Informed consent in children and adolescents

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Confusion persists about when a minor can give informed consent to medical treatment. Physicians may be hesitant to treat minors, even as adolescents, without first obtaining parental or guardian consent for fear of being sued for battery or negligence. However, the common law in Canada is clear that a minor can give informed consent to therapeutic medical treatment, provided he or she can understand the information regarding the proposed treatment and can appreciate the attendant risks and possible consequences. Courts have accepted that there is no precise age at which a minor can be presumed to have the capacity to give informed consent. Each minor must be individually assessed to determine whether he or she possesses the requisite maturity and level of understanding to comprehend the nature, benefits and risks of the proposed treatment. The responsibility for determining a minor's capacity rests with the physician or another health care provider who is seeking to obtain the informed consent. In the event that legal action is taken against the physician on the grounds the minor lacked the capacity to give informed consent, the court must be satisfied that the minor did have sufficient capacity. Examples of cases where the physician was sued by either the minor or the minor's parents are included. In addition, an overview of existing provincial legislation dealing with minors and informed consent is provided.

Key Words: *Capacity to consent, Common law, Informed consent, Minors*

Un consentement éclairé chez les enfants et les adolescents

RÉSUMÉ : La confusion persiste au sujet du moment auquel un mineur peut donner un consentement éclairé au traitement médical. Les médecins peuvent hésiter à traiter les mineurs, même s'il s'agit d'adolescents, sans d'abord obtenir le consentement d'un parent ou d'un tuteur, par crainte de poursuites pour voie de fait ou acte de négligence. Cependant, au Canada, la *Common Law* établit sans équivoque qu'un mineur peut donner un consentement éclairé à un traitement médical thérapeutique s'il peut comprendre l'information reliée au traitement proposé et s'il peut en apprécier les risques inhérents et les conséquences possibles. Les tribunaux ont accepté qu'il n'y ait pas d'âge précis auquel un mineur est présumé capable de donner un consentement éclairé. Chaque mineur doit être évalué pour établir s'il possède la maturité nécessaire et un taux de compréhension suffisant pour saisir la nature, les avantages et les risques du traitement proposé. La responsabilité de déterminer la capacité du mineur incombe au médecin ou au professionnel de la santé qui cherche à obtenir le consentement éclairé. Si des actions en justice sont intentées contre le médecin sous prétexte que le mineur ne possédait pas la capacité de donner un consentement éclairé, il faut alors convaincre le tribunal que le mineur possédait bel et bien une capacité suffisante. Des exemples de cas au cours desquels le médecin a été poursuivi par le mineur ou ses parents sont inclus. En outre, on donne un aperçu des lois provinciales existantes portant sur les mineurs et le consentement éclairé.

The health care professional who sees children usually relates more to the parents or guardians than the children, especially in discussions concerning decisions about medical care. During adolescence, the professional interacts more with the teenager and less with the caregivers, although caregivers continue to play important roles in the teenagers' lives and are often present at their medical visits (1).

During adolescence there are physical, social and cognitive changes and the formation of an identity that affect the ability to give informed consent. During these changes, the professional/patient relationship moves from a directive role to helping adolescents help themselves.

This article outlines the Canadian common law general principles relating to informed consent and minors with some clinical examples. The term 'minor' is used to refer to all persons under the age of majority, with 'adolescent' referring to minors aged 13 and above, and 'child' restricted to refer to minors aged 12 or younger. As well, reference to 'parents' should be interpreted as including the status of 'guardians'. Finally, some of the differences

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in the relevant provincial legislation are discussed, although it is important to note that legislation is subject to change. This article is intended for general information purposes only. For individual concerns, legal advice should be sought.

AGE OF MAJORITY VERSUS AGE NECESSARY FOR INFORMED CONSENT

There is a tendency to equate age of majority with the age necessary to give informed consent to medical treatment that can make physicians hesitant to treat minors, even as adolescents, without first obtaining parental or guardian consent. Physicians may fear that if they rely solely on the minor's consent, they risk being sued for battery or negligence. A physician can be sued for battery if he or she relies on the minor's consent to administer medical treatment and it is later determined that the minor was incapable of giving informed consent. Then, if the parents obtained no consent and the minor's consent is considered a nullity, the court could conclude that the treatment provided by the physician was given without any consent. Nonemergency treatment administered without first obtaining informed consent is considered to be battery for which the physician can be held liable.

