In Starson v. Swayze, [2003] S.C.J. No 33, the Supreme Court of Canada held that a person who is suffering from a mental health problem is capable can be found to make decisions about their treatment. This decision upheld the rulings of the Ontario Superior Court of Justice and the Ontario Court of Appeal. The decision also lowered the standard of proof required for evidence in this regard to a balance of probabilities rather than the enhanced standard previously employed. As the appeal to the Ontario Superior Court, and subsequent appeals, was based solely on the record before the Ontario Care and Consent Board, the Supreme Court of Canada ruling clarified beyond a reasonable doubt what it means to be capable with respect to treatment. This judgment established the legal precedent that a mental health patient has the right to refuse treatment if they are able to understand information relevant to their decision and are able to understand the possible consequences of their decision. I believe that the Supreme Court of Canada’s decision was justified.

Scott Starson was an exceptionally intelligent individual\(^1\) who was highly respected by his peers in the physics academic community.\(^2\) Starson had been institutionalized on a number of occasions beginning in 1985 and had received treatment for a bipolar disorder diagnosis.\(^3\) In July 1998, Starson was charged with two counts of uttering death threats. He was found not criminally responsible and was detained by the Ontario Review Board for 12 months.\(^4\) The psychiatrists, including Drs. Swayze and Posner, wished to treat Starson with a series of anti-
psychotic drugs, which Starson refused. In December 1998, his attending doctors declared that Starson was not capable of making a decision to the proposed treatment. Starson appealed to the Ontario Consent and Capacity Board (the Board). He lost the appeal and the Board ruled Starson was incapable and permitted the doctors to treat Starson against his will. Starson then appealed to the Ontario Superior Court of Justice and was successful in having the Board’s decision set aside. The Superior Court ruled that Starson was capable of making the decision to refuse treatment. This ruling was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada. In the end, Starson was found to be capable of making his own decisions concerning his medical treatment.

The Supreme Court of Canada (the Court) justified its ruling by reviewing the statutory provisions which establishes the legal standard test for capacity as outlined in the Health Care Consent Act, 1996, S.O. 1996, c. 2, Sch. A, S. 4(1). As explained by Major J. for the majority, “a person must be able to understand the information that is relevant to making a treatment decision … [and] be able to appreciate the reasonably foreseeable consequences of the decision or lack of one” [emphasis added]. The Court found the Board “strayed from its legislative mandate to adjudicate solely upon the patent’s capacity” and acted paternalistically by incorporating its conception of what was in Starson’s best interests in their decision. The Board based its finding of incapacity on Starson’s denial of his mental disorder rather than evaluating if Starson had the capacity to understand and appreciate his decision to refuse treatment. The Court found Starson had presented sufficient evidence throughout his various legal proceedings that he was capable of making his own decisions about treatment. Starson was an intellectually gifted person and had the cognitive ability to process, retain and understand relevant information. While Starson acknowledged that he had mental problems, that his behaviour was not normal, that he
had “exhibited things that would be considered manic” and that he needed therapy, however, he denied that he had a mental illness. The fact that Starson acknowledged his condition was deemed sufficient evidence by the Court that he understood his mental health situation. The Court further concluded that Starson was able to appreciate the benefits and risks of his decision to receive or to refuse treatment. Starson testified that previous antipsychotic medications had been unsuccessful with unbearable side-effects, interfered with his mental functioning, and that there was no evidence that the new proposed medications would be any more effective. Although he refused medical treatment in the form of antipsychotic medication, he did consent to non-psychotropic treatment. Starson demonstrated he appreciated the consequences of his decision when he stated that he preferred to remain institutionalized rather than take the proposed treatment. The Court found Starson met the criteria for capacity and was capable in his decision to refuse the proposed medical treatment.

I support the Court’s evaluation of the standard legal test for capacity and believe the Court’s ruling was justified. A person should not be deemed incapable solely on their failure to acknowledge an illness. The Ontario legislation provides a fundamental presumption that all persons are capable unless proven otherwise. Mental illness and incapacity are not one and the same. An unjust finding of incapacity is a serious infringement on a person’s autonomy and right to self-determination. I agree that medical treatment should only be administered with the patient’s consent, unless the patient is found incapable in accordance with the legislation. I am surprised that the Board made no reference to an existing report issued in 1990 that emphasized the high value to be placed on autonomy and self-determination in cases involving mental health issues.
I think the legal standard of capacity for treatment is explicitly laid out. The elements for capacity are objective, straightforward and progressive as laid out in S.4(1) Health Care Consent Act: one must have the ability to understand information relevant to their decision, and then one must also be able to understand the reasonably foreseeable consequences of that decision. I believe the Court appropriately applied those elements and was justified in its ruling. Starson understood he had mental problems, had the cognitive ability to understand his treatment options, and understood and accepted that if he refused treatment, he would not be permitted to leave the institution. Despite the Board’s specialization in mental health cases, they misapplied the elements for capacity and they found him to be incapable based on Starson’s denial of a mental disorder. The Board reasoned that since Starson disagreed with his diagnosis, he therefore could not understand information relevant to his mental health or understand any relevant consequences. I agree with the Court that this is irrelevant in determining capacity because a denial of a mental health disorder can only be used to prove a person is incapable if the mental health disorder is causing the denial.\(^{21}\) If the denial of a mental health disorder is supported by rational thought, the denial alone cannot be used to prove a person is incapable. A patient does not have to admit to having a mental illness in order to appreciate information relevant to their decision to receive or refuse treatment.\(^ {22}\)

