

CPA Advisory

Implications for Psychiatrists of the Supreme Court of Canada Starson v. Swayze Decision

S.A. Brooks, MB, FRCPC¹, R.L. O'Reilly, MB, FRCPC², J.E. Gray, PhD³

This advisory was reviewed and delisted as an official position of the Canadian Psychiatric Association on May 2011. It is being made available for historical purposes only.

Owing to the nature of the media reports of the Starson v. Swayze judgement (2003; SCC 032), the CPA Board of Directors invited the above-named experts to prepare an advisory that would better inform members of the actual implications of the judgement on psychiatric practice.

What is the Starson v. Swayze Decision?

Scott Starson is a highly intelligent man with an interest in physics. In 1998, an Ontario Court found him to be not criminally responsible on account of mental disorder of uttering death threats. Later, while confined to a mental hospital, he was found to be incapable of consenting to or refusing treatment. The Ontario Consent and Capacity Board (CCB) reviewed his case and confirmed the finding of treatment incapacity. Subsequently, three courts, including the Supreme Court of Canada (June 6, 2003, in a split decision) overturned the finding of incapacity. The courts' decisions were partly based on the opinion that insufficient evidence had been presented to the CCB. The courts also noted that the CCB appeared to have been overly

influenced by what it saw as Mr. Starson's best interests rather than by a strict interpretation of the law.

The Supreme Court lowered the standard of evidence required to confirm incapacity to the "balance of probabilities" rather than the enhanced standard previously used in Ontario.

What the Starson v. Swayze Decision Does Not Change

The Supreme Court did not change the specific elements required to make a finding of treatment incapacity in Ontario or other jurisdictions. Under the Ontario Health Care Consent Act (HCCA), it remains possible to treat an incapable patient against his or her will with the consent of a substitute decision maker, as long as the finding of incapacity can be proven on a balance of probabilities by appropriate evidence. However, the HCCA does not permit even involuntary patients to be treated if their informed refusal is deemed to be a capable one. The Starson v. Swayze case did not deal with any constitutional or Charter challenge to the HCCA and leaves intact the laws of a number of other Canadian jurisdictions that do not

permit an involuntary patient, regardless of capacity, to refuse needed psychiatric treatment.

Implications of the Starson v. Swayze Decision

The Supreme Court ruled that Mr. Starson's physicians did not establish that he lacked the capacity to make a decision on his own treatment. The Court opined that it was unclear whether Mr. Starson had been informed that the absence of treatment would likely lead to deterioration (the consequences of nontreatment), among several other issues. Psychiatrists should continue to assess a patient's capacity to make a treatment decision based on the specific requirements in their jurisdiction's legislation. The major clinical implication of the Starson v. Swayze decision is to emphasize the importance of documenting that the specific elements of the test have been addressed and then to ensure that this evidence is provided at any subsequent review board hearing.

In Ontario, the "enhanced standard of proof" for making a determination of incapacity has been lowered by the Supreme Court to a simple balance of probabilities. For other provinces, there appear to be no implications for the process of, or standard for, determining treatment capacity.

The Starson v. Swayze decision may be found at: www.lexum.umontreal.ca/csc-scc/en/rec/html/2003scc032.wpd.html.

¹Assistant Professor, Department of Psychiatry, Dalhousie University, Halifax, Nova Scotia; Chair, Professional Standards and Practice Committee, CPA, Ottawa, Ontario.

²Associate Professor, Department of Psychiatry, The University of Western Ontario, London, Ontario.

³Adjunct Professor, Department of Psychiatry, The University of Western Ontario, London, Ontario.

Comments on the advisory and the judgement itself are invited, especially if members have questions about its applicability where they are practising. The Professional Practice and Standards Committee will try to answer questions or find someone in their province who could give further advice. E-mail comments to president@cpa-apc.org.