Consent to Treatment
Agenda

Introduction to PLP

Consent to treatment

- Principles
- Elements
- Express versus implied consent
- Capacity

Common law of informed consent to treatment

- Standard of Care
- Causation

Documentation and evidence of consent
PLP Professional Staff

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What is PLP?

- Mutual defence organization
- Providing professional liability protection and risk management advice to Ontario dentists since 1973
- Separate from regulatory arm of RCDSO
Services

- Provide advice on dealing with dissatisfied, angry, threatening patients
- Assist members in refunding fees
- Assist members in settling claims or potential claims (either behind the scenes or directly with patient or representative)
- Provide individual and group risk management advice
Protection

- $2 million per occurrence (legal costs and damages)
  - Up to $23 million excess available for total protection of $25 million
- Acts and omissions in course of practicing dentistry
- Includes vicarious liability for staff BUT all regulated health professionals must have individual liability protection
Protection

Who is protected:

• Members
• Former members (provided treatment rendered while a member)
• Partnerships (all partners must be members)
• Health profession corporations

Who is excluded:

• Staff who has or is required to have his/her own liability protection (physicians, nurses and hygienists)
• Corporations other than health profession corporations (technical services corporations are not protected through PLP)
Protection

What is included:

Dental services that were performed or ought to have been performed in Ontario, provided that those services are reasonably considered to be part of, related to, or ancillary to the practice of dentistry

What is excluded:

- Refunds
- Fines and penalties
- Intentional criminal acts
- Punitive, aggravated and exemplary damages
- Proceedings other than civil suits (PCRA and Human Rights Tribunal)
- Treatment provided outside of Ontario
Deductibles

• Minimum Individual Deductible - $2,000
• Step-up Individual Deductible - $5,000 for the second claim, $10,000 for the third claim and $20,000 for each and every additional claim in the preceding 7 years
• Member can request reduction or waiver in certain circumstances
• Reporting does not trigger deductible
• Deductible triggered if PLP
  – pays a claim
  – incurs defence costs
  – incurs expert fees
Cost

2014 RCDSO fees - $2,035

• Includes registration and malpractice protection
• No increase if more than one claim
• Approximately the same as CDSPI malpractice premium for $3 million per occurrence protection with $9 million annual cap
• No annual limit/cap with PLP
CONSENT TO TREATMENT
“Treatment” means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan...

*Health Care Consent Act, 1996, S.O. 1996, c. 2, Sch. A., s. 2(1)*
10.(1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

(a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent.

2. The following are acts of professional misconduct for the purposes of clause 51 (1)(c) of the Health Professions Procedural Code:

... 

7. Treating a patient for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose in a situation in which a consent is required by law, without such a consent.

Everyone has the right to decide what is to be done to one’s own body. This includes the right to be free from medical treatment to which the individual does not consent.

A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor’s opinion, it is the patient who has the final say on whether to undergo treatment.

Consent Can Be Withdrawn

14. A consent that has been given by or on behalf of the person for whom the treatment was proposed may be withdrawn at any time,

(a) by the person, if the person is capable with respect to the treatment at the time of the withdrawal;

(b) by the person’s substitute decision-maker, if the person is incapable with respect to the treatment at the time of the withdrawal.

The individual has the right to determine whether or not to accept treatment and putting and keeping someone on a respirator and without an informed consent is an improper interference with the person.

Assault

A person commits an assault when:

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

_Criminal Code_, R.S.C. 1985, c. C-46, s. 265(1)
[A]ctions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.

Battery

A 22 year old woman sued a doctor and a dentist for the unauthorized extraction of numerous teeth during a tonsillectomy on October 12, 1943.

The patient had only consented to the extraction of two upper teeth. While she was under anesthesia, the dentist extracted all her upper teeth and one lower tooth because he detected tooth decay and disease.

The health practitioners were found liable for battery and the patient was awarded $5,200 in damages (approximately $72,000 in 2014).

[A]ctions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.

Meaning of “emergency”

25.(1) For the purpose of this section...there is an emergency if the person for whom the treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm.

