

Case Summaries: Advance Directives, Do-Not-Resuscitate Orders and Withholding and Withdrawal of Potentially Life-sustaining Treatment Cases

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Advance Directives

Fleming v. Reid

Reid and Gallagher were involuntary psychiatric patients suffering from schizophrenia. Fleming, their doctor, found them to be incompetent to consent to psychiatric treatment and wished to treat them with neuroleptic drugs. Both Reid and Gallagher had previous experience with these kinds of drugs and, while competent, had refused to take them despite their doctor's view that taking them was in their best interests. The Official Guardian was appointed as their substitute decision-maker. The *Mental Health Act* required substitute decision-makers to make treatment decisions in accordance with the prior capable wishes of the presently incapable person. As such, the Official Guardian refused to consent to the use of neuroleptic drugs. Fleming appealed to the review board and the board authorized treatment on the basis that neuroleptic drugs were in Reid and Gallagher's best interests.

Under the *Act*, substitute decision-makers had to take into account the prior capable wishes of patients but the review board did not have to consider the prior capable wishes of patients when they were determining what was in the patient's best interest. The *Act* also permitted treating incompetent voluntary and incompetent involuntary patients differently. Voluntary patients could not be given treatments that were contrary to their previously expressed wishes, but the previously expressed wishes of involuntary patients could be overridden.

The decision of the board was upheld by the District Court and the official appointed guardian of Reid and Gallagher appealed. The guardian argued that provisions of the *Mental Health Act* violated Reid and Gallagher's s. 7 *Charter* rights to security of the person. In particular the guardian challenged the power granted to the review board to compel involuntary incompetent patients to undergo treatment despite their previous expressed wishes when those wishes required the substitute decision-maker to refuse treatment. They argued that under the statutory scheme of the *Act*, the previously expressed wishes of an involuntary patient were rendered meaningless when the substitute decision-maker's decision was appealed to the review board. The Court of Appeal agreed that those sections of the *Mental Health Act* were unconstitutional and stated:

The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlines the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from the refusal of medical treatment does not vitiate the right of medical self-determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment—any treatment—is to be administered.

Citation for case: *Fleming v. Reid*, [1991] 4 Ontario Reports (3d) 74 (Ontario Court of Appeal)

Malette v. Shulman

Mrs. Malette was a Jehovah's Witness. She carried a card that stated that she would refuse to accept any form of blood products in the event of an accident. She was brought into the emergency department after a car accident. She was semi-conscious and in serious condition. Staff discovered a card that clearly expressed that she wanted to refuse blood products. Mrs. Mallette's daughter subsequently confirmed her mother's wishes. Mrs. Malette's condition continued to deteriorate and the physician responsible for her care decided to administer blood products, as he judged that if he did not take this step she would die. He was aware of the card and her refusal of blood. The physician was unsure that the card represented Mrs. Mallette's current wishes, that it applied to life threatening circumstances, and that she was fully informed of the risks at the time she signed the card. Given these doubts the physician considered himself obliged to provide the best treatment possible.

Mrs. Malette survived and sued the physician and the hospital for damages. The judge stated:

I, therefore find that the card is a written declaration of a valid position which the card carrier may legitimately take in imposing a written restriction on her contract with the doctor.... The right to refuse treatment is an inherent component of the supremacy of the patient's right over his own body. That right to refuse treatment is not premised on an understanding of the risks of refusal. However sacred life may be, fair social comment admits that certain aspects of life are properly held to be more important than life itself.

The judge concluded that when Dr. Shulman provided treatment despite Mrs. Mallette's express refusal of that treatment, he committed battery and should pay damages.

Citation for case: *Malette v. Shulman* (1987), 47 Dominion Law Reports (4th) 18 (Ontario High Court of Justice)

Do-Not-Resuscitate Orders

Child and Family Services of Central Manitoba v. Lavallee et al.

As a result of shaken baby-syndrome, an eleven-month-old infant was in a persistent vegetative state. While it had not been determined who had inflicted the injuries, Child and Family Services apprehended the child at the age of three months. After determining that the child was in a persistent vegetative state and would suffer from repeated serious illnesses, the doctor recommended that a “Do Not Resuscitate” (DNR) order be placed on the child’s chart. Child and Family Services agreed with the recommendation but the parents refused to consent to the order. Child and Family Services applied to the court to allow the DNR order to be placed on the chart despite the parent’s refusal. The Court concluded that there was no legal obligation on health care practitioners to take heroic measures to maintain the life of a patient in a persistent vegetative state. While the court did encourage physicians to take into account the wishes of patients’ families or guardians, the court concluded that neither consent nor a court order were required to place a DNR order on the chart.

Citation for case: *Child & Family Services of Central Manitoba v. Lavallee et al.* (1997), 154 Dominion Law Reports (4th) 409 (Manitoba Court of Appeal)

URL: <http://www.canlii.org/mb/cas/mzca/1997/1997mbca26.html>

Sawatzky v. Riverview Health Centre Inc.

