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HOSPITAL TRANSFERS INTO NURSING HOMES:
A POTENTIAL CHARTER REMEDY FOR UNWILLING TRANSFEREES

Jack Fleming *

Introduction

This paper will examine the possibility of a Charter remedy for persons unwillingly transferred from hospitals into nursing homes. This happens when doctors decide that patients (often elderly) in hospitals no longer require a hospital level of care and instead should receive long term care in a nursing home. Sometimes the patients involved have resided in the hospital for a long time. The notice which they are given varies. It is not uncommon for an elderly patient to simply be told that she or he will be transferred to the first nursing home bed which comes available.

The concerns of the patients (and their families) are many. Sometimes they are simply opposed to going to any nursing home, as they feel that the level of care is better in a hospital. Other times they object to a particular nursing home because of the quality of its care or its location. Another concern is the potential effects of transfer trauma in a relocation without proper preparation. There is evidence to indicate that involuntary transfers can lead to significant health problems or death.

As the very basics of interpretation of the Canadian Charter of Rights and Freedoms, let alone their application to a specific case, have yet to be established, this paper will consider the likely principles of interpretation to be developed as well as their application to the instant case.

* Jack Fleming is a lawyer at the Halton Hills Community Legal Clinic and was previously a lawyer at the Advocacy Centre for the Elderly (where the issue of hospital transfers into nursing homes arose). c 1985 Copyright in this article remains with the author.


2. In one case a man, whose wife (herself not in the best of health) visited him daily at a hospital in Toronto, was transferred to a nursing home in King City, where his wife was unable to visit him. c 1985 Copyright in this article remains with the author.
There is also little guidance in the caselaw, both Canadian and American, on the particular issue of involuntary transfers. Cases dealing with similar facts are almost non-existent and it is necessary to proceed by analogy (just as one must proceed by analogy in developing interpretation for the Charter due to the paucity of caselaw). This problem was pointed out by the Florida District Court of Appeal in La Jeune Road Hospital Inc. v. Watson:

"... this case must resolve itself upon a determination of when and under what circumstances may a hospital discharge a patient against that patient's will. Our research has revealed a dearth of authority on the subject."³

Transfer Trauma

Transfer trauma is the medical term for the effects of involuntary relocation on the elderly. The medical evidence on transfer trauma is somewhat contradictory. Some studies have found negative consequences from relocation, others have not.

Dr. L. Pastalan reviewed the literature on relocation, in a fairly recent paper, in an attempt to resolve the contradictions.⁴ He found that the apparent contradictions arose largely due to qualifying factors underlying the conclusions⁵. He listed five major factors:

1. The degree of choice in making the move.
2. The degree of environmental change.
3. The degree of health.
4. The degree of preparation.
5. The methodology used in the study.

Analysing the studies in this light, Dr. Pastalan found that in home to institution moves (which is essentially the situation where someone is only briefly resident in a hospital prior to transfer to a nursing home) which are voluntary, the vast majority are successful, with no decline in health or attitude. He also found that choice plays an important role in determining post-relocation

³ La Jeune Road Hospital Inc. v. Watson 171 So. 2d 202 (1965), at 220.
⁴ Dr. L. Pastalan, Relocation: A State of the Art (unpublished, Institute of Gerontology, University of Michigan, 1980).
⁵ Id., at 2.
There are few studies on involuntary home to institution relocation, but those which do exist show an increased mortality rate over voluntary moves, and indicate that the similarity of the new environment to the old is also an important factor.

Studies on moves from one institution to another show a lower mortality rate where the move is accompanied by extensive preparation. There are conflicting results in studies on involuntary institution to institution transfers, but the majority show an increasing mortality rate and also indicate that persons in ill health (as in transfers to nursing homes) have more trouble adapting than do healthy individuals.

Dr. Pastalan also pointed out that the elderly are particularly susceptible to transfer trauma, and that a carefully designed relocation preparation program can reduce the danger. He lists many important considerations in designing such a program, including personal counselling, involving the relocatee and family in the decision making as much as possible, and visiting the new location as much as possible before moving.

It can be seen from Dr. Pastalan's review of the studies done that transfer trauma is seen by many researchers to be an important cause of death among the elderly. It also appears that a relocation preparation program can have a significant effect on the likelihood of death from transfer trauma. Dr. Pastalan also notes that the first three months immediately following the move are the most dangerous (an important consideration in requesting an injunction).

In taking a case to court on the basis of the dangers of transfer trauma, extensive evidence regarding transfer trauma generally and as it applied to the individual involved would be necessary. For the purposes of this paper, it will be assumed that such evidence could be produced and it will be assumed that the purpose of litigation is not to block the transfer entirely, but rather to ensure that a relocation preparation program is implemented.

6. Id., at 17.
7. Id., at 10.
8. Id., at 17.
9. Id., at 18.
10. Id., at 20.
11. Id., at 22.
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Application of the Charter

In examining the possibility of remedies for unwilling transferees through the use of the Canadian Charter of Rights and Freedoms, an initial issue to consider is whether the Charter applies to the actions of a public hospital. Section 32 of the Charter deals with its application as follows:

"This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

In the United States, the Bill of Rights applies only to government action, but government action has been held to include what might normally be considered private activities if there is sufficient governmental nexus, e.g. the actions of an institution acting pursuant to statute, or publicly funded or whose actions affect entitlement to state provided privileges.