Emergency treatment without consent: incapable person

25.(2) [A] treatment may be administered without consent to a person who is incapable with respect to the treatment, if, in the opinion of the health practitioner proposing the treatment,

(a) there is an emergency; and

(b) the delay required to obtain a consent or refusal on the person’s behalf will prolong the suffering that the person is apparently experiencing or will put the person at risk of sustaining serious bodily harm.

No treatment contrary to wishes

26. A health practitioner shall not administer a treatment under section 25 if the health practitioner has reasonable grounds to believe that the person, while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to the treatment.

11.(1) The following are the elements required for consent to treatment:

1. The consent must relate to the treatment.
2. The consent must be informed.
3. The consent must be given voluntarily.
4. The consent must not be obtained through misrepresentation or fraud.

1. Consent must relate to the treatment

Treatment that is different from or goes beyond the consent provided by the patient or the patient’s substitute decision-maker may give rise to an allegation of battery.

2. **Consent must be informed**

**Informed consent**

11.(2) A consent to treatment is informed if, before giving it,

a) the person received the information about the matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and

b) the person received responses to his or her requests for additional information about those matters.

(3) The matters referred to in subsection (2) are:

2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action.
6. The likely consequences of not having the treatment.

3. Consent must be given voluntarily

A physician who provided pain killers to a drug addicted patient in exchange for sexual favours was found liable in battery since the patient did not voluntarily consent to the sexual activity in light of the power imbalance between the parties and her vulnerability.

4. **Consent must not be obtained through misrepresentation or fraud**

A patient consented to an operation on his 3\textsuperscript{rd} vertebrae, but the surgeon mistakenly operated on the 4\textsuperscript{th} vertebrae.

The surgeon subsequently obtained consent for a second operation, but he didn’t tell the patient the additional operation was necessary because of his error in performing the first surgery.

This omission was considered a deliberate misrepresentation which vitiated the patient’s consent to the second operation, thus rendering it a battery.

The patient was awarded $40,000 in punitive damages (approximately $57,000 in 2014).

*Gerula v. Flores* (1995), 126 D.L.R. (4\textsuperscript{th}) 506
The responsibility to obtain patient consent rests with the treating health practitioner.

The **task** of securing consent can be delegated but the **responsibility** for ensuring that consent has been obtained remains with the person providing the treatment.

A dentist must satisfy himself/herself that patient consent has been properly obtained and documented before commencing treatment.
12. Unless it is not reasonable to do so in the circumstances, a health practitioner is entitled to presume that consent to a treatment includes,

(a) consent to variations or adjustments in the treatment, if the nature, expected benefits, material risks and material side effects of the changed treatment are not significantly different from the nature, expected benefits, material risks and material side effects of the original treatment...

A patient sued a number of physicians in battery and negligence for cosmetic procedures performed on her including a neck lift and eye lid surgery.

The Court dismissed the action in part because the procedures performed were specified in the consent form signed by the patient and the term in the written consent authorising the physicians "to perform any other procedures(s) or take whatever measures that he/they may deem necessary or desirable..." was broad enough to defeat battery where the procedures related to the overriding purpose of the surgery.

*Markowa v. Adamson Cosmetic Facial Surgery Inc.*, 2012 ONSC 1012
A patient will often wish to see a particular physician or to be handled by a particular, clearly identified surgeon. In the case of surgery, the patient is entitled to know who the main actors in the operation will be. However, that obligation would not extend to the usual secondary players who are present during surgery, including anaesthetists, nurses, and physicians in training, such as residents and interns.

Express vs. Implied Consent

Express or implied

11.(4) Consent to treatment may be express or implied.

Implied Consent

A reasonable person would perceive that, based on the patient’s behavior, gestures or body language, the patient has consented to treatment.

Is sufficient only for some routine and non-invasive procedures such as an examination.

Express Consent

The patient has communicated his or her consent verbally or in writing.
Capacity

Presumption of capacity

4.(2) A person is presumed to be capable with respect to treatment...

Exception

(3) A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment...

Capacity

4.(1) A person is capable with respect to a treatment...if the person is able to understand the information that is relevant to making a decision about the treatment...and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity depends on treatment

15.(1) A person may be incapable with respect to some treatments and capable with respect to others.

Capacity depends on time

(2) A person may be incapable with respect to a treatment at one time and capable at another.

