



# Health Legal Report – September 2009

Welcome to the September 2009 issue of the Health Legal Report.

In this issue we discuss 2 recent and topical cases – the first being the WA case which considered the right of an adult to refuse medical treatment and the second, a contract dispute between the Epworth Hospital and Symbion Health.

## The right of an adult to refuse medical treatment

(Brightwater Care Group Inc v Rossiter, by Simon Cooke)

**The right of a competent adult to refuse medical treatment – including the provision of nutrition and hydration by way of a percutaneous endoscopic gastrostomy tube (PEG) – when doing so will result in death was considered in this case in the context of the service provider’s duty to provide the ‘necessaries of life’.**

### Background

Mr Rossiter became quadriplegic after a fall in March 2008. He was admitted to a Western Australian facility providing residential care for people with disabilities operated by Brightwater Care Group Inc in November 2008. Mr Rossiter is totally dependent on the staff of Brightwater. He receives nutrition and hydration by way of a PEG, and is unable to eat or drink orally. He is not terminally ill, and is not dying. Under his present care, Mr Rossiter could live for many years, but he wishes to die.

Mr Rossiter directed the staff of Brightwater to discontinue the provision of nutrition and hydration through the PEG, apart from hydration necessary for continued pain relief. Mr Rossiter repeated the direction many times. Brightwater did not follow Mr Rossiter’s direction. Both Brightwater and Mr Rossiter approached the Supreme Court of WA seeking declarations of their rights in these circumstances.

The Court considered Mr Rossiter’s request on the basis (supported by evidence) that Mr Rossiter had mental capacity. In particular, the evidence was to the effect that Mr Rossiter was capable of making reasoned decisions in respect of his future medical treatment after weighing up alternative options, and was capable of expressing reasons for the decisions he made.

The Court approached the parties’ applications on the basis that these circumstances were ‘exceptional’, and were such that the Court should make declarations concerning the criminality of future conduct.

### Common law

Chief Justice Martin considered that the relevant common law was ‘clear and unambiguous’. A person of full age is assumed to be capable having the mental capacity to consent to, or refuse, medical treatment. Such a person is not obliged to give consent to medical treatment, even if the failure to do so will result in death. A medical practitioner or other service provider is not under any obligation to provide treatment without consent in those circumstances. A medical practitioner or service provider who provides treatment without consent breaks the law by committing a trespass against the patient.

Martin CJ decided that Brightwater has its ordinary duty to give Mr Rossiter information about his proposed course of withdrawing from treatment.

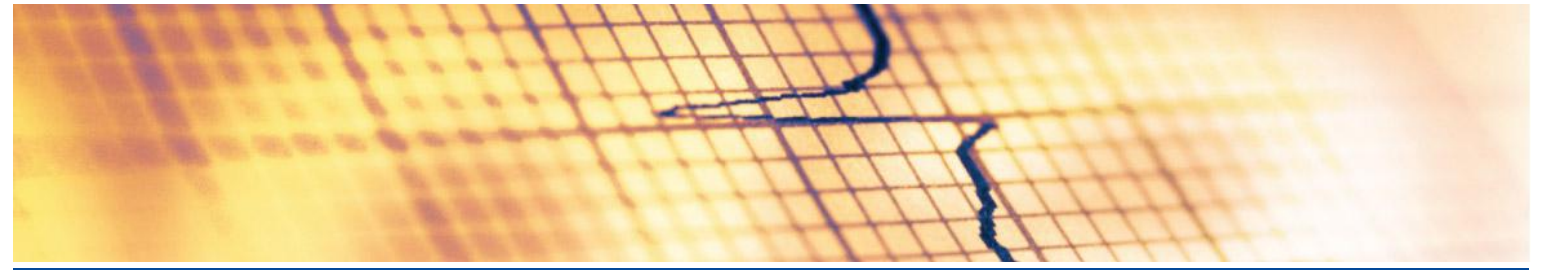
### Statutory provisions

Martin CJ considered whether the common law position had been altered by provisions in the Criminal Code of WA imposing a duty to provide the ‘necessaries of life’ in certain circumstances.

