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THE SUPREME COURT OF
WESTERN AUSTRALIA

2406 of 2009

BRIGHTWATER CARE GROUP (INC)

and

CHRISTIAN ROSSITER

and

ATTORNEY-GENERAL FOR
WESTERN AUSTRALIA

2436 of 2009

CHRISTIAN ROSSITER

and

BRIGHTWATER CARE GROUP (INC)

MARTIN CJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 14 AUGUST 2009, AT 10.06 AM

Continued from 7/8/09

MR J.D. ALLANSON, with him MS J.A. THORNTON, appeared for the plaintiff in 2406 of 2009 and for the defendant in 2436 of 2009.

MS L.B. BLACK appeared for the defendant in 2406 of 2009 and for the plaintiff in 2436 of 2009.

MR R.M. MITCHELL SC, with him MR A. SHUY, appeared as intervener.

THE ASSOCIATE: In the Supreme Court of Western Australia, in the matter of Brightwater Care Group v Rossiter, CIV 2406 of 2009, and the case of Rossiter v Brightwater Care Group, CIV 2436 of 2009.

MARTIN CJ: Mr Allanson?

ALLANSON, MR: If your Honour please, I appear for Brightwater, the plaintiff in the first-mentioned matter and the defendant in the second.

MARTIN CJ: Thank you, Mr Allanson. Ms Black?

BLACK, MS: Yes. May it please you, sir, I appear on instructions from Hammond Legal in this matter for the defendant in the first-mentioned matter and the plaintiff in the second.

MARTIN CJ: Thank you, Ms Black. Mr Mitchell?

MITCHELL, MR: If it please the court, with my learned friend Mr Shuy I appear for the Attorney-General for Western Australia, intervening in matter 2406 of 2009. We would also seek leave to intervene on the same basis in 2436 of 2009 which I understand is not opposed.

MARTIN CJ: Good. No opposition to that?

ALLANSON, MR: It's not opposed, your Honour, and I apologise; I didn't announce the appearance of Ms Thornton as my junior.

MARTIN CJ: That's all right. Very well. If there's no opposition I will give a direction that the Attorney-General for the state of Western Australia be given leave to intervene in the second matter on the same terms. Just before we go on, Ms Black, is there anybody else who seeks leave to be heard? No. Thank you. We will proceed then. Ms Black?

BLACK, MS: There is just a procedural matter, sir, and that is in relation to the originating summons that was filed for matter CIV 2436 it would appear that inadvertently the draft version was filed.

MARTIN CJ: Yes.

BLACK, MS: Just due to the time restraints this occurred. I do now have the amended originating summons for which I understand leave is required and we do seek that leave, sir.

MARTIN CJ: Thank you.

BLACK, MS: Copies have been provided to both of my learned friends.

MARTIN CJ: Thank you very much. Can I just indicate to all those present what arrangements have been made in relation to sitting times. We will need to adjourn from time to time in order to accommodate Mr Rossiter's needs. We will adjourn when advised necessary to do so and, Ms Black, you will tell me and the nurse assisting Mr Rossiter will tell us immediately if there is any need to do that and we will simply rise, but we will adjourn not later than 11.30 for that purpose.

BLACK, MS: Indeed.

MARTIN CJ: Could I also indicate that when we do adjourn arrangements have been made to take Mr Rossiter to a private place elsewhere in the court but he can only get there through the public areas of the court, so I would ask people in court to remain in court until Mr Rossiter has been taken to that place and then you will be allowed to leave, but only then. Thank you. Ms Black?

BLACK, MS: Your Honour, I have spoken with Mr Rossiter this morning in terms of whether he wished to give any evidence this morning as part of the proceedings.

MARTIN CJ: Yes.

BLACK, MS: Your Honour will have an affidavit which was filed on behalf of Mr Rossiter.

MARTIN CJ: Yes.

BLACK, MS: Perhaps for convenience, given he is both a plaintiff and a defendant, if I can just refer to him as Mr Rossiter?

MARTIN CJ: Yes, that would be most convenient.

BLACK, MS: There is an affidavit of Belinda Jean Coniglio who is an officer from Mr Hammond's office who annexes to her affidavit a statement that was made from Mr Rossiter.

MARTIN CJ: Yes.

BLACK, MS: I have read through the statement with him this morning and there are certain matters within that he wishes to provide some clarification and correction.

MARTIN CJ: Yes.

BLACK, MS: And it is his preference that the majority of that statement be read to him as part of his evidence.

MARTIN CJ: Yes.

BLACK, MS: And then as to certain parts of the statement I will then stop and ask him particular questions about those.

MARTIN CJ: Yes.

BLACK, MS: Subject to the court's acceptance of that procedure it was my intention to commence reading the statement to him at paragraph 25 of the statement.

MARTIN CJ: Yes.

BLACK, MS: And the material that is in the statement prior to that point can simply be taken as part of his evidence.

MARTIN CJ: Thank you. Does anybody else wish to be heard on that process?

ALLANSON, MR: Your Honour, as far as that goes we're relying solely on affidavit evidence.

MARTIN CJ: Yes.

ALLANSON, MR: We have already relied on the affidavit of Ms Wagland and there was also the affidavit of Dr Benstead which has been filed.

MARTIN CJ: Perhaps - - -

ALLANSON, MR: And that's the only evidence on which we would seek to - - -

MARTIN CJ: Thank you. Perhaps just to follow in order, given that Brightwater was first and they are the plaintiff, is there any objection to me receiving in evidence those two affidavits in that application?

BLACK, MS: Absolutely not, sir. I just raised it as a preliminary matter for procedure. Thank you, sir.

MARTIN CJ: Thank you. I will take into evidence and receive the affidavits of Janet Ann Wagland sworn 5 August 2009 and the affidavit of Richard Duncan Benstead sworn 10 August 2009 and I will also receive the affidavit to which Ms Black has referred, namely the affidavit of Belinda Jean Coniglio sworn on 11 August 2009. Ms Black, if you could now commence the procedure that you have indicated.

BLACK, MS: Thank you, sir. Mr Rossiter is concerned whether everyone can hear him. We have attempted to do a sound check but perhaps I can just ask him an initial question and we can just check the sound at that time.

MARTIN CJ: Yes, certainly.

ROSSITER, CHRISTIAN called:

BLACK, MS: Mr Rossiter, we're going to ask you some questions now about the statement that you made. Can I just get you to tell everyone, just so we can check the microphone is working, what your name is?---Your Honour, my name is Christian Rossiter.

Christian Rossiter. Is the sound - - -

MARTIN CJ: I can hear that.

BLACK, MS: Yes. All right.

MARTIN CJ: Yes. Thank you.

BLACK, MS: Okay.

Mr Rossiter, I am going to begin reading from your statement and I am going to stop from time to time and ask you some questions but if you want me to stop at any other time you can just interrupt me while I am reading. Okay?
---Thank you.

If you need a break during this time you let us know?
---Thank you.

"I am of sound mind. I have provided Belinda with a report from Dr Rachel Zombor, clinical neuropsychologist. I am unable to undertake any basic human functions, including, but not limited to: I am unable to talk without a tracheostomy; I am unable to clear the phlegm from my throat to enable me to continue to speak through the tracheostomy; I am unable to speak for any reasonable period of time without my voice tiring and becoming weak; I am unable to walk or move my body at all, apart from involuntary spasmodic movements; I am unable to blow my nose; I am unable to wipe the tears from my eyes. Nursing staff are required to wipe the stools from my bottom. I am unable to brush my teeth. This is important to me as I am worried about decay. While the staff at Brightwater brush my teeth in the morning and the afternoon, the staff do not brush my teeth properly. My eyesight has deteriorated since my initial fall and I am required to wear glasses. My right eye is weaker than my left eye. My right eye cannot see the number on the clock on the wall of my room at Brightwater." Mr Rossiter, is all of that correct?
---Yes.

