

CONSENT TO TREATMENT

MINISTRY EXPECTATIONS COVERED:

Grade 11 – CLU 3M Understanding Canadian Law

Overall Expectations

RFV.01 · describe the sources of Canadian rights and freedoms and explain how rights and freedoms may differ and conflict;

RFV.03 · describe the rights and freedoms enshrined in Canadian law and explain how they are interpreted, how they may be limited, and how they are enforced in Canada and in Ontario.

Specific Expectations

RF1.03 – analyse situations in which rights and freedoms may conflict (e.g., when the right to freedom of expression conflicts with legislation to ban hate literature).

RF3.04 – explain the role of the judiciary, especially the Supreme Court of Canada, in interpreting the Charter and the role of government in enforcing Charter rights;

Grade 12 – CLN 4U Canadian and International Law

Overall Expectations

RFV.03 · demonstrate an understanding of the rights and responsibilities of individuals under the Canadian Charter of Rights and Freedoms;

RFV.04 · explain the role of the legislature and the judiciary in defining, interpreting, and enforcing Charter rights in Canada;

Specific Expectations

RF2.02 – distinguish between the law-making powers of the federal, provincial, and municipal governments;

RF2.03 – explain the role of the courts in determining law-making jurisdiction;

RF3.04 – explain how citizens can exercise their rights under the Charter (e.g., by initiating Charter challenges in the courts to legislation or government action; by raising the Charter as a defence when charged with an offence).

RF4.01 – explain how rights may be limited or overruled according to the Charter (e.g., section 1, section 33);

RF4.02 – evaluate the role of the courts and tribunals and, in particular, the Supreme Court of Canada in interpreting Charter rights;

RF4.03 – describe how Charter rights are enforced.

RF5.03 – evaluate the political and legal avenues available for resolving conflicts (e.g., the courts, tribunals, referendums).

TOPICS

- Explanation of the principles of capacity, autonomy, individual liberty and substitute decision making under the *Health Care Consent Act, 1996*, S.O. 1996, c.2, Sch. A.
- Discussion of the application of these principles in the context of the case of *Theresa Marie Schiavo*. How would *Schiavo* have been litigated and decided in Canada?
- Explanation of the limits of autonomy and individual liberty in Canada
- Discussion of the application of these principles in the context of the cases of *Nancy B v. Hôtel-Dieu du Québec* and *Rodriguez v. British Columbia*

DISCUSSION

- Explanation of the principles must be clear
- Remember: These cases tend to be *highly* individual, contextual and dynamic
- General Principles under the *Health Care Consent Act, 1996*
- Treatment may not be administered without the informed consent of a patient who is mentally capable. Primacy of the principle of individual autonomy.

- If the patient is not capable, the health care practitioner looks to the substitute-decision maker (SDM). The SDM is prescribed by section 20 of the Act which provides:

“[20. \(1\)](#) If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following paragraphs:

- 1. The incapable person’s guardian of the person, if the guardian has authority to give or refuse consent to the treatment.*
- 2. The incapable person’s attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.*
- 3. The incapable person’s representative appointed by the Board under section 33, if the representative has authority to give or refuse consent to the treatment.*
- 4. The incapable person’s spouse or partner.*
- 5. A child or parent of the incapable person, or a children’s aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children’s aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.*
- 6. A parent of the incapable person who has only a right of access.*
- 7. A brother or sister of the incapable person.*
- 8. Any other relative of the incapable person. 1996, c. 2, Sched. A, s. 20 (1).”*

- The SDM must act in accordance with the prior capable wishes of the patient. One of the best ways to decide this issue is to have reference to those wishes as expressed in a power of attorney for personal care.
- If the prior capable wishes are unknown, the SDM must follow the “best interests” principle. Section 21 of the Act provides:

“Principles for giving or refusing consent

21. (1) *A person who gives or refuses consent to a treatment on an incapable person’s behalf shall do so in accordance with the following principles:*

1. *If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.*

2. *If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person’s best interests. 1996, c. 2, Sched. A, s. 21 (1).*

Best interests

(2) *In deciding what the incapable person’s best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,*

(a) *the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;*

(b) *any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and*

(c) *the following factors:*

1. *Whether the treatment is likely to,*

i. *improve the incapable person’s condition or well-being,*

ii. *prevent the incapable person’s condition or well-being from deteriorating, or*

iii. *reduce the extent to which, or the rate at which, the incapable person’s condition or well-being is likely to deteriorate.*

