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FINDING OF INCAPACITY TO CONSENT TO TREATMENT UPHELD

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In 2003, the patient, JC, applied to the Ontario Consent and Capacity Board (CCB) for a review of the finding by his treating physician, Dr. H, that he was incapable with respect to treatment for a mental disorder. JC had refused the form of treatment proposed by Dr. H, including the use of neuroleptic (anti-psychotic) medication. The CCB found that JC lacked capacity to consent to treatment. Almost two years later, the long saga of this decision finally ended, after the Supreme Court of Canada declined JC a final opportunity to appeal the Board's decision.

Decision of the Consent and Capacity Board

JC had been diagnosed with schizophrenia several years prior to his involvement with Dr. H. He had also been found not criminally responsible in respect of charges involving the uttering of threats and resisting arrest in early 2003 and had been ordered by the Ontario Review Board to be detained in hospital.

JC suffered from delusions involving, among other things, the belief that he had been physically abused by members of the community, including police, politicians, hospital staff and strangers. He believed that the assaults involved the use of laser beams and poison. He also experienced hallucinations of pain related to the injuries that he supposedly received. According to Dr. H, JC had virtually no insight into his illness and refused to accept even the possibility that he was suffering from a mental disorder.

The CCB considered section 4 of the *Health Care Consent Act, 1996* (HCCA) in making its determination that JC lacked capacity to consent to treatment with respect to his mental disorder. Section 4 provides that, "a person is capable with respect to a treatment … if the person is able to understand the information that is relevant to making a decision about the treatment … and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision." There is a presumption that the individual has capacity under the HCCA.

The CCB found that JC's refusal of treatment, where there was no alternative form of treatment and where his condition would not improve without the treatment, was based on his "fixed and unshakable belief that he [was] not mentally ill." Furthermore, while the evidence before the CCB suggested that JC was an intelligent man who appeared quite capable of understanding the information presented to him regarding the diagnosed illness and proposed treatment, the symptoms of his illness were found to be so profound that JC was unable to listen to any information regarding the proposed treatment and lacked insight to the extent that he was unable to appreciate the reasonably foreseeable consequences of the treatment decision.

Pursuit of Appeals

Between the fall of 2003 and the spring of 2005, JC made two appeals of the CCB's decision about his incapacity on the grounds that the CCB misapprehended the evidence concerning his ability to appreciate the reasonably foreseeable consequences of his refusal of treatment. At both the Superior Court of Justice and the Ontario Court of Appeal, the appeals were dismissed and the Board's decision was upheld. Leave to appeal to the Supreme Court of Canada was denied in the fall of 2005.

Implications

The HCCA places the onus of demonstrating that a patient lacks the requisite capacity to make a decision squarely on the shoulders of the health professional proposing treatment. The physician must prove his or her case on a balance of probability, otherwise known as the “civil standard”. The patient’s “best interests” are irrelevant to the determination of capacity. Knowing the requisite legal test is essential for health professionals who find themselves before the CCB.

While this case did not alter the legal standard, it reflects the CCB's readiness to find a lack of capacity where the evidence demonstrates there to be little or no insight by the patient into his or her mental disorder. This is true even in circumstances where, as was the case for JC, there is evidence to suggest that the patient is "intelligent" and "likely capable of understanding information" regarding treatment.

This case can be distinguished from *Starson v. Swayze*, the leading case regarding capacity under the HCCA (please see our *Communiqué* dated October 24, 2003). The *Starson* case concerned a brilliant physics professor who refused to consent to treatment with medication for his bipolar disorder. The CCB found that Starson did not have the requisite capacity, but a divided Supreme Court of Canada ultimately found that lack of capacity had not been demonstrated. Unlike JC, Starson did not totally lack insight into his condition, although he did not conceive of his condition as an illness. Accordingly, the Court found that Starson's decision not to take the medications based upon his perception that that they would "slow him down" was rational and did not reflect a lack of capacity, as he was able to appreciate the consequences of his decision. The Court found he had a right to refuse unwanted treatment.

As set out in *Starson*, there is a distinction between *inability* to appreciate and *failure* to appreciate the consequences of a treatment decision. In this case, JC had no insight into his condition, and as such, did not have the *ability* to apply the information to his situation. In *Starson*, the Court found that the patient did have the *ability* to understand and appreciate the consequences of his decision, albeit a questionable decision.

There is a significant line of case law in Ontario that recognizes this distinction which has been upheld by the Ontario Court of Appeal. The *Starson* decision was quite controversial in the health sector, with many health professionals being uncomfortable with the outcome. Subsequent cases, such as this one, have demonstrated that the application of *Starson* is very dependent on the facts. Health professionals will need to ensure that they carefully apply the tests to their particular.

ABOUT THE AUTHOR:

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