COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bentley v. Maplewood Seniors Care Society,* 2015 BCCA 91

Date: 20150303
Docket: CA041600

Between:

Margaret Anne Bentley,
by her Litigation Guardian Katherine Hammond,
John Bentley and Katherine Hammond

Appellants
(Petitioners)

And

Maplewood Seniors Care Society,
Fraser Health Authority and
Her Majesty The Queen in Right of the Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson

On appeal from: An order of the Supreme Court of British Columbia, dated February 3, 2014 (*Bentley v. Maplewood Seniors Care Society*, 2014 BCSC 165, Vancouver Docket No. S135854).

Counsel for the Appellants:	K.A.G. Bridge
Counsel for the Respondent, Maplewood Seniors Care Society:	D.A. Strebchuk
Counsel for the Respondent, Fraser Health Authority:	P.A. Washington
Counsel for the Intervenors, Euthanasia Prevention Coalition and Euthanasia Prevention Coalition – BC:	D.G. Cowper, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia February 11, 2015
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson

Summary:

Petitioners applied for declarations that would require the respondent Maplewood to cease providing food and water to Mrs. Bentley, a woman with advanced Alzheimer's disease. In 1991, Mrs. Bentley signed a "statement of wishes" in which she asked that she be allowed to die should she suffer from an extreme disability with no expectation of recovery and that she not be provided with nourishment or liquids. Petitioners subsequently discovered a later statement of wishes which contained different instructions and contemplated that she would be given food and water. Chambers judge held that the statements were unclear, that feeding Mrs. Bentley was "personal care" rather than "health care", and that the statutes relating to advance directives and representation agreements had not been complied with. In any event he found that she was capable of consenting, and was consenting to taking food and water.

On appeal, petitioners argue that chambers judge erred in failing to make a declaration that the "prompting" of Mrs. Bentley to eat or drink by holding food or water to her mouth constitutes battery, and in placing a reverse onus on them to prove lack of consent.

***Held: Appeal dismissed.** Chambers judge found expressly and implicitly that Mrs. Bentley is consenting to being given food and water by holding a spoon or glass to her lips. He did not use inappropriate "ex post facto" reasoning because the actual process of feeding Mrs. Bentley cannot be artificially differentiated from the act of placing the spoon or glass at her lips to see if she will eat or drink. Because Maplewood does not go further when she does not open her mouth, these actions are within the scope of her consent. Finally, the judge did not impose a burden on the petitioners to disprove consent but rather found that they had not rebutted the presumption of capacity to consent. The judge then found on all the facts that she was consenting. No error was shown in his analysis. These findings were also in accordance with the general principle in the legislation and case law that caregivers must give effect to patients' wishes in the 'here and now', regardless of prior directives.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Mrs. Margot Bentley is an 83-year-old woman who has been afflicted with Alzheimer's Disease since at least 1999. She is now in the seventh and final stage of that terrible disease, meeting the following criteria:

> All verbal abilities are lost over the course of this stage. Frequently there is no speech at all - only unintelligible utterances and rare emergence of seemingly forgotten words and phrases. Incontinent of urine, requires assistance toileting and feeding. Basic psychomotor skills, e.g., ability to walk, are lost with the progression of this stage. The brain appears to no longer be able to tell the body what to do. Generalized rigidity and developmental neurological reflexes are frequently present.

Mrs. Bentley sits slumped over in a chair or in bed most of the time, with eyes closed. She has not spoken since 2010 and does not appear to recognize anyone.

[2] In earlier years, Mrs. Bentley was a nurse. In that capacity, she had seen patients in "vegetative" states due to Alzheimer's Disease. She told her family she did not want that to happen to her, and indeed in 1991 she signed a document**,** witnessed by two persons**,** requesting that if the time came when there was "no reasonable expectation of my recovery from extreme physical or mental disability", she be "allowed to die and not be kept alive by artificial means or 'heroic measures'." She also requested "no electrical or mechanical resuscitation of my heart when it has stopped beating", "no nourishment or liquids", and that she be "euthanized" in the event she was unable to recognize members of her family due to mental deterioration. At the end of the directive, she named her husband or failing him, one of her daughters, to serve as her "proxy for the purpose of making medical decisions" on her behalf should she become unable to do so. (Para. 19.)

