

CONSENT IN LONG-TERM CARE: ISSUES OF DETENTION AND RESTRAINT

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WEBINAR

May 17, 2016

Disclaimer

- This presentation and any material provided for this presentation is not legal advice but is only legal information for educational purposes
- Legal issues are **FACT SPECIFIC** and require factual information in order to provide legal advice to resolve an issue/problem/determine your rights
- If you require legal advice, please consult your own lawyer or legal advisor

Long-Term Care Homes Act, 2007

- Came into force July 1, 2010
- **All sections except section 32 and 45**
 - These sections deal with internal transfer to secure units, rights advice and the right to a hearing
- O. Reg. 79/10 also regulates long-term care homes
- *Health Care Consent Act*, Part III dealing with admission from community to secure unit also **not in force**
- No indication that the government plans on implementing these sections

RETIREMENT HOMES ACT, 2010

- Came into force July 1, 2013
- **All sections except section 70**
 - This section deals with “permitted confinement” in a retirement home
- O. Reg. 166/11 also regulates retirement homes

Safety in LTC

- Safety lens in long-term care is intentionally broad: includes residents, staff, medical staff, students, researchers, volunteers and the public
- Long-term care is highly compliance-driven
- Health care organizations have a legal duty to provide a safe environment for patients, residents, clients
- Must balance this with resident's rights

Restraints vs. PASDs

- Distinguishes between personal assistance services devices and restraints
- PASD – is a device that is used to assist a person with a routine activity of living

Restraints

- Intent is to minimize restraints
- Distinction between
 - Physical restraints
 - Barriers, locks
 - Secure units
 - Personal Assistance Service Devices (PASDs)

Prohibited Devices (Restraints & PASDs)

- Roller bars on wheelchairs, commodes or toilets
- Vest or jacket restraints
- Devices that lock and can only be released by a separate device
- Four point restraints
- Device used to restrain on a commode or toilet
- Devices that cannot be immediately released by staff
- Sheets, wraps, tensors or other types of strips or bandages used as a restraint

Not Restraints

- Physical device the resident can release himself from
- Personal Assistance Services Devices (PASDs)
- Drugs set out in a treatment plan
- Barriers, locks or other devices/controls at entrances/exits UNLESS they are used to prevent the resident from leaving
- Barriers, locks or other devices/controls at stairways

Restraint/Detention only Where Allowed by Law

- Long-Term Care Homes can only restrain or detain a resident where allowed by law
- Either by common law or statute law
- Often homes have a “policy” of not allowing residents to come and go, of requiring residents to be accompanied when off site
 - THIS IS NOT LEGAL

Resident's Right 11

11. Every resident has the right to,
- i. participate fully in the development, implementation, review and revision of his or her plan of care,

Resident's Right 11 (cont'd.)

iii. participate fully in making any decision concerning any aspect of his or her care, including any decision concerning his or her admission, discharge or transfer to or from a long-term care home or a secure unit and to obtain an independent opinion with regard to any of those matters, and

- Secure unit sections have not yet passed
- Must still comply with law of consent and well as rules re admission, discharge and transfer

Resident's Rights 12 & 13

13. Every resident has the right not to be restrained, except in the limited circumstances provided for under this Act and subject to the requirements provided for under this Act.
- See also Sections 29-36

Responsive Behaviours

- New concept under the regulation
- Definition:
 - (a) an unmet need in a person, whether cognitive, physical, emotional, social, environmental or other, or
 - (b) a response to circumstances within the social or physical environment that may be frustrating, frightening or confusing to a person;

Responsive Behaviours (cont'd.)

- Homes required to develop:
 - Written approaches
 - Written strategies
 - Resident monitoring and internal reporting protocols
 - Protocols for referral of residents to specialized resources where necessary
- Must be integrated into the care provided to the residents

Behaviours Altercations And Other Interactions

- Duty on the home to take steps to minimize risk of and prevent altercations between and among residents
- Duty to assist both residents and staff
- Must develop procedures to minimize risk of potential harmful interactions due to resident's behaviours, including responsive behaviours

Written Policy

- Every home must have a written policy to
 - Minimize restraint
 - Ensure that restraining is in accordance with Act and regulations
- Must ensure compliance
- Policy must comply with the regulations

Policy

- Must deal with
 - Use of physical restraints
 - Duties and responsibilities of staff
 - Restraining under the common law in emergency situation
 - Types of physical devices allowed
 - Consent of restraints & PASDs
 - Alternatives to the use of restraints
 - Evaluations of the use of restraints