Mr. Sawatzky was a 79-year-old man with Parkinson's disease, chronic aspiration pneumonia, and dementia. He had also experienced multiple strokes. He was hospitalized on a long-term basis. After a number of months, his physician placed a "Do Not Resuscitate" (DNR) order on Mr. Sawatzky's chart without advising Mrs. Sawatzky, Mr. Sawatzky's substitute decision-maker. Mrs. Sawatzky had previously refused such an order. Mrs. Sawatzky applied to the court for an injunction to remove the DNR order from her husband's chart.

At a preliminary hearing the judge issued a temporary injunction that required the facility to initiate resuscitation if Mr. Sawatzky's condition made it necessary. The judge stated:

Fundamental questions [are raised] relating to a patient's right to medical treatment and a doctor's obligation to provide that treatment. Those questions raise serious legal, moral, ethical, medical and practical issues on which it is unlikely to ever be complete agreement. I think that many Canadians have been surprised to learn that a doctor can make a "do not resuscitate" order without the consent of a patient or his or her family, yet that appears to be the current state of the law in Canada, Britain and the United States.

The judge sent the parties away to get more information and try to work it out. Mr. Sawatzky was subsequently transferred to another health care facility. Hence, the case never came back for a ruling on the law in general, and the permanent injunction in particular.

Citation for case: *Sawatzky v. Riverview Health Centre Inc.* (1998), 167 Dominion Law Reports (4th) 359 (Manitoba Court of Queen's Bench)

Withholding and Withdrawal of Potentially Life-Sustaining Treatment

Adults

British Columbia (Attorney General) v. Astaforoff

Astaforoff was a 68-year-old Doukhbor woman who was incarcerated for arson. She went on a hunger strike and was near death at the time the matter was heard before the Court. It was clear that Astaforoff was of sound mind when she refused nutrition and, further, she directed that, if she lost consciousness or became incapable of rational decision-making, she should not receive any medical attention. The Attorney General of Canada applied for an order to compel the province to force-feed Astaforoff to prevent her from dying. The Attorney General of British Columbia wanted to be released from any obligation to feed Astaforoff against her wishes. Health practitioners expressed their reluctance to treat the woman against her will as that would violate their code of ethics. The law imposes a legal duty to provide the necessities of life and the province argued that it had, in fact, provided the necessities of life but that Astaforoff refused them. The Attorney General for Canada argued that the necessities of life should be forced on her. The Court agreed that it would be wrong to force the necessities of life on someone against their will as the potential for abuse was great.

The Court further acknowledged that Astaforoff was trying to commit suicide and while it is a crime to counsel or assist someone in committing suicide and, while there was a duty to use reasonable care in preventing a suicide, it was not a crime to fail to prevent a suicide. Thus, the Court decided that there was not a positive obligation on the province to force-feed Astaforoff to prevent her death.

Citation for case: *British Columbia (Attorney General) v. Astaforoff*, [1983] 6 Western Weekly Reports 322 (British Columbia Supreme Court)

Ciarlariello v. Schacter

Mrs. Ciarlariello's physician ordered a cerebral angiogram after she suffered what was thought to be a subarachnoid hemorrhage from a ruptured cerebral aneurysm. The procedure and risks were explained to Ciarlariello and her family and she consented to the procedure. The angiogram did not show an aneurysm although it did point to an area suspected of containing an aneurysm. After experiencing another bout of symptoms indicative of an aneurysm, Ciarlariello agreed to undergo a second cerebral angiogram. Prior to beginning the procedure, the doctor again explained to Ciarlariello what was involved and what risks the procedure carried. At some point during the procedure Ciarlariello began to hyperventilate and she told the doctors to stop. The procedure was halted and Ciarlariello calmed down. The doctor told Ciarlariello that they needed only about 5 more minutes to complete the procedure and asked her if she wished to complete the test. Ciarlariello allowed the test to continue and, after the final injection of dye was injected, Ciarlariello suffered a severe reaction to the dye and was left a quadriplegic. Ciarlariello sued in battery claiming that she had withdrawn her consent and, in the alternative, sued in negligence claiming that the doctors had a duty to disclose the risks after she had withdrawn her consent.

The various levels of court did not find any grounds to support an action in battery as Ciarlariello had consented to the continuation of the procedure. They did, however, acknowledge that a patient does have the right to withdraw consent after a procedure has begun. Once consent has been withdrawn, physicians are obliged to stop the treatment although they have to ensure that the procedure is being stopped at a stage that would not jeopardize patient safety.

An individual's right to determine what medical procedures will be accepted must include the right to stop a procedure. [T]he patient's right to bodily integrity provides the basis for the withdrawal of consent to a medical procedure even while it is underway. Thus, if it is found that the consent is effectively withdrawn during the course of the proceeding then it must be terminated. This must be the result except in those circumstances where the medical evidence suggests that to terminate the process would be either life threatening or pose immediate and serious problems to the health of the patient.