It is worth noting that s. 32(1) states that the Charter covers the actions of the federal and provincial governments; it does not say that it only covers these actions. It is possible for the courts to say that the Canadian Charter also applies to private individuals and institutions.

It seems likely that Canadian courts will follow the U.S. sufficient nexus test and there are already a number of Canadian cases recognizing that bodies established by statute are reviewable under the Charter. Given that public hospitals are closely regulated by

12. The Canadian Charter of Rights and Freedoms, s. 32(1).
provincial legislation and receive substantial public funding it is likely that a court would hold that the Charter applies to their actions.

Section 7 Analysis

It is s. 7 of the Charter which is most likely to provide a solution to the problem faced by unwilling transferees. Other sections may also be applicable (e.g. s. 2 and s. 5), but only s. 7 will be considered in this paper. Section 7 reads as follows:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."16

It is submitted that a s. 7 analysis should proceed as follows:

1. Does a constitutionally protected interest exist?
2. Has that interest been infringed?
3. Was the infringement made in accordance with the precepts of fundamental justice?
4. Is the infringement allowable pursuant to s. 1 of the Charter?
5. What is the appropriate remedy?

Establishing a Constitutionally Protected Interest

Is there a constitutionally protected interest here? In deciding whether constitutional rights exist, courts look at history, custom, common law and statute law in the jurisdiction and in other "free and democratic" jurisdictions.17 The thesis in the instant case is that the "right to life, liberty and the security of the person" is threatened by a forced transfer from a hospital to a nursing home without an adequate relocation preparation program. Or, put

16. Canadian Charter of Rights and Freedoms, s. 7.

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another way, that everyone has a right to freedom from transfer trauma. Existence of this right can be inferred from a number of sources.

The legislation governing transfers offers little comfort. Regulation 865 provides as follows:

s.31 "(2) when a patient is no longer in need of treatment in a hospital, the attending physician shall write and sign an order that the patient be discharged.

(3) a patient shall be deemed to be discharged when the attending physician or another member of the medical staff to whom the attending physician has delegated the duty, writes and signs the discharge order under subsection (2) and communicates it to the patient.

(4) when the patient is discharged he shall leave the hospital the same day but, with the approval of the administrator, the patient may, at his option, remain in the hospital for a further period not exceeding 24 hours ...."\[18\]

Thus, there is no right to due process before transfer contained in the legislation. On the face of the legislation, the hospital can act quite arbitrarily. Therefore the search for evidence of recognition in our society of a "life, liberty or security of the person" interest in arbitrary transfers must be widened to analogous situations.

One source is tort law. There are no malpractice cases directly on point, but there are American cases stating that a doctor cannot abandon a client without giving reasonable notice.\[19\] It can be argued that the principle involved is present in the instant case. There are no Canadian cases on the precise issue of abandonment.\[20\]

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18. Regulation 865, R.R.O. 1980, s.31(2)(3) and (4).
20. Except perhaps Wilson v. Stark (1967), 61 W.W.R. 705, which did not cite the theory of abandonment developed in the American cases but did hold that a doctor who abandons his patients by making inadequate preparations for replacement when going on vacation is guilty of malpractice.
There are a few American cases directly on the issue of discharge. In La Jeune Road Hospital Inc. v. Watson and Meiselman v. Crown Heights Hospital, abandonment due to premature discharge from hospital was found. In both cases the patient was seriously ill and was not sent to any other institution. In Meiselman, the plaintiff was discharged into the care of his family doctor, but he did not have the necessary expertise to deal with the case.

The clear cut seriousness of the illnesses, and the fact that the patients clearly required a hospital level of care in both cases, made those cases easier to litigate than one based on transfer trauma. However, they do indicate the obligation which is on the medical profession to ensure the continued adequate treatment of a patient once treatment has been commenced.

While there are no Canadian cases directly on the issue of abandonment, Regulation 448 under the Health Disciplines Act does make it professional misconduct to fail:

"...to continue to provide professional services to a patient until the services are no longer required or until the patient has had a reasonable opportunity to arrange for the services of another member." 23

As well, the Code of Ethics of the Canadian Medical Association states that an ethical physician:

Par.15."...will, when he has accepted professional responsibility for an acutely-ill patient, continue to provide his services until they are no longer required, or until he has arranged for the services of another suitable physician. In any other situation, he may withdraw from his responsibility for the care of any patient provided that he gives the patient adequate notice of his intention." 24

Applied to the instant case, the principle of abandonment (which itself is merely a subset of the general principles of malpractice law), together with the requirements of the Health Disciplines Act and of the C.M.A. Code of Ethics, could be said to encompass

22. 34 N.E. 2d 367 (N.Y.C.A. 1941).
23. Regulation 448, R. R. O. 1980, s.27.23
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consideration of the effects of transfer trauma in deciding what constitutes "adequate notice" and "a reasonable opportunity to arrange for the services of another [physician]". It can be argued that to transfer without adequate preparation is akin to terminating treatment without arranging for adequate replacement services.

The tradition that a physician not discontinue treatment of a patient without ensuring continuing adequate care should be equally applicable to a hospital as an entity.\(^{25}\)

Whether a tort action on these facts would succeed is not the issue; the concerns expressed in the caselaw provide a building block in establishing the existence of a constitutional interest.

