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Determining 24-Hour Supervision: A Scoping Review through a Canadian Legal Database

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Abstract:

Background: A highly contentious and controversial aspect of assessments in a medico-legal private practice is the determination of whether or not a client or patient requires 24-hour supervision. **Purpose**: The intent of this article is to review legal cases involving Occupational Therapist's (OTs) and the determination of 24-hour supervision in Canada. **Methods**: A search and scoping review of the Canadian Legal Information Institute (CANLII) was completed using the terms "OT" and "24-hour supervision". A review of the literature and determination of critical observations were completed. **Findings**: Based on 46 legal proceedings since 1986, the following critical observations emerged: Lack of pattern in the areas assessed in determining 24-hour supervision, inconsistent quality of OT testimony related to determining 24-hour supervision, increased demand on OTs to determine if a client requires 24-hour supervision, and lack of guidelines for assessing 24-hour supervision. **Implications**: Without clear guidelines, OT testimony may bear less weight in court. **Recommendations**: The authors propose that an evidence-based framework upon which to formulate a determination of 24-hour supervision needs to be considered. Further research into current OT practice in determining 24-hour supervision and exploration of existing assessment tools for determining 24-hour supervision are recommended.

Key Words: 24-hour supervision, evidence-based practice, clinical reasoning, OT, legal decisions.

Occupational therapy (OT) assessments and treatment are a key component of an evaluee's or client's recovery. In Canada one of the key components and responsibilities of an OT is to determine whether a client or patient requires 24-hour supervision. Historically, most expert testimony involved physicians and surgeons proffering opinions on the need for 24-hour supervision. However, as real world practical implications of function have been increasingly relied upon in courts, the role of the OT, whose scope focuses on client functional abilities, has become more important. In Ontario, the Occupational Therapy Act of 1991 (2007) clearly defines the unique scope of OT practice as different from other regulated healthcare professionals:

> "The practice of occupational therapy is the assessment of function and adaptive behaviour and the treatment and prevention of disorders which affect function or adaptive behaviour to develop, maintain, rehabilitate or augment function or adaptive behaviour in the areas of self-care, productivity and leisure" (Occupational Therapy Act (1991) c. 33, s. 3, pg. 1).

The Ontario Occupational Therapy Act of 1991 highlights the important element of patient function in occupational therapy assessment and treatment. With this, OTs have an expertise in function, i.e. what a person can and cannot do. As the profession educates the public about its scope, more cases and hearings are incorporating the expert testimony of OTs. Despite the growing demand for OTs to present expert opinions related to matters of function, it is the experience and opinion of the authors that few, if any, Canadian guidelines or frameworks exist to address the specific issue of determining 24-hour supervision.

For the purposes of this article, 24-hour supervision is defined as the point at which a person (or client) requires constant supervision, due to a high risk of injury either to self or others. Constant supervision means that the client has at least one person monitoring them 24-hours a day, and this person may provide custodial, medical, personal, or rehabilitative care.

Occupational therapists who work both in the private and public sectors are increasingly called upon to determine the client's level of supervision based on their needs. A literature review of existing research that addresses OT and 24-hour supervision was conducted and no published, clinical research articles specific to occupational therapy and 24-hour supervision were located. However, the professional experience of the authors suggested that further information may be available through the CANLII database, where further investigation was undertaken. During a search of this database, it became evident that the issue of determining 24-hour supervision had been addressed in numerous court cases. As a result of these findings, the authors decided the scope of this article should focus on the provided occupational therapy testimony that addressed the issue of 24-hour supervision in Canadian legal decisions.

A drawback of reviewing published legal decisions about how an OT determined a level of supervision is that legal cases do not typically describe in detail the OT's clinical reasoning process for arriving at his/her decision. However, even with this drawback, the authors decided that reviewing the legal database would be a logical step in considering the practice process of how OT's are making decision about whether clients require 24-hour supervision.