The Court also concluded that the doctors did not have to again explain the risks to Ciarlariello after she had withdrawn her consent as there was no material change in the circumstances. That is, nothing had changed from what she had been informed of on the previous occasions to warrant that she be informed again of the risks. The corollary is, of course, that health care practitioners ought to inform the patient of any material changes so that their consent may be fully informed:

Looking at it objectively, a patient would want to know whether there had been any significant change in the risks involved or in the need for the continuation of this process which had become apparent during the course of the procedure. In addition, the patient will want to know if there has been a material change in

circumstances which could alter the patient's assessment of the costs or benefits of continuing the procedure....Changes may arise during the course of the procedure which are not at all relevant to the issue of consent. Yet, the critical question will always be whether the patient would want to have the information pertaining to those changes in order to decide whether to continue.

Citation for case: *Ciarlariello v. Schacter*, [1993] 2 Supreme Court Report 119 (Supreme Court of Canada)

Conway v. Jacques (2002), 214 Dominion Law Reports (4th) 67 (Ontario Court of Appeal)

Paul Conway was a patient in a psychiatric hospital who was found to be incapable of consenting to treatment. His mother was appointed his substitute decision-maker under the *Health Care Consent Act*. Conway had, while competent, refused to consent to being treated with anti-psychotic drugs. His psychiatrist, Dr. Jacques, wished to treat Conway with a new medication which, the doctor claimed, was more effective than previous medication and had fewer unpleasant side effects. Jacques requested that Conway's mother consent to the use of the drugs. In keeping with Conway's prior competent wishes, Conway's mother refused to give her consent. Jacques appealed to the Consent and Capacity Board to determine whether Mrs. Conway had properly met her obligations as a substitute decision-maker. The Board found that the wish not to be treated with anti-psychotic drugs was no longer applicable to the current circumstances. This was so for two reasons. First, the Board accepted that the kind of drugs that Jacques wanted to use were substantially different from those that Conway had refused in the past. Secondly, the Board accepted that Conway's condition had worsened and that effective treatment required anti-psychotic medications. Thus, it was in Conway's best interests to receive treatment.

At the first level of appeal, the Superior Court found that the Board's decision was not reasonable. The Court did agree that a prior capable wish was not determinative particularly in cases where radical changes in treatment options change the circumstances under which the prior decision was made. Nevertheless, the Court found that the Board had not considered whether Conway would have consented to the use of the newer anti-psychotic medications and concluded, based on his past refusals, that he would not have consented. Thus, the Court overturned the Board's decision to treat Conway.

The Ontario Court of Appeal restored the finding of the Board noting that, since *Fleming v. Reid*, both the substitute decision-maker and the Board have to attend to the prior competent wishes of incapable persons in determining what is in their best interests. Yet prior wishes are not to be determinative as they are but one component to be considered in assessing best interests and, further, circumstances may have changed so as to render the prior capable wish outdated. In this case, Conway's worsening condition, in addition, to improvements in anti-psychotic medications, meant that his prior capable wish was no longer applicable to the circumstances. The Court also stated that trying to assess whether Conway would consent to the use of the drugs if he were capable was not the test the Board was expected to meet under the legislation.

Citation for case: *Conway v. Jacques* (2002), 214 Dominion Law Reports (4th) 67 (Ontario Court of Appeal)

M.(A.) v. Benes, 1999 [unreported]

A.T.M. was a schizophrenic who was involuntarily hospitalized. Her mother, A.M., was deemed A.T.M.'s substitute decision-maker. A.M. refused to consent to electro-convulsive therapy and anti-psychotic medication recommended by Dr. Benes and so Benes applied to the Consent and Capacity Board for a review of A.M.'s refusal. The Board concluded that A.M. had not complied with the provisions of the *Health Care Consent Act* which set out the principles that substitute decision-makers must follow in granting or withholding consent for an incapable person and, further, stated that if A.M. did not consent to the treatment Benes recommended, she would be removed as substitute decision-maker. A.M. appealed the Board decision claiming that the power granted under the *Act* empowering the Board to insist that substitute decision-makers consent to treatment or be removed contravened the security of the person provisions of the *Charter*. A.M. further argued that substitute decision-makers, in situations where the incapable person had not expressed a prior capable wish with respect to treatment, ought to be accorded some deference if their decisions are reasonable and made in good faith.

At the Superior Court, the judge found that there had been no *Charter* violation in not deferring to the substitute decision-maker. The court did, however, find that the *Act* violated the *Charter* by creating a possibility that some substitute decision-makers might not be aware of their duty to respect the prior capable wishes of the incapable person when making treatment decisions. That is, the *Act* did not have a clear and strong notice provision which would ensure that substitute decision-makers would be informed of their rights and obligations under the *Act*, of the criteria by which the Board would be making its decisions, and, finally, of the Board's ability to substitute its own decisions for those of the substitute decision-maker. All parties appealed this decision.

The Ontario Court of Appeal did not find there to be a *Charter* violation noting that the *Act* provided that, if a prior competent wish was known, then both the substitute decision-maker and the Board were obliged to accord it respect. When there is no known prior wish, however, the *Act* requires that both the substitute decision-maker and the Board use a "best-interests" analysis to make treatment decision and, thus, the *Act* provides sufficient protection to ensure the security of the incapable person. The court was not persuaded that a reasonable and good faith decision was necessarily deserving of deference, as reasonableness and good faith would not adequately protect the interests of the incapable person. This was so for three reasons. First, who acts as the substitute decision-maker is often determined by operation of statute rather than by choice of the incapable person while capable; as such, the substitute-decision makers will not always know what treatments the incapable person would want any better than the Board. Second, the substitute decision-maker will not likely have sufficient knowledge about medicine and this is a key element in determining what is in the best interests of the incapable person. The Board, having heard from both the substitute decision-maker and the health practitioner, will be in a better position to make the best interests determination. Third, under the *Act*, there are no procedural guidelines that the substitute decision-maker must follow whereas the Board does have procedural guidelines thus ensuring that the requirements of natural justice are met.

