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case study

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Hunter and New England Area Health Service v A [2009] NSWSC 761

The New South Wales Supreme Court's decision in Hunter and New England Area Health Service v A [2009] NSWSC 761 (delivered 6 August 2009) examined the validity of a particular "advance care directive" and outlined the relevant common law principles governing a person's right to refuse medical treatment, and specifically, through an "advance care directive".

The single judgment of Justice McDougall sets out in clear terms the relevant factors to be considered by a court when assessing the validity of a person's purported refusal of medical treatment through the means of an "advance care directive".

The facts of this specific case need not be considered, as the principles can be generally stated without reference to the facts.

Issues considered by the Court

The Court considered two principal issues.

The Court was required to consider a general issue and a specific issue.

The general issue concerned whether a capable adult had the right to refuse medical treatment.

The specific issue concerned whether the advance care directive prepared by the defendant was a valid exercise of the right of a capable person to refuse medical treatment.

This case is of particular interest for the clear pronunciation of the common law principles relating to the general right of a patient to refuse medical treatment and more specifically, the principles relating to assessing the validity of "advance care directives". An "advance care directive" is a statement that the person does not wish to receive medical treatment generally, or medical treatment of specified kinds.

General right to refuse medical treatment

At common law a person does have the right to refuse medical treatment. This right is said to stem from a competent adult's right of autonomy or self determination - that is, the right to control his or her own body. However, the right to refuse medical treatment only arises in a "competent" adult.

An adult is said to be "competent" for the purposes of validly refusing medical treatment, where that adult is capable of deciding whether to consent to or to refuse medical treatment. At law, an adult is presumed to be so capable. The presumption is rebuttable, however. When considering this question of capacity, one must

examine the importance of the decision and the ability of the individual to receive, retain and process information given to him or her that bears on the decision.

The time at which a refusal of medical treatment may arise varies. A person may seek to refuse medical treatment generally or a specific procedure(s) in advance of the need for medical treatment arising. This is done through an "advance care directive", which seeks to be an expression of the person's will not to receive medical treatment generally or specifically should that need ever arise in the future. Alternatively, a person may seek to refuse medical treatment at the time the need for such treatment arises. This case was concerned with the former.

Principles concerning validity of "advance care directives"

At common law, a person may make an "advance care directive".

An "advance care directive" can only be valid if:

- it is clear and unambiguous;
- its terms apply to the situation that arises;
- it is made by a "competent" person; and
- it was made voluntarily and freely, and not made under undue influence or under some other vitiating means such as misrepresentation.

An "advance care directive" is still valid despite the person giving it not being informed of the consequences of deciding in advance to refuse specified medical treatments.

Moreover, the "advance care directive" is not rendered invalid because it is based on religious, social or moral grounds rather than upon the consideration of risks and benefits.

If there is in existence a valid "advance care directive" and it is known to the medical practitioner, if the medical practitioner nonetheless administers medical treatment contrary to the "advance care directive", he or she would commit battery against the patient and could be sued. However, there is an exception to this rule and that is where the medical treatment refused in an "advance care directive" would be necessary to save the life of a viable unborn child.

The court set out the principles governing the *practical* means of determining the validity of an "advance care directive". First, the terms of the "advance care directive" need to be carefully analysed. However, the terms of the "advance care directive" must not be interpreted as would the words of a statute. "Advance care directives" are rarely written by legally trained persons.

The court went on to set out the principles that ought to apply where a medical practitioner or hospital is genuinely uncertain as to the validity of a purported "advance care directive". In such circumstances where a medical practitioner or a hospital is genuinely and reasonably uncertain as to the validity of an "advance care directive", they should apply promptly to the court for clarification. Furthermore, if the medical practitioner or hospital have promptly applied to the court for such clarification, they may administer any life saving medical treatment on the basis of the "emergency principle" whilst the matter is being determined by the court.

The "emergency principle" is a common law principle which states that where it is not practicable for a medical practitioner to obtain consent for treatment, and where the patient's life is in danger if appropriate medical treatment is not administered, then such treatment may be administered without the patient's consent.

WA statutory regime

The law relating to "advance care directives" will be governed by the provisions in the *Acts Amendment (Consent to Medical Treatment) Act 2008.* This Act was assented to on 19 June 2008 but is still awaiting proclamation.

The Act amends the *Guardianship and Administration Act 1990* by inserting Part 9B which deals with "advance health directives". An "advance health directive" is in essence equivalent to the "advance care directives" discussed in this case note.

Part 9B governs the making of advance health directives, their enforceability and operation. Further, Part 9B empowers the State Administrative Tribunal to make determinations regarding the construction and validity of advance health directives, as well as the capacity of the maker of the advance health directive.

The new section 110ZB expressly preserves the common law relating to a person's entitlement to make treatment decisions in respect of the person's future medical treatment. A "treatment decision" is statutorily defined to mean in relation to a person "a decision to consent or refuse consent to the commencement or continuation of any treatment of the person"

In terms of the validity of an advance health directive, there is an express statutory requirement that a treatment decision in a directive be voluntarily made, and not as a result of coercion or inducement. As discussed earlier, this is also a requirement at common law.

Further, the maker of the directive must have understood the nature of the treatment decision and the consequences of making the treatment decision. This latter requirement appears to alter the common law principles somewhat, in that at common law it is not necessary that the person be informed of the consequences of deciding in advance to refuse specified kinds of medical treatments. If one need not be informed of the consequences of making such a decision, it would seem to follow that that person may not understand the consequences of making such a decision.

The new section 110S considers in what circumstances a treatment decision in an advance health directive will or will not apply. By and large, the circumstances discussed in the new section 110S are similar to the common law principles discussed in the present case. However, of particular interest is the formulation in sections 110S(3)-(5) of an instance where a treatment decision in an advance health directive will not operate. Such an instance is where circumstances have arisen which the maker of the advance health directive would not have reasonably anticipated at the time of making the directive and such circumstances would have caused a reasonable person in the maker's position to have changed their mind.

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