Is there anything else you want to add to that? Are you happy with that?---I'm happy with that.

"My life prior to sustaining the injuries described above was exciting and enjoyable. I travelled extensively as my father was an international airline captain for Malaysia and Singapore Airlines. My travel included visiting America and London on several occasions. During one visit to America I undertook flying lessons in Texas. I wanted to follow in my father's footsteps as an aircraft captain, however, my father discouraged me from doing so as he considered the industry too competitive." Is all of that correct, Mr Rossiter?---Yes.

Mr Rossiter, I now want to read for you the part about your desire to cease provision of nutrients, and you understand "nutrients" means food?---Yes.

"I have been told that there is no hope of rehabilitation or my medical condition improving in any way whatsoever. I have raised my wishes to cease the supply of nutrients to my body with my doctor, Dr Richard Benstead." Is that

right?---Yes.

"Dr Benstead has been noncommittal in relation to my concerns. I am given pain-killers on a daily basis and at least every five to six hours each day. Doctor" - I will leave that paragraph. "My desire to cease nutrients or food being supplied to me arises from the profound inconvenience I suffer as a result of my medical condition." Is that right, Mr Rossiter?---Yes.

"I endure the following inconveniences on a daily basis as a result of my physical condition: a suppository is inserted every three days. This is a slow and painful process, taking between six and eight hours before I can open my bowels"?---That's not correct.

Can you explain that to us?---The suppository is - two suppositories are inserted swiftly in my rectum but the opening of my bowels that the suppositories induce can be a slow process and a painful process, sometimes taking eight hours.

Taking eight hours?---Six or eight hours.

Thank you, Mr Rossiter. "I require a catheter or uridome by way of a condom placed over my penis to pass urine. The urine is collected in a bag attached to my hospital bed. The uridome frequently slips off, soiling both me and the bed linen. This requires frequent changing of the bed linen. Nursing staff must roll me from side to side every six hours or so to prevent bedsores. Brightwater is understaffed. The nursing staff at Brightwater complain about being called by me too frequently." But do I understand, Mr Rossiter, that you have been happy with the care that you have received from the nurses at Brightwater?---I'm happy with the care I have been receiving from Brightwater.

Thank you. Just so everyone heard that, you are happy with the care you have been receiving at Brightwater?---I am happy.

Thank you. "I have asked staff at Brightwater to cease all fluids and food I receive through a tube inserted into my stomach." Is that right, Mr Rossiter?---Yes.

And is your main concern that you have enough fluid to absorb the pain relief but no more than that?---Yes.

"I have made the request to Brightwater staff and medical staff to cease the food supply between 30 and 40 times." Is that right?---Yes.

"I do not believe that every request has been documented by Brightwater staff"?---Yes.

I want to read this to you and have you tell us if this is right. "I do not wish for the tube inserted in my stomach to be removed, only for all dietary supplements, including fluids and nutrients, to be terminated." Is that right? ---That's not right.

Can you explain to us what it is you want?---The tablets would have to be dissolved in a fluid and I would require anti-spasmodic drugs to be piped down the catheter.

Can I just ask you this then, Mr Rossiter: what you want is enough fluid to enable the painkillers to be able to be properly administered through the tube?---Yes. They have to be crushed up and in water.

I'm going to read this, which I think makes that clear: "I would like to continue to receive painkillers through the tube to relieve my pain. The painkillers would need to be crushed with some fluid in order to pass through the tube into my stomach." Is that right?---Yes.

Then if I can skip over family and read this: "My psychologist report considers me to have decision-making capacity in relation to my medical treatment and care arrangements. I have discussed my desire to die with my psychologist, Dr Zombor"?---Yes.

"I would be prepared to go to Switzerland to die." Now, Mr Rossiter, can you tell us what your current position is there. Do you want to go to Switzerland?---No. The Swiss government does not allow - the Swiss government can slow down the patients who wish to terminate their lives. It would have to go through a Swiss court or so.

Mr Rossiter, you have been told that process would take three months?---I read it in that newspaper article.

You read that in the newspaper. Mr Rossiter, can I ask you this: is it your desire at the moment to die in Western Australia?---Yes.

I am going to move to paragraph 68 in light of that evidence, sir.

MARTIN CJ: Thank you.

BLACK, MS: "I have bequeathed the majority of my estate to Tim." Tim is your brother?---Timothy.

Timothy, and he is your - - -?---My brother.

He is your only brother?---My only brother.

Do you have any other family alive?---No, just an aunt who lives in Sydney.

Can you say that again, Mr Rossiter?---Just an aunt who lives in Sydney.

Just an aunt who lives in Sydney. So you have no mother or father alive?---No.

And no other brothers or sisters except Tim?---I have no other - no living relatives.

No living relatives?---Just my brother.

"I currently receive a disability pension. This is the only income that I receive. My residency at Brightwater is subsidised by government funds. Other than specific medical newspaper articles that I have read, I have received no advice regarding the effect on me of starving to death." Mr Rossiter, do you have a friend who is a doctor who has spoken to you about starving to death?---No.

Have you spoken with any medical people about it?---Just the advice I received in the newspaper articles.

Okay, but you have also spoken - do you remember telling me you have also spoken to a friend of yours who is a doctor?---Yes.

Who was your anaesthetist?---Dr Colin Eagle. He is an anaesthetist.

Dr Colin Eagle who is an anaesthetist, and he is your friend, isn't he?---He's my friend.

And you have spoken to him as your friend about this question?---As my friend.

What do you understand will happen if you stop getting fed through a tube?---He advised me it would be a very long process. I would have - but he was under the impression I would have water.

You would have water. So it would be a long process. Do you understand that it would be potentially painful?---I would have painkillers.

Yes, and you would need painkillers with some water to be able to reduce the pain?---Yes.

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Do you understand that if you stopped being fed through the tube, that would eventually lead to you dying?---Please state that again.

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Yes. Do you understand that if the medical staff stop feeding you through the tube, that you will eventually die?
---Yes.

And is that something that you want?---Yes.

I'm going to read to you the last part of your statement and ask you if this is right: "I want Brightwater to respect my wishes and allow me to die with dignity." Is that right?---Yes.

"I respectfully request that the Supreme Court allow me to refuse being fed." Is that right?---Yes.

Do you understand that the application we have made today to the court is for you to have the right to agree to medical treatment or to refuse medical treatment; that the choice is yours? Do you understand that is what we're asking?---Yes.

And do you want to be able to make that decision for yourself?---Yes.

You have said in your statement, "I feel that I am being deprived of the liberty to refuse food being pumped into my stomach due to the extent of my disability." Is that right?---Yes, please read that statement.

I'll read that again, "I feel that I am being deprived of the liberty to refuse food being pumped into my stomach due to the extent of my disability"?---Yes.

"I do not have the ability to personally remove the tube which supplies the nutrients to me"?---Yes.

If you were physically able to stop eating, would you want to stop eating?---Yes.

Just wait one moment, Mr Rossiter. Mr Rossiter, is there anything else you would like to tell the court? You don't have to, but if there was anything else you wanted to say, this is your chance to say it?---I want to say that the pain-killers could make me drowsy and I would like to be made drowsy in my final moments so that the time could pass more quickly and I would like to watch FOXTEL on the television to pass the time.

