Ontario Hospital Association

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LEGISLATIVE UPDATE

April 2020

Backgrounder

Ontario Divisional Court Decision on Hospital Visitor Restriction Policies During COVID-19

Context

In April 2020, the Ontario Divisional Court issued a decision in *Sprague v. Her Majesty the Queen in Right of Ontario*.[1] This decision concerns the application of judicial review principles to hospital policy-making processes on visitor restrictions during the COVID-19 pandemic.

The Applicant brought a motion for judicial review of a hospital's policy on visitor restrictions during the COVID-19 pandemic. The Applicant's father, Mr. Sprague, was a patient at the hospital, and was incapable of making treatment decisions due to an acquired brain injury. He was otherwise in a medically stable condition. The Applicant acted as Mr. Sprague's power of attorney for personal care (substitute decision-maker or SDM) in treatment decisions.

In response to the COVID-19 pandemic, in March 2020, the Chief Medical Officer of Health (CMOH) in Ontario issued a Memorandum to hospitals to maintain the safety of vulnerable patients and staff in acute care settings. The Memorandum recommended that only essential visitors be permitted in hospitals, including "those who have a patient who is dying or very ill, a parent/guardian of an ill child or youth, a visitor of a patient undergoing surgery or a woman giving birth."

Following the CMOH recommendation to restrict hospital access to essential visitors only, hospital management decided to revise their Visitor Policy effective immediately. The new Visitor Policy stated that: "As of March 20, no visitors are allowed. Exceptions will be made on a case-by-case basis, such as those requiring end-of-life care, labouring persons and patients under the age of 18."

The Applicant/SDM did not fall within the class of essential visitors allowed by the hospital, and consequently was not granted in-person visits with Mr. Sprague – although the hospital did offer alternative communication opportunities through telephone or video. In bringing a motion for judicial review of this decision, the Applicant/SDM alleged a violation of Mr. Sprague's rights under sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms.*[2] The Applicant/SDM asked that the Visitor Policy be declared to be of no force or effect, and that the hospital be ordered to grant him full and unfettered access to visit Mr. Sprague in person. The Applicant/SDM also asked for the CMOH memorandum to be declared of no force and effect, on the basis that it violated section 15 of the *Charter*.

[1] *Sprague v. Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335

[2] Respectively, these are the rights to life, liberty and security of the person (section 7); the right to freedom from cruel and unusual punishment (section 12); and the right to freedom from discrimination (section 15) of the *Canadian Charter of Rights and Freedoms*.

The Court dismissed the motion of the Applicant/SDM in its entirety. The Court's reasoning is further outlined below.

Key Highlights of the Decision

- Hospital policies on matters such as visitor restrictions are generally not subject to judicial review by the courts, as they do not rise to a level of "public law" which attracts judicial scrutiny.
- The Applicant's/SDM's *Charter* rights were not breached in the circumstances of this case, as the hospital's Visitor Policy was based on significant clinical and operational considerations, and an appropriate balance of relevant factors.
- Hospitals are independent corporate bodies applying their own clinical and management expertise to ensure the safety of patients, staff and the general public. As such, their decision-making on internal policy matters is afforded a high degree of deference.
- The *Health Care Consent Act* does not require in-person presence of substitute decision-makers for valid consent to treatment. Rather, in the circumstances of this case, and more broadly, consent via telephone or electronic means can be sufficient.

The Court's Findings

The Court made a number of key findings in this decision, as further outlined below.

Hospital's Visitor Policy Decisions are not Subject to Judicial Review

As a first step, the Court considered the issue of whether internal hospital visitor policies are subject to court review through the *Judicial Review Procedures Act.*

It found that such policies are not subject to judicial review for two reasons:

Firstly, the ability for the court to rule in judicial review matters depends on the exercise of a statutory power of decision. In order for a decision to be judicially reviewable, it must be exercised pursuant to a particular statute. In this case, the *Public Hospitals Act*, and its regulations do not dictate how a hospital is to regulate access to its premises for visitors. Rather, the hospital's decision around visitor policies arose from a more general (non-statutory) ability to make decisions for the safety of staff, patients and visitors.

Secondly, even when a decision is exercised pursuant to statute, that decision must be "the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied." The Court reviewed several factors and concluded that the hospital's decision was not of a "sufficiently public character" to attract judicial review, for a number of reasons:

- The hospital's decision-making arose from its authority as an owner/occupier to control its premises and protect its patients and staff (rather than being a broad public decision);
- Public hospitals in Ontario are incorporated under the *Corporations Act* as independent, non-share capital corporations with independent boards of directors. There is no statutory duty upon hospitals to provide general and uninhibited access to their premises or to visitors;
- The Visitor Policy was shaped by medical and clinical criteria that were informed by scientific and epidemiological evidence (rather than being a strictly "legal" exercise of power); and
- Hospitals are not agents of government; and in this case, the hospital applied its own expertise to the CMOH recommendation to create a specific policy (rather than acting as a "arm" of government in a general policy-making role).

