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When No Means Yes: Voluntary Withdrawal of Consent to Medical Treatment

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Cases Considered:

V.A.H. v. Lynch, 2009 ABCA 221, overturning *V.A.H. v. Lynch*, 2008 ABQB

The *V.A.H.* case draws attention to the challenge of determining what actions on the part of a patient constitute withdrawal of consent to medical treatment, specifically in situations where the patient is receiving psychiatric treatment. In Alberta, patients can be admitted to psychiatric facilities on either a voluntary or involuntary basis. Voluntary patients are considered to have the capacity to consent to treatment and are able to discharge themselves against medical advice. Involuntary patients are admitted under the *Mental Health Act* (*MHA*), R.S.A. 1980, c. M-13 and the issue of consent is more complex. This post deals only with voluntary patients.

On April 28, 1977, ten days after giving birth to her first child, V.A.H. voluntarily attended Holy Cross Hospital in Calgary. Both V.A.H. and her child were admitted to the hospital, based on concerns of postpartum psychosis. As part of her intake, V.A.H. signed a form "Consent for Diagnosis Treatment Procedure," confirming her voluntary consent to the "assessment and treatment of her emotional breakdown" (language used in hospital consent form). The "Initial Plan for Psychiatric Care" signed by the on-call physician indicates that V.A.H. should be allowed discharge against medical advice. V.A.H. was seen by her family physician Dr Robert J. Herget as well as psychiatrist Dr. Roland F. Lynch and was treated using medication and seclusion in a low stimulus environment. V.A.H. was administered Haldol, a tranquilizer and neuroleptic drug used at that time for the treatment of psychosis, in conjunction with Cogentin for cessation of breastfeeding. During her treatment V.A.H. refused medication occasionally, which was documented on May 2, 1977 stating "I will not quit nursing my baby. I will not take any medications and I am leaving this place" (at para. 6.). V.A.H. did not leave the hospital after making this statement. During her stay she continued to be administered medication, including two Haldol injections administered while she was being restrained two days after her documented request to leave. V.A.H.'s condition improved over the next month, and she received passes to leave the hospital on a number of days thereafter. V.A.H. was discharged from the hospital against medical advice on June 1, 1977.

In 1993, more than fifteen years later, V.A.H. requested and received her medical records from Holy Cross Hospital as part of a subsequent lawsuit. She filed her statement of claim in this suit for negligence, false imprisonment, assault and battery within a year of receiving those records. In 1998, the action was dismissed by Justice John Rooke on the basis of the *Limitations of Actions Act*, R.S.A. 1980, c. L-15 (*LAA*) (see *V.A.H. v. Lynch* (1998) 224 A.R. 359 (Q.B.)). The decision of Justice Rooke was overturned in part by the Court of Appeal who found that the action in negligence remained statute barred, but directed that the actions in false imprisonment, assault, and battery proceed to trial: (see 2000 ABCA 97). Justice Peter Clark dismissed

V.A.H.'s claims at the second trial on the basis of the *LAA*, alternatively finding that the claims could not be made on a balance of probabilities (see 2008 ABQB 448). Pursuant to a Memorandum of Judgment filed June 22, 2009 the Court of Appeal (per Justices Hunt, Costigan and Ritter) dismissed the appeal, not on the basis of the *LAA*, but on the basis that V.A.H. had not withdrawn consent, and that her consent was a complete bar to her claim, even absent the question of limitations.

It is settled law that medical treatment without consent constitutes battery, with the exception of emergency circumstances. Expressed or implied consent given voluntarily by an informed and capable adult is a complete defence to the offence of battery. The Supreme Court of Canada has recently confirmed that adults have the right to refuse to consent to medical treatment or to demand that treatment be withdrawn or discontinued (see *A.C. v. Manitoba (Director of Child and Family Services)* 2009, SCC 30, at para 45).The ability for the patient to withdraw their consent during treatment, with the exception of where stopping the procedure would endanger the patient's life or threaten immediate and serious health problems (*Ciarlariello v. Schacter*, [1993] S.C.J. No. 46 (SCC) at para 42), recognizes the autonomy of the individual and that persons have the right to determine what is done to their body at all stages of medical treatment.

Justice Clark and the Alberta Court of Appeal (in 2009) interpreted V.A.H.'s statement "I will not quit nursing my baby. I will not take any medications and I am leaving this place." to be a symptom of the illness and not a true revocation of consent. But what would a "true revocation of consent" look like in the circumstances?

Even though there is a certification procedure under the *MHA* for involuntary treatment, circumstances less than those required for certification may render the patient incapable of withdrawing consent. Just as the ability of a patient to withdraw consent may be affected by medications and sedatives (*Ciarlariello v. Schacter*, above at para 43), the mental cognition of a patient due to illness may affect their ability to withdraw consent. However, a distinction must be drawn between loss of capacity due to medication and loss of capacity due to mental illness. For the latter, there is a certification process under the *MHA* whereby a patient can be held and treated involuntarily. Nevertheless, the current permutation of this case suggests that even when mental health is at issue it is not necessary for medical professionals to obtain certification under the *MHA* in order to deny requests for withdrawal of treatment where such withdrawal may be seen as manifestations of the illness. This is contrary to the opinion of Dr. Julio Arboleda-Florez, an expert for the Plaintiff at the second trial that:

> If the Plaintiff was incapable of withdrawing her previously given consent then her physician should have proceeded by declaring her incompetent to consent and signed her in as a formal patient" (2008 ABQB 448 at para 117).

This opinion was based on the idea that because V.A.H. was never certified in accordance with the *Mental Health Act*, S.A. 1972, c. 118, s. 29, she was deemed to be a voluntary patient with the ability to discharge herself from treatment.

This case illustrates the challenge faced in determining whether an action amounts to withdrawal of consent to medical treatment in situations where mental illness is an issue. Even though the onus is on the defence to prove consent (*Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] S.C.J. No. 26), this case suggests that the onus has shifted to the plaintiff to prove withdrawal of that consent.