

Legal aspects related to incapacity

Legal Affairs

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Capacity vs. dangerousness

- Dangerousness is the risk that one represents to themselves or to others

Act respecting the protection of persons whose mental state presents a danger to themselves or to others (R.L.R.Q., chapter P-38.001)

- A person can be dangerous and still be deemed capable

Preventive confinement, temporary confinement and confinement within an institution

- A person can be hospitalized against their will if they present a potential for dangerousness, even if he/she is considered to be capable of making decisions
- Preventive confinement, temporary confinement and confinement in an institution do not allow for the provision of care or treatment if it is refused by the client

Authorization of treatment and/or placement

- The authorization of the court is necessary where the person who may give consent to care required by the state of health of a minor or a person of full age who is incapable of giving his consent is prevented from doing so or, without justification, refuses to do so; it is also necessary where a person of full age who is incapable of giving his consent categorically refuses to receive care, except in the case of hygienic care or emergency.

(art. 16 C.c.Q.)

Emergency care – The exception to the rule!

Consent to medical care is not required in case of emergency if the life of the person is in danger or his integrity is threatened and his consent cannot be obtained in due time.

It is required, however, where the care is unusual or has become useless or where its consequences could be intolerable for the person.

(art. 13 C.c.Q.)

- Therefore, in the case where the treating team judges that the person is medically unable to provide consent at that precise moment, medical care can be administered
- Emergency refers to the notion of imminent or immediate

Elements to consider to conclude that it is incapacity

- 1) The person does not understand the nature of his/her illness;
- 2) The person does not understand the nature and the goal of the proposed treatment;
- 3) The person does not understand the risks and benefits involved with undergoing the treatment;
- 4) The person does not understand the consequences of failing to undergo treatment;
- 5) The inability of the person to understand is linked to his/her mental illness.

Review Board for mental disorders

- A person can stand trial only if they are considered capable to do so.
- If the person is found unfit to stand trial, he/she will be placed under jurisdiction of the Tribunal administratif du Québec (TAQ), Mental disorders review board section, until he/she is recognized as being capable of doing so.

Being fit to stand trial

3 criteria:

- 1) Ability to communicate with the lawyer
- 2) Understanding the nature of the accusation
- 3) Understanding the consequences of the offence

If the person is capable, they will stand trial and can use the defense “not criminally responsible”.

Not criminally responsible

- This is a defence used during trial referring to the moment when the offence was committed.
- If one is found not criminally responsible after evaluation, they are placed under the authority of the Review Board for mental disorders of the TAQ.

Criminal Code

- **16 (1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(art. 16 of the *Criminal Code*)

Attention!

- A client under authorization of treatment and/or placement, in preventive confinement, in temporary confinement or in confinement within an institution is not necessarily incapable of understanding the consequences of the offence committed;
- The client could therefore be declared guilty of the offence.

Attention!

- A client already under the authority of the Review Board for mental disorders of the TAQ for a previous offence will not be automatically judged not criminally responsible for a new offence, because the evaluation refers to the moment when the offence was committed

Voluntary intoxication

- When a client is under self-inflicted intoxication through the consumption of drugs or alcohol, the not criminally responsible defense does not apply
- The incapacity must exist prior to the consumption
- Intoxication and incapacity must be distinguished from one another!

Questions