Some American cases have considered the issue of transfer trauma directly. In \textit{O'Bannon v. Town Court Nursing Centre}\(^{26}\) the United States Supreme Court rejected the existence of a constitutionally protected property interest in continued occupancy in a nursing home which was threatened with closure. This was a case of an important issue being brought forward on "bad facts": the medicaid regulations which led to the decision to close the facility were based on quality of care and were intended to protect seniors as a class. The case did not really deal with transfer trauma, except in a very peripheral fashion.

Freedom from transfer trauma has been recognized as a constitutionally protected life and liberty interest in other cases, two of them being post-\textit{O'Bannon} although none at the Supreme Court level.\(^{27}\)

Moving beyond the specific facts involved in the instant case, a more general examination of the rights and traditions of our society, as developed through the doctrine of natural justice, can be helpful. The caselaw in that area gives an indication of what

\(^{25}\) Hospitals, as well as individual physicians, can be liable for malpractice: \textit{Yepremian v. Scarborough General Hospital} (1978), 20 O.R. (2d) 510, 530 to 531.

sort of rights are sufficiently important to warrant any sort of fairness (the current "threshold issue" in administrative law). Under s. 7, it can be argued that rights comparable in importance to those which have been held to necessitate procedural safeguards under the natural justice doctrine are now constitutionally protected rights under s. 7.

In a hospital transfer case the rights involved concern health (and potential deterioration of it), life (and potential loss of it), accommodation, food, medical care and quality of life for a person, probably for the rest of his or her life. One can look at "natural justice" cases to see how these sorts of concerns have fared in seeking protection, in order to build an argument for protection of analogous rights in the case at hand.

In Re Webb and Ontario Housing Corporation the court found that where someone was being deprived of the benefit of living in subsidized housing she had a right to be told of the case against her and to make answer to it. McKinnon, A.C.J.O. stated:

"If no notice is given to a person who, as a result of investigation by a public corporation and carrying out a public obligation, is in danger of losing an important benefit, and no opportunity is afforded to answer the "case" against him, such a procedure, in my view, would be unfair."  

In the Knapman case, twenty-nine years ago, the Supreme Court of Canada decided that there was a requirement to act judicially (that was the threshold necessity at the time) in deciding to

29. Id., at 196.
31. Since then, of course, the distinction between judicial, or quasi-judicial, and administrative acts has largely disappeared and a range of rights are available through the doctrine of "natural justice", depending on the extent of the duty to act fairly: Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1979] S.C.R. 111; Martineau v. Matsqui Institution Disciplinary Board (No. 2) [1980] 1 S.C.R. 602; Arnett, Ruetter and Mendes, "FIRA and the Rule of Law" (1984), 62 Can. B. Rev. 121, at 129; Evans, Janisch, Mullan and Risk, Administrative Law, (Emond-Montgomery Ltd., Toronto, 1980), at 34.
evict occupants from their homes for health reasons. In *Lazarov*, the court felt that denial of an application for citizenship was sufficiently important to require an opportunity to dispute the grounds of refusal, despite the fact that the applicant could apply again in two years time and would continue to live in Canada regardless.

Surely the harm to unwilling transferees in the instant case is at least comparable to the potential harm to the individuals in these cases. In fact, the potential harm in each of these cases, where procedural fairness was required, was less than the potential harm to unwilling transferees. Remember that at this stage of the analysis the court would be considering whether there is a constitutionally protected right to freedom from transfer trauma; the likely effects on the particular individual involved are not of concern at this point.

An analogy can also be made to the American cases on the right to refuse treatment (usually in the context of psychotropic drugs). There are also American cases establishing that state statutes can create life and liberty interests which are then entitled to due process. For example, there may be no constitutionally inherent right to parole, but once a right to parole is created by statute, due process applies to its revocation. On this reasoning, it could be argued that a right to care is established by statute and can only


33. This seems also to have been the analysis of Madam Justice Wilson in *Singh v. Minister of Employment and Immigration*, as reported in Ontario Lawyers Weekly, Aug. 26, 1985 (the actual case transcript was unavailable at the time of writing).


36. *Public Hospitals Act* R.S.O. 1980 c. 410, s.17: "Where a person has been admitted to a hospital by a physician pursuant to the regulations; and such person requires the level or type of hospital care for which the hospital is approved by the regulations, the hospital shall accept such person as a patient" (emphasis added). Note the mandatory language.
be withdrawn with due process.

In the U.S. case of *Vitek v. Jones*, a statute provided that where a physician designated by the Director of Correctional Services found that a prisoner was suffering from a mental disease which could not be given proper treatment in the jail, the Director could arrange for a transfer to a mental health institution for examination and treatment. In that case the U.S. Supreme Court held that the transfer to a mental health institution constituted a major change in the conditions of confinement amounting to a "grievous loss" that should not be imposed without the opportunity for notice and adequate hearing. The court held that once the state grants a right or expectation that an adverse action will not take place except upon the occurrence of a specified situation then the determination of that occurrence becomes crucial and requires due process.

That reasoning could easily be applied to the instant case, where the occurrence of a specified situation is the determination that "a patient is no longer in need of treatment in a hospital" and the major change in the conditions of life amounting to a "grievous loss" is the transfer to the nursing home environment.

Some U.S. cases have been interpreted as developing a constitutional right to treatment, although this has largely been implicit rather than explicit in the cases and certainly has not been acknowledged at the Supreme Court level. This line of reasoning (thus far largely in the context of involuntary confinement) could also be used. The reasoning in the famous U.S. Supreme Court decision of *Roe v. Wade* can also be applied. In that case, the court found a constitutional right to privacy arising out of the 14th Amendment right to liberty and struck down abortion laws in order to protect a woman's interest in liberty from physical and psychological harm.

