

case study

Date: 17 August 2009

Brightwater Care Group (Inc) v Rossiter (with Attorney General for WA intervening) (No 2406 of 2009)

Rossiter v Brightwater Care Group (Inc) (No 2407 of 2009) (14 August 2009)

The Western Australian Supreme Court (“the Court”) significantly held that Rossiter has the legal right to direct Brightwater Care Group (Inc) to cease providing him with nutrition and general hydration, after he has been given and considered advice by an appropriately qualified medical practitioner as to the consequences that would flow from the discontinuance of receiving nutrition and general hydration. Further, Brightwater Care Group (Inc) would be legally obliged to comply with such a direction but would not be criminally responsible for Rossiter’s resultant death.

This case note is based on transcript of the proceedings heard on 14 August 2008. However, Chief Justice Martin sitting as the Court reserved the right to edit his reasons for decision prior to their formal publication. At the time of writing this case note, the reasons for decision were not yet formally published.

Relevant Facts

The relevant facts of the case were as follows.

- Brightwater Care Group (Inc) (“Brightwater”) provides residential care for people with disabilities.
- Mr Rossiter (“Rossiter”) was admitted to one of Brightwater’s facilities on 4 November 2008.
- Since 4 November 2008, Brightwater has assumed the responsibility of providing all necessary services to Rossiter in conjunction with his own medical practitioner.
- Rossiter is a quadriplegic and is therefore totally dependent on other people for the provision of the necessities of life.
- Rossiter can only take nutrition and hydration through a percutaneous endoscopic gastronomy tube (“PEG”) and not orally.

- Rossiter has expressed a desire to die to staff at his Brightwater facility.
- As Rossiter is a quadriplegic he is unable physically to do any acts himself to bring about his own death.
- Consequently, Rossiter has directed staff at his Brightwater facility to discontinue providing him with nutrition and hydration through his PEG.
- However, Rossiter does want hydration to continue to the extent necessary to allow the dissolution of painkilling medication that he takes.
- Rossiter is aware of the general consequence of the discontinuance of nutrition and hydration, being death. However, there was conflicting evidence before the Court as to whether Rossiter knew of and/or was informed of the specific physiological consequences that flow from the discontinuance of nutrition and hydration.
- Rossiter has the mental capacity to give a direction with respect to his continued treatment.

Issues considered by the Court

The Court considered two issues.

The Court considered two principal issues.

The first issue ("Issue 1") was whether Brightwater is legally obliged to comply with a direction given by Rossiter to discontinue the provision of treatment (ie nutrition and hydration) that maintains his existence. Or alternatively, whether Brightwater is legally obliged to continue the provision of the services (ie nutrition and hydration) which will maintain Rossiter's life.

The second issue ("Issue 2") was if and when Rossiter directs Brightwater to discontinue providing him with nutrition and hydration, would Rossiter's medical practitioner be criminally responsible for providing palliative care to him even though the need to provide such care arose

from Rossiter's own direction that the provision of nutrition and hydration to him be discontinued.

Analysis

Issue 1

Common law

The Court first considered the common law position regarding issue 1.

The common law presumption that an adult person has the mental capacity to consent to or refuse medical treatment applied in this case. Further, positive evidence of this was presented to the Court.

The common law recognises a right of autonomy or self determination. This right includes the right of a mentally capable adult person to determine what shall be done with his or her own body. Consequently, a mentally capable adult person can refuse to consent to medical treatment even if that failure to treat would result in the loss of that adult's life. This is the case regardless of that adult's specific reasons for refusal and regardless of whether the reasons are rational, irrational, unknown or non-existent.

At common law, a person need not be informed of the consequences of refusing medical treatment or specific medical treatment in circumstances where an advance care directive has been given by a person, who at the time of a later court hearing concerning the issue of compliance with the directive, lacks the mental capacity to receive further information or to make any further decision. However, where a person has the mental capacity to receive and consider information given to him and to make informed decisions concerning the refusal of medical treatment before such treatment is discontinued or withdrawn or not offered, then that person should be given the full information required to make an informed decision. In this case, Rossiter still has the mental capacity to make an informed decision and so the court required that he be informed by an appropriately qualified medical practitioner of the consequences which would flow from the cessation of the provision of nutrition and general hydration.

Accordingly, Rossiter has the legal right to determine whether or not he wishes to continue to receive the treatment and services provided by Brightwater. This decision can only be made after he is properly and fully informed of the consequences of not continuing with such treatment and services. Brightwater has the duty to ensure Rossiter is offered this information.

Another consequence of the right of a mentally competent adult to refuse medical treatment is that should a medical practitioner or service provider nonetheless provide the refused treatment to the patient, that medical practitioner or service provider commits a trespass against the person of that patient and can be sued. Consequently, if Rossiter makes the informed decision to refuse further nutrition and general hydration and if Brightwater nonetheless continues to provide them, Brightwater would be acting unlawfully.

