Chapter 10

Consent

The Criminal Code defines an assault as the intentional application of force to the person of another without his consent[1] and sets out various offences and punishments for different types of assault. The civil as opposed to the criminal law uses the technical term battery for this type of act and exposes the perpetrator to liability in damages unless he is able to show legal justification for his act. In a situation involving immediate medical urgency where the person treated is unconscious and his wishes cannot be consulted, consent may not be necessary for a successful defence to a criminal charge or a civil action. Where consent is necessary, it must be freely given by a person who is capable of understanding the nature and effect of the act involved including the risks and who is not otherwise legally incapable of giving a valid consent. In addition, he must be provided with sufficient information to enable him to make an informed decision. While there are express exceptions in the Code, provided the above requirements are satisfied consent by a person who by the civil law of the provinces is a minor is usually a defence where a person is charged with an offence under the Criminal Code which requires the absence of consent.[2]

The requirement of consent in the abortion law

Subsection 4 of section 251 of the Criminal Code provides the "therapeutic abortion exception" to the offence of procuring a miscarriage under subsection 1. Still, without the consent of the patient even a therapeutic abortion would constitute an assault. In this case the consent of a minor alone would appear to satisfy the general criminal law requirement of consent. However, presumably to emphasize Parliament's intent not to infringe upon provincial jurisdiction over physicians and hospitals, subsection 7 of section 251 provides that:

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[1] Criminal Code, section 244(a).

[2] B. Starkman, "The Control of Life: Unexamined Law and the Life Worth Living", *Osgoode Hall Law Journal* 11 (1973): 175, note 17, p. 179.

> Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The effect of this subsection is to recognize all other consent requirements including those contained in the civil law of the provinces. It is not always clear under provincial law in what circumstances a valid consent to an abortion may be given by a minor and when the substituted consent of a parent or guardian must be sought. Nor does the law in the common law provinces provide any enlightenment regarding any requirements to obtain the consent of the father in addition to that of the woman seeking an abortion. Against this background, the Committee was asked to ascertain the practice of hospitals in seeking consent to abortions and to find out in accordance with its Terms of Reference whether "therapeutic abortion committees require the consent of the father, or, in the case of an unmarried minor, the consent of a parent."

Hospital practices and consent

In practice the interpretation of the requirements governing the obtaining of consent to all types of medical treatment including therapeutic abortions is established by hospital boards and hospital administrators. On its visits to hospitals across Canada and from the results of the national hospital survey, the Committee found that in addition to variation resulting from the specific types of treatment involved such as induced abortion, sterilization and contraceptive counselling, in the case of induced abortion **there was a diversity of consent requirements relating to the age of the woman and to the father.**

The Minor. In seven provinces and the two territories there is no special age of consent to medical treatment. In Newfoundland, New Brunswick, Nova Scotia, the Yukon and the Northwest Territories, the age of majority is 19 years, while in Prince Edward Island, Manitoba, Saskatchewan and Alberta it is 18 years. In Quebec and Ontario the age of majority is 18 years and in British Columbia it is 19 years.[3] In these three provinces specific statutes or regulations set lower ages of consent to medical treatment at 14 years for Quebec and 16 years for Ontario and British Columbia.[4]. The provisions dealing expressly with the age of consent to medical treatment have resulted in

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[3] Newfoundland, *The Minors (Attainment of Majority) Act 1971*, S.N. 1971, No. 71, s.6; New Brunswick, *Age of Majority Act*, R.S.N.B. 1973, c.A-4, s.1; Nova Scotia, *Age of Majority Act*, S.N.S. 1970-71, c.10, s.2; Yukon, *Age of Majority Ordinance*, Y.T.O. 1972, c.A-01, s.3; Northwest Territories, *Age of Majority Ordinance*, N.T.R.O. 1974, c.A-1, s.2; Prince Edward Island, *Age of Majority Act*, R.S.P.E.I. 1974, c.A-3, s.1; Manitoba, *The Age of Majority Act*, S.M. 1970, c.91, s.1; Saskatchewan, *The Age of Majority Act*, S.S. 1972, c.1, s.2; Alberta, *The Age of Majority Act*, S.A. 1971, c.1, s.10; Quebec, Civil Code, a. 246 and 324; Ontario, *The Age of Majority and Accountability Act 1971*, S.O. 1971, c.98, s.1; British Columbia, *Age of Majority Act*, S.B.C. 1970, c.2, s.2.