Although it concluded that the hospital's decision was not subject to judicial review,[3] the Court still chose to also examine whether particular *Charter* rights were violated.

The Patient's Charter Rights Were Not Breached

The Court also undertook a detailed analysis of whether Mr. Sprague's *Charter* rights were infringed.

On the issue of section 15 of the *Charter* (the right to freedom from discrimination), the Court acknowledged that the hospital had made a distinction by identifying some visitors as "essential" while others were "non-essential"; and that this distinction may have placed an undue burden on the elderly or those with mental disabilities such as incapacity.

However, the Court found that the Visitor Policy was not discriminatory; rather, "the decision [was] rooted in the expertise of medical and public health professionals exercising their professional judgment, which [was] in turn based on scientific evidence and epidemiological data that elderly patients are more severely impacted by the COVID-19 pandemic." As such, the decision to restrict visitors to the Hospital was a "valid medical concern relevant to protecting patient safety."[4]

With respect to section 7 of the *Charter* (the right to life, liberty and security of the person), the Court found that the right to security was engaged. However, the Visitor Policy was implemented in accordance with the principles of fundamental justice – that is, it was not arbitrary, overly broad or grossly disproportionate in its aims. The Court noted that the Visitor Policy appropriately balanced relevant considerations, including exceptions for matters of compassion (ex. end of life care).

[3] Note that the Court also concluded that the CMOH Memorandum also was not subject to judicial review, based on the fact that the Memorandum is "discretionary" in nature (outlining CMOH recommendations, rather than being a binding directive having the force of law). The Court's reasoning can be found at para 27ff of the decision.
[4] Para 38

On the issue of section 12 of the *Charter* (freedom from cruel and unusual punishment), the Court found that these rights were simply not engaged in the circumstances of this case. The Court noted that the Visitor Policy was "not a sanction imposed by virtue of a conviction or anything akin to a conviction" and that "neither Mr. Sprague as patient nor the applicant as visitor [were] subject to active state control of any kind."

The Court therefore dismissed the arguments against the hospital on all three purported grounds of *Charter* violation.[5]

Deference will be given to hospitals in managing the pandemic

Throughout this decision, the Court also made important comments about the latitude that is afforded to hospitals in managing the pandemic.

In support of the hospital's expertise, the Court highlighted that,

> "*The Applicant's criticisms of the Visitor Policy, and its alleged inconsistencies and logical flaws, are really an attempt to engage the Court in a re-weighing of the complex and often difficult factors, considerations and choices that must be evaluated by a hospital administration during a pandemic. This is not the Court's role.*
>
> *The Hospital has enormous expertise and specialized knowledge available to it in exercising its discretion around hospital administration issues during a pandemic, only one of which is its visitor policy. Significant deference must be afforded to the Hospital in the circumstances. There is ample evidence to support the conclusion that the Visitor Policy to limit visitors was founded on sound medical, scientific and epidemiological evidence…"* [6]

The Court also found that "hospital management had considered the available information, recommendations and guiding principles set out by the CMOH, visitor policies from other hospitals in the greater Toronto area, and expert input. They weighed the risks posed by COVID-19 to the Hospital community against the benefit of visitor access to patients and family members."[7]

In making these findings, the Court affirmed that hospitals decisions on internal matters such as visitor restrictions should be afforded a great degree of deference. The Court recognized the expertise involved in clinical and management decision-making in the circumstances of the pandemic.

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[5] Note that the Court also undertook a detailed analysis of whether the CMOH Memorandum violated Mr. Sprague's *Charter* rights under section 15, and similarly dismissed those claims. The Court's reasoning can be found at paras 57ff of the decision.
[6] Para 45 of the decision [emphasis added]
[7] Para 14 of the decision

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Substitute Decision-Making Consent by Electronic or Telephone Means

Finally, the Court also made some important observations regarding the use of electronic or telephone means to gain substitute decision-maker (SDM) consent for treatment decision.

The Court found that the hospital was able to obtain informed consent from the Applicant/SDM by communicating with him by telephonic or electronic means. In particular, the Court highlighted that the *Health Care Consent Act* does not require the physical presence of a SDM in order to obtain informed consent; and that such a requirement would not be practical or possible to fulfill.

The Court also clarified that its finding was not unique to the pandemic. It noted that, "hospitals regularly obtain consent from substitute decision-makers in this manner [i.e. by telephone or electronic means]. A substitute decision-maker does not need to be physically present with the patient in order to provide informed consent."[8]

This clarification by the Court may assist hospitals in understanding the circumstances under which it might be appropriate to obtain SDM consent for treatment by telephone or electronic means.

Next Steps

The OHA continues to monitor the legal and policy landscape with respect to the COVID-19 pandemic, and will provide members with further updates and information and they become available.

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[8] Para 41 of the decision [emphasis added]