38. Id., at 488.
39. Id., at 490-491.
40. Regulation 865, R.R.O. 1980, s.31(2).
42. 410 U.S. 113 (1972).
As a passing comment, I would note that U.S. cases have generally upheld negative, rather than affirmative rights, i.e. granting freedom from government intervention rather than imposing a positive duty upon the government. Thus, attempts to develop a constitutional right to treatment or a right to a minimum level of welfare assistance have met with little success.\textsuperscript{44}

The Charter's language is somewhat more affirmative but it is quite likely to be interpreted on this point in the same way as the U.S. Bill of Rights.\textsuperscript{45} This problem can be side-stepped by phrasing the issue in the negative sense, i.e. "freedom from transfer trauma". To assert a positive right to a particular level of care would be a much more difficult proposition.

Naturally, the above is only a sketchy outline of the arguments and types of evidence which could be marshalled to assert a constitutional interest in freedom from transfer trauma, but I think that it is sufficient to show that such an interest could be established. By drawing on such sources as tort law, the rules governing physicians, the type of rights said to be due procedural fairness under the natural justice doctrine, the concept that where a right is created by statute the finding of the condition which triggers loss of the right requires due process, the recognition in the "free and democratic society" to our south of transfer trauma as a constitutionally protected interest, the U.S. concepts of right to treatment and the privacy doctrine, it can be demonstrated that in our society the threat posed by the potential effects of transfer trauma is indeed considered a threat to "life, liberty and security of the person."

After establishing a constitutional interest, the next stage in the analysis is to ask whether it has been infringed.

\begin{itemize}
\item \textbf{43.} Ibid. See Hughes, Supra note 34. Some authors have also tried to draw a constitutional right to dignity from the cases establishing a right to privacy; see Poust, "Human Dignity as a Constitutional Right: A Jurisprudentially Based Enquiry into Criteria and Content" (1984), 27 Howard L.J. 145.
\item \textbf{44.} Bender, op. cit. note 13, at 822; Pennhurst State School v. Halderman 51 U.S. 1 (1980).
\item \textbf{45.} Bender, op. cit. note 13, at 823. For a more affirmative view of the "rights" guaranteed by the Charter (as opposed to the "freedoms" for which only non-interference by the state is guaranteed) see Allman et al. and Commissioner of the Northwest Territories (1983), 144 D.L.R. (3d) 467, (N.W.T.S.C.).
\end{itemize}
Substantive Effect of Section 7

The scope of s. 7 is still unclear. One basic question is whether s. 7 has merely procedural effect or whether it also requires substantive due process. That is, is s. 7 complied with if there is proper notice and hearing etc. (as required under the "natural justice" doctrine) or does s. 7 also permit review of the substance of the legislation to determine whether it is reasonable or whether it infringes any constitutionally guaranteed rights? Can a constitutional right be infringed under s. 7 as long as the required amount of procedural fairness is present?

One reading of s. 7 would be that the first clause establishes the substantive effect of the section and the second clause provides for procedural fairness. They are, after all, joined by the conjunctive "and" and therefore must speak to different purposes. The two clauses could also be read sequentially such that both requirements must be met.

Cases on this point thus far differ. The issue is merely touched on here as it is not of crucial importance: procedural due process is, in any event, lacking in the instant case.

Infringement Of The Constitutional Interest and Fundamental Justice.

If a constitutional right to freedom from transfer trauma is established, then clearly it is infringed by an unwilling and unprepared transfer from a hospital to a nursing home (assuming that the evidence on the potential effects of transfer trauma is accepted). The next step is to consider whether that infringement has taken place without due process.

This points out the difficulties of constitutional analysis: a step by step analysis helps to ensure clear thinking and consistency, yet the subject matter is by its very nature extremely fluid. To consider

46. See Bender, op. cit., note 13, at 824.

whether someone has been deprived of a constitutional interest other than "in accordance with the principles of fundamental justice" it is necessary to consider what level of procedural fairness fundamental justice requires here; the "fairness" provided by fundamental justice is a sliding scale of procedural requirements which in turn depends upon a balancing of the interests involved. This balancing of the interests involved is also a function of s. 1 of the Charter, the next step in the analysis. In effect, the discussion could take place at either level. For the purposes of this paper, I will largely discuss the balancing of interests in the context of s. 1.

Procedural fairness in the instant case is non-existent. Pursuant to the legislation, the decision need merely be made by a physician at the hospital. There is no requirement of consultation, consideration of the patient's views, etc. As well, the decision takes effect immediately with no opportunity for reconsideration. The actual process (as opposed to the legislative requirements) will vary from hospital to hospital.

This procedure is clearly inadequate. If prison inmates and parolees retain the right to due process in restrictions on their liberties as do involuntarily committed mental patients, then surely the ordinary citizen who is being treated in a hospital deserves at least some minimum of due process before deprivation of a constitutional right.