[3] Since 2009, Mrs. Bentley has been a patient at Maplewood House, a care facility run by the respondent Maplewood Seniors Care Society in Abbotsford. Members of the staff wake and dress her every day, ensure she is clean, place her in a chair or bed, and undress her and put her into bed every night. At mealtimes, the following occurs:

> Mrs. Bentley can no longer eat independently. The staff at Maplewood have been assisting her with eating and drinking by placing a spoon or glass on her lower lip. When she opens her mouth to accept nourishment or liquid, the care attendant places the nourishment or liquid in her mouth and Mrs. Bentley swallows it. When she keeps her mouth closed despite being prompted, the care attendant will try again. If she keeps her mouth closed despite a couple of attempts, the care attendant makes no attempt to force her to accept nourishment or liquid. [At para. 19.]

[4] Mrs. Bentley has a loving family who want to honour the wishes she expressed to them directly and in the 1991 document I have mentioned. To that end, they filed a petition in the Supreme Court of British Columbia in August 2013 seeking declaratory relief that would prohibit the respondents from giving Mrs. Bentley food and water, with the inevitable result that she would die within a few weeks. One of the declarations sought was that prompting her to eat by holding a spoon or glass to her mouth constitutes battery at common law. The chambers judge declined to make such a declaration, and this aspect of his order is the only subject of this appeal.

[5] Battery, however, did not play a prominent role either in counsel's arguments at trial or in the trial judgment. Instead the focus was on the veritable thicket of interrelated statutes and regulations which came into force in British Columbia in 2000, after lengthy consultation and discussion, to rationalize and clarify the rights of the elderly and others in long-term care. These statutes include the *Representation Agreement Act*, R.S.B.C. 1996, c. 405; the *Adult Guardianship Act,* R.S.B.C. 1996, c. 6; the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181 (the "*HCCCFA Act*"); the *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383; the *Community Care and Assisted Living Act*, S.B.C.

2002, c. 75 and regulations thereto; the *Continuing Care Act*, R.S.B.C. 1996, c. 70; and the *Health Authorities Act,* R.S.B.C. 1996, c. 180.

[6] It is important to explain briefly why, in this age of patient autonomy and bodily integrity, the chambers judge found that he was unable to grant any of the relief sought under these statutes. If nothing else, his analysis shows that persons who wish to make provision for their care and decision-making in their declining years should not only record their wishes clearly, but also obtain legal advice as to what exactly can be accomplished by so-called "living wills", representation agreements, advance directives and related appointments. The Legislature has prescribed extensive substantive and formal requirements relating to each of these in order to protect not only the person in care but also her caregivers. Assuming compliance with the *Charter*, it is not open to a court of law to suspend or ignore such requirements. (Although the petitioners pleaded a constitutional challenge to some of the laws mentioned above, they did not pursue that challenge in the court below or in this court.)

The Chambers Judge's Findings

[7] The chambers judge issued his reasons, indexed as 2014 BCSC 165, on February 3, 2014 after a hearing over three days in late 2013. What follows is a summary of his most important findings of fact and conclusions of law. The emphasis by underlining is mine.

- Mrs. Bentley is not "dying", but if nourishment and water were withdrawn, she would die from starvation or dehydration. (Para. 33.)

- In addition to the 1991 document I have mentioned, there was also in evidence a document found by Mr. Bentley in 2011, the contents of which are reproduced at para. 9 of the reasons. It was found <u>not</u> to be a forgery and to be an expression of Mrs. Bentley's wishes. It brought into question whether the 1991 document expressed her most recent wishes. (Para. 15.) In the second document, Mrs. Bentley stated that if she was in a state of severe physical illness with no reasonable prospect of recovery, she did not wish to be kept alive "by <u>artificial means</u> such as life-support systems, <u>tube feeding</u>, antibiotics, resuscitation or blood transfusions" and that "any treatment which has no benefit other than a mere prolongation of my existence" should be withheld or withdrawn.