[4] Quebec, *Public Health Protection Act*, S.Q. 1972, c.42, s.36; Ontario, O. Reg. 729, s.49, R.R.O. 1970, as amended by O. Reg. 100/74, s.11, under the *Public Hospitals Act*, R.S.O. 1970, c.378; British Columbia, *Infants Act*, R.S.B.C. 1960, c.193, s.23, as amended by S.B.C. 1973 (1st Sess.), c.43. In Saskatchewan and New Brunswick regulations under the *Hospital Standards Act* and the *Public Hospitals Act* dealing with consent to surgical operations use the ages of majority. The consent of the parent or guardian of a minor is required only if the patient is unmarried.

much uncertainty among hospitals and physicians concerning the nature of their obligations and the protection afforded them.

In five provinces (Prince Edward Island, Nova Scotia, New Brunswick, Manitoba and Saskatchewan) and the two territories, all of the hospitals which were visited used the age of legal majority as the required age of consent for the performance of the abortion procedure. In the remaining five provinces, the situation varied to a certain extent, particularly in the three provinces which had statutes or regulations which set lower ages of consent to medical treatment.

In Newfoundland where the age of majority is 19 years, one hospital which had a therapeutic abortion committee was prepared to approve abortion applications beyond the age of 17 years, if in the judgment of the therapeutic abortion committee a young woman was considered to be an "emancipated minor", that is, that she was living away from home and was earning her own livelihood. This practice was also followed by one of the hospitals visited by the Committee in Alberta where the legal age of majority is 18 years.

Of the 19 hospitals with therapeutic abortion committees which were visited by the Committee in Quebec, five hospitals adopted the age of 14 years in principle as the basis of consent for the abortion procedure in accordance with the provisions of the Quebec *Public Health Protection Act*. The remainder of these hospitals, most of which did no induced abortions, adopted the age of majority as the accepted level. In Ontario, 27 hospitals which did the therapeutic abortion procedure which were visited by the Committee accepted the consent of women who were 16 years or older, a decision which was based on the Regulation under the Ontario *Public Hospitals Act*. Seven of the hospitals visited by the Committee in Ontario required the consent of parents for abortion patients up to the age of 18 years, the legal age of majority in that province. All of the hospitals in British Columbia visited by the Committee with one exception required the consent of parents for women who were under 19 years, or the age of majority, despite the fact that the *Infants Act* of that province sets the age of consent to medical treatment at 16 years. In one British Columbia hospital the consent of women who were 18 years of age was accepted if these women lived away from their parents' home and if they earned their own livelihood.

The Father. The law in the common law provinces provides no guidance regarding any requirement to obtain the consent of the father in addition to that of the woman seeking an induced abortion. The law of Quebec deals with the general right of married women to obtain medical treatment, though it does not refer specifically to induced abortion. Section 114 of *An Act Respecting Health Services and Social Services* provides that:

> The consent of the consort shall not be required for the furnishing of services in an establishment.[5]

In five provinces (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick and Manitoba) and the two territories (Yukon and Northwest

[5] S.Q. 1971, c.48. An establishment is defined in article 1(a) to include a hospital centre.

Territories), all of the hospitals visited by the Committee which did the therapeutic abortion procedure required the signed consent of a woman's husband prior to the performance of this operation. In the remainder of the provinces among the hospitals with therapeutic abortion committees which were visited by the Committee, the proportion of hospitals requiring the consent of a woman's husband was: 68.5 percent, Quebec; 55.8 percent, Ontario; 50.0 percent, Saskatchewan; 87.5 percent, Alberta; and 70.5 percent, British Columbia. Many of these hospitals required the consent of a husband prior to the performance of the abortion procedure.[6] Only three of these hospitals required the consent of a husband from whom a woman was separated or divorced and four hospitals required the consent of the father at all times, even when the woman had never been married. In Quebec, hospitals which required the husband's consent despite the provincial law mentioned the ambiguity of the consent requirement in subsection 7 of section 251 of the Criminal Code and the fear of possible legal action against doctors and hospitals as two of the most important reasons for the requirement.

