Medical/Legal Aspects of Advance Care Planning

B.C. Renal Agency ACP

Champion Training Workshop

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3 Objectives

1. Understand the fundamental legal aspects of ACP and Advance Directives
2. Understand legal consent and capacity and the role of substitute decision-makers
3. Understand the legal and ethical obligations of HCP regarding ACP and AD

Advance Care Planning

“a process of reflection and communication in which a capable person makes decisions with respect to future health and/or personal care in the event that they become incapable of giving informed consent. ...[ACP] may involve discussions with HCP and significant others [and]...may result in the creation of an advance directive”

Dunbrack: Glossary Project p.25

Studies re: Success of ACP

- positive attitude towards ACP by patients, families and HCP (BMJ 2010:340:c 1345 Detering et al)
- ACP instills *hope* in patients with end stage renal failure (BMJ 2006: 7574: c 868 Davison & Simpson)
- Fewer than 20% of Canadians complete AD or undertake ACP

Definition: Advance Directive

an oral or (preferably) documented set of wishes, choices and instructions for treatment, and/or

the appointment of a substitute in the event of a person's incapacity

Note: An AD can be a combination of these two directions

What is NOT an Advance Directive?

- Euthanasia (unlawful in Canada)
- Assisted Suicide (also unlawful [SCC: Rodriguez v BC AG 1993; recent defeat of Bill C384 (RDD)
- Do Not Resuscitate Orders – DNR is legally ordered by the HCP
- Power of Attorney

ACP: A Fundamental Right

- Canadian Common law: a competent adult has a right to make an A.D. for health care treatment which HCP must respect [*Malette v Shulman*] (Ont. C.A. 1990)
- This is a fundamental right under the Charter [*Fleming v Reid*] (Ont. C.A.1991)

Legal and Ethical obligations of BC HCP respecting ACP and Advance Directives

CMA Code of Ethics

27. *Recognize your patient's wishes about the initiation, continuation or cessation of life-sustaining treatment.*

28. *Respect the intentions of an incompetent patient as they were expressed (e.g. through an valid advance directive or proxy designation) before the patient became incompetent.*

CMA Joint Statement on Resuscitative Interventions

"When a person is incompetent, treatment decisions must be based on his or her wishes [which] may be found in an advance directive…."

CMA Resolution 02-53

That the CMA urge physicians and other health professionals to discuss advance health care planning directives with seniors and other adult patients with life-limiting illnesses, at a time when patients are capable and not acutely ill.

CMA, CNA, CHA and Catholic Healthcare Association Joint Statement

...every effort should be made to ensure that health care decisions are consistent with [a patient's] known preferences [which] may be found in an advance directive or may have been communicated orally.

Canadian Council on Health Services Accreditation

Hospitals and health authorities are required to ensure the palliative care team informs the [patient] both verbally and in writing of their right to establish an AD, and explains CPR and the potential need for life-support following resuscitation to the client and family, including the risks and benefits.

Law On Advance Directives

- Common Law (Cases)
- Provincial Legislation (Advance Directive and Health Care Consent Legislation)
- Federal legislation (Criminal Law)

Common Law Foundation: Consent to Treatment

"Everyone has the right to decide what is to be done to one's own body [including] the right to be free from medical treatment to which the individual does not consent. This concept of individual autonomy is fundamental to the common law…".

Ciarlariello v. Schacter (SCC 1993)

Capacity: A Necessary Condition

Starson v Swayze [2003] 1 S.C.R. 722

Criteria. A person must be able to:

1. Understand information that is relevant to making a treatment decision.
2. appreciate the reasonably foreseeable consequences of the decision or lack of one.

Common Law (cases)

- *Malette v Shulman* (1990), Ont. C.A.: an AD is a legal direction that binds HC Providers
- *Fleming v Reid* (1991), Ont. C.A.: an AD constitutes a **fundamental** right under the Canadian *Charter*
- SCC cited *Malette* in *Rodriguez* and *Fleming* in *Starson v Swayze*

Provincial Legislation

Study in Disharmony

- 5 jurisdictions: proxy only
- 9 different names for the AD
- 7 different names for the proxy
- BC has not yet created regulations recognizing extra-jurisdictional AD

Relevant B.C. Law

- A fundamental right for adults under the common law of Canada (case law)
- A patchwork of provincial Legislation:

❖ Health Care (Consent) and Care Facility (Admission) Act [HCCA]