In addition to how decisions are to be made by others when a person is not capable of making his or her own treatment decisions, the Court of Appeal considered a number of other procedural issues. With respect to the lack of notice issue found to contravene the *Charter* at the Superior Court, the Court of Appeal found that notice provision of the *Act* did place a statutory obligation on health practitioners to ensure that substitute decision-makers understood the criteria they were to use to make their treatment decisions and that they understood the criteria by which those decisions would be assessed. Moreover, if a decision made by the substitute decision-maker is appealed to the Board, the Board is required under the *Statutory Powers Procedure Act* to inform the substitute decision-maker of the purpose of the hearing and to provide reasonable information regarding any allegation of improper conduct on their part. Thus, the court found that there were sufficient procedural safeguards protecting the rights of the incapable person and so the *Act* was constitutional.

Citation for case: *M.(A.) v. Benes*, 1999 [unreported]

URL: <http://www.canlii.org/on/cas/onca/1999/1999onca677.html>

Nancy B. v. Hôtel-Dieu de Québec et al. (1992), 86 Dominion Law Reports (4th) 385 (Quebec Superior Court)

Nancy B., a 25 year old woman, suffered from Guillain-Barré syndrome which left her unable to breath without a respirator. After she was told that her condition was irreversible, Nancy B. requested that her ventilator be withdrawn. So long as she remained on the respirator, Nancy B. was in no imminent danger of dying but it was virtually certain that she would die if the respirator was withdrawn, as her respiratory muscles had atrophied due to the disease. It was clear that under the *Civil Code of Quebec*, Nancy B. had the right to refuse treatment. Because of paralysis, Nancy B. could not remove the respirator herself. She applied to the court for an injunction against the doctor and the hospital to make them stop the use of the respirator.

The concern was whether, in undertaking the positive act of removing the ventilator, healthcare providers would be caught under the *Criminal Code*. The *Criminal Code* requires that everyone who is under a legal duty to act (as healthcare providers are) must act when it is the case that not acting would be dangerous to life. The *Code* also requires that physicians and surgeons must act with reasonable skill and care in providing treatment. Moreover, the *Code* also holds that it is criminal negligence to do an act that shows disregard for the lives and safety of others. So the concern was that physicians might be found criminally negligent or in violation of some other provision of the *Code* if they removed the ventilator since doing so was certain to cause Nancy B's death. The *Code* also has more general provisions penalizing assisting suicide that caused concern. Would the physicians be violating the assisted suicide provision of the *Code* if they turned off the ventilator?

The Court concluded that respiratory support (from the ventilator) constituted treatment and, thus, was something that Nancy B. could refuse even if her refusal meant her death. The Court also found that a physician acting on Nancy B's direction would not run afoul of the provisions dealing with assisting suicide:

Sections 222 and 241 of the *Criminal Code* deal with different forms of homicide. What I have just reviewed is sufficient to conclude that the person who will have to stop Nancy B.'s respiratory support treatment in order to allow nature to take its course, will not in any manner commit the crimes prohibited by these sections. The same goes for s. 241, aiding suicide.

I would add however that homicide and suicide are not natural deaths, whereas in the present case, if the plaintiff's death takes place after respiratory treatment is stopped at her request, it would be the result of nature taking its course.

The Court granted Nancy B.'s injunction to stop the treatment and requested that the hospital provide her physician with the necessary assistance in carrying out her request.

Citation for case: *Nancy B. v. Hôtel-Dieu de Québec et al.* (1992), 86 Dominion Law Reports (4th) 385 (Quebec Superior Court)

Re London Health Sciences Centre et al v. K.(R.) (Litigation Guardian of)

R.K. was an 83-year-old male who was in a persistent vegetative state. He required high level hospital care, including mechanical ventilation and artificial nutrition and hydration in order to continue to live. His wife and son initially refused a suggestion that life support be removed but subsequently gave consent.

The hospital and the physicians involved in his care sought a declaration from the court that they would not face criminal charges or civil proceedings if they removed life support systems from him. The judge agreed that removal of life support was in R.K.'s best interest. However, the judge said that he could not declare that they could not face criminal or civil charges in the future. To do so would be to improperly interfere with the Attorney-General's discretion. Also given that the family had consented and all medical staff involved with or consulted on the decision agreed that this was in the patient's best interests, a declaration did not seem to be necessary to protect the physician and the hospital.

