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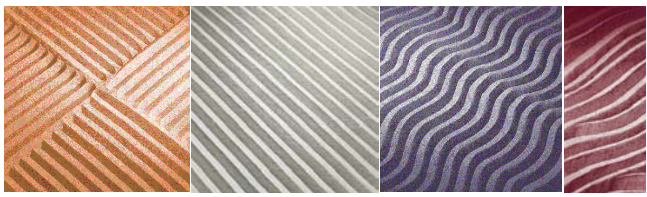

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CHALLENGES AND STRATEGIES FOR HANDLING FORM 1 PATIENTS IN NON-SCHEDULED FACILITIES PENDING TRANSFER

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Part I - Powers and Obligations While Form 1 Patients are in Non-Scheduled Facilities, Pending Transfer

This is the first in a series of *Communiqués* on the topic of challenges and strategies for handling Form 1 Patients in Non-Scheduled Facilities pending transfer. It is clear that despite efforts within the health industry, including several Coroner's Inquests, there are province-wide issues, common themes and challenges for dealing with these patient populations. This first installment will provide an overview of the powers and obligations of non-scheduled facilities housing a Form 1 patient, pending transfer.

A Form 1 is Only an Application for a Psychiatric Assessment

There is often confusion about the powers or obligations of a hospital that is not a Schedule 1 psychiatric facility ("non-scheduled facility") under the *Mental Health Act* ("MHA") once a Form 1 (Application by Physician for Psychiatric Assessment) has been signed. A Form 1 is sufficient authority for seven days from and including the day on which it is signed by a physician:

- to apprehend the person and take him/her to a ***psychiatric facility*** forthwith; and
- to detain, restrain and observe the person in a ***psychiatric facility*** for a maximum of 72 hours.

It is important to understand that the Form 1 is only an application for a psychiatric assessment, and that the assessment can only be done by a physician at a Schedule 1 psychiatric facility. Once the patient is "apprehended", the MHA requires the non-scheduled facility to transfer the patient "forthwith" to a Schedule 1 facility. The only "detention" contemplated and authorized in the legislation is in the Schedule 1 psychiatric facility.

The problem is that, while the legislation requires the person to be transferred "forthwith", that ideal is often not possible, usually for one of two reasons. Sometimes there are no beds available at the Schedule 1 facility. Other times, the patient needs medical treatment and the Schedule 1 facility will not "medically clear" the patient and accept the transfer until the medical issues have been addressed.

In that interim period, non-scheduled facilities need to be aware of their obligations, including in relation to

(a) consent to treatment; and

(b) the protection of patients, staff, and the public.

Consent to Treatment

Sometimes transfer is delayed because the patient requires medical treatment. Filling out a Form 1 does not confer any power or authority to treat a person as an "involuntary" patient. Consent to treatment must still be obtained pursuant to the *Health Care Consent Act, 1996* ("HCCA") as required for any patient, whether involuntary or not. In other words, consent must be obtained from the capable patient or incapable person's substitute decision-maker or pursuant to the emergency provisions under the HCCA.

Power and Responsibility for Safety (Restraint)

It is also important to understand that a Form 1 does not give a non-scheduled facility any power to detain or restrain a patient without consent. Rather, non-scheduled facilities must rely on legislation and the "common law" in relation to restraint.

The common law refers to law that has developed through decided cases. While common law is no less legitimate than statutory law and still has the force of law, because the tests are not spelled out in legislation, powers can be less clear-cut.

A non-scheduled facility can take some guidance as to the scope of its common law powers from section 7 of the HCCA, which states that the Act, "does not affect the common law duty of a caregiver to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or to others". A public hospital is also subject to the *Patient Restraints Minimization Act, 2001* (PRMA) which recognizes these same principles, including the need for emergency restraint.

A hospital is accountable and responsible to protect patients, visitors and staff and therefore must take reasonable steps in the circumstances to protect patients. A court would determine the acceptable level of restraint and supervision in a particular situation based on standards in the industry.

In making decisions regarding supervision and restraint, a non-scheduled facility needs to balance its duty to provide for the safety and well-being of all patients (including the Form 1 patient), visitors and staff against the recognition of an individual's rights anytime a person is restrained without consent.

In our view, a non-scheduled facility would likely be in a defensible position if a health care provided determines restraint is immediately necessary where circumstances warrant, particularly if that patient is the subject of a Form 1 and the non-scheduled facility is taking reasonable steps to transfer him or her to a Schedule 1 psychiatric facility. The restraint should not be ordered for an indefinite period of time, and as in all instances, use of restraint must be continually assessed [subject to principles of least restraint].

On the other hand, if a patient who is the subject of a Form 1 self-harms or harms others under the watch of a non-scheduled facility, it is our view that a court is more likely to be critical of any failure to restrain.

Non-scheduled facilities should document both subjective and objective elements of belief to support a decision that a patient poses a risk, either to him/herself or to others. That is, the decision-maker should believe that the patient poses a risk (the "subjective" element) and that belief should be reasonable (the "objective" element).

While the Form 1 does not give the power to restrain, the language of the criteria can be used to assist in justifying and documenting the reasons for the restraint. Also keep in mind the language of the HCCA and PRMA which use wording such as "immediate action"; "necessary" and "serious bodily harm". Finally, ensure that the steps taken to restrain and protect reflect the level of risk documented.

ABOUT THE AUTHOR

Valerie Wise is an advocacy lawyer practising in our Health Industry Practice Group, focusing on civil and commercial litigation, College matters and Inquests.

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