

In Memoriam: Carla McKague

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Carla McKague recently passed away. Carla is considered by many to have been the inventor of mental health law in Canada. It was my pleasure to be the M.C. at her memorial last week and to deliver remarks on her contribution to the field...

I met Carla when we crossed swords in 1989. She was with ARCH and I was a mental health lawyer with the ministry. It became instantly clear that this was no ordinary lawyer. She was engaged, committed, brilliant beyond description and funny. Very funny. We became fast friends even though she intimidated the hell out of me.

Carla wanted me to talk today about her contribution to mental health law but her contributions to health law in general and human rights and human dignity go far beyond that. I have to say that my remarks are informed by discussion with mental health lawyer Anita Szigeti and Carla's own autobiographical sketch in the book *Call me Crazy* by Irit Shimrat.

Carla's introduction to the mental health system was as a patient², not an advocate. She suffered a serious bout of depression in 1963 and found herself in the Hamilton Psychiatric Hospital receiving ETC, shock therapy. It was not a good experience but she put it behind her.

She found herself back in the world of psychiatry in 1977 when she was a first year law student. She accepted a student placement at the legal clinic at Queen Street Mental Health Centre and discovered that things were every bit as bad in the system as they had been in 1963. Don Weitz worked there as a psychologist and he got her interested in antipsychiatry activism. (As it turned out, he also got her interested in Don Weitz) There she discovered that her bad experience with ECT was not the least bit unique. She already knew that she wanted to be a health lawyer and that interest quickly focused on Mental Health.

Carla helped found ARCH, the Advocacy Resource Centre for the Handicapped, and went to work there when she graduated. She was there for almost a decade.

Her first celebrated case was the 1983 case of Mrs. T., a young

woman caught up in the system. Her psychiatrist wanted to give her electroshock but she refused. Even though she was competent, the doctor tried to get her family to consent. When that didn't work, he went to the review board that approved the treatment.

The only recourse was an application for judicial review. Carla fought valiantly, arguing that electroshock fit the definition of psychosurgery, which was banned in Ontario. She lost but the case was in the headlines across the country. By the way, Mrs. T never had her shock treatment. The ministry offered to transfer her to a new doc who would not use ECT if Carla dropped their appeal, an offer that was impossible to refuse.

But that wasn't the end of it. The minister rose in the legislature to announce that he was appalled that treatment could be administered without anyone's consent. The ministry proclaimed sections in the MHA act that brought in procedural safeguards for the Review Board and provided for appeal to the courts.

And Carla led the fight for even more procedural safeguards for the Mental Health Act and sold it to the NDP, probably not a hard sell given that David Reville was in the house. David was a long time NDP MPP who was, himself, a former psychiatric patient. As the result of a complex bit of minority legislature shenanigans, most of the changes were passed into law.

The government also set up the ECT review committee with Carla as a member. The committee recommended numerous safeguards as well as an elaborate scheme for substitute decision-making in mental health. Few of those recommendations were adopted but the proposed scheme formed the basis for the consent and capacity laws that were later adopted in Ontario, throughout Canada and around the world.

By the way, some years after that Carla was a member of the group that crafted what later became known as the Weistub report, the critical document that led directly to the Health Care Consent Act and the Substitute Decisions Act. It was also the model used by the American Bar Association in crafting what the Americans call model legislation for adoption by the various American states.

But I'm getting ahead of myself.

After the ECT bruh-ha-ha, the legislation had been changed so that the review board could not override the wishes of competent patients but it still had the right to overrule decisions made by substitute decision-makers.

This set the stage for another critical case that Carla fought. – Her clients, Ken Gallagher and George Reid, had both been found not guilty by reason of insanity of criminal offenses and had spent years in the Oak Ridge maximum security facility in Penetanguishine.

Ken and George both knew they were crazy. And they both knew what it was like to take antipsychotic medication. And they preferred to be crazy. Both had expressed competent wishes not to be treated. The public trustee was their decision-maker and refused to consent to anti-psychotics based on those competent wishes.

Their psychiatrist went to the review board and the board overruled the public trustee and ordered treatment. Carla went to court arguing that prior competent wishes, not best interests, should be paramount. She pointed out that the board wasn't even allowed to consider competent wishes when deliberating a treatment order. She lost at the first level but the Court of Appeal found in her favour, ruling that the board's inability to consider prior capable wishes violated the Charter of Rights and Freedoms. And it struck down the treatment order provisions in the *Mental Health Act*.

As the law now stands under the Health Care Consent Act, the board can never rule against the prior capable wishes of an incapable patient although it can overrule substitute decision makers in certain circumstances.

I should tell you that the day after the Court of Appeal released its decision in Reid and Gallagher, Carla was quoted on the front page of the Globe and Mail saying that the case stood for the principal that everyone, even, psychiatric patients, has the right to choose their own hell.

After leaving ARCH, Carla played a pivotal role at the advocacy commission, a magnificent project that was quickly dismembered after the election of the Mike Harris government. From there, Carla went to the office of the Public Guardian and Trustee for the balance of her career.

I can't finish without talking about Carla the teacher and Carla the mentor. It has been said that Carla invented mental health law in Ontario although there were certainly others working alongside her. *Mental Health Law* in Canada, the book that she wrote with Harvey Savage was the bible in the field for many years. She taught law students and psychiatric residents with me at U of T. and we criss-crossed the province together teaching young lawyers the ins and outs of mental health law.

When the Starson case was on its way to the Supreme Court of Canada, Carla was hard at it again, even if only in the shadows that time. That Case provided the opportunity for the highest court in the land to reiterate the principles from Reid and Gallagher of individual autonomy and the right of capable individuals to make their own treatment decision. Starson was brilliantly argued at all levels by Anita Szigeti but Carla was in the background, advising and mentoring Anita on tactics and arguments.

While many would argue that there is a tremendous amount of work yet to be done, patients now enjoy rights and recognition of their humanity that might not have existed were it not for Carla.

And each and every one of us, in Ontario, across Canada and in much of the Western world enjoys the right of medical self-determination unimaginable in years past due, to a very large extent, to the brilliant and committed advocacy of Carla McKague.

Footnotes:

1. Michael Bay was the founding Chair of the Consent and Capacity Board.
2. I use the word "patient" in this paper to indicate individuals who are or who have been considered as such by the mental health system. I do so because that is the term preferred by mental health providers, the primary consumers of this publication. I acknowledge that some would prefer terms such as "psychiatric survivor," "inmate" or "psychiatrized." I express no opinion on what the preferred terminology should be.

Competing Interests: None

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