Authorizations for treatment: the Court of Appeal rules on the legal representation of patients and hospitalization and re-hospitalization clauses

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In a decision rendered on September 1, 2022[1], the Court of Appeal of Quebec stated that a judge seized of an application for authorization for treatment must ensure that the patient in question can be heard and assert their rights. The Court also took the opportunity to analyze the indefinite hospitalization clauses and the re-hospitalization clauses made necessary following a subsequent deterioration in a patient's health.

Legal representation of patients

The Court's reasoning was based on the following elements:

- Article 90 C.C.P. allows the judge to appoint a lawyer *ex officio* to safeguard the rights and interests of an incapable person;
- A hearing on an application for authorization for treatment should not be held without the person who is the subject of the application being represented by a lawyer;
- The principle that such a person should be represented by a lawyer may have certain exceptions, but it can only be discarded after steps have been taken to offer the person involved the presence of a lawyer, following a close consideration of the stakes and circumstances of the case and of a decision expressly reasoned by the judge.

As such, when an application for authorization for treatment is presented, the following analytical framework must be applied from the start of the hearing:

- The judge must assess whether the person concerned is incapable. To meet this first requirement, preliminary evidence of "likelihood of incapacity" must be provided[2];
- The appointment of a lawyer must be necessary to safeguard the rights and interests of the person[3]

When these conditions are met, the judge must suspend the proceedings under article 160 C.C.P.

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for the period necessary for a lawyer to be appointed to represent the patient. The court may also issue a safeguard order.

If the judge is not convinced that the second condition is met, they can withhold their decision and hear the evidence. Once the evidence has been adduced, they can decide to issue a safeguard order if the steps are met or decide on the merits of the application if this second criterion has not been met. In the latter case, they must expressly state the reasons which led them to this conclusion.

The Court pointed out that prior to a hearing, a healthcare establishment must make sure that everything is done to ensure that the person concerned has the possibility of being represented by a lawyer. The bench is also of the view that the presence of an available lawyer at treatment hearings would be an ideal practice in order to allow the judge to appoint them *ex officio*.

Hospitalization and re-hospitalization clauses

In this case, the patient challenged the finding that they must remain hospitalized from the delivery of the judgment authorizing their treatment until their medical discharge. The court pointed out that in the absence of appropriate evidence, it is not up to the Court to usurp the role of the medical profession by setting a term for an ongoing hospitalization. The court maintained the order's conclusion that the patient's hospitalization should continue "until the attending physician deems [the patient's] condition has sufficiently stabilized to allow them to be discharged safely."

Finally, the patient also challenged the conclusion of the judgment relating to their re-hospitalization in the event of non-collaboration with treatment. The Court of Appeal clarified that a clause of this nature should not be a sanction for non-compliance with the treatment plan. A re-hospitalization clause for non-collaboration depends on the circumstances of each case and must be substantiated by appropriate evidence. However, the court does not rule out that this eventuality may justify the re-hospitalization of a patient if evidence to this effect is presented.

The members of Lavery's Administrative Law team regularly represent healthcare establishments and remain available to advise you and answer your questions in connection with this new development in jurisprudence.

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1. *A.N. c. Centre intégré universitaire de santé et de services sociaux du Nord-de-l'Île-de-Montréal*, 2022 QCCA 1167
2. Para. 33 *et seq.*
3. Para. 49 *et seq*.

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