

1-1-1992

The Canadian Law of Consent to Treatment

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Recommended Citation

Larry Buhagiar, "The Canadian Law of Consent to Treatment" (1992) 1 Dal J Leg Stud 215.

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The Canadian Law of Consent to Treatment.
Lorne E. Rozovsky, Q.C. and Fay A. Rozovsky,
Toronto: Butterworths, 1990, pp. 151

The Canadian Law of Consent to Treatment is a collaborative effort by Fay and Lorne Rozovsky that has produced a concise and readable contribution on the legislation and case law pertaining to consent for medical treatment. In one-hundred and fifty-one pages, the authors have synthesized and conceptualized the issue of obtaining valid consent in a manner which is entirely comprehensible.

The authors have framed the issue of consent to treatment as a process,¹ rather than as an objectified goal to be obtained. This analysis of 'consent as process' has merit which is fully realized as the reader continues through each chapter. The first two chapters are spent developing the process,² with the next five serving as guideposts along the process. These guideposts are topical discussions of 'extraordinary' circumstances and particular case studies that demonstrate the practical concerns of each step in the process. The remaining three chapters address the more mechanical aspects surrounding the law of consent to treatment: documentation,³ litigation,⁴ and prevention.⁵

The practical orientation that the authors have chosen to give the book is evident from the first chapter and remains a consistent theme. Initially, the authors appear to have selected some of the more esoteric (and less relevant) examples involving consent. However, a close reading of the material proves that these examples are not only timely, but extremely useful in elucidating the subtext underlying valid consent.

What is significant about *The Canadian Law of Consent to Treatment* is the unexpected underlying theme that in this area of law there are no hard and fast rules. This is indicative of the rapid change that is occurring in the law surrounding consent. The law of consent continues to evolve as our society continues to explore morality and the uses of biotechnology. That is not to say obtaining a valid consent is an intangible goal, but rather that the circumstances upon which consent is obtained may cause great difficulty in this area of law.

In dealing with the issue of mental competency,⁶ it is made clear that no assumptions can or should be made. It speaks to the point that as a process it is imperative that all the steps be followed. This point is substantiated by the fact that persons with a primary diagnosis of mental retardation can often give a valid consent.⁷ The same scenario is replayed with children and adolescents who are living on their own.⁸

Although this does not serve to solidify the reader's understanding of the law of consent, it does demonstrate that variables intrinsic to consent cannot be taken for granted. It is in this manner that the authors have sought to argue for the process approach of consent. Given the

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numerous examples and case studies the argument is a strong and compelling one.

The use of topical discussions of specific circumstances serves as the basis for chapters. The book develops, chapter by chapter, in a building block fashion. By doing so, the authors demonstrate the complexity of the law of consent to treatment by utilizing the topics of preceding chapters. Consent issues concerning children and adolescents, mental disability, and reproduction in the early chapters are revisited in later chapters in the context of issues such as human research and tissue donation.⁹ Thus each chapter has a role in strengthening the concept of 'consent as process'.

Although the book does not claim to be an exhaustive effort on specific topics, there are several noticeable shortfalls in the coverage. The discussion on reproduction is limited to sterilization issues and fails to consider the implications of recent technological advances, such as *in vitro* fertilization and artificial insemination.

The scope of the book also encompasses a legal analysis of consent and the right to refuse treatment. A *Charter*¹⁰ analysis is applied, reminding us that often consent can be viewed in a broader, more encompassing manner than is traditional. An excellent analysis is also done on consent arising from custody issues and arrangements.¹¹

The 'consent as process' approach expounded by the Rozovsky's makes a great deal of sense. There are many ways to go about obtaining consent, but the framing of consent as a process with procedural steps and sequencing creates a consistency and certainty that allows for the courts to more accurately interpret and determine issues of consent.

Another shortcoming is that the authors fail to include examples of how the courts view issues of consent. From a practical stance this information would appear to be extremely relevant. This might have been addressed in the chapter on consent litigation or have been the subject matter for additional chapters. This section could have also included a brief discussion of what constitutes 'informed consent' for different procedures and diagnostic tests.

As the Rozovsky's point out in the preface the book is not to be considered a theoretical treatise,¹² but rather strives to address more practical concerns. Any theoretical implications arising from the book stem from the way the material is covered, as well as from what was and was not addressed by it. *The Canadian Law of Consent to Treatment* represents the law in this area, as it currently stands; and that is as much a theoretical statement as it is a practical reality.

Given the unavoidable theoretical approach and the status of the authors in the field of health law it is disappointing that the authors do not comment on the jurisprudential trends and directions of this area of law.

The reader comes away with a greater appreciation for the subtle nuances and variabilities within the law of consent to treatment. Notwithstanding the (highly applauded) attempt to consolidate the material into a neat and tidy reference package, the material covered

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clearly demonstrates that nothing regarding consent to treatment can be taken for granted.

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¹ at 2-3.

² at 1-27.

³ at 105.

⁴ at 115.

⁵ at 123.

⁶ at 39.

⁷ at 40.

⁸ at 53-68.

⁹ at 76-78.

¹⁰ *Constitution Act, 1982*, Part I

¹¹ P. 67

¹² Preface, at ix.