Thank you, Mr Rossiter?---Thank you, Linda.

MARTIN CJ: Thank you, Mr Rossiter. Thank you, Ms Black?
---Thank you, your Honour.

Thank you. Now, Mr Allanson, is it convenient for you to address first?

ALLANSON, MR: If your Honour please.

BLACK, MS: Your Honour, can I just check if Mr Rossiter needs a break at this point?

MARTIN CJ: Yes, that would be good. Thank you.

BLACK, MS: I'm just going to approach fellow counsel.

MARTIN CJ: Thank you.

BLACK, MS: I don't think in fact either counsel are going to ask any questions of Mr Rossiter.

MARTIN CJ: Yes.

BLACK, MS: Could I speak to him for a moment?

MARTIN CJ: Yes.

BLACK, MS: Thank you, sir.

(THE WITNESS WITHDREW)

MARTIN CJ: Thank you, Ms Black. Mr Allanson?

ALLANSON, MR: Your Honour, the first matter is by way of seeking to amend our application. I have two copies.

MARTIN CJ: Thank you.

ALLANSON, MR: All counsel have got copies, your Honour. Your Honour, we came before the court initially seeking relief by way of two declarations. The second of those declarations was in these terms, "The plaintiff may lawfully clean and replace the PEG tube as required notwithstanding the defendant's express request that the plaintiff cease doing so." That was a response to what was then perceived to be the factual situation and in the light of the evidence this morning that has now fallen away.

MARTIN CJ: Yes.

ALLANSON, MR: So we would not be pressing that.

BLACK, MS: Sorry. Mr Rossiter can't hear Mr Allanson. I'm just not sure if we can perhaps - - -

MARTIN CJ: I don't know if we can rectify that.

BLACK, MS: I'm not sure if there's anything we can do, except perhaps put the microphone - - -

ALLANSON, MR: I can move to the other end of the bar table if that's convenient.

BLACK, MS: Can we do that? Mr Rossiter has just asked - - -

MARTIN CJ: Yes, certainly, if that's convenient. Mr Mitchell, I wonder if you could just make a space there for Mr Allanson. I won't be offended if you shout at me, Mr Allanson, so keep your voice up.

ALLANSON, MR: I am unfortunately not the loudest of counsel but can you hear me now? Thank you. Just to repeat, your Honour, we no longer would be seeking at all an order in terms of the second declaration. It is now accepted that there is no request to remove and replace the PEG tube and that it would still be kept in place for other purposes.

We have, however, your Honour, included alternative relief and it arises in this way: the relief originally sought is that we may lawfully continue administering nutrition and hydration. In the event that that is not lawful, then Brightwater logically would be left in the position, "Well, if it's not lawful to continue doing so, then it should attract no liability by not continuing to do so," but there are a couple of particular matters that arise there.

The first is the way in which a request to cease would arise. Unfortunately it's not in evidence, your Honour. It's not, I think, controversial so if I could say from the bar table the administration of food is done by way of bolus doses. It is not a continuous process, it is done by way of bolus doses, so the occasion for the refusal of food would arise not continuously but on a periodic basis. I think it's six times a day.

Mr Rossiter has in the past requested that nutrition cease. There were, of course, some questions that were raised in the media this week that we have to be aware of, your Honour, as to whether he did want that immediately to happen, and so we have cast our alternative relief in terms of if the defendant requests that we cease to administer the nutrition and hydration.

It is not to cast this as a hypothetical question at all. It is simply to recognise that it is something that will arise on the occasion of him fulfilling what he has said he wishes to do. So the first of the declarations that we would see as appropriate if we cannot lawfully continue to feed is a declaration to that effect.

MARTIN CJ: Yes. You move for an amendment in terms of the - - -

ALLANSON, MR: We would move for an amendment in terms of minute of proposed further amendment with the addition that paragraph (b) is deleted.

MARTIN CJ: Thank you.

ALLANSON, MR: The alternatives are (a) and (c), (d) and (e) as a package.

MARTIN CJ: Does anybody else wish to be heard in relation to the amendment?

BLACK, MS: No, sir.

MARTIN CJ: Very well. The amendment will be allowed.

ALLANSON, MR: Thank you, your Honour. The second of the proposed amended - so it's paragraph (d) - is that we would not be criminally responsible for any consequences to the life or health of Mr Rossiter caused by ceasing to administer nutrition and hydration by way of the PEG tube.

The third is more specific and it relates to the administration of palliative care. Your Honour has heard this morning from Mr Rossiter that he would wish assistance in the form of pain relief in the event that he is no longer being fed and it causes him pain or distress. In the written submissions, your Honour, we have dealt with the necessity for declarations in those terms, if I can go to the written submissions. I don't, unless your Honour requires it, wish to address at length.

MARTIN CJ: No.

ALLANSON, MR: Your Honour will see from the way that we have set out the submissions that although we have come before the court asking for particular declarations, we are not particularly advocating a view.

MARTIN CJ: I was going to ask that, Mr Allanson. Do you propound a view as between the two alternatives?

ALLANSON, MR: Your Honour, no. We are seeking the assistance of the court.

MARTIN CJ: I see.

ALLANSON, MR: It was necessary to formulate questions in such a way that they could be properly litigated before your Honour.

MARTIN CJ: Very well. The second question I have concerns the question of the advice and information provided to Mr Rossiter as to the consequences of withdrawing nutrition and hydration other than the limited hydration required to provide soluble painkillers. There is, I think, a conflict in the evidence before me on that issue.

Dr Benstead's evidence is to the effect that he has given advice, but of course Mr Rossiter has told us in his statement and again that he hasn't received that advice from anybody other than his friend, Dr Colin Eagle. It is not clear to me from that evidence just how thorough that advice was from Dr Eagle. I assume that it was an informal

occasion, not a medical consultation, and it's not clear that all the ramifications of the decision have been gone through. Would you accept that Brightwater is under a duty to ensure that such advice is given before a decision is made by Mr Rossiter?

ALLANSON, MR: Whether it's under a legal duty.
Mr Rossiter is in our care - - -

MARTIN CJ: Yes.

ALLANSON, MR: And if it was something that caused concern to the court I am sure it is something that we could ensure was done.

MARTIN CJ: Thank you. You were going to tell me about palliative care and the issue there - I must say that I share the concerns enunciated in the submissions from the attorney-general on that subject. Let me enunciate those concerns. The difficulty I have - if I could step back. You are asking me to make declaratory in relation to the application of the criminal law. That is something that courts do but we do it very exceptionally and somewhat reluctantly - for all the reasons that you know about, Mr Allanson.

ALLANSON, MR: Yes.

MARTIN CJ: And it's clear then that we don't grant exceptional relief of that kind unless all the facts are established. The difficulty I have with the palliative care issue is that I just don't know precisely what is involved and precisely what its consequences might be. Again if I could enunciate and borrow, if I might conveniently, from the helpful submissions provided by the attorney-general, I think one can establish some principles at the parameters. Those principles would include that provided informed consent is given - and we have heard Mr Rossiter wants palliative care; provided informed consent is given and the purpose of the palliative care is for easing pain and discomfort and the palliative care has no consequences in terms of causing or hastening death then, plainly, that is lawful.

At the other end of the spectrum, if anybody administers a drug for the purpose of causing or hastening the death of somebody else, plainly, that is unlawful. Now, between those two extremes there is a range and spectrum of different possibilities. Including, for example, the scenario in which medication is administered overwhelmingly for the purpose of easing pain and discomfort but which might have the inadvertent effect of hastening death. I just don't know on the evidence where the palliative care that is proposed would fit within that spectrum and it just seems to me, consistently with the submissions put by the state, that I just would be - it would just be impossible for me to grant declaratory relief when I don't know where in the spectrum that fits.