2. *Whether the incapable person’s condition or well-being is likely to improve, remain the same or deteriorate without the treatment.*

3. *Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.*

4. *Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed. 1996, c. 2, Sched. A, s. 21 (2).”*

- What happened in *Schiavo*? Some highlights of the complex legal proceedings follow.
- On February 11, 2000 Judge Greer of the Florida Circuit Court granted the petition of Terry' spouse and permitted the removal of her feeding tube. Without the tube, she would die. It held that there was clear and convincing evidence that Terry would have wanted the feeding tube removed based on testimony of wishes she had expressed prior to the suffering of the brain damage. It also found that Terry was in a persistent vegetative state and would not likely recover.
- On January 24, 2001, the District Court of Appeal of Florida dismissed an appeal by Terry's parents from the decision of Judge Greer. The court noted that Terry had not left a "living will" but was satisfied that Judge Greer had clear and convincing evidence to apply a "best interests" test to order that the feeding tube be removed.
- Several proceedings followed by Terry's parents. They requested that the judgment of the courts authorizing the removal of the feeding tube be suspended. They alleged that there was new evidence that justified a re-hearing. The parents' experts alleged that the treating physicians were guilty of malpractice. The parents were afforded an opportunity to have two physicians present fresh opinions. The court ordered that an independent physician be appointed to examine and evaluate Terry's condition. These efforts did not result in any change in the legal outcome.

- On October 21, 2003 the Florida state legislature passed Bill No. 35E, Ch. 2003-418, Laws of Florida, authorizing the governor to stay the withholding of nutrition and hydration from a patient in a persistent vegetative state if a family member has challenged such withholding.
- On May 5, 2004, the Florida Circuit Court held Bill No. 35E to be unconstitutional. The court held that the law contravened the constitutional right to privacy of medical decision making under the Florida state constitution. Further, the court held that the Bill was an unconstitutional encroachment on judicial authority and judicial independence.
- On September 23, 2004, the Supreme Court of Florida affirmed the decision of the Florida Circuit Court. The Supreme Court held that Bill No. 35E violated a fundamental constitutional principle of separation of powers among the executive, legislative and judicial branches of government.
- On March 18, 2005 the Congress of the United States issued a subpoena to Terry and her spouse requiring them to appear before the Committee on Government Reform.
- Had this case taken place in Ontario, the applicable law would have been the *Health Care Consent Act, 1996*, S.O. 1996, c.2, Sch. A. As Terry would have been incapable of providing consent to her doctors, her substitute decision makers would have been consulted.

- In the absence of a person who had a power of attorney for personal care, the doctors would have consulted Terry's spouse as required by section 20(1)4 of the Act. As an SDM of higher rank under section 20, the spouse's views would have been given preferential regard by the doctors. A conflict could arise because if the parents asserted the right to be consulted under section 20(1)5 of the Act or if they alleged that the SDM was not acting in the patient's best interests.
- The proper exercise of the power of the SDM to consent to treatment would have included a consideration of whether she had an advanced directive or whether she had expressed any wishes concerning treatment while she was capable.
- In the absence of the expression of a wish while she was capable, there would have been an assessment of her "best interests" in accordance with the tests outlined in section 21(2) of the Act.
- The decisions made would be subject to review by the Consent and Capacity Board (CCB). The decisions of this Board are subject to appeal to the Superior Court of Justice. The CCB and the Ontario courts would have likely come to the same conclusion as the Florida courts considering the correctness of the decision of the SDM. It is highly unlikely that the provincial legislature would have passed a law like Bill No. 35E. If it had, our courts would likely have struck it down as an improper restraint on Terry's section 7 Charter rights, including the right to personal autonomy in medical decision making as guaranteed by the right to life.

QUESTIONS AND ISSUES FOR CLASS DISCUSSION

- Are the facts of the *Schiavo* case more like the situation in the *Nancy B* case or more like the situation in the *Rodriguez* case?
- What are the limits of personal autonomy?
- In *Nancy B*, the Superior Court of Québec relied on an American case, *Re Conroy* (1985) 486 A. 2d 1209, which stated that declining life-sustaining treatment is not an attempt to commit suicide. Refusing such treatment allows the underlying disease to take its natural course. Death results primarily from the underlying disease and not as the result of a self-inflicted injury.
- Does this principle form the basis of a valid distinction between *Nancy B.* and *Rodriguez v. British Columbia*?
- The likely limits of autonomy and individual liberty in Canada in medical decision making. A capable person, or his/her SDM acting properly, may refuse life-sustaining treatment or may require others to withhold such treatment even if this results in death. However, a capable person may not require the state or another person to apply treatment, the primary result of which is to bring about the death of the capable person. This does not prohibit the provision of palliative treatment, the primary goal of which is to alleviate pain, even though such palliative treatment may result in or hasten the death of the patient. A person cannot assert Section 7 *Charter* rights (right to life, the right to personal autonomy in medical decision

making, the right to security of the person) in order to require someone else to assist him/her in ending his/her life by the application of treatment, the primary purpose of which is to bring about death.

