Ontario Critical Care Clinical Practice Rounds (OC3PR)

April 25, 2024

The Consent and Capacity Board of Ontario: Role, Navigation, and How It Helps the Health Care Team

Chaired by Dr. Dave Neilipovitz

Presented by Dr. Gianni D'Egidio

Meeting Etiquette

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The Consent and Capacity Board of Ontario: Role, navigation, and how it helps the health care team

Date: April 25th, 2024

Presenter: Gianni D'Egidio

OBJECTIVES:

1. Describe the structure of the CCB and the role it can have in the ICU.

2. Describe the role of the Substitute Decision Makers (SDM).

3. Explain how to navigate the CCB process for the health care team.

Disclosure

This is public knowledge

Visit Canadian Legal Information Institute
https://www.canlii.org/en/on/

Case Presentation

62 year old female with Down Syndrome and advanced dementia, admitted in September 2018. Family wants everything based on religious beliefs.

Entire health care team feels she is suffering.

Patient is incapable.

Substitute decision maker(s) are 2 sisters.

Physicians must obtain consent in order to withdraw life-sustaining treatment.[39] Physicians cannot make a unilateral decision to withdraw life-sustaining treatment. As a part of the

39. The Supreme Court of Canada determined in *Cuthbertson v.Rasouli*, 2013, SCC 53, [2013] 3 S.C.R. 341 (hereinafter *Rasouli*) that consent must be obtained prior to withdrawing life-sustaining treatment.

When a patient or substitute decision-maker does not provide consent to withdraw life-sustaining treatment, physicians must engage in the conflict resolution process as outlined in Section 8 of this policy which may include an application to the Consent and Capacity Board.[40]

Decision Making for End-of-Life Care Policy
College of Physicians and Surgeons of Ontario

In Wawrzyniak v. Livingstone, 2019 ONSC 4900 the Court concluded that the writing of a no-CPR order and withholding of CPR (resuscitation) do not fall within the meaning of “treatment” in the Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A.

As such, consent is not required prior to withholding CPR/Resuscitation and physicians are only obliged to provide CPR in accordance with the standard of care.

Ontario's Consent and Capacity Board (CCB)

Has authority to review the refusal of Substitute Decision-Makers [SDMs] to consent to withdrawal/withholding of treatment;

Hearing convenes within 7 days of receipt of application -- usually in the hospital; now virtual

Decision the day after hearing ends, 'Reasons for Decision' within 4 business days;

The CCB has heard more end-of-life cases than all Canadian Courts combined!

CCB

CCB is an independent neutral third body that is a quasi-judicial board that will come into the hospital and decide what is in the best interests of the patient.

The patient will have a lawyer assigned to them from the CCB. The SDM has the right to legal counsel and if they cannot afford one provide contact information for legal aid

CCB

1. CCB hearing – there will be from 1-5 people on the board. Generally, there is one person, the Chair of the Board, who will preside over the hearing. There will be a lawyer for the patient and should be a lawyer for the SDM. Hearing can be adjourned delayed quite often if there is no legal representation for the SDM.

2. You will be asked to present your case. You can call witnesses if you would like. Hearsay/unfounded/undocumented information is allowed.

3. You and your witnesses will be cross examined.

CCB

4. Hearing can last all day 9-4pm, depending on complexity. You can be compensated for your time.

5. Decision via fax or email within 24 hours, usually same night.

Substitute Decision Making

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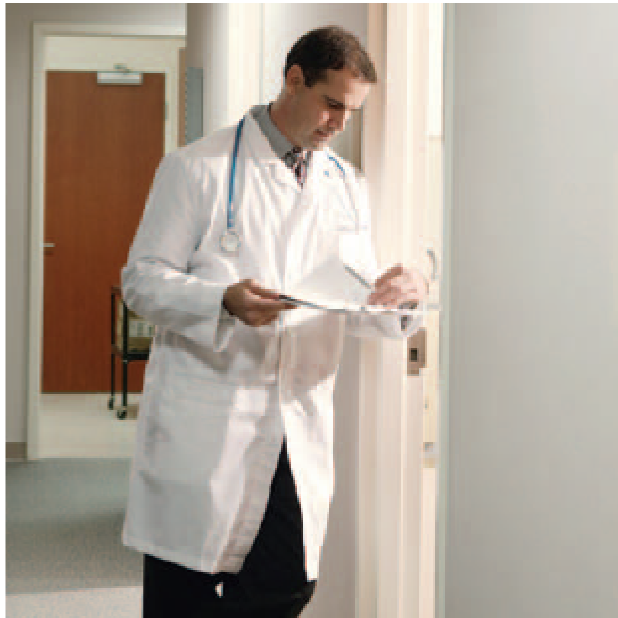
QOM3 The Ottawa M&M Model

