Australian
Health Law
Bulletin

This article was first published in *Australian Health Law Bulletin* Volume 22 No. 5 (HLB 22.5)

Withdrawal of life-sustaining medical treatment

***Alon Januszewicz** HEALTH LEGAL*

The Hunter New England Local Health District is the operator of the John Hunter Hospital (the Hospital) and was the plaintiff in this proceeding before the NSW Supreme Court. JS (a 27-year-old patient of the Hospital and the defendant in this proceeding) suffered from quadriplegia and related medical complications and did not wish to continue to receive life-sustaining medical treatment. JS made his wishes clearly known to the Hospital and the Hospital sought a declaration from the court to the effect that the responsible medical practitioners could lawfully discontinue mechanical ventilation and other life-sustaining treatment.

Justice Darke concluded that JS had the capacity to decide to refuse mechanical ventilation, and that his decision was freely given and based on adequate information. Accordingly, Darke J made the declaration sought by the Hospital that the medical practitioners and staff of the Hospital would be acting lawfully if they acted in accordance with JS's request that he be disconnected from mechanical ventilation.

Background

JS sustained a spinal injury, which left him suffering from quadriplegia since the age of seven. His condition was managed as an outpatient. However, more recently, JS suffered from an escalating combination of chronic medical conditions, including autonomic dysreflexia, a condition associated with extreme respiratory distress.

On 3 September 2013, JS stated his wishes in writing as follows:

> To my doctors, nurses and staff and all the people caring for me. I am writing this letter to address a very difficult and upsetting topic which I have thought about for many months now.
>
> As you know, over the past two years, my body has begun to deteriorate rapidly and because of this I have also begun losing my quality of life. There have always been difficulties and compromises that I have met, but now that degeneration is outpacing the counter measures, which is why I have spent the last three months in hospital. It is because of this that I have come to the conclusion that I want to explore the legal options of withdrawal of life-sustaining therapy.
>
> …
>
> In conclusion, let me be absolutely clear, it is my wish that the life sustaining mechanical ventilation which has kept me alive for the last nineteen years be ceased soon at an agreed time and place. Please give me the control over the care that I receive that every other patient is afforded, and I know is my right.[1]

In a letter dated 3 March 2014, JS further stated:

> I, JS, wish my doctors to disconnect me from mechanical ventilation as I no longer want this treatment even though I understand that I will probably die as a result of the cessation of the mechanical ventilator support.
>
> I consent to my doctors supporting me with medication, including sedating medication, as appropriate to prevent and/or treat distress and pain associated with the cessation of mechanical support. I understand that this support will not hasten my death. As the medications that may be used have been administered to me previously, there are no anticipated side effects from the medication.[2]

The Hospital sought two declarations to the effect that:

- the responsible medical practitioners may lawfully discontinue all life-sustaining treatment and medical support measures for JS, including the withdrawal of ventilation; and
- the medical services to be provided at the hospital to JS be limited to "services ancillary to the discontinuance of all life sustaining treatment, and medical support measures and palliative measures aimed at providing JS with comfort, pain relief and relief of anxiety or torment".[3]

Principles governing refusal of treatment

Justice Darke stated that the legal principles applicable in withdrawal of treatment cases are as stated by McDougall J in *Hunter and New England Area Health Service v A*.[4] Citing *Hunter*, his Honour stated that:

> It is clear that whilst the common law recognises two sometimes conflicting interests, namely: (a) a competent adult's right of autonomy or self determination, or the right to control his or her own body; and (b) the interest of the State in protecting and preserving the lives and health of its citizens, it is generally the case that whenever there is a conflict between a capable adult's exercise of the right to self determination and the State's interest in preserving life, the right of the individual must prevail.[5]

Justice Darke continued by noting that there is a "rebuttable presumption that an adult has the capacity to consent to or refuse medical treatment".[6] His Honour further explained that "[i]t is a corollary of [these] principles that, save for emergency situations, a medical practitioner who provides treatment contrary to the wishes of a mentally competent adult patient acts unlawfully".[7]

In deciding whether a person has capacity to make a particular decision, Darke J stated that:

> … the ultimate question is whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision. That will occur if the person is unable to comprehend and retain the information which is material to the decision, in particular as to the consequences of the decision, or is unable to use and weigh the information as part of the process of making the decision.[8]

His Honour referred to evidence of open discussion by JS with his family and medical staff at least since March 2013, on the possibility of withdrawal of life-sustaining treatment, and the letter written by JS on 3 September 2013 about his wish that life-sustaining mechanical ventilation be ceased. His Honour also considered the medical evidence concerning JS's capacity, which established to his Honour's satisfaction that JS had decision-making capacity:

> The totality of the evidence concerning capacity leaves me in no doubt that JS had the capacity to make the decision … including the request that the mechanical ventilation be disconnected. The evidence demonstrates that, as part of his decision making process, JS was able to (and did) weigh up the information he had.[9]

Accordingly, the court concluded that:

> JS had the capacity to make a decision to refuse the continuation of the mechanical ventilation, and that JS' decision in that regard was freely given and based on adequate information.[10]

Whether a decision to refuse treatment requires informed consent?

