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B.C. appeal court refuses to halt dementia patient's spoon feeding

'Principle of patient autonomy' at issue, judges' panel rules

CRISTIN SCHMITZ

The British Columbia Court of Appeal has affirmed that a care facility is required to continue to offer food and fluids to a woman in the final stage of Alzheimer's disease, even though her family says this contradicts her previously expressed wishes.

Counsel said the March 3 ruling, in *Bentley (Litigation guardian of) v. Maplewood Seniors Care Society* [2015] B.C.J. No. 367, is the first in Canada to grapple with a novel issue that that can arise when dementia patients who can't verbally communicate are also physically unable to feed themselves: Are caregivers obliged to offer such patients nourishment — by holding a spoon or a glass to the person's lips — despite statements the patients may have made years earlier that they do not want to be fed or hydrated in such circumstances?

U.S. jurisprudence on the point is scant and there was no reported case law in British Columbia or the rest of Canada, counsel said.

"Mostly the cases are the other way — that is, they're around the issue of whether a medical intervention is appropriate at that stage of life," said Penny Washington, of Vancouver's Bull, Housser & Tupper.

Toronto's Hugh Scher, co-counsel for the intervener Euthanasia Prevention Coalition and its B.C. affiliate in a case involving spoon feeding a dementia patient, says the B.C. Court of Appeal has set out a bright line for caregivers. MATTHEW SHERWOOD FOR THE LAWYERS WEEKLY

Washington, counsel for the respondent Fraser Health Authority in *Bentley*, said the cases are more often about families insisting on artificial tube-feeding despite the patient's care team saying it is inappropriate at the late stage of the disease.

In Margaret Anne Bentley's case, her family wanted her care facility in Abbotsford, B.C.

Curbs, Page 2

Court offers rule clarity in dismissal cases

CRISTIN SCHMITZ
OTTAWA

Employers generally must have "legitimate business reasons" for administratively suspending their non-unionized workers, and should be "forthright" with employees about those reasons, the Supreme Court has ruled.

Justice Richard Wagner's March 6 ruling, in *Potter v. New Brunswick Legal Aid Services* [2015] S.C.J. No. 10, is the top court's first major decision in the law of constructive dismissal since the leading case of *Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846. The ruling provides guidance on the two-branch *Farber* test for determining whether a constructive dismissal has occurred, an issue that tripped up the New Brunswick courts below.

Justice Wagner gives specific guidance on how to do the two-step analysis, under the first branch of the *Farber* test, for determining (1) whether an administrative suspension constitutes a unilateral change that amounts to a breach of contract and if so, (2) whether the unauthorized administrative suspension can reasonably be perceived as having substantially changed the essential terms of the contract.

Piper, Page 10

TAX LAW

Defining de facto

You may not think you're a director, but CRA does

PAGE 11

LABOUR & EMPLOYMENT

Last rights of employees

Options for employees in a bankruptcy

PAGE 14

BUSINESS & CAREERS

'Earn it before your spend it'

Small firms need to watch where the money goes

PAGE 20

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News

Contents

Curbs: Scher sees potential limits on laws restricting vulnerable care

Continued from page 1

to stop prompting the 83-year-old former nurse to eat or drink by putting a spoon or a glass to her lips. Bentley is in the final stage of a 16-year battle with Alzheimer's. She has not spoken since 2010 and doesn't seem to recognize anyone. She has limited movement. She sits slumped over most of every day with her eyes closed but, when prompted, she does eat and drink at times, and even seems to show a preference for certain foods, such as applesauce. According to the judgment, her caregivers' approach is to prompt her with a spoon or glass and, if she keeps her mouth closed, to try again. If she refuses to open her mouth after a couple of tries, they stop. Her family believes she eats and drinks reflexively, that she is not consenting, and that the caregivers' holding of a spoon or glass to her lips constitutes battery.

However, the Court of Appeal upheld the B.C. Supreme Court's 2014 decision, which relied on expert medical evidence, that Bentley is capable of consenting to eating and drinking. The trial judge concluded that Bentley does consent and communicates her consent by accepting nourishment when it is offered to her.