Administrative law cases also support this contention. The bare minimum of "fairness" under the "natural justice" doctrine includes

48. See note 31.


51. Note that the administrative concerns being balanced in the cases of prisoners and mental patients are similar to those in the instant case. It may be suggested that the cases are not similar because in the instant case we are dealing with voluntary patients, but surely the voluntariness is illusory: where else are they to go?
a right to know the essence of the case against the individual and an opportunity to reply\(^\text{52}\) (which doctrine has also been acknowledged in the context of s. 7)\(^\text{53}\)

In the American case of Brede v. Director For Department of Health,\(^\text{54}\) state law granted entitlement to treatment but also gave unrestricted state authority to transfer (very similar to the instant case). The court held that legislative entitlement to treatment at a facility, even though not a particular facility, meant that a certain amount of due process was required. Once entitlement to a benefit is determined, it is necessary to decide what process is due:

"The cases have recognized that when the deprivation of some government benefit would operate so as to impose severe hardship upon individuals with an entitlement to that benefit, due process protection in the form of a pre-termination hearing may be required."\(^\text{55}\)

In Brede, the court held that such a hearing was required, (due to the potential effects of transfer trauma), where the state was going to transfer the residents of a leprosarium.

The above sources indicate that infringement of a right of this type requires more due process than is currently provided for in the legislation. At this point it is appropriate to consider the effect of the medical nature of the issue on judicial thinking. Will the courts hold that the process provided for by the legislation is appropriate and sufficient as the matter is essentially a medical one?

The U. S. Supreme Court answered that question in the case of Vitek v. Jones\(^\text{56}\) (referred to above), as follows:

"The medical nature of the enquiry, however, does not justify dispensing with due process requirements. It is

\(^{52}\) Webb, supra note 28; Knapman, supra note 30; Lazaraov, supra, note 32; Re Ruiperez and Board of Governors of Lakehead University (1983), 41 O.R. (2d) 552 (Ont. C.A.); Re Giroux and The Queen In Right of Ontario (1984), 46 O.R. (2d) 276


\(^{54}\) 616 F. (2d) 407 (1980).

\(^{55}\) Id., at 412.

\(^{56}\) Supra note 37.
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precisely "the subtleties and nuances of psychiatric diagnosis" that justifies the requirement of adversary hearings." 57

Substituting "medical" for "psychiatric" one could make similar answer in the instant case. Unfortunately, in the later case of Youngberg58 the U. S. Supreme Court was decidedly more deferential to "experts", stating the courts should not "second-guess the expert administrators on matters on which they are better informed", 59 and further that:

"...the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgement, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgement." 60

In short, the U. S. Supreme Court opted for a malpractice standard61 and basically washed its hands of the "medical" decision of appropriate restraints. Courts in Canada are also traditionally reluctant to interfere with the decisions of experts.62 Will this lead them to say that in the case of involuntary hospital transfers the infringement of the constitutional right occurs with all the "fundamental justice" that is required in that situation?

Three answers can be made to this challenge. First, counsel for the patient would probably argue, along the lines of the quote from Vitek v. Jones63 (above) that it is precisely the nuances and uncertainties of this "medical" issue which demand some sort of a hearing.

57. Id., at 495.
58. Youngberg v. Romeo, supra note 50.
59. Id., at 2462.
60 Id., at 2463.
63. Supra note 57.
Second, even if this is a medical question best decided by doctors, the consequences of the decision are serious enough to at least require an opportunity for the patient to make representations to the decision-maker and an opportunity to appeal the decision (even if to a panel of doctors).

Finally, even if one doctor's opinion is sufficient, as provided for in the legislation, if the evidence on the effects of transfer trauma is accepted then if a doctor transfers an "at risk" patient to a nursing home without a relocation program, it can be argued that the doctor is exceeding his or her jurisdiction (and therefore not providing "fundamental justice") in making a decision other than on the criteria of the legislation.

To elaborate briefly on the last point: the legislation, on the face of it, vests great discretion in the doctor. Discretion must be exercised according to the statutory wording which grants it and in accordance with the policy, scope and object of the Act as a whole. As well, it must be exercised on the basis of objective evidence: it is not sufficient to merely state a conclusion repeating the words of the statute. The wording in s. 31 of the regulation is that "when a patient is no longer in need of treatment in a hospital . . ." (emphasis added) which is not the same as "when a doctor deems that a patient is no longer in need of treatment in a hospital . . .". The decision to discharge can only be made when a specific condition is met and that must be

64. Regulation 865 R.R.O. 1980, s.31, although the caselaw even prior to Charter clearly indicates that our courts are able to apply procedural fairness even where statutory wording seems to grant unfettered discretion: Knapman, supra note 30; Lazarov, supra note 32; Pue, Natural Justice in Canada, (Butterworths, 1980), at 87; Mullan, "Developments in Administrative Law; the 1978-79 Term" (1980), 1 Sup. Ct. L. Rev. 1 at 21; R. v. Workman's Compensation Board; ex-parte Kuzyk (1968), 2 O.R. 337, (Ont. C.A.); C.U.P.E. Local 963 v. New Brunswick Liquor Corp. [1979] 2 S.C.R. 227.