Determining capacity to consent

Guiding physicians through capacity and consent to treatment law



THIS GUIDE WAS DEVELOPED BY:

The Mini Task Force on Capacity Issues,
The Dementia Network of Ottawa

MEMBERS OF THE MINI TASK FORCE:

Michele Tremblay, FRCPC, Director of the Inpatient Geriatric Unit, Royal Ottawa Hospital

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The College's Complaints Committee has identified certain issues that appear to be recurring areas of misunderstanding or difficulty for members of the medical profession. One such area is the issues involved in determining capacity to consent in the cognitively impaired.

From time to time, the Committee deals with complaints against physicians who have misunderstood the law with respect to assessing capacity or making decisions without appropriate consents, particularly in circumstances of cognitively impaired patients in nursing home settings, or those who have disinterested or feuding family members. It is easier to misstep in these situations if one is not familiar

To further provide guidance to physicians, we are publishing here an abridged guide to capacity and consent issues, adapted from "A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease" published by the Dementia Network of Ottawa.

In the September issue of *Dialogue*, we will publish guidance in determining Capacity to Consent to Admission to a Care Facility.

Introduction

Progressive dementias ultimately interfere with decision-making abilities involved in all aspects of life. As there is no uniformity in the illness progression, specific capacities will be lost at different periods during the course of each person's disease.

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OM3 The Ottawa M&M Model

Determining Capacity

1. Does the person understand the condition for which the specific treatment is being proposed?
2. Is the person able to explain the nature of the treatment and understand relevant information?
3. Is the person aware of the possible outcomes of treatment, alternatives or lack of treatment?
4. Are the person's expectations realistic?
5. Is the person able to make a decision and communicate a choice?

Determining Capacity

Document the date, finding of incapacity, and reason for decision!!!

They have the right to challenge, you must provide them with a form 33 and form 3

Next Steps?

You now need substitute consent

First, determine if there is a living will, previously expressed wish, or assigned POA

If not, correctly identify the SDM!!!

The following is the Hierarchy of SDMs in the HCCA

1. Guardian of the Person with authority for Health Decisions
2. Attorney for personal care with authority for Health Decisions
3. Representative appointed by the CCB
4. Spouse or partner
5. Child (over 16)
6. Parent with right of access
7. Brother or sister
8. Any other relative
9. Office of the Public Guardian and Trustee

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OM3 The Ottawa M&M Model

Role of SDM/POA

1. Explain the role of the SDM/POA
   a. They must be competent, willing, and available to make decisions. They have the right to abstain from being an SDM. They must be over the age of 16.
   b. Their role is to consent to a treatment plan proposed by the medical team. Their role is not to demand therapy.
   c. They must act on previously competent expressed wishes
   d. If not clear wishes they must act based on values, beliefs, and best interests of the patient

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.

Navigating the CCB Process

CCB

1. Go to CCB website, go to Forms, download form G, complete form G and fax it is to the board

2. Board will set a preliminary date. The hearing will take place wherever the patient is located; it is up to you to book a room/location and to provide directions.

3. You should create a case summary and then provide submissions to the board. Submissions can be anything from the chart (i.e. consult notes, second opinion, pictures, progress notes, nursing notes, etc.) that is used to argue your case.

CCB

Label each individual submission as “A” “B” “C” and what it is and from what date (i.e. Submission A-Family meeting note with Dr. X on April 25th, 2017). Create a submissions list as well.

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Issues with the CCB process?

From time of application to decision is at least one month

Decision is solely based on law and has no regard for medical standards of care or ethical principles

Hearings are long! Preparatory time is even longer!

Litigation? Never ending?

Legal representation?

Case Presentation (CCB)

7) 62 year old female with Down Syndrome and advanced dementia, admitted in September 2018. Family wants everything based on religious beliefs.

SDM not acting in accordance with section 21, SDMs ordered to comply with palliative care. They appealed to the Superior Court. Appeal dropped. Patient subsequently passed away.

RESULT

The panel determined that HC was incapable of consenting to a palliative plan of treatment and, further, that the substitute decision-makers had not complied with the principles for substitute decision-making set out in the *HCCA*. We ordered that the SDMs consent to the plan as set out in the Decision, as repeated above, by April 5th, 2019 at 12pm.

Dated: April 2, 2019

Lora Patton
Presiding Member

Discussion

????? Questions????? Comments???? Your cases????

Thank you for joining us today

Feedback? Suggestions for the next topic?

Submit ideas in our evaluation survey (Link in chat)

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