However, in Canadian common law (which is a body of law that develops through judicial decisions, ie, judge-made law as distinguished from legislative enactments) it is clear that minors can give informed consent to therapeutic medical treatment. (The issue of minors consenting to nontherapeutic procedures, such as organ donation or research, is not discussed in this article.)

Sharpe (2) notes that

> The Canadian cases all support the principle that there is **no age of consent fixed at common law** and that a minor **who is capable of understanding the information about a treatment**, and **appreciating the risks and likely consequences**, is entitled to make a decision to accept or reject treatment because the minor has the capacity to make a treatment decision. [emphasis added]

CAPACITY AND INFORMED CONSENT

The general rule is that a patient must have the capacity to understand and appreciate the nature and consequences of the contemplated treatment in order to be eligible to give informed consent to medical treatment. With respect to minors, the main issues are how one determines whether a minor has the appropriate 'capacity' to assess properly and decide about medical treatment and who is responsible for making that determination.

The courts have accepted that there is no precise age at which a minor can be presumed to have the capacity required to give informed consent. Instead, each minor must be individually assessed to determine whether that person's maturity and level of understanding are sufficient to comprehend the nature, benefits and risks of the proposed treatment. It is possible that a minor may have capacity to make some types of treatment decisions and lack capacity for more complex treatments.

McCall and Robertson (3) note that

> The common law test of capacity is both subjective and functional, and the age of the child is simply one of many factors that must be taken into consideration. The age, intelligence and experience of the particular child must be considered, along with the nature and consequences of the particular treatment. Thus, capacity may vary among children of the same age; one 12-year old may be capable of understanding the nature and consequences of proposed treatment, another may not. Capacity must also vary according to the severity and complexity of the proposed treatment; a 12-year-old may be capable of consenting to some forms of treatment, but not to others.

The responsibility for determining a minor's capacity rests with the physician or another health care provider who is seeking the informed consent. Rozovsky and Rozovsky (4) point out that

> the health care provider must assess each child on an individual basis to determine capacity to consent. This becomes particularly difficult in situations where time limitations and circumstances make it difficult to have any lengthy conversations with the child in order to make such a determination.

Nevertheless, the physician must be satisfied that the minor possesses sufficient capacity in order for that person to give informed consent to medical treatment. In the event that the parents disagree with the minor's decision or if the treatment results in injury to the patient and legal action is taken against the physician on the grounds that the minor lacked capacity to consent, the court must be satisfied that the minor had sufficient capacity.

CASE LAW EXAMPLES

In *Johnston v Wellesley Hospital et al* (5), a physician treated a 20-year-old male to remove acne scars. The age of majority at the time was 21, but the physician obtained consent for the procedure from the then 20-year-old patient. The treatment, called the 'slush' treatment, resulted in excessive blistering, scarring and sensitivity to the patient. The patient sued the physician for negligence, but he also argued that he was incapable of giving informed consent because he was under the age of majority.

The court had to consider whether consent was required from the minor's parents or whether the minor was capable at law of giving informed consent to the procedure. This issue was vital because, if the minor was found incapable of giving consent and no consent was obtained from the parents, the physician would have committed battery and liability would automatically follow,

without the patient having to prove negligence. The court held that the minor was legally capable of consenting and found that the age of majority was of no significance. The court referred to the minor's 'obvious intelligence' and his being 'fully capable of understanding the possible consequences of a medical or surgical procedure as an adult' (5).

In *C(JS) v Wren* (6) , a 16-year-old pregnant girl gave her consent to a physician for an abortion and received approval for it by the then required statutory committee. The minor's parents objected to the procedure and applied for an injunction against the physician. The judge refused the injunction on the grounds that the minor was capable of giving and, in fact, did give her informed consent. The parents appealed and argued that informed consent involved the capacity to understand not just the medical issues, but also the ethical issues of abortion and obligation by children to parents. The Court of Appeal disagreed with the parents and noted that courts will accord greater deference to the minor's decision as he or she grows and develops. The court found that it could not conclude that because the minor and her parents had differing opinions, the minor lacked sufficient intelligence and understanding to make her own decision. The court also noted that the parents conceded the minor was a "normal intelligent 16-year-old" and thus had capacity to give informed consent to the abortion (6).