In litigation, a client who requires 24-hour supervision has significant cost exposures. For example, in Ontario to provide 24-hour supervision $26.00 / hour avg. (based on this OT's market research) Ontario market rate for (PSW) x 40 years (an assumed Life Expectancy) = ~$9.1 million. Thus, in Canada this can be the single largest head of damage in a settlement or financial recompense.

Methods

Ten provincial and territorial occupational therapy associations and one national occupational therapy association in Canada were contacted through email to determine the existence of any clinical practice guidelines published by the national, provincial, and territorial associations related to determining 24-hour supervision This was completed in 2015 and includes all of the associations in Canada. Only four out of 12 occupational therapy associations responded to the email after two email attempts at communication. These four associations reported that they had not published any guideline in determining 24-hour supervision for OTs.

The authors also relied on their clinical experience in aggregating resources for the purpose of this article. A review of Attendant Care and OTs (2011) published by the Ontario Society of Occupational Therapists'Therapists (OSOT) was made. This publication is "intended to be a reflective practice resource for OT's" and albeit "it presents best practice considerations consistent with current arbitration decisions and judgments, readers are reminded that this is a practice 'resource' and not a guideline" (OSOT, 2011, p. 1). This document was not deemed relevant to the focus of this article, because it did not discuss the process of determining 24-hour care specifically. A search of CINAHL was also completed in 2015, however, there was one reference to 24 hour supervision and Occupational Therapy, this will be discussed later in this article. After completing the above, the primary focus of this research involved a Boolean search of the Canadian Legal Information Institute (CANLII) database. There was one exclusion criteria and that was no Quebec or French legal decisions were reviewed due to French language barriers by the authors and the cost prohibitive nature of having to translate French legal decisions externally.

The search terms were "Occupational Therapy" and "24-hour supervision" and the search was completed in October 2012 and October 2016. With these search terms, there were 46 results. The search included an exploration of all legislations and legal decisions (courts, tribunals, and appeal boards). After all legal decisions were read and reviewed, several critical observations were established from the decisions.

Results

The results of reviewing the legal decisions revealed four critical observations. The observations include 1) lack of pattern in the areas assessed in determining 24-hour supervision; 2) inconsistent quality of OT testimony related to determining 24-hour supervision; 3) increased demand on OTs to determine if a client requires 24-hour supervision; and 4) lack of guidelines for assessing 24-hour supervision.

Lack of Pattern

Several of the legal decisions did not articulate the specific areas assessed by OTs in determining 24-hour supervision, and legal decisions that described these areas presented some overlapping elements. These areas presented some overlapping elements, but no clear pattern evolved. Some commonly included areas in the assessments were functional abilities related to Activities of Daily Living (ADLs), which are activities focused on looking after one's body, and Instrumental Activities of Daily Living (IADLs), which are "activities to support daily life within the home and community that often require more complex interactions than those used in ADLs" (American Occupational Therapy Association [AOTA], 2014, p. S19). The areas of ADLs that were taken into consideration for determining 24-hour care, however, were not consistent.

Unfortunately, the legal decisions did not always describe the details of the assessment process, such as the types of tools used and the testing results. For example, in the appeal decision by the Appeals Commission for Alberta Workers Compensation (2008), the OT completed a detailed assessment that deconstructed the functional abilities of the clients into specific categories based on subjective and objective findings. These categories included mobility, personal hygiene, dressing, preparing meals, general shopping, bowel/bladder care, skin care, safety, transportation, and self managed care, among other areas. A combination of these areas in assessment reports may be dictated by governing provincial legislations. However, there remains a lack of guidelines for OT's that would clearly identify the areas that need to be assessed when determining 24- hour supervision.

Inconsistent Quality of OT Testimony

Interestingly, an overall pattern that frequently emerged was for judges or decision-makers to decide against the provision of 24-hour care. For example, in the decision of the Ontario Workplace Safety and Insurance Appeals Tribunal (2013), the Vice-Chair, S. Martel, of the Tribunal determined:

> ". . . while the worker's family seeks 24-hour care, none of the independent medical assessments or the multiple PCA [i.e., *personal care assistant*] assessments done by OTs support this request. I rely in particular on the Toronto Rehabilitation Institute's opinion and recommendations, wherein the worker was assessed by multiple specialists over the course of many days. The assessment team therefore had the opportunity to fully observe and assess the worker's level of functioning. They were of the view that the worker did not require 24-hour supervision" (p. 12).