The case deals only with "natural" feeding by spoon or glass, not with artificial feeding through tubes, which is considered a medical intervention.

The Bentleys' appeal focused on issues of consent and onus of proof.

Left unappealed were other holdings and statements by the trial judge. This included his statement that providing oral nutrition and hydration, by prompting with a spoon or glass,

is "personal" or "basic" care and, as such, is not amenable to advance directives under B.C.'s *Health Care (Consent) and Care Facility (Admission) Act*. This contrasts with "health care," such as artificial tube-feeding, that is subject to advance directives under the act.

The Court of Appeal dismissed the Bentley family's request for a declaration that would bar Maplewood House from giving Bentley food and hydration.

The panel described the family as "loving.

"I recognize the terribly difficult situation in which Mrs. Bentley's family find themselves and I appreciate the disappointment they must feel in being unable to comply with what they believe to have been her wishes and what they believe still to be her wishes," Justice Mary Newbury wrote for Justices Edward Chiasson and P.D. Lowry.

"It is a grave thing, however, to ask or instruct caregivers to stand by and watch a patient starve to death," Justice Newbury said. "It should come as no surprise that a court of law will be assiduous in seeking to ascertain and give effect to the wishes of the patient *in the 'here and now,'* even in the face of prior directives, whether clear or not."

Justice Newbury said this approach is consistent with "the principle of patient autonomy" reflected in the applicable provincial statutes and in many court decisions, including the Supreme Court of Canada's recent ruling that physician-assisted suicide is sometimes permissible but must be based on patients' "clear consent."

In *Bentley*, the B.C. courts have set out a bright line for professional caregivers, in the view of Toronto's Hugh Scher, co-counsel with Geoffrey Cowper of Vancouver's Fasken Martineau for the intervener Euthanasia Prevention Coalition and its B.C. affiliate.

> "I think the likely outcome is more people are going to choose the option of doctor-assisted suicide. They won't want to end up in Margo Bentley's situation, which is a tragic situation. It is certainly contrary to what she wanted for herself.
>
> **Kieran Bridge**
> Construction Law Group

The court has clearly indicated, "and this is supported by international policy around the world," that natural feeding by spoon or glass is not typically considered "medical treatment" or "health care" — to which an advance directive applies — and as such is not something that people can preclude that way, Scher said.

Scher said he believes the same result would likely obtain in Ontario and the rest of Canada, notwithstanding that legislation varies from province to province.

The Bentleys' counsel, Kieran Bridge of Vancouver's Construction Law Group, said his clients have not yet decided whether to seek leave to appeal to the Supreme Court.

Bentley has implications for tens of thousands of people with dementia, Bridge said.

"I think the likely outcome is more people are going to choose the option of doctor-assisted suicide," he predicted. "They won't want to end up in Margo Bentley's situation, which is a tragic situation. It is certainly contrary to what she wanted for herself."

Bridge said the decisions don't mean that British Columbians can't use advance directives to prohibit being naturally fed when they are in an advanced stage of dementia. Rather, in his view, the B.C. Supreme Court's decision stands for the proposition "that if that is your wish, you must be very clear in saying, 'If I get to certain physical stage, don't feed me through any means. Don't try to give me spoon-feeding. Don't try to hydrate me.'"

Bentley told her family she never wanted to live in the "vegetative" state she saw some of her patients endure. She also signed two "living will" documents in the 1990s, whose meaning the courts ultimately found to be contradictory and inconclusive with respect to her wishes about being given food and water if she suffered in future from extreme mental or physical disability.

Scher said it's not clear that the Constitution would permit federal and provincial governments to make laws expressly permitting nursing homes, hospitals, and other caregivers to withhold spoon-feeding from dementia patients who — although they now open their mouths to eat and drink — previously requested that they not be given nutrition in the late stage of the disease.

"The notion that someone should be permitted to starve, or to dehydrate, somebody to death, I think, gives rise to serious concern about basic neglect, and about [the *Charter*'s ss. 7 and 15 guarantees of] life, liberty and security of the person, and equality in terms of treatment, potentially," Scher said. "There may well be constitutional limitations on the ability of Parliament or the legislature to effectively permit restrictions relative to this basic and essential element of life."