#### Duty to provide the necessaries of life

Section 262 of the WA Criminal Code states that:

*It is the duty of every person having charge of another who is unable by reason of age, sickness, mental impairment, detention, or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.*



The other jurisdictions that have criminal codes – Tasmania, Queensland and the Northern Territory – have similar provisions.

#### Cessation of surgical and medical treatment

The obligation to provide the necessities of life must be read together with section 259(2) of the WA Criminal Code, which states:

*A person is not criminally responsible for not administering or ceasing to administer, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) if not administering or ceasing to administer the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.*

There is 'no doubt', according to Martin CJ, that 'the nutrition and hydration provided to Mr Rossiter though the PEG is "surgical or medical treatment"'.

#### **No duty to provide the necessities of life in these circumstances**

Martin CJ gave the following 3 reasons for deciding that the duty to provide the necessities of life did not change Mr Rossiter's common law position:

- The principle of self-determination is so strong at common law that it would require clear unequivocal language for Parliament to demonstrate an intention to depart from that principle.
- The phrase 'having charge of another' should be read as a reference to a person who, by reason of one or more the disabilities referred to in that section, lacks the capacity to direct or control their own destiny and is therefore dependent upon the person 'having charge' of them. While Mr Rossiter lacks physical capacity to control his own destiny, he has the mental capacity to make informed and insightful decisions in respect of his treatment; in that respect, he is not within 'the charge' of Brightwater.
- Mr Rossiter could (theoretically) discharge himself to another service provider. In that case, he is able to 'withdraw himself' from the charge of

Brightwater. However, there was no evidence that that was a practical possibility.

#### **Withdrawal of treatment 'reasonable in all the circumstances'**

Martin CJ concluded that, even if Brightwater did have a duty to continue providing the necessities of life – contrary to the common law position – section 259(2) provided a good defence where the informed decision of a mentally competent patient was to cease further treatment. It was 'reasonable in all the circumstances' to withdraw treatment at the request of a competent adult patient.

#### **Palliation**

The Court was asked to make declarations concerning the provision of palliative care to Mr Rossiter. The Court was more cautious in this aspect of its decision, which concerned the administration of pain relief which may have had the effect of shortening Mr Rossiter's life.


Martin CJ held that the rights and obligations of Mr Rossiter's treating practitioner in respect of provision of palliative care to Mr Rossiter were no different from his obligations any other patient who may be approaching death.

Martin CJ also noted that palliative care administered for the purpose of relieving pain or easing discomfort that had the 'incidental effect' of hastening death 'might' fall within the terms of section 259(1) of the WA Criminal Code, which states that a person is not criminally responsible for administering, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care), if it is administered for the patient's benefit and is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

#### **Declarations**

The Court made the following declarations:

- (1) *If after Mr 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, Mr Rossiter requests that Brightwater cease administering such nutrition and hydration, then Brightwater may not lawfully continue*



*administering nutrition and hydration unless Mr Rossiter revokes that direction, and Brightwater would not be criminally responsible for any consequences to the life or health of Mr Rossiter caused by ceasing to administer such nutrition and hydration to him.*

(2) *Any person providing palliative care to Mr Rossiter on the terms specified in s 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.*

## Hobart Office Open

We are pleased to announce that we have recently opened an office in Hobart to cater for the specific needs of Tasmanian health and aged care clients.

**Fleur Dewhurst** has joined our team and runs our Tasmanian office. Prior to becoming a solicitor, Fleur worked as a Registered Nurse in both the acute care and aged care sectors. Fleur is also currently the Medico-Legal Advisor to the Royal Hobart Hospital.

