McGill Journal of Law and Health ~ Revue de droit et Santé de McGill

THE "CAPABLE" MENTAL HEALTH PATIENT'S RIGHT TO REFUSE TREATMENT

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"Every human being of adult years and sound mind has a right to determine what should be done with his own body." Those words, written by the New York Court of Appeals in 1914,[1] recognized a person's right under the common law to refuse unwanted medical treatment. The right, however, was limited to persons of "sound mind," thus expressly excluding the mentally ill. That exclusion was lifted in the United States in 1979 in the Boston Hospital case,[2] prompting one article in a psychiatric journal to depict patients who exercised their right to refuse treatment as "rotting with their rights on."[3] In a short time, however, the psychiatric profession came around to accept a patient's "autonomy of choice" with regard to their treatment, shifting attention away from the question of the patient's "right" to refuse treatment to the question of the patient's "capacity" to make that decision.

In Canada, a 1991 decision of the Ontario Court of Appeal held that a capable psychiatric patient's right to refuse treatment was "included in the liberty interests" protected by section 7 of the *Canadian Charter of Rights and Freedoms*.[4] In the 2003 case of *Starson* v *Swayze,*[5] the Supreme Court of Canada in turn declared: "The right to refuse unwanted medical treatment is fundamental

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Citation: Ronald B Sklar, "The 'Capable' Mental Health Patient's Right to Refuse Treatment" (2011) 5:2 MJLH 291.

Référence : Ronald B Sklar, « The 'Capable' Mental Health Patient's Right to Refuse Treatment » (2011) 5 : 2 RDSM 291.

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[1] *Schloendorff v Society of New York Hospital*, 211 NY 125 at 129-130 (1914).

[2] *Rogers v Okin*, 478 F Supp 1342 (D Mass 1979).

[3] TG Gutheil, "In Search of True Freedom: Drug Refusal, Involuntary Medication and 'Rotting with Your Rights On'" (1980) 137 American Journal of Psychiatry 327.

[4] *Fleming v Reid* (1991), 4 OR (2d) 74.

[5] [2003] 1 SCR 722 [*Starson*].

to a person's dignity and autonomy. The right is equally important in the context of treatment for mental illness."[6] While the *Starson* Court did not expressly hold that the right was protected under the *Charter*, its expression of the right as "fundamental to a person's dignity and autonomy" suggests such a holding was almost inevitable.

The *Starson* case dealt specifically with the issue of what constitutes "capacity." Section 4(1) of the Ontario *Health Care Consent Act*, the law impugned in *Starson*, had defined capacity as the ability "to understand the information that is relevant to making a decision about treatment" and the ability "to appreciate the reasonably foreseeable consequences of a decision or lack of decision."[7]

Professor Starson's "driving passion in life" was physics. He had published several papers on the subject and "by all accounts [was] an extraordinarily intelligent and unique individual." In recognition of his accomplishments, his peers had allowed him to use the title, "professor," even though he had never held an academic position. Unfortunately, since 1985 Starson had been hospitalized in psychiatric institutions in both Canada and the United States. He had received several different diagnoses; at the time of his hospitalization that gave rise to the *Starson* decision, his diagnosis was bipolar disorder. The press covering his case had dubbed him "Canada's Beautiful Mind," a reference to a movie of that name about the brilliant mathematician, John Nash, who had held a research position at Princeton University and later the position of instructor in mathematics at the Massachusetts Institute of Technology, while suffering from paranoid schizophrenia.

Starson had denied he was mentally ill, although he acknowledged to his doctors that he had "mental problems that were difficult . . . to handle" and that he "needed therapy." He acknowledged further that "his own perception of reality differed from that held by others." He had refused the psychiatric medications prescribed for him – neuroleptic medications, mood stabilizers, anti-anxiety medication and anti-parkinsonian medication – claiming that all his previous medications had "significantly dulled his thinking and thereby prevented his work as a physicist"; he said he "preferred his altered state to what he viewed as the boredom of normalcy."

His attending physicians declared him incapable to make his own treatment decisions on the basis of his denial of mental illness. Starson applied to the Ontario Consent and Capacity Board for a review of that decision. The

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[6] *Ibid* at 759.

[7] *Health Care Consent Act*, SO 1996, c 2 (Sch A) [*Act*].

Board confirmed the finding of incapacity, reasoning that "without an acknowledgement of illness, the patient cannot relate information to his own particular disorder and therefore cannot understand the consequences of a decision to either refuse or consent to medication." Denial of mental illness had previously been held by the Board and Ontario courts to render a patient's refusal to accept treatment incapable, under similar reasoning.[8]

When the case reached the Supreme Court, three justices, in dissent, agreed with the Board's reasoning. The six-justice majority held, however, that Starson's denial of mental illness had not rendered him incapable:

> [A] patient is not required to describe his mental condition as an 'illness,' or to otherwise characterize the condition in negative terms. Nor is a patient required to agree with the attending physician's opinion regarding the cause of that condition. … 'The word condition allows the requirement for understanding to focus on the [patient's recognition he is affected by] the manifestations of the illness rather than the [doctors'] interpretation … of these manifestations.' … Psychiatry is not an exact science, and 'capable but dissident interpretations of information' are to be expected.[9]

At the outset of its decision, the Board had stated that "it viewed with great sadness the current situation of the patient" and had later noted that "his life has been devastated by his mental condition." The majority interpreted this language to indicate that the Board had considered Starson's "best interests" in reaching the conclusion that he was incapable. This, they concluded, was improper.

> The legislative mandate of the Board is to adjudicate solely upon a patient's capacity. The Board's conception of the patient's best interests is irrelevant to that determination. … 'A competent patient has the absolute entitlement to make decisions that any reasonable person would deem foolish.'[10]

The Court was unanimous that the patient's best interests is irrelevant to the capacity determination, although the dissenting justices disagreed on whether the language quoted above indicated that the Board's decision was influenced by consideration of Starson's best interests, coming as it did at the outset of the Board's reasons.

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[8] See *Khan v St Thomas Psychiatric Hospital* (1992), 87 DLR (4th) 289 (Ont CA).

[9] *Starson*, *supra* note 5 at 761-762, quoting in part from DN Weisstub, *Enquiry on Mental Competency. Final Report* (Toronto: Queen's Printer for Ontario, 1990) at 229, 250.

[10] *Starson*, *ibid* at 759.