❖ Representation Agreement Act (S.9)[RAA]

❖ Proposed Changes: Bill 29Amendments 2007 will amend HCCA and RAA

B.C. HCCA

4. Every adult who is capable of giving or refusing consent to health care has

a) the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,…

d) the right to expect that a decision to give, refuse or revoke consent will be respected

HCCA S. 12.1

- No emergency health care contrary to wishes
- **12.1** A health care provider **must not provide health care** … if the health care provider has reasonable grounds to believe that the person, while capable and after attaining 19 years of age, **expressed an instruction or wish** applicable to the circumstances **to refuse consent** to the health care. *(bolding mine)*

Duties of a Temporary Substitute Decision Maker (HCCA)

- S. 19 (1) [TDSM] must, before giving or refusing consent, consult, to the greatest extent possible with the adult and
- b) comply with any instructions or wishes the adult expressed while he or she was capable.

Who is TSDM?

In Descending Order of Priority

- Spouse or partner
- Child
- Parent
- Brother/Sister
- (Bill 29: Grandparent)
- (Bill 29: Grandchild)
- Any other family member by birth or adoption
- (Bill 29: Close friend)
- (Bill 29: Person “immediately related by marriage”)
- None of the above: Person appointed by the Public Guardian and Trustee (PGT)

Representation Agreement Act

Current B.C. Law creates barriers:

- *RAA* recognizes proxy only
- Includes complex and expensive requirement for legal consultation;
- No extra-territorial harmony
- Documents not easily accessible
- No legal immunity for HCP; only reps and monitors are protected

Federal Criminal Law

The *Criminal Code* appears to:

- prohibit respecting an individual's refusal of potentially life-sustaining treatment, and
- Also, *Criminal Code* contains no definition of death.

Why is the law so muddled?

The answer appears to be:

- fear of euthanasia, or
- the belief that respect for Advance Directives leads us on a slippery slope to a society that accepts euthanasia (e.g. Terry Schiavo Case)

Schiavo case: LifeSiteNews.com

- *The courts gave "her husband the green light to "euthanasize (sic) her"*
- *"In the name of medical privacy and personal choice, the culture of death now seeks the blood of our elderly, our disabled, and our terminally ill."*
- *"[The case] sets a precedent where our society no longer judges [these people] as fully human."*

Letter to AG from TLABC

"The TLABC is concerned that advance directives will introduce an inadequate method for making health-care decisions which will result in necessary treatment being improperly denied to patients who would otherwise have chosen to be treated."

TLABC Letter p. 2

"… it is noted that the [.] Health Authority appears to be promoting advance directives ***in order to reduce health-care costs****."* …

"…the [.]HA is training individuals … to discuss advance care directives with patients….This raises ***serious concerns about the legitimacy, purpose and use*** *to which advance directives will be put."* …

Tim Stainton, MSW, PHD, Associate Professor, UBC

"Older persons and those with physical and developmental disabilities, if encouraged to fill out AD without the ***protection*** *of a representative or proxy, are more likely to be subject to decisions made by health care professionals ….* *

*Article in Perspectives May 2006

Stainton article, continued

Regrettably, such decisions are often based on inaccurate perceptions of a person's quality, or even value, of life."

*"Far from fostering self determination, AD may simply result in the inappropriate withdrawal of **life saving treatment** based on a brief checklist (refers to a H.A.)*

What should be implemented?

1. B.C. AD legislation approving AD documents (proxy, instructional or both) which are easily accessible and simple to execute
2. Training for HCP to discuss and advise on ACP with capable patients
3. *Criminal Code* amendments to ensure HCP immunity for following AD

What should HCP do?

- Help patients and families with ACP
- Be prepared to listen and to document

Better Option:

Ongoing discussion

Begin when the patient is capable and HCP is available to listen

Best Option: Disease Specific ACP

- Article: *Impact of a Disease-Specific Planning Intervention on Surrogate Understanding of Patient Goals for Future Medical Treatment* (JAGS 7:2010) [Gunderson Lutheran Faculty members] demonstrates significantly better understanding of p^t goals by surrogates
- For overview: Sue Grant's ACP Webpage

Final Note

Advance Directive legislation must incorporate the ideals of patient autonomy and self-determination. These are at the heart of this fundamental right—and that means the patient's goals must be at the heart of every ACP discussion.

ADVANCE DIRECTIVES:
Medical/Legal Issues

Questions?

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