- Most of the relevant legislation, including s. 3(1)(b) of the *Representation Agreement Act*, s. 3(1) of the *HCCCFA Act* and s. 3(1) of the *Adult Guardianship Act* provide that unless the contrary is shown, <u>every adult is presumed to be capable of making decisions about personal care and health care</u>. (Para. 53.) However, the chambers judge noted:

  > It is entirely possible that the decisions Mrs. Bentley predicted she would make for herself in the future through her "proxies" and as set out in her statements of wishes are different than the decisions she is currently making. <u>All adults are entitled to</u>

> change their mind subsequent to creating written instructions, which is one of the risks associated with written instructions for the future. This Court must consider the possibility that Mrs. Bentley's previously expressed wishes are not valid in the face of her current consent.
>
> It is clear from the provisions referred to above that the legislature expressly considered and precluded the possibility that a challenge to an adult's capability could be premised on her method of communicating. The fact that Mrs. Bentley could be communicating her decisions and preferences through non-verbal means, such as choosing when to accept and when to refuse food, does not mean that she is mentally incapable of making this decision.
>
> The petitioners state in their affidavits that they no longer see in Mrs. Bentley the active and creative person that they knew as their wife and mother. I appreciate that Alzheimer's disease has brought about many changes in Mrs. Bentley, including serious cognitive and physical disabilities. However, I agree with counsel for [Fraser Health Authority] who asserts that it is of fundamental importance to respect and care for the person that Mrs. Bentley is now. The evidence presented of Mrs. Bentley's limitations, for instance, that she no longer recognizes her family members, does not speak, and has very limited physical movements, helps inform me of her current condition. However, these limitations do not necessarily mean that she is incapable of making the decision to accept or refuse to eat and drink. [Paras. 54-6, emphasis added.]

- The judge rejected the evidence of Dr. Edelson, a general practitioner, and preferred the evidence of Dr. O'Connor, an expert in incapacity assessment, to find that the petitioners had not met the onus on them to rebut the presumption that Mrs. Bentley was "capable of making the decision to accept or refuse to eat and drink." (Para. 59.) The judge found it "significant" that Mrs. Bentley:

> … indicates preferences for certain flavours and eats different amounts at different times. The petitioner has not established that Mrs. Bentley's behaviour is a mere reflex and not communication through behaviour, which is the only means through which Mrs. Bentley can communicate. [Para. 59; emphasis added.]

- From the finding that Mrs. Bentley was "communicating her consent" by accepting food and water, it followed that the respondents were required to continue to "offer" her assistance with feeding in the form of prompting her with a spoon or glass." (Para. 60.)
- Although the case was decided on this basis, the judge went on to explain why the outcome would be no different even if he had found that Mrs. Bentley was incapable of making the decision to take food and water.
- After reviewing the parties' arguments with respect to various provisions in the *HCCCFA Act*, the judge found that "providing oral nutrition and hydration by prompting with a spoon or glass is not health care" within the meaning of the Act and is instead a form of personal care or basic care. (Para. 77) This meant that the "consent scheme" laid out in the Act did not apply. It did not mean, however, that the respondents could provide food and water without consent, since adults have a "common law right to consent or refuse consent to personal care

services." The judge then considered various ways in which "substitute decision-makers" could give or refuse consent on an adult's behalf. (Para. 84).

If Feeding Constitutes Health Care:

- Health care may be provided without consent in emergency circumstances, but they did not exist in this case;
- A personal guardian appointed by court order under the *Patients Property Act* may consent, but no personal guardian had been appointed in this case. (Para. 89.)
- A representation agreement is the only means by which an adult in this province may appoint someone else to make health care decisions for the adult if he or she has become incapable. The *Representation Agreement Act* contemplates a 'standard' set of decisions that may be made, as well as a broader set of decisions that may be specifically adopted, including the giving or refusal of consent to "health care necessary to preserve life." (Para. 100.)
- The 1991 document did not comply with the statutory requirements for such a directive, but "the greater problem relate[d] to the absence of clarity regarding the purported representatives' authority." (Para. 98.) In the Court's analysis:

> Although it would appear from the words purporting to appoint her husband, and alternately, her daughter, "to serve as my proxy for the purpose of making medical decisions on my behalf in the event that I become incompetent and unable to make such decisions for myself" that Mrs. Bentley intended her "representatives" to have authority to make health care decisions, it is not clear whether she intended them to have authority to make personal care decisions. Additionally, it is not clear whether Mrs. Bentley intended her "representatives" to have standard or broader powers, and therefore not clear whether they have the authority to refuse consent to health care necessary to preserve life.
>
> This uncertainty makes it inappropriate for the Court to exercise its power to hold that this document is a valid representation agreement despite its defects. The 1991 Statement of Wishes did not make Mr. Bentley or Ms. Hammond Mrs. Bentley's legal representatives within the meaning of the *Representation Agreement Act*. [Paras. 101-2; emphasis added.]