Citation for case: *Re London Health Sciences Centre et al v. K.(R.) (Litigation Guardian of)* (1997), Dominion Law Reports 724 (Ontario General Division Court)

Starson v. Swayze

Starson was something of a genius in physics; he also suffered from bipolar disorder which had led to periods of institutionalization. In 1998, Starson was found not criminally responsible for uttering death threats. The Ontario Review Board ordered that he be held in a provincial mental health facility. Swayze and Posner were psychiatrists who wished to treat Starson with mood stabilizers, and with anti-psychotic, anti-anxiety, and anti-parkinsonian medications. Starson refused treatment and the Consent and Capacity Board found that Starson was incapable of making treatment decisions. Starson appealed the Board's decision. At the first level of appeal to the Superior Court, the Court found that the Board's decision was unreasonable and set it aside. Swayze and Posner appealed to the Court of Appeal. The Court of Appeal refused to overturn the decision agreeing that the Board's decision was unreasonable.

The Court noted that under the *Health Care Consent Act* there was a presumption that people were capable of making treatment decisions and that the onus rested with those who challenge the presumption to establish incompetence. Further, the Court examined the two-part test under the *Act* for determining whether a person was capable of making treatment decisions: first, the person has to "understand the information that is relevant to making a decision about treatment;" and, second, the person has to be "able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

The evidence clearly indicated that Starson met the test. While he refused the psychiatric labels applied to his condition, he agreed that he suffered many of the symptoms that the labels described. That is, Starson understood that he had a mental problem. Moreover, Swayze and Posner could not prove that the medications they wished to use would be effective in treating Starson as they had failed in the past. The Court was also moved by the reasons for Starson's refusal. Starson claimed that he could not pursue his scientific research while taking the medications because they affected his ability to think. Thus, Starson understood both the positive and negative consequences of not undergoing treatment. In conclusion, the Court remarked that:

Putting aside any paternalistic instincts—and we think that neither the Board nor the appellants [Swayze and Posner] have done so—we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects lack of capacity. And therefore it is a decision that the statute and s. 7 of the *Canadian Charter of Rights and Freedoms* permit him to make.

The case was appealed to the Supreme Court of Canada.

In a 6–3 decision, the Supreme Court of Canada agreed that the Board’s finding was unreasonable and upheld the decision of the lower courts. Two matters are, however, worth noting. First, the Court clarified that the onus is on the Board to clearly establish incapacity and that what is in the person’s best interest is irrelevant in determining whether the person is capable of making a treatment decision. Second, the Court declared that proof must be assessed on a balance of probability standard which was a lesser standard than what was required under the *Act*. Thus, psychiatric patients have the right to refuse treatment which may be in their best interests provided that they understand the information relevant to making the treatment decision and they understand the possible consequences of their decision.

Citation for case: *Starson v. Swayze*, [2003] 1 S.C.R. 722 (Supreme Court of Canada), (2001), 201 Dominion Law Reports (4th) 123 (Ontario Court of Appeal)

Minors

B.H. v. Alberta (Director of Child Welfare)

B.H. was 16-and-one-half-years old and a member of the Jehovah's Witness faith when she was diagnosed with leukemia. She required blood transfusions but she and her family refused them. Eventually the father gave consent but B.H continued to refuse and doctors would not treat her in the face of her refusal. The Director of Child Welfare from Alberta sought an apprehension and treatment order. This order was granted by the provincial court. Although medical experts considered that B.H. was a mature minor in that she was intelligent and capable, the judge of the provincial court suggested that she had lived a life sheltered by her religious faith and had not reached a point where she could question that faith and therefore she was not a mature minor.

B.H. appealed to the Court of Queen's Bench. The judge considered that B.H. was a mature minor but stated that the *Child Welfare Act* in Alberta clearly states that if a child is under the age of 18 and in need of protective services the law applies. The judge said that as B.H. was a mature minor, her opinions about the proposed course of treatment must be considered but not necessarily followed. The court considered that while this overrode B.H's *Charter* rights to freedom of religion, the limitations on her freedom of religion were justifiable to protect her welfare. Accordingly, a treatment order was issued by the court which allowed the doctors and nurses to administer treatment including blood transfusions.

Citation for case: *B.H. v. Alberta (Director of Child Welfare)* (2002), 329 Alberta Reports 395 (Alberta Court of Queen's Bench)

URL: <http://www.canlii.org/ab/cas/abqb/2002/2002abqb371.html>

B.(R.) v. Children's Aid Society of Metropolitan Toronto (Sheena B.)

A child was born to a Jehovah's Witness couple. The child was born premature and had compromised health which required many treatments. The doctors treated the child without blood products but when her hemoglobin levels dropped to a perilous level, they notified the Children's Aid Society when the parents refused consent for a blood transfusion. The Children's Aid Society petitioned the court for a hearing on temporary custody of the child and was appointed as temporary guardian so that permission to use blood products could be given. The parents appealed the decision claiming that the provisions of the Ontario *Child Welfare Act* which authorized the apprehension of the child violated their section 7 *Charter* rights to make treatment decisions for their child had been violated. They also claimed that their section 2 rights to freedom of religion had been violated, as transfusions were contrary to their faith. The parent's appeal was dismissed at two levels of Court before it reached the Supreme Court of Canada.