ALLANSON, MR: Your Honour, if I can go back to the first stage. Firstly, we were using palliative care in the sense

in which it is defined - although I should point out that the definition to which we refer has not yet been proclaimed but that's the way in which it has been used in the amendments to the Guardianship and Administration Act - as meaning "medical, surgical or nursing procedures directed at relieving a person's pain, discomfort or distress." So it is palliative care in that sense, that is directed to relieving pain, discomfort or distress and not to hastening death.

The reason why we seek relief with regard to the palliative care - and we would see that as falling under section 259(1) of the Criminal Code - arises from the fact that it is unlawful to aid a person in killing themselves.

MARTIN CJ: Yes.

ALLANSON, MR: The scope of the notion of aiding a person in killing himself or herself is uncertain and recent authority in the United Kingdom has shown, for example, that it could possibly be construed as extending to assisting somebody to travel to a place where lawfully they are permitted to take their life. It would also, we say, arguably extend to a person who wishes to die - and it would, of course, extend to a person who wishes to die - providing them with the means by which to do it.

It may also, we fear, extend to someone who provides relief from pain for the purpose of enabling someone to ease their passage - to put it that way. That's why it is sought, your Honour. It is in the apprehension that somebody who, knowing of Mr Rossiter's desire not to live, if ceasing to feed him is properly construed as enabling him to die or indeed enabling him to kill himself, easing his pain as he does so, could be seen as aiding that process.

MARTIN CJ: All right.

ALLANSON, MR: So it's in that limited sense that we were seeking the relief of the court.

MARTIN CJ: It may be then that I could accommodate that concern by expressing the view which I tentatively hold, which is that if and when a lawful direction was given to cease the provision of nutrition and hydration, putting in train a process, then in that circumstance I wouldn't have thought Mr Rossiter would be in any different position to any other patient who is going down the road towards their death and I don't think the fact that it is initiated by reason of a lawful direction would alter the obligations of the treating doctor. If that view were expressed, would that sufficiently accommodate interests? The problem I have - let me go specifically to section 259(1). That section provides:

A person is not criminally responsible for administering in good faith -

et cetera -

palliative care if the administration of the treatment is reasonable having regard to the patient's state at the time and to all the circumstances of the case.

The difficulty I have is that I can imagine that the nature of the palliative care that would be provided in the circumstance that we are positing would alter from time to time, so I don't know what the treatment would be from one day to the next and I don't know what the patient's state will be from one day to the next, so all that I could usefully say is, well, if it's reasonable having regard to the treatment and the patient's state, then you are within the scope of section 259(1), but all I would be doing then is telling you that the section may or may not apply depending on the circumstances, which is really, I think, unhelpful. That is really the problem I have in this area.

ALLANSON, MR: Your Honour, knowing that the section applies and that the provision of palliative care in these circumstances would be medical treatment to which the normal rule in section 259(1) applies so that the question is whether it is reasonable having regard to the patient's state at the time and all the circumstances of the case, does indeed go a long way to meeting the concern that we have because there was the question about whether palliative care or pain relief in these circumstances would indeed enable Brightwater and its staff to rely on 259. If that is clear, we would expect - - -

MARTIN CJ: I think that's helpful, Mr Allanson, and I will ask Mr Mitchell in due course whether that accommodates the concerns the attorney had enunciated.

ALLANSON, MR: Otherwise, your Honour, what we have attempted to do in our written submission is provide as much material - and I apologise for the amount of material.

MARTIN CJ: I am very grateful to you for that, Mr Allanson.

ALLANSON, MR: And to indicate the peculiar nature of this problem because although there is a wealth of authority in other jurisdictions, it is, with respect, a peculiar problem in that we are dealing with the situation of Mr Rossiter, who is not terminally ill. He is not, as in so many of the cases, a person in a permanent vegetative state. He is capable, it appears, of making his own decisions. There is evidence as to his capacity for decision-making and your Honour has had the opportunity to see him this morning.

MARTIN CJ: Yes.

ALLANSON, MR: Section 259(1) as it interacts with the other provisions of the code provides the legislative context in which we require the guidance. The only point that I would make, your Honour, is we would press upon the court that it is proper to read section 259(1) as incorporating as part of its context those two competing principles of the sanctity of life and the right of self-determination, despite the fact that they are not readily apparent in the text that we have before you.

It doesn't appear to be in dispute between the parties that that is the proper way to approach it, but we would urge on the court that section 259(1) can be read in that way and that if the court does read it in that way as incorporating those principles, then the result follows.

The only positive point we make, your Honour, is if it is not lawful for us to continue to feed Mr Rossiter or to provide nutrition in this particular way, we would submit that positively the alternative relief, perhaps limited in the way your Honour has spoken of, should be granted because if it is not lawful for us to continue, it is an intolerable situation for people who have care and will continue to have care of this man to not know their legal position. Otherwise we rely on the written submissions - - -

MARTIN CJ: Mr Allanson, I have a couple of questions for you in relation to section 262 and they come from some thoughts that I have been having about the possible scope of that section, and that of course is the section that perhaps gives rise to your client's concern.

ALLANSON, MR: Yes.

MARTIN CJ: It seems to me that there are two alternative arguments in support of the proposition that the section doesn't apply to the circumstances of this case, and they both really focus to some extent upon the meaning of a person having charge of another and the allied concept of the person being able to withdraw from that charge.

On the face of it, of course, Brightwater has the physical charge of Mr Rossiter. He is unable to survive without their continued assistance. If you look at the section, it talks about a variety of circumstances including age, sickness, mental impairment, detention or any other cause, whereby a person is unable to withdraw himself from such charge and unable to provide himself with the necessities of life.

It seems to me, therefore, that what the section is getting at is a circumstance in which a person has lost the capacity to control their own destiny. If that is right and we apply that notion to Mr Rossiter, in relation to physical matters he has certainly lost the capacity to control his own destiny. He is unable to care for himself physically. But if we ask that question at a mental level and ask, "Has he lost the capacity to control his own destiny?" the answer is no. He has the capacity to give direction and he has the capacity to give instructions and he has the capacity to receive and assimilate information.

It seems to me that in that sense it might be that Mr Rossiter is not relevantly within the charge of Brightwater but retains those capacities. That is the first proposition. Do you have any comment to offer in relation to that?

ALLANSON, MR: It requires an atomisation of the elements of the charge. It could commonly, of course, be the case that someone who is physically unable to withdraw themselves from charge still retains completely their faculties. In this case, for example, there would clearly be a breach of that section, we say, were we to cease administering care to Mr Rossiter.

MARTIN CJ: Yes, but that would be because that would be within the area in which he is within your charge; that is to say, he depends upon you tending to his physical needs. If you construe the section in the way in which I have suggested, then you would say, well, if Mr Rossiter is not within Brightwater's charge in respect of giving directions as to how he shall be treated, then if they act in accordance with his directions then they are outside the area of the scope covered by the section.

Another way of putting it, and perhaps simpler, is this, and that is really the second proposition: the section only applies if Mr Rossiter is unable to withdraw himself from the charge of Brightwater. In this case if

Mr Rossiter could find another service provider, I assume that he has the financial capacity and could simply give a direction to remove himself from Brightwater and go somewhere else. If that is right, wouldn't that lead to the conclusion that the section doesn't apply?

