Mental Health or Hospital Acts contain specific procedures to address the issue of consent to treatment for those with a psychiatric disorder. This infoLAW will not touch on persons subject to those Acts but will focus on other adults who do not have the capacity to give or refuse consent to treatment on their own behalf. Examples include: a young adult living with a permanent developmental handicap; an adult temporarily unconscious due to injury or intoxication; and an older adult whose mental abilities have deteriorated.

Provincial/territorial statutes differ in their content. They may set out how consent to treatment is to be obtained when the patient does not have the capacity to consent. They may also stipulate how an advance directive for health care may be made. Nurses must comply with the applicable legislation in their jurisdiction.

What is meant by having the capacity to consent to treatment?

Having the capacity to consent to treatment means understanding the nature of the decision to be made and understanding the consequences of the decision, including the decision to decline treatment.

The legal presumption is that all adults have the capacity to consent to treatment. A nurse need not explore an adult’s capacity to make treatment decisions unless there is reason to believe he does not understand the nature of the decisions to be made or their consequences.

A person’s capacity may vary with time or with the nature of the decision to be made. An assessment of a person’s capacity may lead to different results at different times. Obtaining consent to treatment should therefore be considered a process rather than a single event.

Who decides on an adult’s capacity or incapacity?

The health care professional proposing the treatment is responsible for obtaining the patient’s consent. For example, if a nurse runs her own foot care business, she must obtain consent before providing care or not proceed. If a patient is clearly incapable of consenting, the nurse must adhere to the law on substitute decision-making in her jurisdiction. If the nurse is unsure of the patient’s capacity to consent, an assessment and determination is needed, with thorough documentation of the process and its outcome. Consultation with other professionals is recommended.

It is more common for the patient to be under the care of a physician who is proposing an overall treatment plan. This physician should make a determination of capacity if the circumstances warrant it, unless additional expertise is required. Because nurses have such close contact with patients, the information they gather may be of critical importance to the physician making the determination. Sharing relevant patient information between health team members is proper practice and is not a breach of confidentiality.
When an adult is deemed incapable, who makes decisions about their care and treatment?

Statutes tend to provide a hierarchy of substitute decision-makers. First priority is given to a court-appointed substitute decision-maker or person with a power of attorney for personal care or proxy. If these do not exist, authority falls to a spouse, or then to various family members in accordance with the statutory list. Careful documentation is essential when consent is obtained from a substitute decision-maker.

When devising a plan of care to meet the incapable adult’s current health needs, substitute decision-makers and health care professionals must consider and respect the patient’s previously known wishes or advance directives that were expressed when he was capable and apply to the situation, and the patient’s best interests.

What if emergency treatment is required?

When immediate medical treatment is necessary to save the life or preserve the health of a person who, by reason of unconsciousness or extreme illness, is incapable of either giving or withholding consent, the law considers this an emergency that justifies an exception to the usual rules of consent. Giving emergency treatment without consent is lawful if the delay that would result from obtaining a consent or refusal would put the patient at greater risk.

The fact that a person is in serious physical jeopardy does not nullify previously expressed directives regarding health care treatment if these directives become known to health care professionals and apply to the emergency situation. An Ontario court made this clear when it found a physician had committed battery when he personally gave blood transfusions to an unconscious MVA victim whose wallet card identified her as a Jehovah’s Witness. The wallet card contained an explicit refusal of any blood or blood products but consented to non-blood intravenous fluids. The court found that she had clearly communicated a health care directive in the only way possible in preparation for just this kind of emergency.

Summary

Failure to obtain consent means the treatment cannot be legally given unless it is an emergency. Given the variations in the laws between provinces and territories governing consent procedures for incapable adults, it is important to follow your agency’s policies and procedures for obtaining consent in these situations. If you have questions or concerns, call CNPS at 1-844-4MY-CNPS.


2. InfoLAW, Independent Practice (Vol. 4, No. 1, November 2004; Revision of September 1995).


N.B. In this document, the feminine pronoun includes the masculine and vice versa except where referring to a participant in a legal proceeding.

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