## When the termination of a contract goes wrong

(*Epworth Foundation v Healthcare Imaging Services (Victoria) Pty Ltd* by **Natalie Franks**)

**On 31 July 2009 Justice Judd in the Victorian Supreme Court handed down a judgement in favour of Healthcare Imaging Services (Victoria) Pty Ltd (a subsidiary of Symbion Health) in relation to proceedings brought by the company which operates Epworth Hospital.**

**This case is a useful reminder of the need to ensure that in the context of any outsourced arrangement, leases and service Agreements are expressly and clearly linked (so that if one ends, they both end) and that when related agreements are being negotiated, careful and specific consideration is given to the impact that those agreements will have on existing contracts.**

**This case also demonstrates the critical importance of a contracting party's approach and strategy when considering the termination of service arrangements.**

### What are the facts?


Symbion (through its subsidiary Healthcare Imaging Services (Victoria) Pty Ltd) has a contract to provide radiology services from the Epworth Hospital. A Service Agreement was executed by the parties in August 2002. At that time Symbion occupied 3 sites within the hospital but leases were never assigned to

Symbion (but remained in the name of the business which Symbion had previously acquired - Medig). In February 2007 (that is - after a further 5 years of contract negotiation) the parties executed 3 new leases and a car park licence. Unfortunately for Epworth, the Service Agreement was not altered to refer to the new Symbion leases/licence – but instead continued to refer to the old Medig leases and “any further leases entered into pursuant to that lease”.

In April 2007 Epworth started to complain about Symbion's performance under the Service Agreement in relation to, amongst other things, on-call arrangements, KPIs, service definition and availability of contemporary equipment. The complaints quickly escalated to a threat of contract termination by Epworth in June 2007.

Symbion responded to the allegations by making a number of service changes and capital commitments. Symbion made it clear that its response was in no way to be taken as an acceptance of any of the allegations made by the Epworth. Notwithstanding the steps taken by Symbion, Epworth refused to withdraw its notice of breach.

Critically, one of the steps taken by Symbion was the purchase and installation of a 3T MRI.



Between May 2007 and the end of April 2008, Symbion was the subject of a possible takeover involving Primary Health Care and Healthscope. Primary acquired a majority shareholding in Symbion on 13 February 2008.

On the same day as the new MRI became operational (ie 5 May 2008) the CEO of Epworth met with the CEO of Primary. At this meeting the Epworth CEO indicated that Epworth wished to terminate the current arrangements with Symbion/Primary. (The Court refused to accept that the timing was coincidental but rather reached the view that Epworth had deliberately delayed exercising its right to terminate until after the 3T MRI had been installed and commissioned).

Epworth sought to terminate the Service Agreement and the 3 Symbion leases relying on a provision in the Service Agreement which expressly entitled Epworth to terminate the Agreement where Symbion had not sought Epworth's prior written consent to a change in control in Symbion. The change of control being Primary's acquisition of a majority shareholding in Symbion.

In these circumstances, under the terms of the Service Agreement, Epworth was entitled to call for a surrender of the leases which were referred to in the Service Agreement. Although the leases specifically referred to in the Agreement were those granted to Medig (not the ones which Symbion had actually signed), Epworth argued the language of the Service Agreement was broad enough to capture the current Symbion leases.

Symbion challenged Epworth's right to terminate the Service Agreement or call for a surrender of the leases. The Court upheld Symbion's challenge.

### **Why was Symbion successful?**

Symbion was successful because:

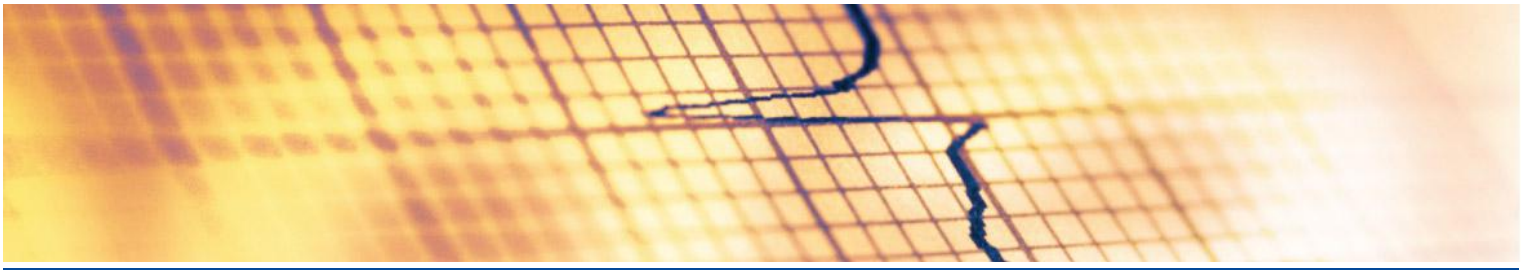
- the wording of the Service Agreement did not refer to the leases/car park licence Symbion had with Epworth – rather they referred to earlier arrangements. The Court refused to link the current leases to the Service Agreement because the wording in the Service Agreement was clear and unambiguous – and at the time of signing had meaning. During the negotiation of the 2007 leases no attempt had been made by either Epworth or Symbion to link the new leases to the

previously signed (but still current) Service Agreement. As such, the takeover of Symbion did not mean that Symbion was in breach of its 2007 leases.

- the Court found that Epworth unreasonably delayed its rights to terminate the Service Agreement and as a result of its conduct between the date of change of control took place (ie 13 February 2008) and the date it gave its termination notice (5 May 2008) it had in effect, by its conduct, elected to continue with the contract and waive its termination rights. Part of this conduct was the fact that Epworth had stood by and allowed the installation of the MRI to commence and be completed before seeking to terminate the Service Agreement and also that Epworth continued to demand that Symbion perform its obligations under the Service Agreement.
- more than 2 months elapsed between Primary taking control of Symbion before Epworth acted to terminate the Agreement. In Justice Judd's opinion "in the circumstances the delay was so unreasonable that an election (to continue the contract) is to be imputed to Epworth on that basis alone". In the Court's view a minimum response by Epworth would have been to immediately stop the delivery and installation of the 3T MRI until the legal position concerning the right to terminate for change in control could be resolved.

Symbion also alleged that it had purchased and installed the 3T MRI relying on an assumption that Epworth would not exercise any entitlement it may have had to terminate the Agreement for change in control.

Whilst the Court accepted that contracting parties do not have a general duty to disclose in commercial dealings, a failure to warn may constitute misleading or deceptive misconduct because, in some circumstances, a person was entitled to believe that a relevant matter would have been communicated and could infer from silence that a relevant risk did not exist.



In this case, Justice Judd found that by giving the notice of service breaches and by Epworth's subsequent conduct in specifying its complaints and expectations, Epworth conveyed to Symbion that if it remedied the specified defaults, the threat of termination would be withdrawn and the parties' relationship would be restored. The Court also found that Epworth ought to have appreciated that Symbion did not appreciate that there was any risk of termination arising out of the takeover events when it agreed to install the 3T MRI.

had taken advantage of Symbion's assumption that the Agreement would not be terminated due to Primary's takeover and took a substantial benefit from Symbion's performance of the Agreement, while reserving itself a right to terminate the Agreement for an undisclosed reason. All of these circumstances imposed a duty on Epworth to correct Symbion's assumption before it required Symbion to purchase and install the MRI. As such, the termination after the MRI had been installed was unconscionable in the Court's opinion.

In all these circumstances (which the Court found were not "ordinary") Justice Judd found that Epworth

## Other news

### Legislative compliance

In response to client demand, we have produced a legislative compliance register to meet the specific needs of community service organisations. This version of our register covers diverse topics such as housing, transportation, counselling services, regulation of health professionals, and governance obligations.

### Consequences of becoming a company limited by guarantee

At the request of a number of community health centres we have prepared a detailed report which covers the consequences of CHCs becoming companies limited by guarantee. The Report is comprehensive and includes subjects such as accessing records under the *Health Records Act*, financial reporting obligations, directors' duties, company reporting obligations, *Privacy Act* obligations and use of the company seal.

Please contact us for further information in relation to these products and services.

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