Relevant statutory provisions

After considering the position at common law, the Court went on to examine relevant statutory provisions, which may impact on the common law position. The relevant statutory provisions are sections 259 and 262 of the Criminal Code.

Section 262 of the Criminal Code in essence imposes a duty on a person who has the charge of another in circumstances where that other is by reason of age, sickness, mental impairment, detention or any other cause is unable to withdraw him or herself from that charge, to provide the necessaries of life where that other person is unable to do so him or herself.

The Court found that section 262 of the Criminal Code does not apply to Rossiter's case for three reasons, and thus Brightwater are not under a statutory duty to provide the necessaries of life to Rossiter against his wishes.

First, to read section 262 of the Criminal Code as imposing a legal duty on a person to provide medical treatment against the wishes of a mentally competent adult would represent a significant move away from the common law position described above. A statutory provision will only be construed as having such an effect on the common law if the language used in the statutory provision is clear and unambiguous.

This is not the case with section 262 of the Criminal Code.

Secondly, the Court stated that Rossiter does not fall within the strict wording of the provision as he cannot be said to be in the "charge of" Brightwater, as he has the mental capacity to make informed and insightful decisions in relation to his future treatment.

The third reason, which is somewhat related to the second reason, was merely raised by the Court but was not the subject of a final finding. That reason was that Rossiter cannot be said to be unable to withdraw himself from "the charge" of Brightwater, as he has the mental capacity to give directions with respect to his future care and appears to have the financial capacity to implement those directions. Consequently, it appears that Rossiter could find another service provider and discharge himself from Brightwater to that other service provider.

In the alternative, the Court went on to say that even if section 262 of the Criminal Code did impose a duty on Brightwater to provide the necessaries of life to Rossiter and that duty was breached by Brightwater in its attempts to comply with a direction by Rossiter not to continue providing him with nutrition and general hydration, section 259(2) of the Criminal Code would provide a defence to Brightwater against any such claim.

Section 259(2) of the Criminal Code states in effect that a person is not criminally responsible for not administering or ceasing to administer medical treatment if that course is reasonable having regard to the patient's state at the time and to all the circumstances of the case. Providing nutrition and general hydration through a PEG was held to fall within the scope of the phrase "surgical or medical treatment" appearing in section 259(2) of the Criminal Code.

The Court found that it would clearly be reasonable to comply with the expressed wishes of a mentally competent adult to not receive medical treatment. This is what the common law itself requires of a medical practitioner or hospital. Furthermore, the "advance health directive" provisions contained in the *Acts Amendment (Consent to Medical Treatment) Act 2008* (which are still awaiting proclamation) were enacted to give force and effect to that very common law principle.

Conclusion

The Court concluded sections 259 and 262 of the Criminal Code do not alter the common law position. Consequently, Rossiter has the legal right to direct Brightwater to discontinue providing him with general hydration and nutrition after he has been provided with full information regarding the consequences of such action. Brightwater would be under a legal obligation to comply with such a direction. However, Rossiter also may revoke this decision at any time provided he still has the requisite mental capacity and Brightwater would be required to comply with the altered direction in such circumstances.

Issue 2

The resolution of issue 2 required the Court to consider section 259(1) of the Criminal Code.

Section 259(1) of the Criminal Code so far as it is relevant provides that a person is not criminally responsible for administering palliative care to another person for that person's benefit, if the administration of palliative care is reasonable having regard to the patient's state at the time and to all the circumstances of the case.

The Court found that section 259(1) of the Criminal Code would apply to the provision of palliative care to Rossiter despite the fact that the need for palliative care arose because of Rossiter's own informed decision to discontinue receiving the medical treatment necessary to sustain his life.

In addition, the Court stated that there is no breach of a legal obligation in circumstances where palliative care is administered to a person who has given informed consent to such palliative care and the palliative care does not cause or hasten the person's death.

Furthermore, the Court added that it is unlawful for any person including a health professional to administer medication for the purpose of causing or hastening the death of another person.

Declarations

The Court made two declarations incorporating its findings discussed above. Those declarations were described in the following terms:

"If after the defendant [Rossiter] has been given advice by an appropriately qualified medical practitioner as to the consequences which would flow from the cessation of the administration of nutrition and hydration, other than hydration associated with the provision of medication, the defendant requests that the plaintiff [Brightwater] cease administering such nutrition and hydration, then the plaintiff may not lawfully continue administering nutrition and hydration unless the defendant revokes that direction, and the plaintiff would not be criminally responsible for any consequences to the life or health of the defendant caused by ceasing to administer such nutrition and hydration to him."

"Any person providing palliative care to Mr Rossiter on the terms specified in section 259(1) of the Criminal Code would not be criminally responsible for providing that care notwithstanding that the occasion for its provision arises from Mr Rossiter's informed decision to discontinue the treatment necessary to sustain his life."

This publication is intended to provide a general outline and is not intended to be and is not a complete or definitive statement of the law on the subject matter. Further professional advice should be sought before any action is taken in relation to the matters described in this publication.

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