67. Regulation 865, R.R.O 1980, s.31
determined by objective evidence. 68

This theory is further supported by the wording of s. 31(1) of regulation 865, 69 dealing with admission, which states that a person shall be admitted "when the medical practitioner is of the opinion that it is medically necessary for the person to be admitted to hospital ..." (emphasis added). Section 31(2), dealing with discharge, states that "when a patient is no longer in need of treatment in a hospital ..." (emphasis added) the patient shall be discharged. The statutory wording thus provides an objective standard for discharge as opposed to the more subjective and discretionary one for admission. 70 Thus a doctor transferring without applying the standard would not be providing the procedural fairness due when a constitutional right is threatened. 71

This argument, that the individual involved is exceeding his/her jurisdiction, used so often in administrative law cases to avoid exclusionary clauses, could be used in this context to evade attempts to limit the procedural fairness due on infringement of a constitutional right, particularly if Canadian courts adopt the U.S. practice of applying the Constitution not only to the wording of legislation but also to the acts of officials (who are perhaps not

68. As in Knapman, supra note 30.
69. Regulation 865, R.R.O. 1980, s.31(1).
70. Id., s. 31(2). This is in line with the cases stating that taking away of privilege requires due process even if granting the privilege initially does not: Webb, supra note 28; Goldberg, supra note 35.
71. Consider also that it is fairly certain that a doctor who discharged a patient in need of continued care (although not at the hospital level), when there was no nursing home bed available would be exceeding his or her jurisdiction, as the patient would, in those circumstances, continue to be in need of treatment at a hospital. The condition precedent to discharge would not have been met. Likewise it can be argued that a doctor who discharges an at-risk patient without a relocation preparation program has exceeded his or her jurisdiction. The person continues to be in need of treatment in the hospital because the alternative is a high likelihood of death, just as in the case of someone discharged and turned out onto the street when no bed is available. While as a matter of degree the cases are different (and thus the former is more difficult to argue than the latter) the principle remains the same.
correctly following constitutionally adequate legislation).\textsuperscript{72}

Thus, having established a constitutional right to freedom from transfer trauma, it is obvious on the face of it that an unwilling and unprepared transfer infringes this constitutional right. Moving on to the next stage in the analysis, by examining the level of procedural fairness due in analogous situations, it can be seen that under current legislation this infringement is made without procedural fairness (the "fundamental justice" part of s. 7). The challenge that the medical nature of the issue limits the procedural fairness due can be dealt with. It is not necessary to identify the precise procedural requirements needed here to satisfy "fundamental justice"; it is enough to establish that the current procedural provisions are insufficient.

At this stage of the analysis, the existence of a constitutional right, and the infringement of that right without due process, have been shown. The next step (perhaps the most difficult) is to decide whether the unconstitutional legislation is saved by s. 1 of the Charter.

**The Effect of Section 1**

At this point, it is useful to look briefly at the American approach to constitutional analysis. The American and Canadian approaches would diverge earlier, at the point at which a constitutional interest has been identified. The U.S. courts would at that point begin to balance the interests of the individual against those of the government or institution. Under the Charter it would appear that s. 7 rights should be taken as absolute at the initial stage and any balancing of interests should only occur after that, when s. 1 is brought into play.\textsuperscript{73} Section 1 of the Charter reads as follows:

"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."\textsuperscript{74}

U.S. Courts have applied a variety of standards in testing the

\textsuperscript{72} Bender, op. cit. note 13, at 827.


\textsuperscript{74} The Canadian Charter of Rights and Freedoms, s. 1
constitutionality of state statutes, but they can be roughly divided into two categories.\textsuperscript{75}

The easiest is the "minimum scrutiny" test. To satisfy this test the government need only show a conceivable rational basis for the statutory provision that will further a legitimate state goal. A statute is only constitutional if it is wholly irrelevant to the achievement of the state's objective.

The other test is the "compelling interest" or strict scrutiny test and it is used when a government classification is based upon a "suspect classification" such as race (this would relate to s. 15 of the Canadian Charter of Rights and Freedoms) or a "fundamental right" is adversely affected. The latter test has been extended into the area of mental health law.\textsuperscript{76} It requires that there be a clear and present danger and that the government action is a strict necessity to serve a compelling governmental objective.\textsuperscript{77}

Going back to the analysis followed in Canadian courts, it is not yet clear what the test is, although a test similar to the "compelling interest" test has been propounded in some cases.\textsuperscript{78} Given the difficulties which the American approach has led to (including the development of an intermediate level of scrutiny in some cases), it is unlikely that Canadian courts will follow that example. This view is reinforced by the fact that we have a single test spelled out in s. 1 (unlike the U.S., where it was developed by

\textsuperscript{75} Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter" (1984), 13 Man. L. J. 669, at 671.


\textsuperscript{77} Bender, op. cit. note 75 at 671.

the courts) and it is a flexible one.\textsuperscript{79}

A three step procedure for the application of s. 1 is set out in the Re Ontario Film and Video Appreciation Society and Ontario Board of Censors\textsuperscript{80}. It proceeds as follows:

1. Is the limitation "demonstrably justifiable"?
2. Is it "reasonable"?
3. Is it "prescribed by law"?

\textbf{Demonstrably Justifiable}

There is no presumption of legislative validity in applying the Charter\textsuperscript{81} and there have been suggestions of a leaning in favour of the rights of the individual.\textsuperscript{82} The onus is on the government or institution to demonstrate justification for infringement once a limitation on a fundamental right or freedom has been shown.\textsuperscript{83}

It seems likely that our courts will hold that the legislative end involved must be more or less "compelling" (i.e. justifiable) depending upon the relative importance of the right being infringed versus that of the governmental interest. Working from a standard of reasonableness, as envisaged by s. 1, it seems clear that the two

\textsuperscript{79} It is also reinforced by the fact that U.S. levels of scrutiny arose largely in the context of equal protection, rather than due process; also both are contained in the same section of the 14th Amendment and thus a similar analysis is applied to each. In the Charter equal protection and due process are separated into different sections, and they do not arise out of the same historical context.