Special provisions for lower ages of consent to medical treatment

Two prominent Canadian legal scholars, Mr. H. Allan Leal, Q.C., Chairman of the Ontario Law Reform Commission, and Professor Horace Krever, Q.C., now Mr. Justice Krever of the Ontario Supreme Court have referred to the effect of the phenomenon of teenage sexuality in attracting attention to the subject of consent to medical treatment of minors.[7] Concern about medical treatment to minors resulted in statutory enactments in Quebec and British Columbia and an amendment to a regulation in Ontario which reduced the age of consent to medical treatment for minors. None dealt expressly with induced abortion. The relevant provision of the Quebec *Public Health Protection Act* in its original Bill form was made specifically applicable to the care and treatment of a minor who is pregnant, but it was considered that this and other references to conditions requiring medical care might limit the minor's access to medical care and treatment without a requirement of parental consent to the cases provided for in the Bill.[8] On the other hand, a Saskatchewan Bill which was not enacted proposed to put the age of consent to medical treatment at 16 years and it excluded "the procurement of a miscarriage upon a female person."[9]

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[6] In the national hospital survey among the 209 hospitals which had established therapeutic abortion committees, 143 or 68.4 percent required the consent of a husband prior to the abortion procedure, and 18.4 percent, the consent of a husband from whom a woman was separated or divorced.

[7] *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada*, 1973, Appendix H—"Report of the Ontario Commissioners on the Age of Consent to Medical, Surgical and Dental Treatment", page 228 (Leal); *Minors and Consent for Medical Treatment*—Lecture delivered at the University of Toronto, March 18th, 1974 (Krever).

[8] P.-A. Crépeau, "Le consentement du mineur en matière de soins et traitements médicaux ou chirurgicaux selon le droit civil canadien", *Canadian Bar Review* 52 (1974); 247, pp. 252-253.

[9] Schedule 2 annexed to Appendix H of *Proceedings, supra*, note 7, p. 243.

Quebec. The effect of the provisions of the *Public Health Protection Act* of Quebec is that a minor 14 years or older may consent on his own to any care and treatment required by his state of health. However, in two situations the physician or the establishment must inform the person having paternal authority: (1) where a minor is sheltered for more than 12 hours; and (2) in the case of extended treatment. The obligation to inform is that of the physician or the establishment and is not a condition of the validity of the minor's consent.

On the one hand the Quebec legislation creates a presumption that the minor at the age of 14 years is capable of understanding the implications of a contract for medical treatment. On the other hand it has:

> slightly modified the law's general rules by determining the precise age where a child becomes, as a rule, capable of entering into a medical contract on his own. This law has in fact limited the minor's capacity to contract. For the child less than 14 years of age, the law has taken away his capacity to enter into a medical contract on his own, even in the case where he would have sufficient discernment to weigh the implications of such a contract.[10]

Ontario. The amendment to the Regulation under the *Public Hospitals Act* provides for the acceptance of a consent in writing signed by a patient who is 16 years of age or over, or who is married. As in the Quebec provision, the Regulation limits the minor's capacity to consent.

> My fear is that this new amendment has given the impression and, perhaps, a false sense of security, to members of the medical profession that a consent of a child over 16 years is full authority to the physician, and that a child under 16 may, in no circumstances other than an emergency, be treated without parental consent. My own view is, as I have indicated, that the amendment accomplishes no such result.[11]

The amendment to the Regulation under the Ontario *Public Hospitals Act* appears to afford protection to hospitals which obtain the consent of a minor over the age of 16 years, but the physician is left without this protection. The omission is due to the fact that the parent statute, the Ontario *Public Hospitals Act,* deals exclusively with the regulation of hospitals. It does not directly regulate a physician's conduct or the nature of his liability. In addition the Act purports to preclude public hospitals from permitting the performance of a surgical operation upon a minor who is under the age of 16 years without obtaining the consent of the parent or guardian. If this is so, hospitals can no longer rely on the common law capacity of a minor to consent. At the same time a physician would still be free to raise the defence of the common law capacity of a minor to consent because the physician's conduct is not directly governed or regulated by provisions which are either in the statute or the regulations.

