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SIGNIFICANT COURT OF APPEAL DECISION ON WITHDRAWING LIFE SUPPORT

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A. INTRODUCTION

In a judgment released on June 29, 2011,[1] the Ontario Court of Appeal decided that doctors must obtain the consent of the substitute decision maker to withdraw life support and move the patient to palliative care, failing which the doctors' proposed action must be referred for determination to the Consent and Capacity Board, established under the Ontario *Health Care Consent Act.* The judgement will be of particular interest to both hospitals and other health care charities, as well as many religious charities.

B. FACTS

Mr. Hassan Rasouli has been in what his doctors describe as a "persistent vegetative state" since October 7, 2010 as a result of complications following surgery to remove a benign brain tumour. He is attached to a mechanical ventilator and receiving artificial nutrition and hydration. Believing his case to be "hopeless," his doctors proposed that the life sustaining measures be removed and that he be given palliative care. Mr. Rasouli's wife and substitute decision maker, continuing to hope that he would recover, refused to consent to the withdrawal of life support. She also applied to the Ontario Superior Court of Justice for an order restraining the doctors from proceeding with their treatment plan without her consent and, failing that, to refer the matter to the Consent and Capacity Board for determination.

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[1] *Rasouli v.Sunnybrook Health Sciences Centre*, 2011 ONCA 482

C. THE LEGISLATION

The case was concerned solely with interpreting the provisions of the *Health Care Consent Act* (the "Act"). The relevant provisions of the Act[2] may be summarized as follows.

> The purpose of the Act is to provide consistent rules for consent to treatment, to facilitate treatment for persons lacking capacity to make decisions, and to ensure a significant role for supportive family members.
>
> A doctor who proposes a "treatment" for a person shall not administer the treatment without the person's consent, or if the person is incapable, without the consent of the person's substitute decision maker. If the substitute decision maker knows of a wish applicable to the circumstances that the patient expressed when capable, the substitute decision maker must follow it. Otherwise, the substitute decision maker is to make treatment decisions based on the best interests of the patient, according to criteria set out in the Act concerning the beliefs and wishes of the incapable person and the nature and value of the treatment.
>
> The words "treatment" and "treatment plan" are defined in the Act and the decision turned on their interpretation. The relevant portions of the definitions for the purposes of this bulletin are:
>
> "*plan of treatment*" means a plan that provides for the administration to the person of various treatments or courses of treatment and may, in addition, provide for the withholding or withdrawal of treatment in light of the person's current health condition and;
>
> "*treatment"* means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan…

D. POSITION OF THE DOCTORS

The doctors argued that from a medical perspective all avenues had been exhausted, there was no hope of recovery, and continuing life support would be of no benefit to Mr. Rasouli. In their view, measures that are not medically indicated do not come within the definition of "treatment" under the Act and can, therefore, be withdrawn without the substitute decision maker's consent. Requiring her consent would set a dangerous precedent, encouraging patients to insist on treatments that their doctors regard as medically futile. The doctors were not suggesting that they could withdraw treatment in an arbitrary or irresponsible fashion. On

[2] See sections 1, 2.(1) (2),10.,21 and 37.(1) of the *Health Care Consent Act*

the contrary, they would still be required to act in the patient's best interests and meet the required standard of care.

E. POSITION OF THE SUBSTITUTE DECISION MAKER

From the perspective of the wife and substitute decision maker of Mr. Rasouli, the medical measures were of benefit because they were keeping her husband alive. She argued that "he is entitled to remain alive, with the assistance of life support measures, until such time as she feels there is no hope for his recovery." (para.44)

F. DECISION OF JUSTICE HIMEL ON THE APPLICATION

Justice Susan Himel of the Ontario Superior Court of Justice heard the application of the substitute decision maker over three days and found in her favour. Justice Himel determined that the definition of the word "treatment" included a "plan of treatment" which includes, as part of its definition, the "withholding or withdrawing of treatment". She did not, however, rely entirely on this rather circular argument but also found that "life support" could be considered "therapeutic" treatment under the definition of treatment and, therefore, its withdrawal necessarily means the "withdrawal of treatment". The doctors were thus required to obtain the consent of the substitute decision maker prior to withdrawing the treatment and, failing that, to apply to the Consent and Capacity Board for a review of the substitute decision maker's decision in light of the best interests of the patient.

G. DECISION OF THE COURT OF APPEAL

The Court of Appeal reached the same result as Justice Himel but for different reasons, which attempted to address the concerns of the doctors about being forced to administer treatments that they consider to be of no benefit to the patient.

While the Court of Appeal insisted that it was not necessary to "finally decide" the issue of whether "treatment" as defined under the Act must have some medical benefit, it did rather forcefully state that "if the legislature intended that consent was required to the withholding or withdrawal of life support measures that are considered to be medically ineffective or inappropriate we would have expected clearer language to that effect." (para.41)

The Court of Appeal noted that the doctors' plan of treatment consisted of 1) withdrawing life support and 2) providing palliative care. Palliative care was clearly included in the definition of "treatment" under the Act and was a necessary response to the removal of life support. In the Court's opinion, the withdrawal of life support and provision of end-of-life palliative care were integrally linked as a "treatment package," both therefore requiring the substitute decision maker's consent or a determination by the Consent and Capacity Board. In other words, the Court interpreted "end-of-life palliative care to include the withdrawal of life support measures where those measures are in place."

The Court distinguished Mr. Rasouli's circumstances from the situation where a treatment, which is no longer effective, is withdrawn but end-of-life palliative care is premature because the patient's death is not imminent. In the Court's opinion, this distinction responds to the doctors' concern that Justice Himel's reasons in the Rasouli decision would force them to administer or continue treatments that they judge to be medically futile, if insisted upon by their patients.

H. CONCLUSION

The decision of the Court of Appeal is based on statutory interpretation of an Ontario Act, not on the common law. It concerns withdrawal of treatment in the narrow context of end-of-life care. It remains to be seen how broadly it will be interpreted by other jurisdictions.

While the Court declined to deal with the "metaphysical debate" about the medical value of the life support measures, it nevertheless dealt with a very sensitive and compelling issue. It underlines the importance that these end-of-life decisions be, as the Court said so well, "worked out over time through a combination of patience, understanding, and professional guidance and counselling." Failing that, the expertise of the Consent and Capacity Board can be called on to make a determination.