Although the rationality of the decision was not raised in these circumstances, Darke J repeated the remarks of the court in *Hunter*, where the court stated that a person may validly refuse medical treatment "upon religious, social or moral grounds or indeed upon no apparent rational grounds".[11] In doing so, Darke J followed the approach taken in *Hunter*, while noting the reservations expressed by the court in *Brightwater Care Group (Inc) v Rossiter*.[12] The court in *Hunter* said:

> I do not accept the proposition that, in general, a [competent] adult's clearly expressed advance refusal of specified medical procedures or treatment should be held to be ineffective simply because, at the time of statement of the refusal, the person was not given adequate information as to the benefits of the procedure or treatment.[13]

That is, while valid consent to treatment must be "based on full information, including as to risks and benefits", a decision to refuse treatment does not have to be informed to be valid.[14] In *Brightwater*, however, the WA Supreme Court stated that medical service providers should be under an obligation to inform patients of all aspects and risks associated with the decision to refuse treatment before seeking their consent to do so.[15] Ultimately, the difference in approach expressed by the two courts was not relevant, because Darke J found that "JS appears to have been given adequate information about the life-sustaining treatments and about what would happen to him if such treatment was withdrawn".[16]

Whether medical practitioners are aiding and abetting suicide?

Justice Darke turned to consider s 31C of the Crimes Act 1900 (NSW), which concerns aiding and abetting the suicide or attempted suicide of another person. However, his Honour held that a patient does not commit suicide if they refuse medical assistance, even in the knowledge of certain death.[17]

Orders made

For these reasons, the court made the first order sought by the Hospital to:

> Declare that the medical practitioners and staff of the John Hunter Hospital with responsibility for the care of the defendant, JS, would be acting lawfully if they act in accordance with the request made by JS on 3 March 2014 that he be disconnected from the mechanical ventilation currently in place, provided that such request is not withdrawn or modified by JS.[18]

The court, however, declined to make the second order sought by the Hospital, concerning the future medical treatment to be provided to JS, because it considered that "such a declaration, insofar as it would effectively prescribe the limits of JS' future care, is not appropriate".[19]

Comments

The principles considered by the court in this case helpfully illustrate the issues raised when patients make a request to cease receiving medical treatment. Once the patient is established to be competent to make these decisions, the health service provider must respect the

wishes of the patient. It is not necessary to obtain a declaration from a court. However, if there are questions about the competence of the patient, obtaining a declaration will provide clarity and reassurance to health service providers and their staff.

Alon Januszewicz
Senior Associate
Health Legal
alon.januszewicz@healthlegal.com.au

Footnotes

1. *Re JS* [2014] NSWSC 302; BC201401933 at [19], [20], [25].
2. Above, n 1, at [25].
3. Above, n 1, at [5].
4. Above, n 1, at [6], citing *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; [2009] NSWSC 761; BC200907152. See B Mainhoff "What is an adult's right to self-determination? Recent case law" (2010) 18(4) *Australian Health Law Bulletin* 46.
5. Above, n 1, at [6].
6. Above, n 1, at [7], citing *Hunter*, above, n 4.
7. Above, n 1, at [10], citing *Dept of Health and Community Services (NT) v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 309–10 per McHugh J; 106 ALR 385; 66 ALJR 300; [1992] HCA 15; *Hunter*, above, n 4, at [30], among others.
8. Above, n 1, at [18], citing *Hunter*, above, n 4.
9. Above, n 1, at [29].
10. Above, n 1, at [32].
11. Above, n 1, at [7], citing *Hunter*, above, n 4.
12. *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84; [2009] WASC 229; BC200907548. See D Markovich "Duties relating to the preservation of human life: the interface between civil and criminal law" (2009) 17(9&10) *Australian Health Law Bulletin* 172.
13. *Hunter*, above, n 4, at [28].
14. *Hunter*, above, n 4, at [30].
15. *Brightwater*, above, n 12, at [30].
16. Above, n 1, at [30].
17. Above, n 1, at [34], citing Basten JA in *X v Sydney Children's Hospitals Network (Randwick and Westmead) (incorporating The Royal Alexandra Hospital for Children)* (2013) 304 ALR 517; [2013] NSWCA 320; BC201313311 at [59]: "The legal concept of suicide, being the intentional taking of one's own life, is not engaged in a case where medical assistance is refused, even in the knowledge of certain death."
18. Above, n 1, at [36].
19. Above, n 1, at [35].