Standard of care and resource implications of the *Cuthbertson* v. *Rasouli* ruling

Robert Sibbald MSc, Paula Chidwick PhD, Laura Hawryluck MD MSc

On Oct. 18, 2013, the Supreme Court of Canada released its judgment in the case of Hassan Rasouli.[1] The court stressed that its ruling applied only in Ontario. The main implication of the ruling is that physicians in Ontario seeking to withdraw life support over the wishes of substitute decision-makers have no other choice but to apply to the province's Consent and Capacity Board, regardless of whether they feel ongoing treatment falls within the standard of medical care. We explore two major consequences of the ruling that we feel physicians should consider. First, the ruling will likely affect the standard of medical care and practice well beyond Ontario. Second, there are potentially substantial resource implications for Ontario now that the Supreme Court's decision has given the Consent and Capacity Board a larger role to play in end-of-life decision-making.

Hassan Rasouli has been dependent on life support in the intensive care unit at Toronto's Sunnybrook Health Science Centre since 2010, where he remains while waiting for a bed in a complex continuing care facility. He was deemed to be in a vegetative state following resection of a meningioma. After months without improvement, his physicians felt that ongoing mechanical ventilation was no longer medically indicated and would not therefore be "offered," which meant that consent of the family was not required. The outcome of a court case brought by Mrs. Rasouli against her husband's physicians was that consent was required for withdrawal of life support. An appeal at the Ontario Court of Appeal failed, following which the physicians sought and were granted leave to appeal to the Supreme Court of Canada. One of the arguments put forward by the physicians was that, to be considered a treatment, an intervention must be medically indicated, and medical benefit was a requirement of indication. The Supreme Court has now dismissed this appeal.[1]

In the past, when treatments were felt no longer to provide medical benefit and conflicts could not be resolved, physicians were not clear how to proceed. Some acceded to the insistence to continue treatments despite the potential harms. Some in Ontario brought such cases to the Consent and Capacity Board. Others elsewhere in Canada generally went to court, only to have injunctions placed on any decisions regarding withdrawal of life support pending more thorough hearings, with the cases often being dropped because of the death of the patient. Up to now, such problems have remained largely unresolved.

In the recent Supreme Court decision, Chief Justice McLachlin noted that "the concept of health-related purpose in the *Health Care Consent Act* does not interfere with a physician's professional assessment of whether a procedure offers a medical benefit [is medically indicated]" (para 37). She acknowledged that, "this clinical term ["medical benefit"] has legal implications for the physician's standard of care" (para 36). However, for patients already receiving ventilator support, such as the case with Hassan Rasouli, the physicians' recourse now must be to apply to the Consent and Capacity Board if they feel that ongoing mechanical ventilation is not medically indicated and the substitute decision-maker will not consent to a plan of treatment that includes withdrawal of ventilator support. The reasoning of the Supreme Court was that the legislative requirement for consent was any intervention undertaken for a "health-related purpose" as opposed to anything that could provide medical benefit.

Ontario's Consent and Capacity Board is a quasi-judicial tribunal that does not benefit from expertise in critical care medicine. Yet it is now the first line of legal adjudication in the province in one of the most complex fields of medicine. An interesting potential outcome is that, if the board determines that ongoing ventilation is in the best interests of the patient, then the board will essentially have the power to mould a medical standard of care contrary

Key points

- Physicians in Ontario seeking to withdraw life support over the wishes of substitute decision-makers, as in the Rasouli case, must now apply to the province's Consent and Capacity Board.
- Any instruction by the board that results in physicians providing treatment they would otherwise not offer will affect the standard of care further afield.
- Substantial resource implications will be associated with the board's increased involvement in end-of-life decision-making.

Competing interests: All of the authors have been involved in clinical cases that have been brought before the Consent and Capacity Board. Laura Hawryluck wrote submissions to the Supreme Court of Canada on the Rasouli case to have the appeal heard and worked with the Canadian Critical Care Society in its role of intervenor before the court.

