

ADMISSION TO LONG-TERM CARE HOMES: ARE EVALUATIONS OF CAPACITY BEING CONDUCTED IN ACCORDANCE WITH THE LAW?

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You live alone and have a fall. You are admitted to hospital. While there, a social worker comes to talk to you about moving to a nursing home. You tell her no you are not interested. She feels that you can no longer cope at home and insists that you need to move to a nursing home. You listen, answer her questions, and politely decline.

The next thing you know, you're told that you have been found "incapable" of making a decision about going to a nursing home, someone else has made that decision for you, and you will be moving to the nursing home as soon as a bed can be found. A bed becomes available and you are taken against your will to a nursing home where you are told that you cannot leave.

Could this happen to you? Unfortunately, yes. In a review of recent reasons for decision by the Consent and Capacity Board ("CCB"), violation of the rights of people found incapable with respect to admission decisions would appear to be widespread. Given that few people actually apply to the CCB for a review, it is argued that is likely that many persons are being admitted into long-term care homes in contravention of the law.

The Law

In order to be admitted in a long-term care home (also known as a nursing home or home for the aged), someone must consent to the admission. If you are mentally competent, you consent to that admission.

Where there are reasons to question your capacity, an evaluator will perform an "evaluation" to determine whether or not you are able to make your own decisions, pursuant to the *Health Care Consent Act* ("HCCA"). An evaluator is someone defined in the HCCA as being a member of a specified health or social work college.¹ They require **no training** in conducting evaluations.

¹ HCCA s. 2(1).

The *HCCA* states that you are presumed capable until you have been legally determined to be incapable. To be capable with respect to admission to a long-term care home means that you are able to understand the information that is relevant to making a decision about the admission and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.² If you are determined to be incapable, your substitute decision-maker (“SDM”) will make that decision on your behalf, unless you challenge the finding.³

There is not such thing as “global incapacity” – incapacity is determined on an issue by issue basis. For example, you may be capable to consent to treatment, but not capable to consent to admission to long-term care, and vice-versa.

If an evaluator finds you incapable, he/she is required to tell you that you have a right to challenge the finding by requesting a hearing before the CCB. At the hearing, you have a right to be represented by a lawyer. If you want to have a hearing, the evaluator must assist you in completing the application for the hearing and finding a lawyer. If you are low income, you may also qualify for a legal aid certificate to pay for the lawyer. In most cases, the lawyer will assist you in completing the legal aid application.

If the CCB finds you are incapable, your SDM will make the decision on your behalf regarding admission, unless you appeal to Court, in which case the admission will not occur until there is a final determination of your capacity has been made by the Courts. (Even if you are found to be incapable, in law there is actually no way to force you to go to a long-term care home. For further discussion, please see *Long-Term Care Facilities in Ontario: The Advocate’s Manual*, 3rd ed. published by the Advocacy Centre for the Elderly.)

If the CCB finds that you are capable, you get to make your own decisions about admission to a long-term care home. The determination by the CCB is about whether you get to make your own decisions, **not** about whether you need to be in a long-term care home.

The Evaluation

There is no specific “test” or list of questions to determine capacity in respect of admission to a long-term care home. There are no magic questions, and no magic answers. “Capacity” is a legal issue, not a medical one. Unfortunately, evaluations are poorly understood, even by those who are conducting them. This leads to improper evaluations, which can lead to people being admitted in long-term care homes against their will.

² *HCCA* s. 4(1).

³ For a full discussion of substitute decision-making, see the article entitled *Making Treatment Decisions* in ACE’s Spring/Summer 2006 newsletter which is available at www.ancelaw.ca.

The “Tests”

There is no specific “test” which one can use to determine capacity in respect of admission to a long-term care home. In order to determine capacity, the evaluator must determine whether the person understands and appreciates the issue before them. However, because some evaluators do not understand capacity, they purport to use a variety of tests to make this determination. These tests either test the wrong issue, for example memory or cognition or are not sufficient to make the determination. While these tests may be a resource in assisting an evaluator in coming to a conclusion, by themselves they cannot be used to determine capacity. Below are a few examples of these tests:

- **Mini-Mental Status Exams:** The “Mini Mental Status Exam”, also known as the “MMSE” or “Folstein Test”, is a test of cognition. It consists of 30 questions. It does not test legal capacity.
- **Clock Test:** This test is often used in conjunction with the MMSE and again, does not determine capacity.
- **Evaluator’s Questionnaire:** This is the most common way of “testing” capacity to make admission decisions, as the questionnaire is included in the application package for admission to a long-term care home. It consists of the following five questions:
 1. What problems are you having right now? (Does the person understand his/her condition or problem?)
 2. How do you think admission to a nursing home or home for the aged could help you with your condition/problem? (Does the person appreciate the foreseeable consequences of admission or not?)
 3. Can you think of any other ways of looking after your condition/problem? (Does the person understand the condition/problem?)
 4. What could happen to you if you choose not to live in a nursing home or home for the aged? (Does the person appreciate the foreseeable consequences of admission or not?)
 5. What could happen to you if you choose to live in a nursing home or home for the aged? (Does the person appreciate the foreseeable consequences of admission or not?)