ALLANSON, MR: His relationship with Brightwater is contractual.

ROSSITER, MR: Nicky, I'm in pain. Can - - -

ALLANSON, MR: He is saying he is in pain.

MARTIN CJ: Do we need to adjourn?

ALLANSON, MR: If your Honour please.

MARTIN CJ: Very well. What I will do is we will adjourn the court, but what I would ask, as I indicated earlier, is if everybody would remain within the body of the court until you're advised that you are free to leave. We should adjourn for 10 or 15 minutes, thereabouts?

BLACK, MS: I might just check how long we need. Just one moment, please.

....., **MS:** 10 minutes.

MARTIN CJ: 10 minutes.

BLACK, MS: Perhaps if we make it 15 to get him back in again, sir.

MARTIN CJ: Yes, certainly. We will adjourn then, thank you.

ROSSITER, MR: Thank you.



MARTIN CJ: Mr Allanson?

ALLANSON, MR: Thank you, your Honour. Having had the opportunity with - section 262, there's only two matters I really can say to the propositions your Honour has put.

MARTIN CJ: Yes.

ALLANSON, MR: The first is that Brightwater's position in a practical sense has always been that in practical terms it's impossible for Mr Rossiter to withdraw from our charge in that there is not an alternative place for him to go.

MARTIN CJ: I see.

ALLANSON, MR: With regard to the more general prospect, your Honour, it's not something that I had thought in terms of being able to divide the notion of charge up so that there was the ability to withdraw from charge partially even though someone is completely physically dependent, and I can't say anything more at the moment, your Honour, than that it causes me some problems.

MARTIN CJ: This might be to what extent is Mr Rossiter within the charge of Brightwater.

ALLANSON, MR: Yes.

MARTIN CJ: So that if he retains the capacity direct then he is not in that respect within their charge, and if therefore he exercises the right to direct then his compliance with that direction falls outside the section.

ALLANSON, MR: Well, in that way, your Honour, it comes back to simply the effect of the same conflict but on a different section, and that is to what extent is this dilemma to be resolved by the primacy given to the state's interest in the preservation of life or by the primacy given to somebody's ability to determine their own destiny.

MARTIN CJ: Well, it seems to me that when you go to section 239(2), which would provide a defence to your client if section 262 applied, then it really seems to me that when you look at the way in which that section was introduced into the code, there's really no doubt about where the legislature was intending that balance to lie and it was in favour of the primacy of self-determination.

ALLANSON, MR: The only thing I would say with regard to that, your Honour, and I'm not disputing the proposition at all, is that when you look at the material supporting the introduction, it was in the context of decisions being made in the case of terminal illness.

MARTIN CJ: Yes.

ALLANSON, MR: And we do have the position here of Mr Rossiter who is not terminally ill, but other than that, your Honour, it is essentially the same.

MARTIN CJ: Yes.

ALLANSON, MR: And your Honour will have seen from the authorities that we were able to get together the only case we could find that was very similar was the American decision of the court in California in Bouvier, which clearly found in favour of the right of the individual to determine - or to make their own decisions but in a particular constitutional context that we don't have, and that's the right of privacy under the American constitution. Otherwise, your Honour, unless there's anything - - -

MARTIN CJ: No.

ALLANSON, MR: You did say you had further questions, your Honour.

MARTIN CJ: No, that's it, Mr Allanson. You have covered all my concerns. Thank you very much.

ALLANSON, MR: If your Honour pleases.

MARTIN CJ: Now, before I call on other counsel, I understand there is somebody here who does in fact wish to apply to be heard. Mr O'Meara, is it?

O'MEARA, MR: Yes.

MARTIN CJ: Come forward please so that we can pick you up on a microphone. Now, I wonder if you could just tell us your name and who you are?

O'MEARA, MR: My name is Peter O'Meara, president of the Right to Life Association of Western Australia. We have placed a submission with the court, which we presume that you have.

MARTIN CJ: Yes, I've seen that and the parties have been given it. Now, you apply to be heard as a friend of the court?

O'MEARA, MR: Yes.

MARTIN CJ: All right. Well, I'll just ask if any of the parties or the intervener wish to be heard in relation to that.

BLACK, MS: I do, sir.

MARTIN CJ: Yes?

BLACK, MS: We would object to that. The basis is as set out in our submissions, that this is not a case which deals with the issues that have been raised by the Right to Life Association in their submissions. This is a case where we have clearly stated the sole question, putting it practically, for the court's determination is the right of Mr Rossiter to accept or refuse medical treatment. That is the only issue which we have invited the court to consider today and we have made clear in our submissions that questions about the right to travel to Switzerland, the rights to otherwise end one's life, are not to be the subject of any determination by the court.

MARTIN CJ: Thank you, Ms Black. Mr Allanson, does your client have a position on this?

ALLANSON, MR: We leave it to the court, your Honour. I mean we've brought a fairly limited application in the way in which the questions have been posed and the material has been presented, but in a matter of this importance it's for the court to determine how it's best going to arrive at a decision.

MARTIN CJ: Thank you. Mr Mitchell?

MITCHELL, MR: We don't have a position. I would just draw your Honour's attention perhaps to one case which has addressed a similar issue perhaps, which is on the list of authorities, Re BWV ex parte Gardner (2003) 7 VR 280. At pages 490 to 491 his Honour Morris J considered an application by Right to Life Australia Inc in that case to intervene and gave permission to - or declined permission to intervene but allowed them to appear as amicus on condition that their hearing be confined to making written submissions and oral submissions confined to one hour concerning the interpretation of the Medical Treatment Act, and in that case they're prepared by senior counsel.

MARTIN CJ: Yes. Thank you, Mr Mitchell. Ms Black, I think there is considerable force in what you say but because of the public interest, and I mean that in the legal sense, in the issues raised by this case it does seem to me to be appropriate for me to hear from any group within the community that wishes to express a view on these issues, but I am very cognisant of the point that you make.

BLACK, MS: Thank you, sir.

MARTIN CJ: So I would propose, Mr O'Meara, to give you right to appear as a friend of the court. You have provided a written submission and I have read that submission. Do you wish to say anything in addition to that?

O'MEARA, MR: I think the submission contains everything that, you know, we put before you on the care, medical care and treatment of patients, and also our concern for the "right to life" persons who are under medical care.

MARTIN CJ: Yes.

O'MEARA, MR: In this particular case.

MARTIN CJ: Yes. Thank you. Is there anything else you wish to say?

O'MEARA, MR: No, just thank the court for giving us a hearing.

MARTIN CJ: Thank you, Mr O'Meara, you can return to the rear of the court now. Thank you. Now, as between Mr Mitchell and Ms Black, is there any preference as to the order in which you address?

BLACK, MS: No. It might be more useful for your Honour to hear from Mr Mitchell first only because he can probably respond to the matters you have just raised with Mr Allanson.

MARTIN CJ: Yes, and then you can go last, Ms Black.

BLACK, MS: I'm more than happy to go last, sir.

MARTIN CJ: Yes, all right. Mr Mitchell, thank you?

MITCHELL, MR: If it please the court, I might move down to where Mr Allanson was.

MARTIN CJ: Yes, that would be convenient. Thank you.

MITCHELL, MR: So that Mr Rossiter can hear me.

BLACK, MS: I'm just going to explain to Mr Rossiter who is appearing next.

MARTIN CJ: Yes. Thank you.