- Is it appropriate for legislatures to intervene in the process by enacting laws giving the executive branch of government the right to stay decisions of the courts on medical care?
- Terry's parents submitted clips from a six-hour video (which was part of a court-ordered medical examination) to the media showing how she looked in the hospital with the feeding tube in place. The video was broadcast in the public media. Is this properly respectful of Terry's privacy interests? Is it properly respectful of the court? Should the courts require non-publication of evidence obtained by its own orders and which shows an incapable person in circumstances in which he/she would feel that publication would be an affront to his/her dignity?

ACTIVITIES

Debate

Mock Trial/Court Proceeding

Decision Making (Write the judgment, explain what you would do in the sample case)

Patient/SDM/Physician Communications Re: Withholding Life Sustaining Treatment and/or Providing Treatment Which Is Palliative or More (Role Playing)

Guest Speaker

Film

Web-searches

- cases on medical decision making
- search terms – “consent”, “treatment”, “persistent vegetative state”, “freedom”, “right to life”, etc.

Research Paper

- cultural issues in Canada affecting medical decision making
- differences between Canadian law/practice and other jurisdictions, especially Holland and the state of Oregon

RESOURCES

Speakers

Medico-Legal Society of Toronto, 416 669 2509, www.mlst.ca

Joint Centre for Bioethics, University of Toronto, 416 978 2701, www.utoronto.ca/jcb

Films/DVD

“The Sea Inside” (El mar adentro), DVD, Story of Ramón Sampedro, a Spanish writer/poet who was rendered quadriplegic as the result of a diving accident. He claimed the right to die by assisted-suicide. His case was litigated in the Spanish courts. The version produced by Alliance Atlantis Films has English, French and Spanish audio tracks with subtitles. The original version is in Spanish with English sub-titles. The role of Sampedro is played by Javier Bardem.

“Ethics in America”, Fred Friendly, Columbia University, Video #104: Does Doctor Know Best? A pregnant young woman is diagnosed with cancer. Issues discussed: Who decides what the course of treatment should be? Should the child be sacrificed to cure the cancer? What happens if the patient becomes incapable? Panelists: Former U.S. Surgeon General C. Everett Koop; Dr. Vincent DeVita, director of the National Cancer Institute; Dr. Frank Young, Commissioner of the U.S. Food and Drug Administration; former

HEW Secretary Joseph A. Califano, Jr.; Dr. Paul Marks, president of Sloan-Kettering Cancer Center; Professor Alexander Capron of the University of Southern California; and Ellen Goodman of the "Boston Globe."

"Before I Die: Medical Care and Personal Choices", 1997, Fred Friendly Seminars, Moderated by Arthur Miller, Panel Discussion by lawyers, religious leaders and distinguished authors on assisted suicide, advance directives and palliative care.

"Managing Our Miracles – Final Choices", 1986, Fred Friendly Seminars, Moderated by Benno C. Schmidt, Jr., Panel discussion by government leaders, judges, lawyers and doctors about advanced directives and substitute decision making in the context of the care of the elderly.

Legislation and Case Law

www.gov.on.ca/Laws Website of the Government of Ontario, *Health Care Consent Act, 1996*

www.scc-csc.gc.ca Website of the Supreme Court of Canada, *Rodriguez v. British Columbia*

www.ontariocourts.on.ca Website of the Court of Appeal for Ontario

www.canlii.org Website of the Canadian Legal Information Institute, contains recent decisions of all Canadian courts

www.cma.ca Website of the Canadian Medical Association, Joint Statement on Resuscitative Intervention, 1995

www.flcourts.org. Website of the Florida courts, multiple references to the cases involving of Theresa Maria Schiavo

Nancy B. v. Hôtel-Dieu du Québec et al. (1992) 86 D.L.R. (4th) 385 (English version), [1992] R.J.Q. 361 (French version), (Qué. S.C.), Dufour, J.) [Note: This case is not available online]