This would suggest that the Vice-Chair of the Tribunal had the testimony of multiple professionals on which to rely and multiple days of testing to assist in rendering a decision.

To the other extreme, it was noted that judges upheld the opinion of OTs who used objective and direct functional testing and who corroborated and considered the reports of other professionals. For opinions that lacked an objective foundation and relied more heavily on subjective patient reports, the weight of testimony was called into question. For example, in the Alberta decision written by Madame Justice A. B. Moen for the case Ward v. Ward (2010), it was noted:

> "Ms. Wilson (*an expert witness*) did not do a home study but rather chose to rely on self-reports by Cory (*one of the* plaintiffs) and other such information. Given that Cory has an unrealistic view of his ability to complete school, and that he has a somewhat optimistic view of what he could do for himself relying on his self-reporting has its limitations" (p. 46-47).

The two assessments documented in the legal proceedings above suggest an inconsistency in the quality of the OT testimony. Some OTs rely on direct functional observation and direct testing for days to support their testimony in court, whereas, other OTs rely on subjective self-reports by clients to inform and support their testimony. There does not seem to be a clear, specific pattern as to what assessment tools are used to help determine the level of 24-hour supervision. This lack of pattern in choosing and using assessments has led to the inconsistent quality of the testimonies of OTs.

None of the legal decisions reviewed describe specifically and clearly what standardized assessment tools were used by OTs for determining 24-hour supervision, but rather addressed areas such as function and cognition. This occurrence is more likely a reflection of what the judge decided to describe and summarize in the published decision as opposed to the fact the OT may or may not have actually utilized any specific standardized assessment tools.

Increased Demand

Overall, there is a significant trend that OTs across Canada are increasingly being called upon to make the determination of whether or not a client requires 24-hour supervision. This determination process is used by OTs who work in the private and public sectors. A review of recent legal cases suggests that OTs are increasingly being asked to testify on this subject and, as such, it is imperative to understand and describe the quality of expert evidence that is being accepted from OTs by the courts. The increased demand of OTs determining the need for 24-hour is a trend that can easily be viewed by ever increasing number of legal decisions involving OTs and the 24-hour supervision issue over the past 30 years. For example, between 1986 and 1996, there were only two legal decisions involving OTs determining 24-hour supervision. Between 1996 and 2006, there were 17 legal decisions involving OTs. In 2009 and 2010 there were 11 legal decisions involving occupational therapy and 24-hour supervision. In a period of 30 years, there has been a largely noticeable increase in the number of legal decisions involving OTs assessing for and determining 24-hour supervision. Although, the majority of cases have occurred in BC, Alberta, and Ontario, OT testimony has been provided in all provinces, right across Canada.

Lack of Guidelines for Assessments

As the authors reviewed cases from across Canada, it was interesting to note that testimony on 24-hour supervision is an issue that is being disputed throughout Canada. Hence, as this is an issue in all provinces, the authors of this article contacted the 10 provincial and territorial OT associations and one national association to see if they had published, knew of, or considered guidelines around this issue. The websites for all associations were first reviewed, but given no guidelines were apparent direct contact via email was made. Four out of the 11 associations responded. None of the four respondents had published a set of guidelines on how to assess or address whether or not a client requires 24-hour supervision. Additionally, none of the published legal decisions reviewed in this research commented on whether guidelines were used for the specific issue of determining 24-hour supervision.

Discussion

The authors of this article suggest that, as OTs in Canada are being asked to increasingly provide evidence on whether or not a client requires 24- hour supervision, it is necessary that OTs begin to develop guidelines on how to approach this issue. Life Care Planning relies on the expert evidence provided by OTs in determining what the future costs of care will be. However, as life care planners it is our experience that there are also situations where a client, as a result of injuries, might not require 24-hour supervision in the present, but may require such as age and disability combine.

