NO AGE OF CONSENT IN ONTARIO

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The health of citizens is under provincial jurisdiction in Canada, and most health-related legislation varies from province to province. In Ontario, the Health Care Consent Act, S.O. 1996, c.2 ("HCCA"), see HTTP://192.75.156.68/DBLAWS/STATUTES/ENGLISH/96H02_E.HTM, consolidated the principles of consent to ensure that they are commonly applied to all settings. However, nothing in the act was intended to change the existing common law regarding research. This act came into force on March 28, 1996. With this act, the term "mentally capable" has replaced the term "competent."

In the HCCA, there is no longer a minimum "age of consent". People under 18 years of age should be assessed as to their capacity to make the decision in the same way as an adult. For example, a 13 year old may be capable to give consent to receive stitches to the hand, but may not be capable to give consent to undergo brain surgery. See section 4(2) of the HCCA. The complexity of the research or treatment, the severity of the risks, the maturity of the child, and other factors must be weighed and considered.

However, it is interesting to note, that there may still be a presumption that at the age of 16, the teenager may be treated like an adult, when one reads section 1(c)(iii), which states that one of the purposes of the act is to:

(c) To enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services by,

. . . .

(iii) Requiring that wishes with respect to treatment, admission to a care facility or personal assistance services, expressed by persons while capable and after attaining 16 years of age, be adhered to.

Section 4(3) goes on to discuss how capacity is determined. A physician may presume that a patient is capable of making decisions with respect to treatment or admission to a facility UNLESS there are reasonable grounds to believe the patient is incapable. The following are some examples of situations where one may question the patient's capacity to give consent, which would then necessitate a capacity assessment:

(i) The person shows signs of confused or delusional thinking,
(ii) The person is experiencing severe pain, acute fear or anxiety,
(iii) The person's judgment is impaired by drugs or alcohol,
(iv) A patient is capable to give consent to treatment if the person is,
(v) Able to UNDERSTAND the information that is relevant to making a decision about treatment, AND;
(vi) Able to APPRECIATE the reasonably foreseeable consequences of making or not making a decision.

See section 4(1) of the HCCA. Thus, an assessment should be made at the beginning of the treatment or research, and periodically thereafter, to ensure that the patient is continuing to exhibit the capacity to give consent to that treatment or research. It is argued that since research is not necessary

(or beneficial) treatment, that there is a higher standard of care required in explaining the research, than would be required if it was necessary or (beneficial) treatment.

Thus, in Ontario, when a child is considered capable to provide consent to treatment or to participate in research, that child should also have the right to decide to whom his private medical information is communicated. If a child is assessed regarding capacity (i.e. able to understand the information about the proposed treatment, and appreciate all the consequences of the decision) and found NOT capable to give consent, then it is often prudent to involve the child in the decision making process. Nothing in the HCCA requires that the child give assent.

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