- Similar difficulties arose if one considered the 1991 document as an advance directive (a document that may provide the adult's own consent to health care) under the *HCCCFA Act*. In addition to the non-compliance of the document with the statutory requirements relating to execution, Mrs. Bentley's instructions were again unclear. In the chambers judge's words:

> Although the petitioner argues that Mrs. Bentley's refusal of consent is clear in the words "No nourishment or liquids", when the 1991 Statement of Wishes is taken as a whole, the instructions become much less clear. The document states that when "there is no reasonable expectation of my recovery from extreme physical or mental disability, I direct that I be allowed to die and not be kept alive by artificial means or "heroic measures"." It is not clear what relationship the items listed in A-E have with this preceding instruction. It is possible that the items listed are examples of what

> Mrs. Bentley considered "artificial" or "heroic", but it is also possible or that she did not want "artificial" or "heroic" methods of providing the listed items. It is quite unlikely that the listed items were meant to stand alone with no relationship to this preceding instruction because the preceding instruction outlines the triggering event.
>
> The most likely interpretation appears to be that Mrs. Bentley did not want artificial delivery of nourishment or liquids through measures like a feeding tube. I do not believe many people would consider eating with a spoon or drinking from a glass, even when done with assistance, "artificial". While "heroic measures" may be a commonly used expression, it does not communicate with any degree of clarity what a particular adult considers "heroic". As Ms. Duthie's Clinical Ethics Consult report states, there is consensus in the medical community that assistance with oral nutrition and hydration is neither artificial nor heroic.
>
> I find that the instruction "No nourishment or liquids", when read in the context of the 1991 Statement of Wishes, is so unclear that even if this document could be considered a valid advance directive, this instruction could not be taken as consent by operation of s. 19.8(1)(b). [Paras. 110-12.]

- Failing a personal guardian, representative, or instruction from an advance directive, s. 16 of the *HCCFSA Act* allows a health care provider to choose a "temporary substitute decision maker" to give or refuse consent to health care. Under this statute, Mr. Bentley would be the 'substitute'; however, under s. 18(2) he would have the authority to refuse to consent to health care "only if there is substantial agreement among the health care providers caring for the adult" that the refusal is "medically appropriate" and if the decision was made in accordance with s. 19(1) and (2). The majority of the health care providers in this case did not agree that ceasing to offer Mrs. Bentley assistance with eating would be medically appropriate. Thus, even if Mr. Bentley were a temporary substitute decision maker, he would not have the legal authority to "make a binding decision when her health care providers believe it is medically inappropriate." (Para. 120.)

If Feeding Constitutes Personal Care

- In the absence of any statutory authority outlining personal care rights and consent thereto, adults have a common law right to consent or refuse to consent to personal care services. (Para. 121.) Again, "substitute consent" must be sought by a court-appointed personal guardian or from a representative named in a representation agreement. For the reasons discussed earlier, neither of these alternatives was available.

- The chambers judge described the legal 'limbo' into which the case fell:

> If an adult has neither a personal guardian nor a representative who has authority to make personal care decisions, it is unclear who consent must be obtained from. An advance directive may not contain instructions relating to personal care; the scope of an advance directive is limited to health care (*HCCCFA Act*, s. 19.2(1)). There is no statutorily outlined substitute consent system for personal care like the temporary substitute decision maker system in the *HCCCFA Act* for health care.
>
> I am of the view that when an adult is incapable of making a personal care decision and

> has no personal guardian and no representative, the common law principles of personal autonomy and bodily integrity require that at minimum a service provider should consult with friends and family of the adult, who are best placed to know what the adult would have wanted, and with any written wishes the adult documented. [At paras. 123-4.]

- The respondents and petitioners had engaged in "extensive consultations" regarding Mrs. Bentley's wishes but were unable to agree. Given the lack of clarity in the two written documents, the Court declined to make a declaration that the 1991 document expressed a clear instruction to withdraw the assistance with feeding that Mrs. Bentley was receiving. (Para. 127.)