While many OTs utilize tools such as the Cognitive Assessment of Minnesota, Functional Independence Measure, Cognistat, etc. to assess the need for 24-hour supervision, which may or may not be appropriate, the major issues are two-fold. First, it is unclear what specific assessment tools, standardized or otherwise, are used by OTs consistently in determining 24-hour supervision. It should be noted that not all reviewed legal cases described the specific standardized and/or non-standardized assessment tools used by the OTs. Second, there was not consistency among the specific areas being assessed to determine 24-hour supervision. It was even less clear what assessment tools were used in situations where there were orthopaedic or psychosocial issues.

In the author's search for information on 24-hour supervision and occupational therapy, one relevant article was found and subsequently reviewed that examined the

economic costs of attendant care, specifically for adults who sustained traumatic brain and spinal cord injuries (Lannin et al., 2012). Although the focus of this article was determining costs and the study was conducted in Australia, numerous assessment tools were mentioned in the study, including the Mayo Portland Adaptability Index, Functional Independence Measure, Care and Needs Scale, a paid and unpaid recall questionnaire, manual handling checklist and Equipment and Housing Modification Checklist, Caregiver Inventory Questionnaire, and a Care Diary, that may be worth considering when developing specific guidelines for determining 24-hour supervision. It is acknowledged by the authors that the aforementioned tools are a mix of subjective and objective measures specifically related to traumatic brain injury (TBI). Despite the specified population for the tools, the principle behind using several standardized and non-standardized tools, especially when determining 24-hour supervision is worth exploring in the process of guideline development.

Based upon a review of data, it is recommended that a national survey be completed to determine the current methodologies or assessment tools that are being utilized by practicing OTs to guide their decision-making process when determining 24-hour supervision. From the review of published legal decisions conducted for purposes of this project, it is apparent that OTs are making determinations about the need for 24-hour supervision, and thus, further research needs to be conducted into how these determinations are being made.

The main limitation of this article is that the reviewed legal reports did not explain in detail the process of how OTs determined 24-hour supervision or reveal the specific contents of the OTs' reports. Regarding the process, it was not evident in the legal reports how the OTs obtained their data and arrived at their findings or what guidelines were used in directing the assessment process. Moreover, the subjective and objective data, the context of the assessments, and the rationale for the recommendations were not explicitly articulated. This limitation is likely due to the fact that the reports were not intentionally written by and for clinicians, but rather for the legal community or public at large. As well, data was indeed limited or non-existent in some provinces. Despite this limitation, it is important to consider that these legal decisions may have serious implications for the practice of OTs.

Conclusion

Occupational therapists are often called upon to determine if a client requires 24-hour supervision and the implication of this on a med-legal file and Tort Claim is enormous in Canada. This is because a determination that 24-hour supervision is required can be the single largest head of damage. Based upon a review of legal decisions from 1986 until 2016, an overall trend in the increase in OTs being called upon in legal proceedings to determine whether or not a client requires 24-hour supervision was detected. The reviewed legal reports sometimes included testimonies from OTs. However, they did not present any consistency about what OTs included in their reports and rarely went into detail about the testing tools used to arrive at the determination that 24-hour supervision is required. Additionally, they did not explain how assessments were conducted and what specific processes were followed in determining 24-hour supervision in most reports. As such, the need for a guideline that frames the content and process of occupational therapy assessments when determining 24-hour supervision becomes evident. Finally, further research into current occupational therapy practices in determining 24-hour supervision across Canada and the exploration of existing standardized and non-standardized tools that may be suitable in developing a disposition around 24-hour supervision is recommended.

Conflicts of Interest Declaration

The author, while very passionate about this area of practice in occupational therapy, is associated with Mathew Rose and Associates (MRA) Medical Legal Consultants and has a financial interest in this organization. MRA is involved in providing medical-legal consulting (including Occupational Therapy and Life Care Planning) for use in litigation.

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