A majority of four at the Supreme Court of Canada recognized that parents generally have the right to raise children as they see fit and that this is indeed part of the liberty interests of parents. However, such a right is not unfettered and must be balanced against *parens patriae* jurisdiction of the Court to intervene when the welfare of a child is in jeopardy. Thus, while the parents were denied the right to make treatment decisions for their child, deprivations of their right was consistent with the requirements of fundamental justice. Three justices found that the section 7 rights of the *Charter* of the parents to liberty were constrained by the section 7 rights of the child to security of the person.

With respect to the parents' argument that their section 2 rights to freedom of religion had been violated, a majority of five justices found that the effect of the *Child Welfare Act* could well violate the parents' freedom of religion as it empowers the Children's Aid Society to act counter to the religion-based wishes of the parents. However, the Court found that the violation was justified by section 1 of the *Charter* finding that the state's interest in protecting the welfare of children was a pressing and substantial objective. The four remaining justices found that the guarantee of freedom of religion does not go so far as to allow parents to jeopardize the life of their child. Moreover, the Court expressed caution in allowing the religious views of parents to interfere with the freedom of conscience of the child who is, as yet, too young to decide whether she will subscribe to the Jehovah's Witness faith. Thus, the parent's right to freedom of religion must be balanced against the child right to freedom of religion. Parents cannot refuse consent to treatment that is ordered when the treatment is in the best interests of the child.

Citation for case: *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 Supreme Court Reports 315 (Supreme Court of Canada) (*Sheena B.*)

C. et al. v. Wren

A 16-year-old sought an abortion and, as was required by law at the time, she got approval for the abortion from the statutory committee. The parents of the young woman sued the doctor and sought an injunction to stop the procedure. The parents argued that the girl had not given informed consent to the procedure and, thus, the doctor's actions would constitute assault. The doctor did not defend the suit but the young woman retained legal counsel and entered the litigation as an intervener. The Court found against the parents, finding that the young woman did have sufficient understanding and intelligence to make up her own mind regarding the procedure. Thus, provided persons have sufficient intelligence and understanding of the risks and consequences of their choice, they have the capacity to consent to their own treatment.

Citation for case: *C. et al. v. Wren* (1986), 35 Dominion Law Reports 419 (Alberta Court of Appeal)

Couture-Jacquet v. Montreal Children's Hospital

Catherine Jacquet, aged three, had a rare form of cancer of the pelvis. The tumor was removed and she underwent three courses of chemotherapy. The chemotherapy caused serious side effects, including hearing loss and kidney damage. Her physicians then proposed that she undergo a fourth course of chemotherapy, saying that without it Catherine had six weeks to live. They estimated that the treatment had a 10–20 percent chance of curing her. They also acknowledged that the treatment had some negative effects, as it would increase her hearing loss and kidney damage to the point that if she survived she would require a hearing aid, dialysis, and a kidney transplant. Catherine's mother and grandmother were advised of these facts. Catherine's mother refused consent for treatment saying that further pain and suffering for such a small chance of a cure was not in her daughter's best interests.

The hospital sought an order under section 42 of Article 19 of Quebec's *Public Health Protection Act* to enable it to provide Catherine with the treatment. The court granted this order. Catherine's mother appealed. The Quebec Court of Appeal agreed that the hospital should not be permitted to provide the fourth course of chemotherapy. The judges concluded that the court could only intervene and reverse a decision made by a parent if the decision was unreasonable and not in the best interests of the child. Catherine's mother's position that she wanted her daughter to die with dignity was judged reasonable in the circumstances given the small chance of cure and the significant pain and suffering the treatment would cause Catherine.

Citation for case: *Couture-Jacquet v. Montreal Children's Hospital* (1986), 28 Dominion Law Reports (4th) 22 (Quebec Court of Appeal)

H.(T.) v. Children's Aid Society of Metropolitan Toronto

A 13-year-old Jehovah's Witness girl required a blood transfusion. Both the girl and her mother refused to consent to the transfusion. An emergency wardship application was made by Children's Aid Society (CAS) to assume temporary custody over the girl so that the transfusion could go forward. At the hearing, T.H. argued that she was a mature minor and capable of making her own treatment decisions. The Court did not find this to be so and ordered that CAS assume wardship for her. After the treatment had been given, T.H. appealed from the wardship order arguing that her constitutional rights to security of the person and freedom of religion had been violated. The Court found that the child was not a mature minor and, thus, not capable of making treatment decisions. With respect to her security of the person rights, the court found that the principle of fundamental and natural justice had been complied with. With respect to her right to religious freedom, the court found that it had indeed been violated but such violation was justified as T.H. was not capable of making treatment decisions and her mother was unwilling to consent. Violating her religious rights was justified, as the intent was to save her life.

Citation for case: *H.(T.) v. Children's Aid Society of Metropolitan Toronto* (1996), 138 Dominion Law Reports (4th) 144 (Ontario General Division Court)

New Brunswick (Minister of Health and Community Services) v. R.B. and S.B.

A 10-year-old girl who was hydrocephalic and mentally retarded developed meningitis. Her physicians wanted to treat her with antibiotics but her parents refused permission for this as they felt that it was in her best interests to die. The child's neurosurgeon agreed with the parents that not treating the meningitis was in the child's best interest but the child's pediatrician believed she should be treated.