- Given the family's belief that Mrs. Bentley was incapable of making the decision to continue eating, the judge considered whether withdrawing food and water from someone who is not capable of making the decision herself was permitted by law. (Para. 128.) He answered this question in the negative, noting the statutory duty on the Fraser Health Authority to support and assist anyone who is unable to seek support and assistance because of a disease or other condition*: Adult Guardianship Act,* s. 44; *Residential Care Regulation*, B.C. Reg. 96/2009, ss. 66-7.

- Mrs. Bentley was clearly an adult who needed support and assistance and as such was in need of protection under the *Adult Guardianship Act*. After considering it and the *Residents' Bill of Rights* attached as a schedule to the *Community Care and Assisted Living Act*, the judge emphasized that assisting Mrs. Bentley with feeding is not a form of health care and that the 1991 document did not constitute "clear refusal to consent to providing nourishment by prompting with a spoon or glass." He could find no legislation which contemplated that "reference to previously expressed wishes or substitute decision makers could be relied on to refuse consent to personal care services on behalf of an adult that would lead to her death …". (Para. 144.)

- Section 9(3) of the *Representation Agreement Act* expressly provides that a "representative may give or refuse consent to health care necessary to preserve life". However, there is no equivalent statement that a representative could refuse consent to personal care necessary to preserve life. (Para. 144.) It followed that to withdraw the assistance Mrs. Bentley was receiving would amount to "neglect" within the meaning of the *Adult Guardianship Act* and that Fraser Health Authority would be obliged to respond appropriately if it became aware of any such neglect. (Para. 145.)

- The Court was not in a position to grant a declaration to the effect that adherence to Mrs. Bentley's wishes would constitute "lawful excuse" within the meaning of s. 215(2) of the *Criminal Code* to any person who might otherwise be obliged to provide the necessaries of

life to her.

[8] In the result, the chambers judge summarized his conclusions thus:

> 1. Mrs. Bentley is capable of making the decision to accept oral nutrition and hydration and is providing her consent through her behavior when she accepts nourishment and liquids;
> 2. The assistance with feeding that she is currently receiving must continue;
> 3. The provision of oral nutrition and hydration by prompting with a glass or spoon is a form of personal care, not health care within the meaning of the *HCCCFA Act*;
> 4. Neither the 1991 Statement of Wishes nor the Second Statement of Wishes constitute a valid representation agreement or advance directive;
> 5. Even if Mrs. Bentley was found incapable of making the decision to accept oral nutrition and hydration, I am not satisfied that the British Columbia legislature intended to allow reference to previously expressed wishes or substitute decision makers to be relied on to refuse basic personal care that is necessary to preserve life.
> 6. Withdrawing oral nutrition and hydration for an adult that is not capable of making that decision would constitute neglect within the meaning of the *Adult Guardianship Act*. [At para. 153; emphasis added.]

The petition was dismissed in its entirety.

On Appeal

[9] As already mentioned, Mrs. Bentley's family has not appealed the vast majority of the chambers judge's findings and conclusions. Indeed, their grounds of appeal relate only to the question of consent in relation to the common law tort of battery, which may be defined as any "non-trivial contact." (See *Non-Marine Underwriters, Lloyd's of London v. Scalera* 2000 SCC 24, at para. 16.) Consent is, of course, a defence to battery.

[10] The grounds of appeal are that:

> A. The learned Chambers Judge erred in law by failing to address whether [Mrs. Bentley] had consented to the process of "prodding" and "prompting" that precedes her being fed by Maplewood.
>
> B. The learned Chambers Judge erred in law by placing the onus on [Mrs. Bentley] to prove a "clear refusal of consent", rather than placing the onus on Maplewood to prove consent by [Mrs. Bentley] to being "prodded" and "prompted".
>
> C. The learned Chambers Judge erred in law by failing to find that, in the absence of consent to the process described above, a battery is committed by Maplewood when it prods and prompts [Mrs. Bentley].

I pause to note the argument of Fraser Health Authority that a claim for battery cannot as a procedural matter be brought by petition. Although this may be correct, it was not pressed in argument and need not now be considered.

[11] Obviously, at least the first and third grounds turn on whether Mrs. Bentley is consenting to being given food and water (and for that purpose, to being "prodded" (Mr. Bridge's word) or being "offered" (Mr. Strebchuk's word) food and drink when a spoon or glass is held to her lips. The petitioners assert that the judge made no finding that she does so consent.