REFUSAL OF CONSENT OR INCAPACITY

In the event a minor refuses to consent to treatment that the physician believes to be in the minor's best interests, it is unclear whether a physician can accept the refusal and still claim the minor has capacity. Sharpe (2) notes that

> if a minor chooses to reject a clearly beneficial treatment, without a reasoned explanation, some providers may conclude that the minor does not fully appreciate the reasonably foreseeable consequences of his or her decision and is not mentally competent to make this decision. It is not clear whether the courts would support this position in the case of young people. They would not when considering adults. In Ontario, the law has progressed significantly from the days where a patient's refusal of treatment considered in that person's best interests was determinative of their incapacity. It remains to be discovered whether courts would apply special rules to young people here.

In *Re LDK; CAS of Metropolitan Toronto v K And K* (7), a 12-year-old girl had leukemia. Both the child and her parents, who were Jehovah's Witnesses, refused chemotherapy treatment which included blood transfusions. The judge found that while the child was rejecting the treatment on religious grounds, she was also basing her refusal on the suffering she had seen in other minors who had undergone chemotherapy. The judge did not comment directly on the child's right of refusal. However, he commented on her wisdom, maturity and courageous nature and held that the child made a reasoned decision based on all available information, and he upheld her (and her parents') treatment refusal. This case suggests that even a mature child of 12 would have the right to give an informed refusal to treatment.

Some writers believe this right of refusal is a logical corollary to the right of informed consent:

> Where there is capacity and a right to consent to treatment, one must presume that there is a corresponding capacity and right to refuse ... it is likely that any court would rule that a minor has the right to refuse any treatment to which he has a right to consent (8).

With respect to minors who are incapable of giving informed consent, such consent must be obtained from the parent(s). Sharpe (9) explains:

> ... it appears to be settled law that parents and guardians have the power to consent to medical treatment on behalf of a minor incapable of understanding the nature and consequences of the treatment. Parents and guardians are, of course, presumed to be acting in the best interests of the minor. Where a physician is of the view that the parent or guardian, in refusing to authorize a procedure, is thereby endangering the life or health of the minor, he or she should not feel bound by such a refusal. Rather, the doctor would be well advised to inform the local Children's Aid Society (where the minor is younger than 16 years) of the situation. The Society or a public official responsible for the legal welfare of children may apply for a judicial determination of whether the child is to be given treatment according to the doctor's recommendation.

Therefore, under the common law, a minor has the right to give informed consent to therapeutic medical treatment if the physician believes that the minor has the capacity to understand the nature, benefits and possible consequences of a proposed treatment. It is possible that such a minor also has the right to give an informed refusal of medical treatment.

PROVINCIAL LEGISLATION

For those provinces without specific legislation, the above-noted common law principles apply to the issue of informed consent and minors. However, several provinces have enacted legislation in an effort to clarify when and how minors may give informed consent to medical treatment. The following sections give a brief overview of provincial legislation dealing generally with minors and consent to medical treatment. Due to the general nature of this article, legislation dealing with mental health and child welfare are not included.

Prince Edward Island: There is no general statute stating

at what age a minor will be presumed to have capacity to give informed consent to medical treatment. However, section 48 of the *Hospital Management Regulations*, issued pursuant to the *Hospitals Act*, states that no surgical operation shall be performed unless a consent in writing for the performance of the operation has been signed by the parent or guardian of the patient if the patient is unmarried and under 18 years of age.

New Brunswick: Section 2 of the *Medical Consent of Minors Act* states that minors aged 16 years and older will be considered as adults for the purposes of the law respecting consent to medical treatment.

Section 3 states that minors under the age of 16 can give consent to medical treatment where, in the opinion of a "legally qualified medical practitioner . . . attending the minor" and in the written opinion of another, similarly qualified practitioner:

> (a) the minor is capable of understanding the nature and consequences of a medical treatment and
>
> (b) the medical treatment and the procedure to be used are in the best interests of the minor...

Quebec: Quebec does not rely on common law as do the other provinces. Instead, most of Quebec's civil law is codified, the basic principles of which can be found in the *Civil Codes of Quebec*. Section 1 of the *Civil Code* refers in part to minors and consent to care.

