

# **OTLA Submission to College of Physicians and Surgeons of Ontario**

## *Consent to Treatment*

February 12, 2024

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input on the College of Physicians and Surgeons of Ontario (CPSO)'s review of their Consent to Treatment Policy ("Policy").

The Ontario Trial Lawyers Association was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

## Background

A patient's right to determine what will happen to their body is one of the most significant rights held by Canadians. As noted by the Ontario Court of Appeal in *Malette v. Shulman*:<sup>1</sup>

"The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority."

Given the current Policy was approved by Council in 2001, OTLA supports the CPSO's decision to review the Policy to ensure it continues to emphasize the legal and moral priority of patient autonomy when advising its' physician members about their obligations to obtain informed consent prior to treatment. OTLA encourages the CPSO to ensure that any changes or revisions to the Policy resulting from these consultations are clear, unambiguous, and patient-focused. Given Courts in Ontario are often addressing and interpreting concepts of informed consent in the context of medical treatment, OTLA recommends that the CPSO consider more frequent reviews of this Policy in the future.

---

<sup>1</sup> *Malette v. Shulman et al*, [1990 CanLII 6868 \(ON CA\)](#) at Part VII, last paragraph.

Below, OTLA has set out several proposed amendments to the Policy that seek to clarify the obligations of physician members to their patients in obtaining Consent and that emphasize the paramountcy of patient autonomy.

## **Proposed Amendments**

### ***Clarification of the definition of “Treatment”***

This definition of “Treatment” should be amended to explicitly include the withdrawal of an intervention as a form of recognized Treatment, in line with the Supreme Court of Canada’s decision in *Cuthbertson v. Rasouli*<sup>2</sup>. This amendment would help remind physicians of the judicial clarification of the legislated definition of “treatment” as set out in the *Health Care Consent Act*<sup>3</sup>, and the requirement that informed consent is required even when withdrawing an intervention.

### ***Clarification and caution of the definition of “Emergency”***

The definition of “Emergency” both in the Policy and in [Section 25](#) of the Act includes situations where a person is “apparently experiencing severe suffering”. “Severe suffering” is an ambiguous term that each physician may define differently. Given this ambiguity, OTLA recommends that physician members be specifically advised to interpret “severe suffering” with caution when determining that a situation is truly an Emergency as envisioned under the Act/Policy that does not require patient consent.

### ***The importance of considering and addressing language barriers and communication issues***

Under the heading of General Expectations (at paragraph 4 of the Policy), physicians are “advised” to consider and address language and/or communication issues when obtaining consent. In OTLA’s view, this statement should be amended to read that physicians “must” or “are required” to consider language or communication issues when seeking the consent of their patients. It is imperative that physicians turn their mind to whether or not their patient can understand what is being suggested about their medical care prior to engaging in any treatment.

With respect to the use of translation or interpretive services, physicians should be “strongly advised” to use formal translation or interpretive services where institutional and local resources permit, to avoid undue interference by, or reliance on, family assistance where such reliance is avoidable. To assist physicians and patients, the CPSO should consider working with the Ministry of Health and Long-Term Care to develop telephone and/or virtual translation and interpretive services that are available on demand across the Province.

---

<sup>2</sup> *Cuthbertson v. Rasouli*, [2013 SCC 53](#), [2013] 3 S.C.R. 341

<sup>3</sup> *Health Care Consent Act*, [1996, S.O. 1996, c.2, Sched. A](#) [“Act”] at [Section 2\(1\)](#).

### ***Advice and Guidance should be provided regarding cultural dynamics in health care decision-making processes***

OTLA strongly recommends that the CPSO provide advice and guidance to physicians respecting the potential implications of cultural dynamics in the health care decision making process. In particular, OTLA recommends advising physicians that they must consider how cultural dynamics may be impacting how their patient receives/interprets health care information, and how they make decisions. Physicians should be advised to consider whether or not further steps should be taken to ensure that the patient's health care decisions are being made in a culturally appropriate, sensitive, and informed manner.

### ***Ensuring consent is freely given***

Paragraph 6(d)(i) of the Policy, under the heading of "Obtaining Consent," is unclear. The provision notes that if physicians believe that consent is not being freely given, that they must ensure that there has been no coercion. In OTLA's view, this is misleading as to a physicians' legal obligations. It should be clearly articulated that if a physician believes that consent is not being freely given, then there is invalid consent and no treatment ought to be provided, whether the lack of free consent results from "coercion" or for any other reason. In all circumstances, where a physician determines that consent is not freely given, treatment should be withheld until or unless freely given and informed consent can be obtained.

### ***Explicit consent should be required for painful, risky or invasive procedures***

Paragraph 8 of the Policy states that physicians are "strongly advised" to obtain explicit consent where the treatment is "more than mildly painful, carries appreciable risk, will result in ablation of a bodily function, is a surgical procedure or an invasive investigative procedure, or will lead to significant changes in consciousness."

To prioritize patient autonomy and bodily integrity, OTLA is of the view that the phrase "strongly advised to" should be amended to "must." In OTLA's view, all physicians should be required to obtain explicit consent before providing any treatment or procedure that may cause significant harm to a patient, is invasive, or is painful.

The suggested change would also allow for concordance with paragraph 20 of the Policy, which directs physicians that they "must" document consent where the treatment is "more than mildly painful, carries appreciable risk, will result in ablation of a bodily function, is a surgical procedure or an invasive investigative procedure, or will lead to significant changes in consciousness." If physicians "must" document consent to such treatment, it reasons that they must also obtain the necessary explicit consent they are being told they must document. This amendment would ensure the protection of both physicians and patients in circumstances that involve significant and potentially impactful treatments or procedures.

### ***Documentation should be strongly encouraged in all circumstances***

Physician documentation in a medical record is imperative for both patients and physicians. Clear and complete documentation offers the greatest assurance that the proper considerations have been reviewed with a patient, and that informed consent has been appropriately obtained.

As noted above, paragraph 20 of the Policy directs physicians that they must record consent where the treatment is “more than mildly painful, carries appreciable risk, will result in ablation of a bodily function, is a surgical procedure or an invasive investigative procedure, or will lead to significant changes in consciousness.” In paragraph 21, however, the Policy only states that physicians are “advised” to document consent in all other circumstances.

In OTLA’s view, the Policy’s advice should be strengthened and direct physicians that they are “strongly advised” to document consent in the patient’s record in all other circumstances. Such a change would remind physicians of the critical importance that good documentation can make, ensuring a good practice of obtaining and recording all necessary aspects of informed consent.

## **Conclusion**

It has been and continues to be OTLA’s position that the CPSO continue to uphold patients’ fundamental right to determine what occurs with their bodies. With the greater clarity and direction afforded by the proposed amendments, it is OTLA’s hope that physicians will be encouraged to improve their practices when obtaining the consent to treatment for their patients.

As always, OTLA appreciates the opportunity to be involved in this process and if you have any questions or require clarification, please do not hesitate to contact us.