Policy Requirements: Minimization of Restraints

- Use of physical devices
- Duties and responsibilities of staff
- Common law duty to restrain
- Types of devices permitted
- How consent to be obtained and documented
- Alternatives including planning development and implementation using an interdisciplinary approach
- How minimization of restraint will be evaluated
- How homes will ensure use of restraints complies with the Act and Regulations

Staff Duty

- Determine who has authority under the Act to restrain/release resident
- Ensure staff are aware at all times when a resident is using a physical restraint

Plan of Care

- Use of physical restraints may be included in a plan of care only if ALL the following conditions are met:
 - Significant risk to resident/other person of serious bodily harm
 - Alternatives considered and tried where appropriate and would not/are not effective
 - Least restrictive method
 - Ordered/Approved by physician or nurse in the extended class
 - Consented to by resident or if incapable, a SDM who has authority to consent

Consent to Restraints

- Restraints must be consented to except under emergency situations (pursuant to the common law)
- Issues
 - Can a person consent to their own “restraint”?
 - Who has legal authority to consent to restraints?

Substitute Decision-Making and Restraints

- *Health Care Consent Act* DOES not deal with consent to restraints EXCEPT with respect to use of restraints in the administration of treatment
- Therefore there is no “hierarchy” when it comes to use of restraints
- Attorney for Personal Care
 - Is it safety?
 - Even if it is – does it require a “Ulysses Contract” to enable attorney to consent to restraint?
- Guardian of the Person with Authority

Requirements for Use

- Licencee must ensure that:
 - Device used in accordance with regulations
 - Resident to be monitored per the regulations
 - Resident is released and repositioned per the regulations
 - Resident's condition is reassessed and effectiveness of the restraining evaluated per the regulations
 - Resident restrained only as long as necessary to address the risk of serious bodily harm to self/others
 - Restraint is discontinued when there is an alternative or less restrictive method available in light of the resident's physical/mental condition and personal history
 - Comply with any other requirements in the regulations

Physical Restraints

- Physical restraints must be:
 - Applied per manufacturer’s instructions
 - Well maintained
 - Not altered except for routine adjustments per manufacturer’s instructions
 - Use must meet requirements of the regulations

Resident Protection

- Resident not to be restrained
 - For the convenience of staff
 - As a disciplinary measure
 - Other than in accordance with the Act
 - By the administration of a drug, except at common law
 - By the use of barriers, locks or other devices preventing leaving room, part of the home, or grounds, except pursuant to the Act or the common law

Common Law Duty to Restrain

- Act does not affect the common law duty
- Where the resident is restrained in accordance with the common law duty, the licensee must still meet the requirements in the regulations
- Use of a drug (chemical restraint) must be ordered by physician or other person allowed under the regulations

Personal Assistance Service Devices

- A device being used to assist a person with routine activity of daily living
- Must be included in plan of care
- Alternatives must have been considered
- Must be least restrictive method
- Must be approved per the Act

Detention

- Secure unit sections not in force
- Detention ONLY pursuant to common law – which means only emergency situations
- ? Authority to detain on locked units
- ? SDM's authority to detain
- ? Challenge detention

Admission to Long-Term Care

- Finding of incapacity, and the ability to “consent” to admission to a long-term care home under the *Health Care Consent Act* DO NOT give the substitute decision-maker the ability to detain and restrain in a long-term care home or other facility

PS v. Ontario

- Parts of *Mental Health Act* struck down as being unconstitutional as deaf man was held for years in psychiatric facility
- Act was inadequate as it dealt with long-term detention
- One can infer that absence of any protections as presently exist in long-term care are therefore unconstitutional and illegal

Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefore

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful

Restrictions on Visitors by Family/SDM

- SDMs generally do not have authority to restrict visitors or restrict other access to residents of long-term care homes
- Attorney for personal care/Guardian of the Person may have limited authority if the person is incapable of making the decision AND it is a safety issue

Restriction on Visitors and Access by Long-Term Care Home

- Long-Term Care Home has no authority to restrict access by visitors
 - Resident Right #14: Every Resident has the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference
- Home has no authority to prevent resident from going out with third parties

Restraints in Retirement Homes

- All restraints are prohibited by the *Retirement Homes Act* except under the common law, where permitted by the common law in an emergency situation
- Includes physical and chemical (drugs) restraints
- Requires that the home have specified policies and procedures

Detention in Retirement Homes

- Detention sections have not been enacted and therefore homes may not legally detain/confine their tenants
- Similar issues as in long-term care homes
- Further, retirement homes are **tenancies**
- Even if the sections are enacted, for your **landlord** to detain you are open to legal challenge

Personal Assistance Service Devices in Retirement Homes

- Are permitted if they meet the criteria set out in the legislation regarding policies and use
- List of prohibited devices are the same as in the *Long-Term Care Homes Act*

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