The evaluator will ask the person the five questions, writes down their answers, and base their determination based upon this. The CCB has consistently held

that this simply asking these five questions is not sufficient for a finding of incapacity.

- **“Best Interest” Test:** This is not a specific test, *per se*. However, this is most often how the evaluator comes to their decision, no matter what “formal” test they use. Based upon this model, if the person disagrees with what the evaluator believes is in their best interest, they are found to be incapable.
- **Functional Test:** The functional test determines the person’s physical ability to perform a task, and is not a test of the person’s mental capacity to understand and appreciate admission to a long-term care home.

The Problem

In a review of the case law, it becomes obvious that many evaluators do not understand the law under which they are supposed to be operating. Both the CCB and the Court have found again and again that many evaluators are ill-informed as to the test of capacity.

As the issue here is the person’s liberty (i.e. choosing where he or she will live), complying with the law is of utmost importance. Where the evaluation is improperly performed, the person’s fundamental rights are violated and any admission will be illegal. One of the most fundamental tenets of our society is that one’s freedom cannot be restricted except in accordance with the law.

Unfortunately, in the case of admission, when the cases come before the CCB, we find repeated instances of person’s rights being violated. An example of the types of violations which occur can be found in the case of *Re AB*,⁴ in which the Board held that what occurred was so inadequate that it could not be considered an evaluation. It held as follows:

- While the legislation did not contain a statutory requirement that the person to be evaluated be advised of the reason for the evaluation, misleading the person either intentionally or unintentionally about the purpose of the evaluation is not something to condone.
- When society authorizes taking away a person's right to make his or her own decisions regarding such fundamental issues as where the person will live, even when this is done to protect a person from his or her own lack of capacity, there is a process that must be followed. The process is an evaluation of the person's capacity to make the decision, replete with safeguards such as the right to apply to this Board for a review of the finding of incapacity. The decision of the Board is automatically appealable to the Superior Court of Justice. The evaluator must be

⁴ [2004] O.C.C.B.C. No. 233, TO 04-1257, 1260, May 5, 2004.

a member of one of the health care colleges prescribed in the legislation or regulations.

- There had to be an evaluation. The Board found that there was no evaluation and what transpired fell so short of what the legislation contemplates before stripping a person of the right to make his or her own decision that it could not be considered an evaluation within the meaning of the law.
- The Evaluator Questionnaire is a guide, a resource tool, on how to conduct an evaluation. It is not, by itself, an exam the answers to which are marked by the evaluator and scored "capable" or "incapable." The evaluator has to be a member of one of the prescribed health professions and a member of that profession's College. He or she is expected to bring his or her professional training to bear on the question of capacity. The legislation contains a highly subjective test for capacity that cannot be scored on the basis of answers to five simplistic questions. In many cases, the questions must be modified, at the very least, to make them applicable to the person whose capacity is being evaluated.
- Even though there was a clinical record available, which one would have thought would have been rich with notations that could have illuminated his capacity or lack thereof, it was neither reviewed nor was any evidence from it at the hearing.
- The evaluator did not record the person's answers on the questionnaire or make notes of them. The Board stated that it wondered how it could review a conclusion without knowing what had actually been said in response to the questions?
- The evaluator did not know the legislative test for capacity. This is equivalent to a police officer charging a person for speeding without knowing the speed limit.
- The Board found that there was only a skeletal declaration of incapacity, not a considered evaluation, resulting in a finding of incapacity that could be reviewed. What transpired fell so drastically short of what the legislation contemplated before depriving a person of the right to make his or her own admission decision, that it could not be considered an evaluation of capacity within the meaning of the *Health Care Consent Act*.

Because the vast majority of the persons being admitted are seniors with health problems, there is little complaint about this. The common perception is that the admission is being done in the person's "best interest", and therefore everything done, whether in strict compliance of the law, is reasonable.

For example, in the case *In Re L.M.*,⁵ Ms. Scott, (the person responsible for authorizing admission to the care facility and therefore for ensuring that legal consent for admission was obtained) actually voiced this opinion. In this matter, there were a number of issues being dealt with, including whether or not the SDMs were capable themselves of making the decision.

Ms. Scott's evidence was analyzed by the CCB as follows:

Ms Scott concluded by saying that in her view the legal definition of capacity was irrelevant to the consent process. She guided her approach based upon whether or not consent was given or refused in accordance with what she thought was in the patient's best interests: "We try to obtain the best result for the patient".

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Consequently, when substitute decision-makers disagreed with her view of the incapable person's "best result," she simply bypassed them and went to Public Guardian and Trustee for consent to admission to a care facility. Substitute decision-makers who disagreed with her were *ipso facto* incapable, though based upon her definition of capacity as, "did the substitute decision-maker agree with my decision?"

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The whole process is mandatory because informed consent is the linchpin of the admission, the difference between lawful admission and false imprisonment.

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Put differently, Ms Scott disregarded Mrs. L.M.'s legal rights as well as those of her husband and son. Respect for a person's legal rights and adherence to one's own legal obligations in professional relationships is a minimum ethical standard for any health care professional. How can Ms Scott say she respected Mrs. L.M.'s dignity and autonomy when she ignored her legal rights?