Consent for the Collection, Use or Disclosure of Personal Health Information

Capacity to consent

21.(1) An individual is capable of consenting to the collection, use or disclosure of personal health information if the individual is able,

(a) to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure, as the case may be; and

(b) to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent.

*Personal Health Information Protection Act, 2004, S.O. 2004, c.3 Sch. A*
Incapable Adults
10.(1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

(a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or

(b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person’s substitute decision-maker has given consent on the person’s behalf in accordance with this Act.

List of persons who may give or refuse consent

20.(1) If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following paragraphs:

1. The incapable person’s guardian of the person, if the guardian has authority to give or refuse consent to the treatment.
2. The incapable person’s attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.
4. The incapable person’s spouse or partner.
5. A child or parent of the incapable person.

... 
7. A brother or sister of the incapable person.
8. Any other relative of the incapable person.

Guiding Principles

Principles for giving or refusing consent

21.(1) A person who gives or refuses consent to a treatment on an incapable person’s behalf shall do so in accordance with the following principles:

1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.

2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person’s best interests.

21.(2) In deciding what the incapable person’s best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,

(a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;

(b) any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and

(c) the following factors:
1. Whether the treatment is likely to,
   i. improve the incapable person’s condition or well-being,
   ii. prevent the incapable person’s condition or well-being from deteriorating, or
   iii. reduce the extent to which, or the rate at which, the incapable person’s condition or well-being is likely to deteriorate.

2. Whether the incapable person’s condition or well-being is likely to improve, remain the same or deteriorate without the treatment.

3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.

4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

Advance Directives

Wishes

5.(1) A person may, while capable, express wishes with respect to treatment, admission to a care facility or a personal assistance service.

Manner of expression

(2) Wishes may be expressed in a power of attorney, in a form prescribed by the regulations, in any other written form, orally or in any other manner.

Power of attorney for personal care

46.(1) A person may give a written power of attorney for personal care, authorizing the person or persons named as attorneys to make, on the grantor’s behalf, decisions concerning the grantor’s personal care.

Incapacity for personal care

45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care...or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

When dealing with an incapable patient, dentists must take “reasonable steps” to ascertain:

1. Whether the patient while competent has expressed any health care preferences or wishes in a power of attorney (i.e. a living will or advance directive) relevant to the current situation; and

2. Who may make decisions on behalf of the patient.
Children and Consent to Treatment

There is no minimum age for capacity to consent to treatment in Ontario.

As with all patients, a health practitioner must assess the decision-making capacity of a child before proceeding with treatment.

The factors to consider in determining whether a child fulfills the criteria for capacity set out in the *Health Care Consent Act* include:

- the patient’s age;
- the patient’s level of maturity;
- the patient’s intelligence; and
- the treatment in question.
The parents of a pregnant 16 year old sought an injunction to prevent their daughter from having an abortion.

The Alberta Court of Appeal concluded that the girl had sufficient maturity to understand the nature and the consequences of having an abortion and was entitled to undergo the procedure despite the objections of her parents:

[T]his expectant mother and her parents had fully discussed the ethical issues involved and, most regrettably, disagreed.... [I]t is conceded that she is a "normal intelligent 16 year-old". We infer that she did have sufficient intelligence and understanding to make up her own mind and did so. At her age and level of understanding, the law is that she is to be permitted to do so.

Courts in Ontario, New Brunswick and Newfoundland upheld the rights of three minors between the ages of 12 and 15 who were Jehovah’s Witnesses to refuse blood transfusions on the grounds that they had sufficient intelligence and maturity to understand the nature and consequences of refusing the treatment and therefore had the legal capacity to make that decision.
General Guidelines

Patients 12 years and younger:

• While there is no “bright line” age when it comes to consent, parents or a guardian will likely be required to provide consent on behalf of patients 12 years or younger.

Patients between 12 - 15 years:

• A determination must be made as to whether the patient has the capacity to consent based on age, maturity, nature of treatment, etc. With the patient’s permission, parents may be involved in the discussion and consent can then be obtained from patient and parent.

Patients 16 years and older:

• In the absence of evidence to the contrary, patients 16 years or older are presumed to be capable of consenting.
Divorced and Separated Parents

*Divorce Act*, R.S.C. 1985, c. 3.