MITCHELL, MR: Thank you, your Honour. Your Honour, as the submission just made by the Right to Life Association perhaps illustrates, the circumstances of this case certainly raise fundamental moral and ethical issues about which there could be more than one reasonable view and testimony to that can also be found in what were several hundreds of pages of Hansard debates in relation to the Acts Amendment (Consent to Medical Treatment) Act of 2008.

The attorney-general submits that however difficult those moral and ethical issues are the common law has provided a clear and well-established answer to that question to the effect that an adult person of sound mind has the right to decide what medical treatment they will receive including the right to refuse that treatment even when it may be life saving. I won't take your Honour through the authorities.

MARTIN CJ: No.

MITCHELL, MR: We have referred to them in our written submissions. I would just make the point in relation to that that the 2008 Amendment Act proceeded on the basis that that was the law. The yet to be proclaimed but enacted provisions about advance health directives don't create a duty to follow such a directive beyond that which is contained in section 110S of the provision which, if your Honour has the Amendment Act, is at page 17 of my reprint or my print.

MARTIN CJ: Yes.

MITCHELL, MR: It provided:

The treatments decision in an advance health directive operates in respect of the treatment to which it applies at any time the maker of the directive is unable to make reasonable judgments in respect of that treatment and as if the treatment decision had been by the maker at that time and the maker were of full legal capacity.

MARTIN CJ: A provision that would be pointless unless there was power to direct.

MITCHELL, MR: Yes.

MARTIN CJ: So the legislature has proceeded on the assumption that the principle of self-determination prevails.

MITCHELL, MR: Yes.

MARTIN CJ: Yes.

MITCHELL, MR: And that of course was the same act that introduced subsection (2) into section 259 of the code.

MARTIN CJ: Yes.

MITCHELL, MR: Which has been proclaimed. We would say that even prior to that provision the obligations of the health care provider would not have been any different, and I will come to deal with section 262 in particular of the Criminal Code, but section 259 in establishing the criterion of reasonableness must be read against the background of that common law right of a patient to accept or refuse treatment, and so it will seldom be reasonable to impose treatment on an adult of sound mind in the face of their refusal to consent and it will never be other than reasonable to fail to provide treatment which the carer has no right to give.

The difficult cases which have come before the courts in the past of Bland's case and the others are situations where a person may be in a permanent vegetative state or have some other disability which prevents them from being able to exercise that choice in circumstances where perhaps there is no or little indication as to what that choice would have been.

That may be the case where the application of section 259(2) becomes more difficult. In a case like this we would submit there could be only one answer. That perhaps is the quick way of dealing with this case but, for the reasons we have set out in our written submissions, we would say that criminal liability wouldn't result in that event in any event. Can I turn then to section 262 of the Criminal Code.

MARTIN CJ: Yes, thank you.

MITCHELL, MR: We would draw a distinction between the existence of the duty and the content of that duty. Section 262 refers to an inability at two points: firstly, an inability by reason of age et cetera to withdraw himself from such a charge, and an inability to provide himself with the necessaries of life. To the extent that the existence of the duty depends on ability or inability, it can't matter whether that ability, if it exists, is exercised.

We would say that while Mr Rossiter consents to the provision of nutrition and hydration via the PEG tube, it would constitute a contravention of that duty imposed by section 262 for the care provider to withdraw that treatment.

MARTIN CJ: Because he would to that extent be within their charge.

MITCHELL, MR: Well, he may yes. So if the work - in your Honour's argument it would need to be the work done by a person having charge of another.

MARTIN CJ: But if the charge is limited to compliance with lawful directions, compliance - the only - - -

MITCHELL, MR: Yes.

MARTIN CJ: Provision of treatment for which there is lawful consent, then once there is no longer lawful consent that treatment no longer falls within the scope of their charge.

MITCHELL, MR: Yes. The concern I would have with that submission, if it were to lead to a conclusion that because of existence of the duty, can't depend on whether the ability is exercised to withdraw - - -

MARTIN CJ: Yes.

MITCHELL, MR: That there would be no duty arising in a situation where there was consent. It may be that the term in the opening words is the duty of a person having charge

of another that the charge in fact is withdrawn and in that way the section doesn't apply.

MARTIN CJ: Yes. That's the way I was inclined to look at it.

MITCHELL, MR: Yes.

MARTIN CJ: That the ambit of the charge - use another word - responsibility - - -

MITCHELL, MR: Yes.

MARTIN CJ: Is affected by the scope of the consent.

MITCHELL, MR: Yes. We would put it in - the same conclusion but at a different point; at the point when the duty exists how is it to be exercised, the section we would say can only impose a duty to undertake lawful actions to provide necessaries. If consent is refused by a competent adult then there is no lawful action which could be taken to provide with those necessaries. That appeared to be the approach which Lord Browne-Wilkinson took in Bland's case - and if I can take your Honour to that particular passage.

MARTIN CJ: Yes.

MITCHELL, MR: It's reported in 1993 appeal cases, beginning at 789 but the passage I wish to take your Honour to is at page 882.

MARTIN CJ: Yes.

MITCHELL, MR: Recognising that this is, of course, dealing with the common law rather than the Criminal Code, we would say that what his Lordship says here would be equally applicable to section 262. He says that about .7 on the page:

Any treatment given by a doctor to a patient which is invasive is unlawful unless done with the consent of the patient. It constitutes the crime of battery and the tort of trespass to the person. Thus in the case of an adult who is mentally competent the artificial feeding regime and attendant steps necessary would be unlawful unless the patient consented to it. A mentally competent patient can at any time put an end to life support systems by refusing his consent to their continuation. In the ordinary case of murder by positive act or commission, the consent of the victim is no defence but where the charge is one of murder by omission to do an act and the act omitted could only be done with the consent of the patient, refusal by the patient of consent to the doing of such act does indirectly provide a defence to the

charge of murder. The doctor cannot owe to the patient any duty to maintain his -

I think it's "life" but I have got a hole punch:

where that life can only be sustained by intrusive medical care to which a patient will not consent.

MARTIN CJ: While you have that there, I hope your photocopy extends to page 864 and Lord Goff's judgment.

MITCHELL, MR: I believe it does.

MARTIN CJ: Although Lord Browne-Wilkinson didn't refer to informed consent, Lord Goff does. You see in the middle of 864 his Lordship says:

On this basis it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued -

and his Lordship refers to the Canadian case of Nancy B. Do you have any submissions to put on the extent to which consent needs to be informed?

MITCHELL, MR: We would say that consent needs to be informed in that that is a condition of the permission being granted. It may be a different thing to say that a refusal to give consent must be informed.

MARTIN CJ: Let me put it this way: if there's an informed - I'm concerned that we not go beyond the precise circumstances of this case.

MITCHELL, MR: Yes.

MARTIN CJ: In this case we have an existing regime which involves the provision of life-sustaining treatment.

MITCHELL, MR: Yes.

MARTIN CJ: Do you have a submission to put on the question of whether or not before a direction to discontinue that treatment should be acted upon, there is a duty to provide information to a mentally competent patient?

MITCHELL, MR: In my submission, there would be such a duty arising out of the relationship of carer and provider. That being said, if the patient either refuses consent or withdraws consent, treatment can't be provided or continued until the consent is given.

MARTIN CJ: Yes.

MITCHELL, MR: But in the face of a refusal, then there would be a duty - - -

MARTIN CJ: To inform.

MITCHELL, MR: To inform.

MARTIN CJ: If that duty is complied with and there is a refusal, that's it? You don't inquire into the reasons for the refusal, whether they are ration or irrational?

MITCHELL, MR: If you start from the position that the person is of sound mind, then the rationality or irrationality doesn't matter.

