Application of Justice Health; Re a Patient

New South Wales Supreme Court
30 March 2011
(2011) 80 NSWLR 354; [2011] NSWSC 432
Brereton J

[1] BRERETON J. The patient the subject of the present application is presently an inmate in a correctional centre. He has end stage lung cancer, with a prognosis of days or at best weeks. He is not competent to give consent, nor expressly refuse any medical treatment or treatment plan. He has no guardian appointed, and there is no other person who can provide a substituted consent.

[2] The unanimous medical opinion is that further active treatment would be futile. The medical opinion also extends to express the view that it would not be in the inmate's best interests for treatment to continue. As presently minded, I have difficulty in understanding how medical practitioners are able to express conclusions about the inmate's best interests in those terms. Likewise, I have some difficulty in appreciating the argument that such patients should be allowed to "die with dignity", which also appears in some of the evidence; that is a controversial view as to which the views of medical practitioners carry no more weight than others. What I think is important, however, is the unanimous view that further treatment would be futile, in the sense that cardiopulmonary resuscitation would achieve no more than a short prolongation of life without quality.

[3] By summons filed today Justice Health, which has medical care and responsibility of the patient, seeks the following relief:

- 1.

  A declaration that Justice Health may lawfully discontinue all life sustaining treatment and medical support measures designed to keep the patient alive in his existing terminal state of lung cancer;

  (2011) 80 NSWLR 354 at 356

- 2.

  A declaration that it be lawful for Justice Health to issue a "not for resuscitation order" in respect of the patient.

[4] Applications such as these in respect of critically ill patients who are not competent to give or withhold consent to medical treatment are made in the *parens patriae* jurisdiction of the Court (see *Messiha (By His Tutor Magdy Messiha) v South East Health* [2004] NSWSC 1061; *Northridge v Central Sydney Area Health Service* [2000] NSWSC 1241; (2000) 50 NSWLR 549). That jurisdiction is also resorted to in the case of children, when it is proposed

that they undergo procedures which are considered beyond the ordinary authority of those having parental responsibility for them (see *Secretary, Department of Health & Community Services v JWB & SMB (Marion's case)* (1992) 175 CLR 218). In such cases, however, typically an application to the Court is necessary because what is proposed is an act which would otherwise be an unlawful assault — invasive therapy of a type that would constitute an assault in the absence of consent on the part of the patient. Thus, in *Marion's case*, it would have been an assault to perform the procedure on the patient, without the requisite consent. The procedure was one in respect of which consent was beyond the ordinary scope of parental responsibility. Accordingly, the Court's authority and consent as *parens patriae* was required.

[5] The present case does not involve any proposal to administer any form of invasive therapy. It involves a proposal not to give aggressive therapy that would, in the absence of consent or therapeutic privilege, otherwise constitute an assault. In those circumstances it seems to me that it is not a case in which the consent of the patient, were he competent, or if he is not, the Court as *parens patriae*, would be required.

[6] Another basis upon which it might be put that resort to the Court was necessary was to clarify whether, consistent with the law, the medical authorities could withhold treatment. Just as lawyers are not expected to be their client's mouthpiece only, but bring to the task professional judgment, so medical practitioners are not the mere instruments of their patients, at their patient's behest, but are also expected to bring to their tasks professional medical judgment. No patient has a right to insist on being given any particular treatment. The patient's right is that the medical practitioner use reasonable professional care in the interests of the patient's health and wellbeing. A patient is not entitled to insist on being prescribed particular drugs or receiving particular treatment but to that treatment, which the medical practitioner, using reasonable care, judges is best for the patient in the circumstances.

[7] It seems to me that it would be a rare case in which the Court would, by mandatory injunction, require a medical practitioner to render to a patient a particular form of medical treatment, which the practitioner genuinely and reasonably thought was not warranted or appropriate in the circumstances. It may be that there are some cases in which unanimity of medical opinion would be such that no other course of action than administering a particular form of treatment would be justifiable but this, at least, is not one of them.

[8] Accordingly, it seems to me that apart from the question raised by s 72A of the *Crimes (Administration of Sentences) Act 1999*, to which I shall come, it would not in the present circumstances be necessary for the medical practitioners to resort to the Court for any declaration of the type sought.

(2011) 80 NSWLR 354 at 357

[9] Section 72A of the *Crimes (Administration of Sentences) Act 1999* relevantly provides as follows:

"72A Medical attention

An inmate must be supplied with such medical attendance, treatment and medicine as in the opinion of a medical officer is necessary for the preservation of the health of the inmate, of other inmates and of any other person."

[10] That section appears in the context of an Act which is said to have the following objects, as stated by s 2A(1):

"2A Objects of Act

- (1)

  This Act has the following objects:

  - (a)

    to ensure that those offenders who are required to be held in custody are removed from the general community and placed in a safe, secure and humane environment,

  - (b)

    to ensure that other offenders are kept under supervision in a safe, secure and humane manner,

  - (c)

    to ensure that the safety of persons having the custody or supervision of offenders is not endangered,

  - (d)

    to provide for the rehabilitation of offenders with a view to their reintegration into the general community."

[11] It is also worth noting that s 2A(3) also provides:

"2A Objects of Act

- …
- (3)

  Nothing in this section gives rise to any civil cause of action or can be taken into account in any civil proceedings."

This may mean that I should not have regard to the objects at all, but the better view is that its objects are permissible background for the purposes of the construction of s 72A.

[12] It seems to me, particularly in the light of s 2A, that it was not intended that s 72A should have the effect of making more stringent medical standards applicable to inmates than to persons admitted to hospitals in the community.

[13] The fundamental question is whether the mere prolongation of life, without quality, is "preservation of the health of the inmate" for the purposes of s 72A. I am acutely conscious of the undesirability of embarking on this topic in the absence of a contradictor. The evidence discloses that those who might be

expected to have an interest in the patient's care and welfare have, to the extent possible, been contacted — including a son and a former wife — but do not wish to be involved in the medical decision-making process. On the other hand, I think it is desirable that the medical practitioners be able to have a degree of certainty that the course they propose to take is not contrary to the statutory requirements of s 72A. If ever the issue is contested, the authority of this judgment will appropriately be discounted for absence of a contradictor.

[14] In my view, treatment that is futile is not treatment that is necessary for the preservation of health. The mere fact that the treatment might prolong life, by hours or days, without quality, does not make it treatment that is necessary for the preservation of health. Although life and health are closely associated, there is a distinction between treatment necessary for the preservation of health, and treatment that might achieve the mere prolongation of life.

[15] In those circumstances, I propose to declare that, on the proper construction of s 72A of the *Crimes (Administration of Sentences) Act 1999*, and in the present circumstances of the patient, s 72A does not require that the patient be given cardiopulmonary resuscitation.

(2011) 80 NSWLR 354 at 358

[16] I so declare. I direct that the order be entered forthwith.

So ordered

Solicitors for the applicant: *Legal Branch, NSW Department of Health*.