[12] With respect, he did make this finding implicitly at various points in his reasons. At paras. 57-60, for example, he rejected Dr. Edelson's evidence that Mrs. Bentley does not function mentally, preferring Dr. O'Connor's opinion that she does have "the capacity to make this decision." The Court went on to discuss its express "finding" that Mrs. Bentley is "currently capable of making the decision to eat and drink and is communicating her consent through her behaviour …". (Para. 60; my emphasis.) As we have seen, the judge acknowledged that this conclusion effectively decided the case, but he went on to explain why, even if he had found Mrs. Bentley incapable of making the decision, the outcome of the petition would have been no different. (Para. 61.)

[13] The trial judge made the finding of consent again expressly at para. 153, where, as we have seen, he stated his first conclusion:

> Mrs. Bentley is capable of making the decision to accept oral nutrition and hydration and is providing her consent through her behavior when she accepts nourishment and liquids. [Emphasis added.]

[14] In these circumstances, I cannot agree that the chambers judge failed to address the question of Mrs. Bentley's consent to the "prompting" that precedes her being fed by her caregivers. He clearly found that she is consenting when she opens her mouth to receive food or water. In law, such consent is a complete defence to the very technical battery that might otherwise exist. This consent arises in the present, rather than in any previous written instruction, and as we have seen, Mrs. Bentley's previous written directives were not effective as a consent to the withdrawal of food and water.

[15] In his oral submissions, Mr. Bridge on behalf of the petitioners also contended that the judge should not have inferred Mrs. Bentley's consent to being prompted, from the fact that after being prompted, she eats or drinks until she is satiated, or chooses not to eat or drink at any particular time. Counsel described the Court's analysis as "*ex post facto*" reasoning.

[16] As Ms. Washington pointed out, however, prompting Mrs. Bentley to eat by presenting the spoon at her lips cannot be differentiated in such an artificial way from the actual process of placing food or water in her mouth. Ms. Washington emphasizes that if and when the time comes when Mrs. Bentley keeps her mouth closed (as she now does when visited by the dental hygienist) or her teeth clenched, the respondents would respect her decision and would not attempt to feed her by means of a feeding tube or any other "medical" means. Doing so would cross the line between personal care and health care and would raise a host of ethical and legal issues that need not be addressed here.

[17] The petitioners' second ground of appeal relates to onus of proof. The petitioners submit that the chambers judge placed the onus on them to prove a "clear refusal of consent" rather than placing the onus on the respondent Maplewood to prove the defence of consent. It is true the chambers judge gave effect to the statutory presumption contained in the *Representation Agreement Act* at s. 3(1)(b), the *HCCCFA Act* at s. 3(1) and the *Adult Guardianship Act* at s. 3(1) that unless the contrary is demonstrated, an adult is presumed to be capable of making decisions about personal and health care – a presumption inherent in tort law as well. I see no indication, however, that he placed an onus on the petitioners to prove that Mrs. Bentley had refused to consent to feeding. He carefully considered the evidence, and in particular the expert opinions, and found that the petitioners had not met the onus on them to rebut the presumption that Mrs. Bentley is capable of making the decision to accept or refuse to eat and drink. (Para. 59.) He then found on all the facts that she was consenting. I would not accede to this final ground of appeal.

[18] In closing, I emphasize again that the scope of this appeal was a narrow one and that none of the chambers judge's conclusions regarding the documents executed by Mrs. Bentley, the applicability of the various statutes to them, or the determination of her wishes was appealed. 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. It is a grave thing, however, to ask or instruct caregivers to stand by and watch a patient starve to death. 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. This is consistent with the principle of patient autonomy that is also reflected in the statutes referred to earlier (see especially s. 19.8 of the *HCCCFA Act*), and in many judicial decisions, including *Carter v. Canada (Attorney General)* 2015 SCC 5, where the Court emphasized that when assisted suicide is legalized, it must be conditional on the on the "clear consent" of the patient. (Para. 127.)

[19] I cannot say the trial judge in this case erred in inferring Mrs. Bentley's consent to being fed, or in rejecting the claim of battery. With thanks to all counsel for their helpful submissions, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Lowry"

I AGREE:

"The Honourable Mr. Justice Chiasson"