This article has been peer reviewed.

Correspondence to:
Robert Sibbald,
robert.sibbald@lhsc.on.ca

***CMAJ* 2014. DOI:10.1503/cmaj.131640**

to the professional opinion regarding benefit. This has implications beyond Ontario, because standards of professional opinion regarding patients' interests are usually quite consistent across jurisdictions; the standard of care is determined in part by what similarly trained practitioners do. Any instruction by the Consent and Capacity Board that results in physicians providing treatment they would otherwise not offer will affect the standard of care further afield.

Yet a more pressing concern is that substantial resources are required to maintain patients on life support where it is argued that there is no medical benefit and treatment lies outside the standard of care. This is the elephant in the room in cases such as Hassan Rasouli's.

Supporters of the Consent and Capacity Board process maintain that the board is a better venue than the courts to resolve such cases because of its legislated mandate to hear and decide cases with incredible speed (relative to the courts). However, having tracked these decisions[2] and written about the process and outcomes,[3–6] we have concluded that the process is still in need of improvement. Of concern is the increasing frequency with which substitute decision-makers are choosing to appeal decisions by the Consent and Capacity Board to the Superior Court of Ontario. To date, 11 of 30 form-G end-of-life cases have been appealed, and only 1 appeal has been successful.[2] The successful appeal was the first case brought before the Consent and Capacity Board that dealt with acute treatments for a patient at the end of life where the courts seemed to confuse cardiopulmonary resuscitation and "life support" more generally.[7]

Appeals are an essential component of any justice system, but there is a cost attached to them. On average, appeals of Consent and Capacity Board decisions (usually to withdraw treatment and allow a natural death) take three to four months to be heard in court and another number of weeks for the court to render a ruling. The average bed in an intensive care unit costs about $3000/day to operate, which means that it costs about $360 000 per patient for a case to be heard in court. Ontario has spent almost $4 million maintaining patients on life support in the course of the 11 end-of-life cases that have been appealed, and only once has the court overturned a decision by the board to withdraw life support. These rough calculations underestimate the actual costs, because many physicians prefer to avoid the time and conflict associated with pursuing an application to the Consent and Capacity Board for a determination of their patient's best interests, and some delays in the process of appeal are longer than usual.

When physicians bring cases that argue from a professional standard of care to the Consent and Capacity Board, it is difficult to see how the board could ever disagree (as considered in another Canadian case, "[the court] could not conceive of any circumstances in which it would be other than an abuse of power to require a medical practitioner to act contrary to the fundamental duty which that practitioner owed to his or her patient"[8]). For such cases, an appeal would serve only as a means of allowing families to "win" for the time it would take to hear the appeal, at substantial cost to both the health care and legal systems.

Some might argue that a few months' delay would have been preferable to the more than three years spent maintaining Hassan Rasouli on life support. But the Rasouli case was pursued in the hope that the Supreme Court would have found there are certain situations in which it is inappropriate for the Consent and Capacity Board to hear such cases and would have ruled on principles that would clarify the role of the standard of care in these situations.

We do not argue that a black and white distinction has to be made between who gets to decide. We believe that the Consent and Capacity Board is a useful and appropriate venue for some cases, for example where a patient's best interests may be served by forgoing treatments that are medically indicated. However, if the professional judgment of a group of physicians is that a treatment lies outside the standard of care, we believe that the board should have no role in questioning that judgment.

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Affiliations: Department of Clinical and Corporate Ethics, London Health Sciences Centre, and Department of Family Medicine, Western University (Sibbald), London, Ont.; William Osler Health System (Chidwick), Brampton, Ont.; Department of Medicine, University Health Network (Hawryluck), Toronto, Ont.

Contributors: Robert Sibbald wrote the initial draft of the opinion. Paula Chidwick and Laura Hawryluck critically reviewed it and made key revisions. All of the authors approved the final version submitted for publication.