\textsuperscript{80} (1983), 41 O.R. (2d) 583, (Div. Ct.)

\textsuperscript{81} \textit{Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, supra} note 80; \textit{Law Society of Upper Canada v. Skapinker, supra} note 17.

\textsuperscript{82} \textit{Re Federal Republic of Germany and Rauca, supra} note 78; \textit{Crain v. Couture, supra} note 78.

\textsuperscript{83} \textit{Re Ontario Film and Video Appreciation Society, supra} note 80; \textit{Public Service Alliance of Canada v. The Queen in Right of Canada} (March 21, 1984, F.C.T.C., Reed J.), in \textit{Canadian Charter of Rights Annotated}; \textit{Re Cadeddu and the Queen (1982), 4 C.C.C. (3d) 97, (Ont. H.C.J)}; \textit{Re Southam Inc. and the Queen (No. 1) (1983), 41 O.R. (2d) 113, (Ont. C.A.)}; \textit{Re Jamieson and The Queen (1982), 70 C.C.C. (2d) 430, (Que. S.C.)}. 
polarized extremes of the U.S. levels of scrutiny are inappropriate; what is required is a balancing of the interests involved in each case. Thus, in beginning a s. 1 analysis it is necessary to consider: a) is there a legitimate governmental interest to be served here; and b) is that interest still justifiable when one considers the importance of the right being infringed? After deciding those questions, one can move on to the next step of considering the reasonableness of the particular limitation.

An American case, where application was made for an injunction to remove a patient who had refused to be transferred from a hospital to a nursing home, provides an example of a hospital's interests. The court said of the hospital:

"It has a moral duty to reserve its accommodation for persons who actually need medical and hospital care and it would be a deviation from its purposes to act as a nursing home for aged persons who do not need constant medical care but who need nursing care. There are homes for the aged, there are nursing homes and similar institutions. Hospitals have a duty not to permit their facilities to be diverted to the uses for which hospitals are not intended."84

The governmental interest here seems to be a concern over the allocation of scarce resources. On the face of it, this will probably be accepted as a legitimate concern by our courts. But is it still legitimate when compared to the importance of the right being limited? Some infringement on the right to freedom from transfer trauma is justifiable, in the sense that it would not be reasonable to prohibit any and all transfers of elderly patients because of the potential effects of transfer trauma; in that sense, the constitutional right involved is not an absolute one. If, on the other hand, the right to freedom from transfer trauma was seen to simply prohibit transfers without a relocation preparation program, perhaps the right could be seen as absolute.

It is unclear whether the limitation would fail at this stage (all three requirements of s. 1 must be met) or not.

Reasonable Limitation

Is the limitation reasonable? It seems likely that Canadian courts will take the approach that a limitation is reasonable when it is a

means proportionate to the end at which the law is directed. In U.S. cases using the "strict scrutiny" test, the "least restrictive alternative" test has been employed to ensure that where a legitimate state goal exists, the least restrictive alternative is used to achieve that goal. This test has been applied to mental health cases. There is some suggestion that this test will be used by Canadian courts, but it is not yet clear that it will. Again, it is likely that Canadian courts will eventually agree on a more flexible test, i.e. the more important the right infringed, and the greater the infringement, the more closely tailored to the intended end the state's infringement must be.

In determining the reasonableness of the limitation, how do the interests balance in the instant case? In the very similar U.S. case of Brede the interests of the state in transferring the residents of a leprosarium were outweighed by the potential harm to the patients. Likewise, in the cases of Yaretsky v. Blum, Bracco v. Lackner, Rockhill Care Centre v. Harris, and Klein v. Mathews, it was held that the state's interest in transferring medicaid recipients to a different nursing home would not be substantially hurt by the provision of some procedural fairness.

85. Quebec Association of Protestant School Boards v. Attorney General of Quebec (No.2) (1982), 140 D.L.R. (3d) 33, (Que. S.C); Hawkins, "Making Section One Work" in Charter of Rights and Administrative Law, (Carswell, Bar Admission Course Materials, 1983) at 130; Southam, supra note 83; Public Service Alliance, supra note 83.


88. Hawkins, supra note 85, at 131.

89. 616 F (2d) 407 (1980).

Hospital Transfers Into Nursing Homes

The interests of the individual have not always fared so well in U.S. cases. In the Youngberg\textsuperscript{91} case, quoted above regarding the presumptive validity of the opinions of expert administrators, the court's comments were made with the full realization that such institutions often offer less than adequate surroundings:

"Such a presumption [of the validity of professional opinions] is necessary to enable institutions of this type - often, unfortunately, overcrowded and under staffed - to continue to function."\textsuperscript{92}

Financial considerations and administrative difficulties have been held to be legitimate considerations in balancing the interests of the state and the individual,\textsuperscript{93} and the practical realities of the institutional setting must be considered.\textsuperscript{94} However, these administrative concerns have received a set-back recently in the Supreme Court of Canada, and may not be given as much weight as previously expected.\textsuperscript{95}

90. decertification of an entire nursing home and the issue was the residents' desire to have standing at the decertification hearing, which is a different issue than the requirement of a hearing for each resident at the individual time of discharge from an institution. In Rockhill the court held that the situation was closer to the Goldberg v. Kelly (see note 35) situation than that in Mathews v. Eldridge (424 U.S. 319 (1976); where right to a hearing was denied in terminating disability benefit payments) as the "clogging of the administrative process" was not present. It could be claimed that such "clogging" is potentially present in the situation of individual transfers.