Article 14 states that consent to treatment for a minor must be given by the person having parental authority or by a tutor (guardian). However, a minor aged 14 years or over may give his or her consent to such care. However, if that minor must remain in a health establishment for more than 12 h, the parent or guardian must be informed of that fact.

Article 16 states that court authorization is necessary to cause a minor aged 14 years or over to undergo care he or she refuses, except in cases of an emergency if the minor's life is endangered or integrity threatened, in which case parental or the tutor's consent is sufficient.

Article 17 provides that a minor aged 14 years or over may give consent to care not required by the state of his or her health, but parental or the tutor's consent is required if the care entails a serious risk for the minor's health and may cause him or her "grave and permanent effects".

Article 18 states that where a person is under 14 years of age or is incapable of giving consent, consent to care not required by the person's state of health is given by the parent or tutor; however, court authority is necessary if the care "entails a serious risk for health or if it might cause grave and permanent effects".

Ontario: The *Health Care Consent Act, 1996* came into force on March 29, 1996 and the *Consent to Treatment Act* has been repealed. Section 4(1) of the new act states:

> a person is capable with respect to a treatment, admission to a care facility ... if the person is able to understand the information that is relevant to making a decision about the treatment, (or) admission ..., as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

Section 4(2) states in part that a person is presumed capable with respect to treatment and admission.

Section 10 states that a health practitioner shall not administer a treatment unless he or she believes that the person is capable with respect to the treatment and the person has given consent. Where the health practitioner believes that the person is incapable with respect to the treatment, consent has to be obtained from that person's substitute decision-maker in accordance with the act.

Section 15 notes that a person may be incapable with respect to some treatments and capable with respect to others.

Section 26 of the *Hospital Management Regulations*, issued pursuant to the *Public Hospitals Act*, provides that no surgical operation shall be performed on a patient unless written consent has been signed by the patient's custodian where the patient is unmarried and under 16 years of age. Patients over the age of 16 years or who are married are required to give their own consent.

Manitoba: In *The Health Care Directives and Consequential Amendments Act*, the preamble states that Manitoba law recognizes that mentally capable individuals have the right to consent to medical treatment. Section 4(2) states that persons aged 16 years and over are presumed to have capacity to make health care decisions. Section 2 notes that a person is considered to have the capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the foreseeable consequences of a decision or lack of decision.

Saskatchewan: Under regulations issued pursuant to the *Hospital Standards Act*, written consent to surgical operations must by obtained by the parent or guardian where the patient is unmarried and is under 18 years of age (Section 55).

British Columbia: Section 16 of the *Infants Act* was amended in 1993 to provide that a minor may consent to health care, and it is not necessary for the health care provider to obtain a consent from the minor's parents or guardians. Consent will only be considered valid when the health care provider has explained to the minor and is satisfied that the minor understands the nature, consequences and the reasonably foreseeable benefits and risks of the treatment. The health care provider must also have made reasonable efforts to determine and must have concluded that the health care is in the minor's best interests.

CONCLUSION

As the above-noted case examples illustrate, the issue of minors and their ability to give informed consent has proved to be problematic for physicians in the past. One can imagine the reaction of the physician in the Johnston

case when he learned that he was being sued in part because he relied on the consent of a 20-year-old patient who appeared to be intelligent and capable of understanding the consequences of the treatment.

However, the Canadian common law is now settled that a minor can give informed consent to therapeutic medical treatment, provided the treating physician is satisfied that the minor possesses sufficient capacity to understand the nature, purpose and possible consequences of the proposed treatment.

As also noted above, several provinces have superseded these common law principles by enacting specific legislation. Some provinces' legislation (eg, New Brunswick, Ontario's *Health Care Consent Act, 1996* and British Columbia) readily reflect the common law provisions. Other provinces, such as Manitoba and Quebec, have gone further and have separated minors into two groups according to age so that minors of a certain age and over will be presumed to have capacity.

However, while it may be helpful for a physician to have an overview of both the Canadian common law principles and legislation dealing with minors and informed consent, it may be equally useful to remember that once a minor is deemed to be capable of providing informed consent, the physician owes a corresponding duty of confidentiality to that patient in the same manner as the duty owed to an adult patient.

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