MARTIN CJ: It doesn't matter, yes.

MITCHELL, MR: The only point at which rationality may be relevant is if it gives rise to a question about whether the person is of sound mind and capacity.

MARTIN CJ: Yes. You say on that subject - and I'm sorry for taking you off course, Mr Mitchell. You say on that subject that because of the exceptional nature of the jurisdiction that I'm exercising, I should be satisfied of all the facts, not rely on the presumption, but in this case there is evidence from each of Dr Benstead and Dr Zombor as to capacity.

MITCHELL, MR: Yes.

MARTIN CJ: You don't suggest that I shouldn't act on that evidence, do you?

MITCHELL, MR: No. We say firstly it's a matter for the court to be positively satisfied, given the exceptional nature, and it wouldn't be appropriate simply to rely on the presumption in the absence of evidence to the contrary. We would accept that there is material before your Honour which is capable of satisfying the court of that matter.

MARTIN CJ: Yes.

MITCHELL, MR: I say that particularly because of the neuropsychologist's report which goes into some detail, although - - -

MARTIN CJ: It is obviously a very thorough report, very thorough investigations, opinion given precisely on these issues.

MITCHELL, MR: Yes, and importantly at a time when Mr Rossiter was expressing the view that he wished to withdraw that consent.

MARTIN CJ: Yes.

MITCHELL, MR: We don't suggest that it necessarily makes an ultimate difference at the end of the day, but we do say it is an important point of principle that before - - -

MARTIN CJ: I understand that.

MITCHELL, MR: Otherwise, in relation to my learned friend's submissions, we should say that the - I think your Honour probably encapsulated better than I could what our argument was in relation to the issue of declarations and palliative care.

MARTIN CJ: Let me go to the palliative care issue. I was, as you would gather from my remarks, much assisted by your submissions on that subject, but the proposition that was put by Mr Allanson is that it would be of assistance if, for example, a declaration was made of what I think would be very limited effect and it would be perhaps along the lines that if palliative care was given on the terms specified in section 259(1) of the Criminal Code - in other words, all requirements of that section were met - then that section would apply so that a person providing that care would not be criminally responsible notwithstanding that the occasion for the provision of the care arose from a direction by Mr Rossiter to cease the provision of the treatment necessary to sustain his life. What would you say about a declaration in those terms?

MITCHELL, MR: We wouldn't have any great difficulty with it being made. It does seem a very broad declaration of very limited effect.

MARTIN CJ: All it is really saying is that you can come within the scope of the section if you bring yourself within the scope of the section. It's not terribly informative.

MITCHELL, MR: That does bring me to one technical matter - - -

MARTIN CJ: I think Mr Allanson would say the significance of it is that it provides the palliative care providers with the knowledge that the fact that this process comes about at the patient's initiative doesn't prevent them from relying on section 259(1), and to that extent it may have utility.

MITCHELL, MR: And that is the position which I have attempted to encapsulate in paragraph 1(b) of our written submissions.

MARTIN CJ: Yes.

MITCHELL, MR: Which are really just reflecting the language of section 259.

MARTIN CJ: Yes.

MITCHELL, MR: One perhaps overly technical matter but I feel I should raise it.

MARTIN CJ: Yes.

MITCHELL, MR: Simply because I once very much regretted not telling a court it was possibly exercising federal jurisdiction when I didn't think it mattered and lived to regret it.

MARTIN CJ: Yes.

MITCHELL, MR: My learned friend Ms Black raises a point which also perhaps emerges from Mr Rossiter's evidence, that he feels discriminated against because of his disability. My learned friend Ms Black puts it in terms of issues that may arise under both federal and state discrimination legislation and says it's not necessary to resolve that matter. We would agree with that proposition.

MARTIN CJ: Yes.

MITCHELL, MR: The only point I would make is that the making of that submission would appear to raise a matter under a Commonwealth act, if not under the constitution, to the extent that the submission would depend on interrelationship between federal anti-discrimination law and the state Criminal Code, but if that were the case then the jurisdiction in the matter may be federal and there may be a necessity to identify a matter, which a decision of the High Court in *Croome v Tasmania* would say in this court of case a declaration can be made in the circumstances.

MARTIN CJ: Yes.

MITCHELL, MR: But it may be relevant to the sorts of - - -

MARTIN CJ: Relief that could - - -

MITCHELL, MR: Relief that can be properly given.

MARTIN CJ: Yes. I'm grateful to you for that, Mr Mitchell. Thank you very much.

MITCHELL, MR: Otherwise I don't think I have anything further to add other than to emphasise that the law in our submission does draw a distinction between positive acts and withdrawing treatment where that treatment is refused and that nothing in our submission should be taken to suggest that any positive action taken to assist the person in ending their life would be a criminal offence.

MARTIN CJ: Yes. Thank you very much, Mr Mitchell.

MITCHELL, MR: If it please the court.

MARTIN CJ: Ms Black?

BLACK, MS: Thank you, sir. Given the public nature of the lead-up to this, sir, there is just one observation I wanted to make clear. It is not the application of Mr Rossiter today to ask the court to make an order allowing him to die. His application is for the court to make a declaration that will enable him to exercise the same power of choice that every citizen in this state also possesses; to make a choice as to whether or not he receives medical treatment.

As it doesn't appear to be in issue between any of the counsel the administering of nutrition and hydration through a PEG tube is medical treatment for all intents and purposes, so the only application that is being brought today is for the court to make a declaration that Brightwater nursing staff and its agents and servants are obliged to adhere to Mr Rossiter's wishes one way or the other.

Mr Rossiter wishes me to make it clear to the court that the effect of the declaration is not that he wants to go back to the nursing home today and immediately stop eating. He simply wants to be able to go home today with the knowledge that it is his choice if and when he may make that decision to no longer be fed nutrition and that is a choice he may make and change his mind.

MARTIN CJ: Quite, and I think that is why we need to fashion any declarations that I make with that very clearly in mind.

BLACK, MS: Indeed, and - - -

MARTIN CJ: Because any decision would not be irrevocable.

BLACK, MS: That is correct. What I wanted to say in that regard is that if your Honour has any concern that the terms of the declaration we seek would in any way cause an outcome other than what it is we intend today, then clearly we would be agreeable to amending the declaration to the extent it needed to be done.

MARTIN CJ: Yes.

BLACK, MS: But our position is that Mr Rossiter simply wants to have enshrined and enforced his right to make that choice. Mr Rossiter has also asked me if I can put this fairly and squarely before the court: what he really wants is to end his life as quickly as possible and as painlessly as possible. How that can be done in this state, it would appear, is by his consent or refusal of medical treatment and he is heartened by your Honour's observations with respect to the lawfulness of the continuation of pain relief and quite clearly we would take the view that seems to be consistent with the view your Honour is expressing, that as a patient's condition deteriorates the amount of pain relief required may well increase and that even if that has the effect of hastening the death, as long as the purpose of it was a reasonable one and for pain relief, then quite clearly it would seem that that is lawful.

MARTIN CJ: That is the area covered by section 259(1). Other than saying the section applies I would be disinclined to go there.

BLACK, MS: Yes.

MARTIN CJ: Because I just don't know what is involved and that issue I think is actually the trickiest issue in this case.

BLACK, MS: It is.

MARTIN CJ: I think the other issues are actually quite straightforward.

BLACK, MS: That's certainly our view and I can unhelpfully say we don't intend to take the issue about the criminal liability or otherwise of Brightwater any further in the sense that from Mr Rossiter's perspective all he seeks is the right to be able to make these choices.