Applies to legally married couples only.


May apply to married or unmarried couples.
Custody and Access

Custody: full parental rights.

Access: the right to receive health information about children of the relationship but not to give or withhold consent to treatment.

May be changed by court order or agreement between the parties.
Joint Custody

Subject to a court order or agreement stating otherwise, the consent of either joint custodial patient is sufficient to treat an incapable minor.

However, when dealing with separated or divorced parents with joint custody, it may be wise to attempt to secure the consent of both parents before proceeding with treatment on an incapable minor, particularly if the treatment is invasive, risky and/or costly.
INFORMED CONSENT
11.(1) The following are the elements required for consent to treatment:

1. The consent must relate to the treatment.
2. The consent must be informed.
3. The consent must be given voluntarily.
4. The consent must not be obtained through misrepresentation or fraud.

Informed consent

11.(2) A consent to treatment is informed if, before giving it,

a) the person received the information about the matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and

b) the person received responses to his or her requests for additional information about those matters.

(3) The matters referred to in subsection (2) are:

2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action.
6. The likely consequences of not having the treatment.

2. The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:

   ...

  20. Failing to comply with section 3 relating to an agreement with a patient.

   ...

3. An agreement with a patient shall,

   ...

   (d) specify particulars of all payments to be made under it including who is responsible for making the payments...

[U]nless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery.

Elements of Negligence

- Duty of Care
- Standard of Care
- Injury
- Causation
- Damages
Duty of Disclosure

In obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation.

[A] risk is...material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to undergo the proposed therapy.

What the doctor knows or should know that the particular patient deems relevant to a decision whether to undergo prescribed treatment goes equally to his duty of disclosure as do the material risks recognized as a matter of required medical knowledge.

Even if a certain risk is a mere possibility which ordinarily need not be disclosed, yet if its occurrence carries serious consequences, as for example, paralysis or even death, it should be regarded as a material risk requiring disclosure.

Elective Procedures

Where an operation is elective,...even minimal risks must be disclosed to patients, since the frequency of the risk becomes much less material when the operation is unnecessary for his medical welfare.

Risks associated with dental procedures that Canadian courts have deemed to be “material”:

- Displacing an impacted wisdom tooth into the maxillary sinus cavity during surgical extraction (*Finch v. Carpenter*, [1993] B.C.J. No. 1918)
- Damage to dental bridgework during the administration of general anaesthetic (*De Vos v. Robertson*, [2000] O.J. No. 51)
Risks held not to be “material” in the circumstances of the case:

- Injury to the temporomandibular joint during the extraction of wisdom teeth (*Constantini v. Wakeham* (1991), 123 A.R. 117)
- Developing TMJ pain/trismus following a wisdom tooth extraction (*Bollard v. Eller*, [2013] ONSC 5112)
The doctrine of "informed consent" dictates that every individual has a right to know what risks are involved in undergoing or foregoing medical treatment and a concomitant right to make meaningful decisions based on a full understanding of those risks.

Content of Disclosure

Where there is more than one medically reasonable treatment and the risk/benefit analysis engaged by the alternatives involves different considerations, a reasonable person would want to know about the alternatives and would want the assistance of the doctor's risk/benefit analysis of the various possible treatments before deciding whether to proceed with a specific treatment.

Put differently, a reasonable person could not make an informed decision to proceed with treatment "A" if that patient was unaware of the risks and benefits associated with treatment "B", a medically appropriate alternative treatment.

Content of Disclosure

[A]n explanation of risk involves three major elements. The first is an adequate explanation of the procedure and the injury that may occur. The second is an explanation of the frequency or likelihood of the risk materializing (the "odds" of it happening). Thirdly, the physician must explain the consequences of the injury should it occur.

Patients Must Understand Advice

Health professionals have a duty to take *reasonable steps* to ensure patients understand the information disclosed to them.

Unless there are compelling reasons to do otherwise, patients should be given sufficient time to consider and reflect on the information provided and should not be hurried or pressed to make a quick decision:

[I]nforming...a patient should occur at an earlier time than when [the patient] is on the table immediately before undergoing the procedure.

