COFFEE TALK: A HEALTH INDUSTRY SEMINAR SERIES

Consent, Capacity and Substitute Decision Making: A Primer

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Overview

1. Consent and Capacity
2. Substitute Decision Making
3. Common Challenges and Practical Solutions
4. Summary
What is “Consent”? 

- Recognizes the right and authority of an individual to make own decisions (individual self-determination) 
- Generally - to give assent or approval to something proposed by a third party 
- May be subject to certain requirements in order to be legally valid 
- Lack of consent may be legally actionable
What is “Capacity”?

• Individual’s mental ability to make a certain decision

• Capacity is issue specific

• Capacity can fluctuate (a person can be capable at certain times, but not capable at others)

• May be specific legal requirements
Rules for Consent and Capacity

• Common law principles (court-made)
• May be set out in legislation
• Statutory rules may specify:
  ➢ Requirements for valid consent
  ➢ Applicable “test” for capacity
  ➢ Who determines capacity
  ➢ If a Substitute Decision-Maker (“SDM”) can make decisions on an individual’s behalf, and if so:
    • Who can act as SDM
    • Obligations of SDM when making the decision(s)
Rules for Consent and Capacity

• Generally speaking:
  ➢ An individual is presumed capable to make his/her own decisions and to give or refuse consent
  ➢ A capable individual is entitled to disregard advice and/or make an unwise decision
• May be exceptions in certain situations, e.g. minimum age requirement
• Specific (statutory) rules for certain types of decisions
Substitute Decisions Act (SDA)

• Establishes legal framework for:

  ➢ Determining when a person has capacity to make decisions about his/her:
    • **Personal care** (i.e. health care, nutrition, shelter, clothing, hygiene, safety)
    • **Property** (i.e. real property, income, anything financial)

  ➢ Requirements and processes for:
    • Appointment of Guardian (Statutory or Court)
    • Granting Power of Attorney (POA) (by capable individual)
      • Must meet certain legal requirements to be valid ➔ e.g., in writing, signed, witnessed)

  ➢ Powers and duties of Attorneys and Guardians
Health Care Consent Act (HCCA)

• Framework for consent, capacity and substitute decision-making for health care

• Applies to:
  ➢ Treatment – where proposed by a health practitioner
  ➢ Admission to a long-term care home
  ➢ Personal assistance services in a long-term care home
Health Care Consent Act (HCCA)

• Imposes obligations on (as defined by HCCA):
  ➢ **Health practitioner** who proposes a treatment
  ➢ **Evaluator** for long-term care admission and personal assistance services
  ➢ **Substitute decision-maker** re: giving or refusing consent for decisions under the Act
• Section 49 of SDA ties to HCCA
• Sets out a hierarchy of substitute decision-makers
• Sets out process for making application to the CCB
Consent to Treatment

• “Treatment” broadly defined
  - Anything done for a health-related purpose (with some exceptions, e.g. taking of health history, communication of diagnosis)
  - Includes a “plan of treatment”

• Consent must:
  - Relate to the treatment
  - Be informed
  - Be given voluntarily
  - Not be obtained through misrepresentation or fraud
Informed Consent

• Client/SDM must receive the information a reasonable person would require in order to make a decision, including:
  ➢ Nature of the treatment
  ➢ Expected benefits
  ➢ Material risks and side effects
  ➢ Alternative course(s) of action
  ➢ Likely consequences of having/not having the treatment

• Answers to any questions
Consent to Treatment

• Authority to act without consent limited to certain “emergency” situations (S. 25(1) HCCA)
  ➢ there is an emergency if the person for whom the treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm

• Protection from liability (S. 29(4) HCCA)
  ➢ A health practitioner who, in good faith, administers a treatment to a person under section 25 or 27 is not liable for administering the treatment without consent
Test for Capacity

• A person is capable with respect to treatment decision if s/he is:
  - **Able to understand** the information that is relevant to decision, and
  - **Able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision

• Capacity is presumed

• Capacity depends on decision and time

• No minimum age
Determination of Incapacity

• If determined client/patient is incapable, must notify of finding and consequences:
  ➢ Right of appeal to CCB
  ➢ No treatment pending appeal
  ➢ Emergency exception

• HCCA establishes a hierarchy for substitute decision-makers (SDMs)
• SDMs of equal rank → joint decision-makers
Who is SDM?

• HCCA → individual(s) who rank highest in hierarchy and meet the following criteria:
  1. Capable with respect to the decision;
  2. > 16 years old (unless parent);
  3. Not prohibited by court order/separation agreement from having access;
  4. Available; and
  5. Willing to act as SDM
Hierarchy of SDMs

1. Guardian of the person
2. Attorney for personal care
3. Board appointed representative
4. Spouse or Partner
5. Child, “Custodial” Parent, CAS or other person lawfully entitled to provide consent in place of parent
6. “Access” Parent
7. Brother or Sister
8. Any Other Relative (blood, marriage or adoption)

• SDM of Last Resort → PGT
Substitute Decision-Maker’s Obligations

• SDM must follow any last known wishes expressed when capable
• If no applicable wishes expressed, make decisions in best interests
• Best interests considerations:
  ➢ Values and beliefs;
  ➢ Wishes; and
  ➢ Whether the treatment is likely to,
    i. improve incapable person’s condition or well-being,
    ii. prevent incapable person’s condition from deteriorating;
    iii. reduce the extent to which, or the rate at which, the incapable person’s condition is likely to deteriorate
Substitute Decision-Maker’s Obligations

- Whether the incapable person’s condition or well-being is likely to improve, remain the same or deteriorate without the treatment.

- Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.

- Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed
Common Challenges/Practical Solutions

SDM not acting in accordance with the principles set out in s. 21 of the HCCA

• Form G Application to CCB
• Parties to the application include the health practitioner, the incapable person, the SDM and any other person whom the board specifies
• Hearing to begin within 7 days after the board receives the application
• Board shall render a decision within one day after the hearing ends
Common Challenges/Practical Solutions

Two or more SDMs of equal ranking

• All entitled to act as SDM
  ➢ May decide amongst themselves to allow one to act
  ➢ Application to CCB for appointment as representative (s. 33)
  ➢ If unable to agree → PGT
Common Challenges/Practical Solutions

Neglect/Suspected Abuse

• No SDM in the hierarchy willing and available to act
• Duty to investigate:
  ▶ any allegation that a person is incapable of personal care and that serious adverse effects are occurring or may occur as a result
  ▶ any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result.
Common Challenges/Practical Solutions

Validity of POA document

• POA is valid when it meets the following criteria:
  ➢ Attorney is >18 years old
  ➢ Document is signed by grantor
  ➢ Executed in presence of two witnesses who meet criteria in SDA and have also signed document

• Other considerations
Summary

• Rules re: consent and capacity codified in various statutes and common law
• Consider elements required for valid consent in each circumstance
• Capacity is issue-specific; an individual may be capable in respect of some decisions but not others
• SDMs must be identified in accordance with the hierarchy
• Document, document, document!
Questions?

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