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Ms. Scott bypassed legal process and ethical obligations and there are practical consequences. First, Ms. Scott's approach erodes the trust health professionals must have in each other and the trust clients must have in the health care system if it is to function in an era of escalating costs, complex decisions, and limited funding. Second, knowing that Ms Scott sees fit to bypass the process and ignore her client's rights, how can the staff at the office of the Public Guardian and Trustee ever again rely on her capacity assessments? Third, in this case, Ms Scott fuelled Mr. P.M.'s otherwise

⁵ O.C.C.B.C., TO-05-7935, 7936, November 25, 2005.

unjustified distrust for the system and process. Fourth, her approach in this case rendered her evidence too suspect to be credible.

In 1997, in a case called “*Re Koch*”,⁶ the judge, Mr. Justice Quinn, was extremely critical of the process used to assess capacity and in fact, compared it to the criminal justice process, stating that the evaluator was acting as “police, judge and jury”. He found that, given the impact of the finding, the evaluator’s review had fallen far below that which had been expected. Mr. Justice Quinn went on to describe what would be necessary to support a finding of incapacity.

Despite this case having taken place almost ten years ago, evaluators continue to be woefully uninformed when it comes to the evaluation process. Time and again, we see evaluators making findings where it is clear from their evidence that they not only do not know how to execute an evaluation, they do not even know the legal test for capacity. The result is that persons are found to be incapable at law of making decisions, are taken out of their home and put into a long-term care home that they do not wish to go to, despite the fact that the evaluator does not understand the fundamental law under which they are operating. For example, in the case of *In Re G.B.*,⁷ the CCB stated the following regarding the evaluation of Mr. G.B.:

The question I asked Ms. C.P. [the evaluator] focused upon her definition of “capacity” and test for capacity against which she measured Mr. G.B., Ms. C.P. said she measured Mr. G.B. against his ability to look after himself, the risks he faced and the safety concerns his treatment teams identified. The first time I asked her what definition of capacity she used, she said she based her conclusion on the facts. The second time I asked her the same question, she referred to a *Mental Health Act* definition of inability to weigh and retain information.

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Ms. C.P. assessed Mr. G.B.’s capacity while being part of a treatment team that already decided Mr. G.B. could not safely go home and in furtherance of the goal of getting him into a care facility. This made the result of the capacity assessment appear preordained that a decision was made to get Mr. G.B. into a care facility because that was in his best interests. It is the obligation of health care professionals to be concerned about their patient’s and clients’ best interests. But, it is the role of a person assessing capacity to divorce those concerns from the assessment. When the assessor is part of the treatment team, the onus rests with him or her to satisfy the Board that the finding of incapacity was based upon the test for capacity, not a determination of the person’s best interests.

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⁶ (1997), 33 O.R. (3d) 485 (Gen. Div.).

⁷ O.C.C.B.C., KI-06-1556, May 29, 2006.

I don't expect an evaluator to have the definition of capacity memorized. However, I don't think I set the standard too high by expecting an evaluator either to know that the definition is in the *Health Care Consent Act* and be able to point to it there, or that being capable requires both the ability to understand information relevant to the decision and the ability to appreciate the reasonably foreseeable consequences of making or not making the decision.

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Even so, the finding of incapacity takes away the incapable person's right to make his or her own decision about where to live. Evaluators are authorized by the state to take that right away if the person fails a certain test – the test for capacity to make that specific decision at that particular time. They ought to know the test, else how can it be said the process is fair?

There are many other examples of cases where the evaluator does not know the legal test for capacity, does not understand how to evaluate a person's capacity, and violates the person's fundamental rights of liberty.⁸

What is not known, however, is the number of admissions that are made following improper evaluations where the person does not apply to the CCB. Given the high percentage of cases reviewed where the evaluations were conducted improperly and the person's fundamental rights were otherwise violated, it is argued that the number is high. This suggests that there are many persons who are living in long-term care homes who have been admitted illegally.

It is therefore imperative that those who are in the admission process know their rights, and contact a lawyer when they disagree with the finding, to prevent being admitted in a long-term care home against their will. Names of lawyers who specialize in this area of law can be obtained by contacting the local area office of Legal Aid Ontario.

⁸ See for example, *Saunders v. Bridgepoint Hospital* [2005] O.J. No. 5531, (OCJ), December 14, 2005; *In Re A.B.*, [2006] O.C.C.B.D. No. 144, OT-06-1192, April 27, 2006; *In Re S.S.* [2005] O.C.C.B.D. No. 19, TO-05-4570, February 2, 2005; *In Re D.*, O.C.C.B.D., TO-06-1481, May 25, 2006; *In Re J.*, [2005] O.C.C.B.C. No. 198, TO-05-6548, July 8, 2005; *In Re P.G.* [2005] O.C.C.B.D. No. 362, TO-05-7785, 7786, 7787, October 17, 2006; and *In Re J.D.*, [2004] O.C.C.B.D. No. 528, TO-04-3232.