The Court found that the child's *Charter* rights would be violated if she did not receive treatment as the *Charter* specifically protects citizens from discrimination on the basis of physical or mental disability. The Court stated that prolonging the child's life through treatment was not cruel and unusual treatment although not treating her seemed more like cruel and unusual treatment. Thus, the Court transferred custody of the child to the Ministry of Health and Community Services.

Citation for case: *New Brunswick (Minister of Health and Community Services) v. R.B. and S.B.* (1990), 106 New Brunswick Reports (2d) 206 (New Brunswick Court of Queen's Bench)

Re A.Y. (1993)

A 15-year-old Jehovah's Witness boy required chemotherapy to treat his cancer. It was anticipated that a blood transfusion would be necessary during the course of chemotherapy. Medical evidence was led to suggest that intensive chemotherapy could result in a 10–40% chance of inhibiting the progress of the disease though not curing it. The boy and his parents consented to treatment with the proviso that they did not consent to the use of blood products. The boy's treating physician determined that he was a mature minor and thus capable of making decisions regarding his treatment and agreed to proceed with the treatment with that proviso. The director of the hospital contacted the Director of Child Welfare who apprehended the boy as a child in need of protection. The Director applied to the court for a declaration that the child was in need of protection and an order allowing the use of blood products in his treatment.

The Court found that A.Y. was a mature minor with firm religious convictions and was not a child in need of protection. A.Y. was deemed to be mature enough to make his own treatment decisions and, since the physician was willing to proceed with treatment without resorting to blood products, an order to permit the use of blood products was not issued. The Court noted that while the chemotherapy was necessary treatment, the fact that the physician was willing to proceed without using blood products indicated that blood was not essential treatment.

Citation for case: *Re A.Y.* (1993), 111 Newfoundland & Prince Edward Island Reports 91 (Newfoundland Supreme Court)

Re: S.D.

S.D. was a 7-year-old child who was born with profound mental retardation. He had no control over his faculties, limbs, or bodily functions. He was legally blind, partly deaf, incontinent, incapable of feeding himself, and incapable of walking or talking. He was institutionalized. At the age of five months, a shunt was put into his brain to drain off the excess fluid from his head. The shunt became blocked when he was about 7 years of age and doctors asked the parents for permission to perform the surgery. The parents refused to give consent claiming that the child should be allowed to die a dignified death. The Superintendent of Family Services apprehended the boy as a child in need of protection and petitioned the Provincial Court for custody of the child. The Court refused to transfer custody to the Superintendent finding that the right to refuse treatment remained with the family. The judge accepted the parents' argument that correcting the problem with the shunt constituted "extraordinary surgical intervention" rather than necessary medical attention as repairing the shunt would not cure or improve the child's condition. The judge ordered the child returned to the care of his family and found that the shunt surgery would constitute cruel and unusual treatment. The Superintendent appealed.

The B.C. Supreme Court overturned the decision of the Provincial Court. Evidence was offered to show that the child was not suffering any pain and did respond to his environment; indeed, it appeared that the child was developing more physical skills and he was the only child out of 50 in the institution's school who was thought to be able to benefit from music therapy. Evidence was also led that it was not certain that S.D. would die if the shunt surgery was not done. Rather, it was entirely possible that he would live although the increased pressure on his brain without the correction would cause him pain and also decrease his functional level. In the end, the Court decided not to leave the parents with custody over the child. The Court stated:

In considering the application of the *parens patriae* jurisdiction I recognize that the central concern is to discover what is in S.'s best interest. This is not a "right to die" situation where the courts are concerned with people who are terminally ill from incurable conditions. Rather it is a question of whether S. has the right to receive appropriate medical and surgical care of a relatively simple kind which will assure to him the continuation of his life, such as it is.

I am satisfied that the laws of society are structured to preserve, protect and maintain human life and that in the exercise of its inherent jurisdiction this court could not sanction the termination of a life expect for the most coercive reason. The presumption must be in favour of life. Neither could this court sanction the willful withdrawal of surgical therapy where such withholding could result not necessarily in death but in a prolongation of life for an indeterminate time but in a more impoverished and more agonizing form.

Citation for case: *Re: S.D.*, [1983] 3 Western Weekly Reports 618 (British Columbia Supreme Court)

Re T.D.D.

T.D. was a 13-year-old boy who had cancer. His parents refused treatment on his behalf. The court determined that T.D. was a child in need of protection under section 11(a)(iv) of Saskatchewan's *Child and Family Services Act*. The Minister for Social Services was given the authority to consent to the care and treatment of T.D. for a nine month period. T.D. underwent the cycles of his first course of chemotherapy and two cycles of his second. After this he told his physician that he did not want further chemotherapy. His physician believed that with further chemotherapy and surgery T.D. would have a 65 percent chance of recovery. However, T.D.'s parents wished to take him to Mexico for alternative cancer treatment and told him that this treatment had an 85–90 percent success rate.

The court was asked to consider whether T.D. could be considered a “mature minor” and therefore able to accept or refuse treatment. The court considered the following factors:

- The child's age and maturity
- That nature and extent of his dependency upon his guardians in respect of taking care of himself and making his own decisions
- The complexity of the treatment.