*Ferguson v. Hamilton Civic Hospitals et al.* (1983), 40 O.R. (2d) 577
Causation

What would a reasonable person in the patient’s position have done if there had been proper disclosure of attendant risks of the treatment?

[F]ears which are idiosyncratic, which do not relate directly to the material risks of a proposed treatment and which would often be unknown to a physician, cannot be considered.... [A] plaintiff would not be able to successfully prove causation simply by demonstrating an irrational fear which, had the physician disclosed all the risks, would have convinced the plaintiff to forego medical treatment.

For example, if a doctor failed to tell the patient that one of the risks of a procedure was an allergic reaction which could cause a temporary red rash on the skin, and the patient had an irrational belief that a rash is a highly significant and dangerous sign of evil spirits in the body, the patient could not successfully prove causation by demonstrating that he would not have proceeded with the treatment on the basis of this irrational fear.

...in the Patient’s Position

Which aspects of the plaintiff’s personal circumstances should be attributed to the reasonable person? There is no doubt that objectively ascertainable circumstances, such as a plaintiff’s age, income, marital status, and other factors, should be taken into consideration...“special considerations” affecting the particular patient should [also] be considered, as should any “specific questions” asked of the physician by the patient. In my view this means that the “reasonable person” who sets the standard for the objective test must be taken to possess the patient’s reasonable beliefs, fears, desires and expectations.

Factual versus Legal Causation

An obstetrician who failed to advise a patient of the risk of dehiscence at the site of a pre-existing c-section scar and therefore did not obtain her informed consent to vaginal birth was not liable for the death of her fetus caused by placental abruption and uterine rupture at another location during labour, even though full disclosure would have led the patient to avoid labour by choosing an operative delivery.

*Glenn v. Adu-Poku,* (6 February 2002), Belleville 8501/96
2. The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:

... 

25. Failing to keep records as required by the regulations.

Evidence of Consent – Consent Forms

Consent forms should contain the following:

- The patient’s name;
- The date;
- A description of the treatment being performed;
- An acknowledgment that the patient consents to such additional or alternative treatment as may be advisable or necessary;
- The name of the health professional performing the treatment;
- An acknowledgment that the patient consents to other dentists, surgeons or staff assisting with the procedure;
- An acknowledgement that the benefits and risks of the treatment were discussed (space should be left to list material risks);
• An acknowledgment that alternative treatment options, their risks and benefits were discussed (space should be left to list some of the alternative treatments and their risks and benefits);

• An acknowledgement that the consequences of not proceeding with the treatment were discussed (space should be left to list some of the consequences);

• An acknowledgment that the patient had an opportunity to discuss any questions or concerns (space should be left to list any questions or concerns raised);

• An acknowledgment that the patient had a chance to read and understands the information in the form;

• Space for a witness not involved with the procedure or dental practice to sign and date; and

• Space for the patient to sign and date.
Record-Keeping

- The consent discussion should be documented during or soon after it occurs.
- The amount of information to be documented will vary depending on the procedure in question.
- Documentation for routine procedures and examinations does not have to be elaborate.
- Invasive, complicated, risky and/or elective procedures require more elaborate documentation that mirrors the information in the draft consent form discussed above.
- Any questions asked or concerns raised by the patient should be recorded along with the response to the questions or concerns.
• If a consent form was reviewed with the patient, this should be documented and a copy of the signed consent form should be kept in the patient’s chart.

• Any visual aids used during the consultation should be described; a copy of any diagrams should be kept in the chart.

• Any printed information distributed to the patient should be listed.

• The patient’s decision to accept or refuse treatment should be recorded.

• The patient could be asked to initial the notes of the informed consent conversation.

• It is acceptable to use common abbreviations or acronyms.
Invariable Practice

If a person can say of something he regularly does in his professional life that he invariably does it in a certain way, that surely is evidence and possibly convincing evidence that he did it in that way on the day in question.

Bellknap et al. v. Meakes (1989), 64 D.L.R. (4th) 452
Assistance and support are as close as your telephone

Practice Advice & Guidance
416-934-5614

Risk Management
416-934-5600

RCDSO Website
www.rcdso.org
Thanks for your attention.

Are there any questions?