British Columbia. The statutory amendment to the *Infants Act* places the age of consent to medical treatment of minors at 16 years. The Bill was opposed in the legislature on the grounds that it would allow a 16 year old girl

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[10] A. Mayrand, *L'inviolabilité de la personne humaine.* (Montreal: Wilson & LaFleur, 1975), number 50, p. 62. The author is a Judge of the Court of Appeal of the Province of Quebec.

[11] *Minors and Consent for Medical Treatment, supra,* note 7.

to seek an induced abortion without her parents' consent.[12] Unlike the reference to the care and treatment of a minor who is pregnant in the original Quebec Bill, this criticism of the British Columbia Bill was based on what was presumably included in its general wording. The Act sets conditions on the effectiveness of a minor's consent (subsection 3), and provides (in subsection 5) that the person treating the minor may inform the parent or guardian. In contrast to the limitation on the general civil law capacity to contract by the Quebec legislation, subsection 4 of the *Infants Act* preserves the common law capacity of a minor to consent by providing that:

> Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.

The conditions in subsection 3 have been summarized in the *Twelfth Report of the British Columbia Royal Commission on Family and Children's Law.*[13]

> The statute has reduced the age of consent to sixteen, but a doctor is still not free to accept the young person's consent immediately. The practitioner must "first" make a "reasonable effort" to obtain the consent of the parents. In the alternative, the doctor can get a written opinion from a second practitioner. The two options are not equal choices because the attempt to get parental consent is to be undertaken "first". Both options can cause delay and may inhibit the provision of early treatment.

It has been pointed out that subsection 4 "was taken *verbatim* from its English equivalent" in the *Family Law Reform Act 1969.*[14] The English provision in turn reflected the findings of the Committee on the Age of Majority (The Latey Committee Report) which was presented to the Parliament of the United Kingdom in July, 1967.

> There is no rigid rule of English law which renders a minor incapable of giving his consent to an operation but there seems to be no direct judicial authority establishing that the consent of such a person is valid.[15]

From the findings of the Committee it would appear that British Columbia hospitals with therapeutic abortion committees as a general rule did not accept the minor's consent to medical treatment. The question of whether there could be at common law an age at which there is capacity to consent that might be lower than the age provided in the legislation would seem unimportant in practice. The preservation of any common law capacity to consent is an attempt to provide as much protection as possible to physicians, even at the expense of incorporating uncertainty into the statute. It contains additional uncertainty, for example the condition in subsection 3 which makes the effectiveness of the consent conditional on the physician first having made "a reasonable effort" to obtain the consent of the parent or guardian. The effect of this uncertainty appears to be that many British Columbia hospitals with therapeutic abortion committees have sought protection in practice by using

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12 R. Gosse, "Consent to Medical Treatment: A Minor Digression", *University of British Columbia Law Review* 9(1974): 56, at p. 73.

13 "The Medical Consent of Minors", *Twelfth Report of the British Columbia Royal Commission on Family and Children's Law*, Vancouver, August 1975, p. 4.

14 Gosse, *Supra*, note 12, p. 69. *Family Law Reform Act 1969*, c. 46.

15 Cmnd. No. 3342, p. 117.

the only certain standard they can find, the age of majority. It would appear from the Committee's findings that the Quebec statute and the Ontario regulation provide sufficient certainty to encourage hospitals to accept the consent to therapeutic abortions of minors who have reached the required age.

The uniform act

In view of the deeply held convictions about the issue of induced abortion, it is hardly surprising that many physicians wish to have ascertainable standards for accepting the consent of minors. It is by no means certain that the following provision of a Medical Consent of Minors Act recommended for enactment as a Uniform Act by the Uniform Law Conference of Canada will be used in induced abortion cases any more than is subsection 4 of the British Columbia statute:

> 3.(1) The consent to medical treatment of a minor who has not attained the age of sixteen years (the age of consent to medical treatment contained in section 2) is as effective as it would be if he had attained the age of majority where, in the opinion of a legally qualified medical practitioner or dentist attending the minor, supported by the written opinion of one other legally qualified medical practitioner or dentist, as the case may be,
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> (a) the minor is capable of understanding the nature and consequences of the medical treatment, and
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> (b) the medical treatment and the procedure to be used is in the best interests of the minor and his continuing health and well-being.