MARTIN CJ: If I gave a limited declaration of the kind that I enunciated to Mr Mitchell, would that suit Mr Rossiter's purposes?

BLACK, MS: Perhaps if your Honour can indicate again what that was.

MARTIN CJ: Basically it would be a declaration to the effect that - and I scribbled a note of it which I will go back to. I could give a declaration in terms that any person providing palliative care to Mr Rossiter on the terms specified in section 259(1) would not be criminally responsible for providing that care notwithstanding that the occasion for its provision arose from Mr Rossiter's informed decision to discontinue the treatment necessary to sustain his life. In other words, what I would be doing is saying that Mr Rossiter would be in no different position to any other person approaching the end of their days - - -

BLACK, MS: Indeed.

MARTIN CJ: - - - in relation to the administration of palliative care.

BLACK, MS: Can I say firstly we would have no objection to that declaration, and secondly that your Honour has just made the very comment that I was about to make, which is that all that Mr Rossiter wants to do today is to have the court enforce the fact that as a matter of law he is in no different position to any other person who suffers from any condition.

As your Honour would be aware, if a cancer patient is told, "Without chemotherapy you will die," that person has the right to say, "I choose not to have chemotherapy." If a person has a gangrenous toe and is told without removing it they will die, even if it's an irrational decision they can say, "Well, I choose not to have it removed notwithstanding the consequences."

Your Honour raised the issue as to the extent to which Mr Rossiter needed to understand the impact and effect - - -

MARTIN CJ: Yes, I am glad you are coming to that because I was going to ask you about that.

BLACK, MS: Our position is that as a matter of law your Honour does not need to be satisfied that Mr Rossiter understands the process that would be involved in leading to his death. Your Honour need not be satisfied that Mr Rossiter understands precisely what would happen or in what order in terms of were he to stop eating, what would happen to his body.

We say that the authorities essentially support a position that the only relevant issue in that respect that your Honour must be first satisfied of is that Mr Rossiter has the capacity and understanding sufficient to refuse or consent to medical treatment. The issue was dealt with in the very recent decision of the New South Wales Supreme Court in the decision of Hunter and New England Area Health Service.

MARTIN CJ: Yes, I have read what McDougal J had to say on that but, with respect to his Honour, he was dealing with a very different case.

BLACK, MS: He was.

MARTIN CJ: He was dealing with an advance directive given by a person who lacked the capacity to receive any more information or make any decision at the time the court case was heard. It seems to me that there is an arguable basis for distinguishing this case from that. Firstly, Mr Rossiter is mentally competent, he has the capacity to receive and assimilate information, and what is proposed is a change to a regime that has been in place for quite some time under which Brightwater has assumed the responsibility of providing an ongoing care and maintenance regime.

It seems to me that in that circumstance, despite what McDougal J said, there may well be a duty on Brightwater to ensure that Mr Rossiter is provided with the basis for making an informed decision. What he does with that information I think is a matter for him.

BLACK, MS: Indeed.

MARTIN CJ: My tentative view is that there is a duty to ensure that information is provided and that the relief I grant - because of the uncertainty about whether or not that has been done, my tentative view is the relief that I grant should be conditioned upon that being achieved. Do you have any difficulty with that?

BLACK, MS: I don't as long as - I think the only observation I need to make is this: it's a question of how far that would have to go. If what your Honour is saying - - -

MARTIN CJ: Rogers v Whitaker.

BLACK, MS: - - - is that he needs to be given the information, then I think that's enough to fulfil the duty.

MARTIN CJ: By analogy to Rogers v Whitaker, an appropriately qualified doctor would have to go through all the implications of the course. In other words, it would be no different to a consent to treatment case.

BLACK, MS: Indeed, and if we are talking about the sort of situation before a person has an operation and the anaesthetist comes and says, "Look, these are the matters I must as a matter of law explain to you," then clearly we have no difficulty with that and in fact we would positively encourage Brightwater to do that.

I am sure from their own position and their own obviously very careful legal standpoint, I can't imagine a circumstance where they wouldn't obtain written consent or a written document indicating the refusal of consent which included, "I have had provided to me such information as I need to be able to make this decision." If that was all the court was saying, that there didn't need to be some inquiry as to Mr Rossiter's understanding of what he had then been told, then we would have no difficulty with that.

Quite clearly, sir, we rely upon our written submissions and I don't intend to take the court through all of those.

MARTIN CJ: I'm very grateful to you for them, Ms Black. They are very helpful.

BLACK, MS: Thank you, sir. I would just then make just some final summarising comments. Firstly, it is not so much that Mr Rossiter wants to die, but from my communications with him and the material provided, what is apparent is that Mr Rossiter does not wish to continue to endure the pain and agony of being kept alive and he finds himself in a position where of course one of the few things he remains in a position to control is the medical treatment that is given to him or not given to him. What he seeks from the court is his right to exercise that same right that every person in this state can exercise; to refuse or to consent to medical treatment.

As I've indicated, we concur with the state's view with respect to the effects of section 259 and the matters that your Honour has raised in that regard. If I can, just then to conclude, read from the concluding remarks that were made in my written submissions which really set out in summary form our position. The first is that, and, your Honour, it would appear it's not in dispute, Mr Rossiter does have a legal right to refuse the medical treatment referred to in the proposed declaration. His capacity to refuse such treatment is not in issue. The only reason why Mr Rossiter has been unable to effectively exercise that right that belongs to both him and every citizen is because he is not physically able to prevent such treatment.

In these circumstances, to grant Mr Rossiter the relief that is sought by him is not to force the court to make a determination as to the value of either his life or the life of any other person in our community. What your Honour would do if you granted Mr Rossiter's declaration is to affirm the fundamental right of an individual to self-determination and to decide for himself what medical treatment can be administered to him.

That the making of such a declaration will have the effect of hastening his death is a consequence of the decision that Mr Rossiter has made and has every right to make. If the declaration is made, it would not be a recognition by the court of his right to die. Whether the court should or can in fact recognise such a right is potentially a question for another day and another proceeding but it forms no part of these proceedings. Those are the submissions, sir.

MARTIN CJ: Thank you. Mr Mitchell, do you have any submissions in reply?

MITCHELL, MR: No, sir.

MARTIN CJ: Mr Allanson?

ALLANSON, MR: Nothing in reply, unless there's anything - - -

MARTIN CJ: No.

ALLANSON, MR: Perhaps the one matter, your Honour, is the formulation with regard to the declaration for palliative care. Even though your Honour has recognised the limitations of the declaration in those terms, it is still a declaration that would provide considerable assistance, and we would urge on you - - -

MARTIN CJ: Yes, very well. Well, what I propose to do is to adjourn for 10 minutes, which will give Mr Rossiter a

chance for a bit more of a break. I will come back and give my decision then. I might try and get closer to Mr Rossiter for the purpose of giving that decision.

BLACK, MS: Yes. I conveyed to Mr Rossiter during the break that your Honour had indicated you would be prepared to move down here.

MARTIN CJ: Yes.

BLACK, MS: Mr Rossiter would be very grateful for that as he is having some difficulties hearing.

MARTIN CJ: Very well. Well, I will come down and give my decision from where my associate is now sitting.

BLACK, MS: Thank you, sir.

MARTIN CJ: That will mean some unusual arrangements for going in and out of court, but that doesn't matter, and I would ask you to use the time to perhaps think about the precise terms of the relief, but anyway we can deal with that once I have given my reasons.

BLACK, MS: Thank you, sir.

MARTIN CJ: We'll adjourn for 10 minutes.