

# The Catch-22 of Ontario's Health Care Consent Act

*RICHARDO'REILLY in London, Ont.  
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It has now been more than a year since the Supreme Court of Canada decided that Scott Schutzman — a.k.a. Professor Starson — was entitled to refuse anti-psychotic treatment while being involuntarily detained in a psychiatric hospital. How has Mr. Starson fared in the year following his legal "victory" in the Supreme Court? You be the judge.

Because he has not been given the medication needed to get him well enough to leave hospital, Mr. Starson has languished for the last year in involuntary detention. This is in addition to his previous five years of untreated incarceration in hospital.

Without treatment for his psychiatric illness, Mr. Starson will remain confined until he has a spontaneous recovery or dies, whichever comes first. Once a noted academic, he has made no further contributions to the field of astrophysics. Indeed, his comments to reporters since the court decision indicate that he continues to suffer from delusions and can barely hold a logical conversation.

How can a civilized society confine an individual because of the symptoms of illness and then throw away the only key to his freedom — treatment with anti-psychotic medication?

In part, this deplorable situation was caused by a refusal to consider all the relevant evidence. The courts found that Mr. Starson's doctors did not present sufficient proof of his incapacity to an independent tribunal assigned to evaluate his mental status.

Fine, but if relevant evidence was omitted at the tribunal, surely it is essential that this evidence be introduced at the court review. The failure to admit such evidence had permanent ramifications for Mr. Starson: Under Ontario's Health Care Consent Act, once a person judged to be capable refuses a specific treatment, the treatment cannot be given when the person later becomes incapable.

This means that, despite the fact that no reasonable person would dispute that Mr. Starson is now incapable of understanding his need for psychiatric treatment, he has been condemned to a lifetime of suffering, trapped by the failure to admit all evidence about his capacity at the time of the original tribunal and by the perverse Catch-22 of Ontario's Health Care Consent Act.

The tragedy is that his is not an isolated case. A large number of patients are detained untreated in Ontario's psychiatric hospitals because the law prevents them from receiving treatment or because the glacial pace of the legal system requires that they be kept in hospital for years before a decision is made on whether treatment can be given.

A recent study in my own hospital showed that, over a 10-year period, 15 patients appealed an independent tribunal's finding of incapacity to the courts. None of these patients was ever found to be capable of refusing treatment, yet they were detained in hospital for an average of 253 days before receiving treatment for their illness. One patient was forced to stay in hospital for two years before treatment was started.

Why was treatment not given sooner? Because in Ontario, treatment cannot be started while an appeal is before the courts. Delays of a year in resolving legal disputes may be the norm in civil and criminal cases, but are totally unacceptable when deciding if an ill individual can receive treatment.

To resolve this inhumane situation the Ontario government can make two simple changes. First, allow treatment to proceed once an independent tribunal has reviewed the case and confirmed the finding of incapacity. The patient could still appeal the decision to the court but would not have to undergo an extensive deprivation of liberty while awaiting the appeal. (Actually, most patients would be long gone from hospital before the court case was even scheduled, living productive lives.)

Second, adopt the Manitoba Mental Health Act provision for involuntarily detained patients that stipulates that a substitute decision maker must make a decision that is in the patient's best interest where following pre-expressed wishes would "endanger the physical or mental health or

the safety of the patient or another person." These changes provide the appropriate protection for individuals' civil rights but, unlike the current Ontario provisions, would not deprive patients of the treatment they need to get out of hospital. Without such changes Mr. Starson can look forward to a life where he spends every one of his future summers rotting in hospital.

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