A note to this recommended Uniform Act suggests that:

> 1. A jurisdiction considering enactment of this Act may wish to exclude particular kinds of procedures from its scope, e.g. contraception, sterilization, or procurement of miscarriage. In the case of any exclusions, however, consideration must also be given as to whether or not the exclusion is to apply generally or only with respect to section 3.[16]

While one can appreciate concern lest reference to specific types of treatment limit the provision of general protection in the case of consents obtained from minors, there appears to be no reason save fear of controversy not to consider the question of minors' consent to induced abortion separately from consent to any other type of medical treatment. In light of the Committee's findings that a statute which provides certainty promotes the acceptance of a minor's consent to abortion, presumably a provision which is certain and made expressly applicable to therapeutic abortion would offer more acceptable protection to physicians and hospitals reluctant to forsake the shelter of the age of majority. A provision dealing specifically with consent to induced abortion would make it unnecessary for hospitals to develop their own guidelines for accepting consents, for example, justification based on the fact that the minor

[16] *Proceedings of the Uniform Law Conference of Canada*, 1975, Appendix N, pp. 162-163.

was near the age of majority, was living away from home and was earning her own livelihood. It would also make it unnecessary for legal advisors to consider whether legal decisions in non-abortion cases where the consent of a "mature minor" was accepted[17] are applicable to the case of induced abortion. The so-called emancipated minor and mature minor exceptions seem superfluous where the common law capacity of a minor to consent remains in force.

Consent and contract

The provision of the Quebec *Public Health Protection Act* refers to the capacity of the minor to enter into a contract for medical treatment. The Ontario and British Columbia provisions, which use consent in the context of the intentional application of force, do not mention contract. Yet it is important to appreciate that the habit of looking to the age of majority for a standard for consent has been influenced by the establishment of such an age in the law of property and its subsequent acceptance for contractual capacity. The acceptance of such an age in the law of contract made it necessary to create an exception for necessaries, including contracts for necessary medical treatment. It would be reasonable to assume that where a therapeutic abortion committee has issued the required certificate stating that the continuation of the pregnancy would be likely to endanger the life or health of the woman the contract would be one for necessary medical treatment.[18]

The common law capacity of a minor to consent survives from a time when the influence of the age of majority had not acquired its later influence as a standard for consent. If the age of 14 years in Quebec as opposed to 16 years in the other two provinces (Ontario and British Columbia) reflects the orientation of the Quebec civil law toward the lower ages traditionally accepted for the contractual capacity of minors, then recognition of a basis in the common law for the acceptance of a lower age of consent may make it possible to arrive at a uniform age for all the provinces.

In the context of its Terms of Reference relating to consent to medical care and treatment and based on its review of hospital practices in these respects, the Committee concludes that:

1. **Since the "therapeutic abortion exception" in the Abortion Law does not specify any age of consent, a minor of any age who is not otherwise legally incapable may give a valid consent to the procedure for the purposes of the criminal law.**

2. **Since the "therapeutic abortion exception" in the Abortion Law does not seek to infringe upon provincial jurisdiction over the matter of consent to medical care and treatment, the uncertainties in the laws of the provinces have been allowed to affect the consent requirements of hospitals.**

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[17] For example, *Johnston v. Wellesley Hospital*, (1971) 2 O.R. 103 (H.C.J.).

[18] See A. Mayrand, *supra*, note 10, number 51, p. 65.

3. **While there is considerable variation in the practices of hospitals with therapeutic abortion committees across the country, most of these hospitals require the consent of a parent or guardian to a therapeutic abortion on an unmarried minor. In provinces where the age of consent to medical treatment was lower than the age of majority, a substantial number of hospitals continued to use the age of majority as a standard for consent.**

4. **Although there is no known legal requirement for the consent of the father to a therapeutic abortion, more than two-thirds of the hospitals surveyed by the Committee (68.4 percent) which did the abortion procedure required the consent of the husband. A few hospitals required the consent of a husband from whom the woman was separated or divorced (18.4 percent) and the consent of the father where the woman had never been married.**