91. Youngberg v. Romeo, supra note 50.
92. Id., at 2463.
93. Quint, op. cit., note 41, at 184; Ingraham v. Wright, 430 U.S. 651 (1976); Youngberg v. Romeo, supra note 50, at 2461; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). In Wyatt v. Stickney, supra note 87, the Court upheld the right of mental health patients to adequate care despite the cost issue: the individual rights of the patients were held to outweigh the cost considerations of the state in a case of severe cutbacks.
94. Ingraham v. Wright, supra note 93; Wolff v. McDonald, supra note 49.
In balancing the "liberty of the individual" and "the demands of an organized society" in the instant case, one must balance the potential harm (including possibly death) to the patient and the personnel and financial limitations and overcrowding problems of the hospitals. The interests on both sides are strong. However, I think it likely that a court would be convinced that a hospital which transfers a patient without taking into account at all the potential effects of transfer trauma is going beyond what is necessary to achieve its ends.

The right being infringed is important and the infringement severe; therefore the means must be closely tailored to the intended end, which they are not. Hospitals could provide relocation preparation programs prior to transfer, and some sort of opportunity to have input into the transfer decision, together with a right of appeal, without severely impairing their own interests. Transfers do not usually take place very quickly anyway, due to the scarcity of nursing home beds, so the process would probably not be slowed down very much. There would be some additional cost in implementing a relocation preparation program, but that seems a minor consideration in this context.

The greatest impact could be on nursing homes. It is the scarcity of nursing home beds which is the major factor in peremptory moves and which presents a major difficulty in preparing for relocation (i.e., it is difficult to prepare for a move to a particular home when it could be a long time before that particular home has a bed free). If a case such as proposed here were successful, no doubt the next step would be to litigate to try to force the government to provide more nursing home beds (a more difficult proposition).

It would seem that the current limitation on the right to freedom from transfer trauma is not reasonable. An intermediate course could be taken which would not infringe too greatly on the rights of the patients or on the concerns of the hospital.

Prescribed By Law

While the current procedure is authorized by the legislation, that may not be sufficient for it to be considered to be "prescribed by law." The procedure for discharges could be held to be void for vagueness as it gives absolutely no indication of the basis on which a doctor is to exercise his or her discretion. On that basis, the

96. Canadian Charter of Rights and Freedoms, s. 1.
97. Canadian Charter of Rights and Freedoms, s 1.
procedure may not be properly prescribed by law.\textsuperscript{98}

Thus, to conclude the s. 1 analysis, some limitation on the rights of the transferees may be justifiable, but the current limitation is certainly not reasonable and may not be properly prescribed by law. Therefore s.1 will not save the constitutionally invalid legislation.

Judicial Remedies

Section 24 of the Charter gives the court wide powers regarding remedies:

"24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."\textsuperscript{99}

American courts have been quite activist in fashioning appropriate remedies,\textsuperscript{100} expressing a judicial activism foreign to the Canadian judiciary.\textsuperscript{101} It is not necessary that the courts spell out what would be acceptable procedure. In most cases of unconstitutional infringement of rights and freedoms, the courts will no doubt content themselves with declaring legislative enactments invalid, leaving it to the government to draw up new provisions.

However, they may in some cases provide some guidelines to indicate what would satisfy them. In the instant case, it would seem that an appropriate remedy, and one that our courts could be comfortable with, would be to basically leave the decision making structure intact, but to provide for an opportunity to discuss the matter with the decision-making physician, and a right of appeal; and also to require hospitals to consider the potential effects of

\begin{footnotesize}
\begin{enumerate}
\item Re Ontario Film and Video Appreciation Society, supra, note 80; Reference Re Education Act and Minority Language Educational Rights, (June 26, 1984) 26 A.C.W.S. (2d) 146, (Ont. C.A.), referred to in Canadian Charter of Rights Annotated, p. 8-6.
\item The Canadian Charter of Rights and Freedoms, s. 24.
\item Richards and Smith, \textit{ibid.}, note 100.
\end{enumerate}
\end{footnotesize}
transfer trauma and to provide a relocation preparation program where there is danger of transfer trauma. In this way the needs of both parties could be adequately balanced and the court would avoid tampering too much with legislative intent and with decision making by "experts".

Conclusion

This paper suggests the likelihood of success in a case based on transfer trauma. It would appear that a constitutionally protected interest is present, pursuant to s. 7 of the Charter, it has been infringed without any of the procedural fairness due under the concept of "fundamental justice," and the infringement is not saved by s. 1 of the Charter.

The thus far unlitigated situation of unwilling transfers from hospitals to nursing homes, apart from being an interesting and challenging issue in itself, provides an example of the wide variety of problems with potential remedies now available through the Charter. A case such as this one could perhaps have been argued on natural justice grounds, but it is certainly a stronger case argued as a constitutionally protected right.

It can be seen that the success of cases such as this one can depend on the methods of Charter analysis developed by our courts. It is essential that a logical framework of analysis be developed around the Charter if there is to be any predictability and consistency in its application. However, as can be seen from the tentative steps to distill a process for Charter analysis in this paper, it is a very slippery topic.

Although it was only briefly touched on in this paper, it is also clear that evidence of a wide-ranging and detailed nature can be crucial to the success of a Charter case.

It will be fascinating to see the issues which are raised, and the methods of analysis which are developed, over the coming years.