Experts concluded that T.D. was less mature than the average 13-year-old because his social experiences were limited to his family and church. He was also thought to be deeply under the influence of his father, who, the court concluded, was providing him with inaccurate information about the real risks and options. The court concluded that because of the inaccurate information he was receiving he did not understand or appreciate the medical treatment that he required. As a result he was judged not to be a mature minor and therefore was unable to consent or refuse consent to treatment. The Minister was left with the authority to consent to treatment. The court also ordered that although T.D. was to remain in the custody of his parents, his medical treatment would be provided in their absence and without their influence. If this was not practicable, T.D. would temporarily be placed in foster care.

Citation for case: *Re T.D.D.* (1999), 171 Dominion Law Reports (4th) 761 (Saskatchewan Court of Queen's Bench)

Saskatchewan (Minister of Social Services) v. P.(F.) (K'aila)

K.P. was born with a fatal liver disease for which transplantation was the only treatment option. Evidence suggested that, without the transplant, there was a 100 percent chance the child would die within a year. If a transplant was done, there was a five year survival rate of 60–65 percent. If a transplant were done, the child would have to take immunosuppressive drugs, would experience delayed growth, and would always have a compromised immune system. The parents refused to consent to the surgery wishing that their child could die a dignified death.

The Minister argued that it was in the child's best interests to have the surgery despite the problematic future for the child, as the alternative was certain death. As such, the Minister sought a declaration that K.P. was a child in need of protection.

The Court was clearly impressed with the thoughtfulness and intelligence of the parents. They had evidently weighed the matter thoroughly and carefully before arriving at the decision not to agree to treatment. Expert evidence demonstrated that both transplantation and foregoing transplantation were considered appropriate medical treatment. In the end, the Court found the parent's decision reasonable and did not approve the application of the Minister. The Court noted that both parents were aboriginal but stated that their decision was personal not cultural, and one reached after much research and reflection. The Court was careful to distinguish this case from blood transfusion cases. The Court commented that blood transfusions carry little risk and generally are part of curative treatment whereas a liver transplant in this context was invasive and not really curative.

Citation for case: *Saskatchewan (Minister of Social Services) v. P.(F.) (K'aila)* (1990), 69 Dominion Law Reports (4th) 134 (Saskatchewan Provincial Court)

Van Mol (Guardian ad litem of) v. Ashmore

Melanie Van Mol was born with a heart defect that required surgery throughout her childhood. When she was 15 her doctor proposed further surgery to repair her heart. By the time the surgery was scheduled Melanie was 16 years old. During surgery a blood vessel tore. As a result Melanie was now paraplegic and had difficulties with her voice. Melanie sued the physicians and hospital for negligence and for failing to obtain her informed consent. Her case was initially dismissed. She appealed to the Supreme Court of British Columbia. The majority of the judges stated that the law in British Columbia, in 1990, was that a minor may give informed consent to treatment if he or she has sufficient maturity, intelligence, and capability of understanding to make such choices. If the child is considered a mature minor, parents have no right to give or withhold consent. The British Columbia *Infants Act* did not change this.

In this case, the majority of judges concluded that the physicians should have decided whether Melanie was a mature minor and that there was ample evidence to suggest that she was. To meet the standard for informed consent the physicians would have to have told the patient of the three alternative techniques available and the risks and advantages of each. She should have been told that there were options to reduce the risks of paraplegia that her surgeon did not propose to use and that she could obtain a second opinion.

Citation for case: *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 168 Dominion Law Reports (4th) 637 (British Columbia Court of Appeal)

Walker (Litigation Guardian of) v. Region 2 Hospital Corp.

A 15-year-old boy, Joshua, was diagnosed with leukemia the treatment of which would likely require blood transfusions or treatments with blood products. The boy refused because he was a Jehovah's Witness. The boy's doctors felt that he understood his condition and the likely results of not receiving blood products but that he was sufficiently mature to make treatment decisions. The boy signed a release to absolve the hospital and its employees from any liability that could result from their not treating him with blood products and he also signed a directive refusing blood products. The doctors and the hospital applied to the Court of Queen's Bench for an order declaring that Joshua was a mature minor according to the New Brunswick *Medical Consent of Minors' Act* and permitting them to not to treat Joshua with blood products. Neither the Attorney General of the province nor Family Services contested the application. However, the Court decided that Joshua was a child in need of protection and appointed a guardian with the authority to consent to the administration of blood products. This case was appealed.

A majority of the Court of Appeal found that the lower court judge had made errors in interpreting the *Act*. First, the judge did not adequately consider whether Joshua was a mature minor capable of making his own treatment decisions and, secondly, the judge failed to see that a corollary of the right to consent to treatment is the right to refuse it. The Court of Appeal also found that the application by the doctors and the hospital was unnecessary so long as the minor was found to be mature under the *Act*.

Citation for case: *Walker (Litigation Guardian of) v. Region 2 Hospital Corp.* (1994), 116 Dominion Law Reports (4th) 477 (New Brunswick Court of Appeal)