Court defers to hospital's decision-making during pandemic

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In response to the COVID-19 pandemic and a March 19 recommendation by the Chief Medical Officer of Health, hospitals across Ontario modified their visitor policies to limit access to "essential visitors" only. These decisions were made to prevent the spread of the novel coronavirus, and in particular, to protect hospitals' patients and staff from infection.

On April 9, 2020, the Ontario Divisional Court (the Court) heard a challenge to North York General Hospital's (the Hospital) restricted visitor policy. The challenge was brought by the substitute decision-maker and litigation guardian of a patient who is 77 years old and medically stable. The patient is also the substitute decision-maker's father. The applicant asked the Court to review the Hospital's visitor restrictions and sought "full and unfettered" access to his father to be able to make treatment decisions on his behalf. On April 20, the Court released its decision dismissing the application (see 2020 ONSC 2335).

Of note, due to social distancing measures during the pandemic, this was the first virtual hearing held in the history of the Divisional Court.

What you need to know

- The Court determined that the Hospital's decision to restrict access to its premises was not a decision that is subject to judicial review by the courts.
- The Court recognized and, ultimately, deferred to the Hospital's expertise and experience as the Hospital established that its decision was informed by the available medical and epidemiological evidence in the context of the pandemic.
- The Court concluded that the visitor policy did not breach the patient's rights under sections 7, 12 and 15 of the *Charter of Rights and Freedoms* (the *Charter*).
- The Court confirmed that informed consent does not need to be provided by a substitute decision-maker in person; it can be provided via telephone or e-mail.

A hospital's decision to restrict visitors is not subject to judicial review

Not every decision made by an organization is subject to judicial review. In order to trigger the jurisdiction of the court, a decision must be made pursuant to a statutory power and it needs to be public in nature – neither of which were present in this case. Common examples of reviewable decisions are those of administrative tribunals or of an organization implementing a specific government program.

Here, when making the decision to restrict visitor access, the Hospital was not acting pursuant to a statutory authority – *i.e.* a power granted to it by the Legislature. Neither the *Public Hospitals Act*, nor its regulations, dictate how a hospital is to regulate access to its premises to visitors. The Court confirmed there is no statutory duty on a hospital to provide general and unlimited access to visitors.

While the decision to restrict visitor access certainly affects the public, this is not sufficient to trigger the oversight of the court. Rather, the decision needs to go further to be considered to be of a sufficient public nature to be reviewable; it must be "public" in a "public law sense". In other words, the organization would need to be exercising a power central to the administrative mandate given to it by the government. Here, the Hospital's authority arose from its rights as an independent corporation (rather than an agent of government) and as an occupier of its premises. Furthermore, the Court stated that "[w]hile it is expected that hospitals will follow the [Chief Medical Officer of Health's] recommendation, they are not statutorily compelled to do so."

Throughout its 13-page decision, the Court emphasized the complexity of the decisions faced by a hospital administration during a pandemic and the expertise that the Hospital brought to bear on those decisions:

> [T]he 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 visitor policy. Significant deference must be afforded to the Hospital in the circumstances.

The Visitor's Policy does not breach the *Charter of Rights and Freedoms*

The applicant argued that the visitor policy breached his father's rights to (1) equality; (2) life, liberty and security of the person; and (3) protection from cruel and unusual punishment. Despite deciding that the decision was not subject to judicial review, the Court went on to consider and reject these *Charter* arguments.

The focus of the challenge was on whether the patient's equality rights were infringed, in particular, because exceptions were made for some visitors (including visitors seeing patients who are at the end-of-life, labouring or under the age of 18), but not for others. He argued that these distinctions placed an undue and discriminatory burden on the elderly and those with mental disabilities.

The Court concluded that the visitor policy is not discriminatory, but rather is "rooted in the expertise of medical and public health professionals exercising their professional judgment, which is in turn based on scientific evidence and epidemiological data". The distinction made, between those who were granted exceptions and those who were not, was based on the severity of the impact of the virus on the patient demographic to be visited. For example, the medical evidence showed that the elderly are more likely to suffer severe consequences if infected with COVID-19, whereas children are not affected to the same degree.

The Court emphasized that the Hospital's decision was based on the evidence and valid medical concern relevant to protecting patient safety. It was not arbitrary (in that it fulfilled its objective in protecting the Hospital community), it was not overbroad (in that it did not affect more people than it needed to), and it was not grossly disproportionate (in that it did not go too far to protect patients).

Informed consent can be obtained remotely

Part of the applicant's argument was that he was unable to fulfill his duties as his father's substitute decision-maker without being with him in person.

The Court confirmed that a substitute decision-maker does not need to be physically present to provide informed consent. It explained that "[s]uch a requirement would not be practical or possible to fulfill." Rather, informed substitute consent may be obtained by the healthcare provider through telephone and e-mail consultation. The Court noted that this is not unique to the pandemic, as healthcare providers regularly obtain consent from substitute decision-makers in this manner outside the context of a pandemic.

Takeaway

Throughout the pandemic, health care providers across Ontario have been engaged in complex and evolving decision-making based on the available (and changing) expert and medical evidence. While hospitals recognize that visitor restrictions during the pandemic are very difficult for families and patients, the Court's decision in this case confirms that hospitals will be given deference in making the decisions necessary to protect their staff and patients, provided their decisions are made:

- with regard to the best clinical and scientific evidence available at the time;
- for the purpose of protecting the safety of hospital patients and staff; and
- with due consideration for those persons affected by decisions.

As health care organizations across the country face challenging decision-making arising from the pandemic, BLG's dedicated Health Law group is available to assist you. For further information about the implications of this decision for your organization, please feel free to contact any one of the co-authors of this article.

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