the client. These decisions evidenced a shift away from 'paternalistic' medicine (where the doctor determines what is in the patient's best interests) and toward the recognition that clients have a right to autonomy and self-determination.

#### by Kathryn Frelick

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Around the same time, a case involving the administration of a blood transfusion to a woman who was a Jehovah's Witness confirmed that an individual has the right to refuse treatment. An unconscious patient was taken to the emergency department of a hospital and required a blood transfusion to save her life. Prior to commencing treatment, the nursing staff found a card in the patient's purse indicating that she refused blood products. Despite this, the physician administered the blood products. Although this action saved her life, the patient successfully sued the physician for negligence.

Principles of informed consent are codified in the *Health Care Consent Act, 1996* (HCCA). This Act deals with consent to treatment, admission to long term care homes and personal assistance services. There is a general obligation to ensure that there is consent from a capable client or from an incapable client's substitute decision-maker (SDM) to proceed with treatment, admission to a long term care home or personal assistance services. Among other things, the HCCA sets out a legal test for capacity and rules for substitute decision-making, as well as opportunities to challenge such decisions.

Fundamentally, consent is best described as a process by which necessary information is provided to a capable individual or incapable person's SDM so as to enable that person to make an informed decision. The most critical part of obtaining informed consent is the discussion between the health professional and the client or the client's SDM. With respect to treatment, for example, the HCCA sets out the basic elements of consent (i.e., it must relate to the decision at hand, be informed and be given voluntarily and not obtained through fraud or misrepresentation) and the minimum information required for consent to be informed.

### Capacity and substitute decision-making

Under the HCCA, an individual is presumed to be capable unless there are reasonable grounds to believe otherwise. Capacity may fluctuate with time and also depends on the particular decision; that is, the person may be capable with respect to some decisions, but not others.

A capable person is entitled to make his or her own decisions. There is no provision for a capable person to delegate decision-making to another person. The capable person is required to give or refuse consent under the HCCA.

A person is capable with respect to treatment, admission to a long term care home or personal assistance service if he or she is able to understand the information that is relevant to the decision and able to appreciate the reasonably foreseeable consequences of a decision or lack thereof. The HCCA does not require actual appreciation of the consequences. Capable individuals are entitled to disregard clinical advice and to make unwise decisions. This can be particularly troubling for health care professionals given their duty to act in the best interests of the client and training to 'do no harm,' especially when the client's decision may be to his or her detriment.

The legislation sets out who may act on behalf of an incapable person and requirements in this regard. For example, the SDM must have capacity with respect to the particular decision. In contrast to the client, the SDM cannot simply ignore clinical advice and must make decisions on behalf of the incapable person in accordance with his or her prior capable wishes (if known) or best interests.

### Consent requirements

The LTCHA and corresponding regulations have extensive provisions relating to consent. The highlights include the following.

#### Admission to a long term care home

Although consent for admission to long term care has always been necessary under the HCCA, the LTCHA explicitly sets out the required elements for consent for admission. Consent must relate to the decision, be informed, be given voluntarily and not be obtained through fraud or misrepresentation. To be informed, a resident must receive the information that a reasonable person in same circumstances would require regarding:

- what the admission entails;
- expected advantages and disadvantages;
- alternatives to admission; and
- the likely consequences of not being admitted.

The resident is entitled to responses to all requests for additional information. There is an obligation on the person responsible for authorizing the admission to take reasonable steps to ensure that the resident or the resident's SDM has given consent.

#### Admission or transfer to a secure unit

The provisions under the LTCHA related to admission to a secure unit are not yet coming into force. It is not known when they may be enacted or, operationally, how they will work.

Nevertheless, it is worth noting that strict criteria under the legislation will need to be met before admission to a secure unit can be considered, based on a risk assessment of the resident and consent from the resident or SDM. An SDM may only consent if admission to a secure unit is essential to prevent serious bodily harm to the incapable resident or allows him or her greater freedom or enjoyment.

A resident who has been admitted to a secure unit under SDM consent will be entitled to notice setting out the reasons for admission, the right to appeal the decision to the Consent and Capacity Board and the right to counsel. The resident will also be entitled to rights advice and assistance with the process.

#### Restraints and personal assistance services devices

The LTCHA and regulations introduce detailed requirements relating to restraint and, if included in a resident's plan of care, consent.

If a personal assistance services device (PASD) (i.e., a device used to assist a resident with a routine activity of living) has the effect of limiting or inhibiting a resident's freedom of movement and the resident is not able, either physically or cognitively, to release himself or herself from the PASD, this must be included in the resident's plan of care. Again, there are consent requirements in this regard.

#### Regulated documents

The LTCHA has special provisions related to 'regulated documents,' which are defined under the regulations. Regulated documents cannot be presented for signature to a resident or SDM unless the document complies with all the requirements of the regulations and compliance has been certified by a lawyer.

Under the regulations, a document containing a consent or directive with respect to a treatment, course of treatment or plan of treatment is a regulated document. Thus, if a

long term care home has developed a level of care form or another type of advance directive to be signed by residents or SDMs that sets out their wishes with respect to treatment, as a required document it would need to meet all of the requirements of the regulations and be certified by a lawyer.

#### Fulfilling the requirements

The provisions of the LTCHA and regulations

are extensive, including in the area of consent. The LTCHA requires that long term care homes develop policies and processes with respect to a number of different areas, such as restraint. If not already in place, it is recommended that long term care homes take a systems approach to consent and ensure that appropriate policies and procedures are in place to support consent obligations generally, as well as in relation to specific areas such as restraint. **LTC**



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