In understanding the consequences of a decision to consent or refuse treatment, the patient must also weigh their personal values against the perceived benefits or risks. As values are relative to autonomy and personal experience, it cannot be held that all patients’ values are the same. Starson understood his disorder enough to make rational decisions in accordance with his values concerning treatment. Starson valued his intellectual ability and love of physics above all else, to a point where he would sacrifice his own freedom in pursuit of that goal. In exercising
his right to autonomy and self-determination in refusing treatment, Starson was acting on what he believed to be in his best interest. Starson’s attending psychiatrist, Swayze and Posner, acted paternalistically and placed their values of what they perceived to be in Starson’s best interests as superior to Starson’s values. When Starson refused the proposed treatment, the doctors declared him incapable. The assumption that the treatment they proposed could be considered to be in Starson’s best interests is irrelevant to his decision to refuse treatment. I believe Starson acted rationally in accordance to his values, goals and his authentic autonomy. The Court correctly applied this evidence to Starson’s understanding the consequences of refusing treatment.

The legal test for capacity requires a standard of evidentiary proof on a balance of probabilities. I believe the Court was accurate in the weight allocated to the evidence presented by Starson and his doctors with regard to this standard. While Starson did not accept a label for his mental problems, however, he acknowledged his behaviour was abnormal and expressed his wish to continue treatment, albeit it psychotherapy instead of the proposed medication. Although his doctors wanted to provide treatment that they believed would allow Starson to return to society, however, they could not provide evidence that the proposed medical treatment plan would be successful. I believe the Board was inaccurate in its unbalanced weighting of the evidence presented. In its decision, the Board placed too much weight on evidence that was not associated with the legal test for capacity. The Board dismissed letters from scientists, friends and colleges in support of Starson on the basis that these character witnesses did not understand the legal test for capacity. In Canada witnesses are not required to understand the legal concepts for which their evidence is presented. The Board placed less weight on evidence presented by Starson on the basis that he did not accept a label to his mental health problem. It is vital when evaluating the evidence presented that it is weighed according to the standard of proof. This is
especially important in any decision regarding capacity where a person’s autonomy and freedom are at stake.

I believe the Court correctly weighted the evidence presented in their determination of legal capacity. The case of *Starson v. Swayze*, supra, has fundamentally changed the evaluation of capacity regarding the treatment of patients with mental health problems. The Supreme Court of Canada ruling was justified in their analysis of the capacity elements required under S. 4(1) *Health Care Consent Act*. The Court ruled against any element of paternalism by medical doctors. The Court respected the rights of autonomy of patients with mental health disorders. Insofar as a patient is capable, the patient’s choice, the patient’s decision, the patient’s expression of their autonomy, is the only decision that matters. What is deemed to be in the best interests of a patient by a third party is irrelevant. Every patient has the right to receive or refuse treatment to the extent of their capacity. I agree that autonomy of the capable individual must be promoted and respected above all else.
Reference List


Endnotes

2 Ibid. Professor H.P. Noyes of Stanford University, whom co-authored a paper with Starson, is said to have
described Starson’s thinking as “ten years ahead of his time.” In addition, although [Starson] is not by university
training a professor, his peers in the academic community allow him to use the title as recognition of his
accomplishments.”
3 Ibid, at summary
4 Ibid, at summary
6 Ibid.
7 Ibid.
9 Ibid, at ¶ 78. Capacity is not just the understanding and appreciation, but the ability to understand and the ability to
appreciate.
10 Ibid, at ¶ 112
11 Ibid, at ¶ 76, 90, 112
12 Ibid, at ¶ 78
13 Ibid, at ¶ 93. “[Starson] also stated that due to his need for therapy, he would not leave the hospital at that time
even if he were permitted to do so.”
14 Starson v. Swayze, [2001] O.J. No. 2283 at ¶ 11. Starson testified the side effects “have always been the most
horrible experiences in my life.”
15 [1999] O.J. No. 4483 at ¶ 48-59. Starson described the effect of drugs on his brain as “foggy, pounding feeling”
which made it impossible for him to do his work as a physicist.” (at ¶ 54) Professor Geoffrey Hunter testified that,
during the period in the fall of 1998 when Professor Starson was being forcibly treated with injectable
antipsychotic drug”, Starson “sounded as though he was quite drunk… they change him from being an eloquent
(loquacious) and amiable person into a struggling to-think drunk.” (at ¶ 56).
16 Ibid, at summary. One of Starson’s psychiatrists, Dr. Poser, testified that “only 60 percent of patients treated
with neuroleptics respond favourable to new treatment.” (at ¶ 98).
17 Ibid, at ¶ 52
18 Ibid, at ¶ 62
20 Weisstub, Professor D.N., Enquiry on Mental Competency: Final Report (1990), The Enquiry: Ontario, 1990,
to fuse mental illness with lack of capacity, and stressed the “importance that autonomy and self-determination be
given priority when assessing individuals [with mental health problems]. The [Ontario Care and Consent] Board
must avoid the error to equating the presence of a mental disorder with incapacity.”
incapable solely on a denial of mental illness would require further evidence that the denial was caused by the illness
and that the denial was as a result of rational deliberation.
22 [2003] S.C.J. No. 33 at ¶ 16. However, in order to understand information relevant to a proposed treatment, the
patient must acknowledge their symptoms exist.
23 I am a paralegal, and have been employed by the Ministry of the Attorney General at the Peel Crown Attorney’s
Office since 2003, where I am currently the Guns and Gangs Case Management Coordinator.