The Top Five 2011

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

Rasouli v. Sunnybrook Health Science Centre, 2011 ONCA 482

http://www.canlii.org/en/on/onca/doc/2011/2011onca482/2011onca482.html

Under the Health Care Consent Act *(HCCA), any medical treatment requires the consent of the patient or that patient's legal substitute decision-maker. In this case, the Ontario Court of Appeal (OCA) considered whether removing life support when a patient appears non-responsive is a form of medical treatment.*

Date Released: June 29, 2011

Ruling

The Ontario Court of Appeal ruled that the decision to remove life support necessarily triggers end-of-life palliative care, which is treatment that eases suffering pending imminent death. The decision to remove life support therefore constitutes "treatment" under the *Health Care Consent Act* (*HCCA*) and thus requires the consent of the patient or the patient's substitute decision-maker.

Facts

Hassan Rasouli required surgery to remove a benign brain tumour. After his surgery, complications resulted in a bacterial infection, leaving him with severe brain damage. Mr. Rasouli was then placed on life-sustaining measures to keep him alive, including a mechanical ventilator and feeding through a nutrition and hydration tube inserted into his stomach. Without these measures, it was expected that he would die. His doctors concluded that he was in a permanent vegetative state, meaning that he would never regain consciousness and there was no hope of recovery. Accordingly, his doctors believed it was in his best interest to be taken off life support.

The doctors argued that they did not need the permission of Mr. Rasouli's wife, Ms. Salasel, to take him off life support. Ms. Salasel, on the other hand, believed that there was still hope. She did not accept that there was no chance of recovery, and therefore opposed the doctors' position that Mr. Rasouli be taken off life support. The doctors argued that while a patient has a right to refuse treatment, there is no right to insist that treatment that has no medical value be continued. They contended that to require advance consent for withholding medically unnecessary treatment would have negative consequences for the medical profession and the limited resources of the health care system.

Decision

The Ontario Court of Appeal found that withdrawal of life support falls within the definition of "treatment" under the *HCCA*, and consent is required to proceed. The doctors' plan involved removing life support and then administering palliative care to reduce the patient's suffering at the end. Removing life support and administering palliative care cannot be separated. In this case, they are not independent of one another; one necessarily follows the other. Since palliative care immediately follows the withdrawal of life support, together they amount to an inseparable package and constitute "treatment" as contemplated by the *HCCA.* The court therefore interpreted end-of-life palliative treatment as *including* the decision to remove life support.

A distinction was made for situations where there is a gap between the withdrawal of treatment and the beginning of palliative care. An example is ceasing to give cancer drugs where a patient has minimal chance of survival, but may still live for weeks or months. Such decisions do not cause the patient's immediate death, and do not trigger immediate palliative treatment.

The court regarded the limited resources argument as not central to deciding the issue. Since financial constraints did not give rise to the appeal, they were not considered. Similarly, the court found it unnecessary to decide whether "treatment" under the *HCCA* must provide some medical value.

Discussion

1. In your opinion, did the court come to the right decision? Does the withdrawal of life support constitute "treatment" in your view?

2. Who should have the ultimate decision over the care of someone who is declared to be in a permanent, vegetative state: doctors or family members? Why?

3. Should patients have a right to medical treatment that offers no medical value? Is ceasing existing treatment the same as refusing medically unnecessary treatment in the first place?

4. Was the Ontario Court of Appeal right to ignore the possibility of increased costs to the health care system as a result of their decision?