

CHRONOLOGY

- 1950s The Petitioner, Margot Bentley (“Margot”) graduated as a registered nurse and began working with patients, frequently including those suffering from Alzheimer’s Disease and other forms of dementia.
- 1960s-70s Margot often told her daughter, Danielle Tuck (“Danielle”) that she believes in an afterlife and is not afraid of dying.
- Nov. 24, 1991 Margot signed and had witnessed a document she referred to as her living will (defined in the Petition as her “Statement of Wishes”), which states that in her current condition, "I direct that I be allowed to die and not be kept alive by artificial means or 'heroic measures'" and which states "In particular ... no nourishment or liquids".
- Dec. 1999 Margot was diagnosed as being in the early stages of irreversible Alzheimer’s disease.
- Post-diagnosis Margot told Danielle that when she worked as a nurse, she had often seen people who were suffering from Alzheimer's disease and dementia, and that she did not want that happening to her.
- Post-diagnosis Margot discussed with her daughter, Katherine Hammond (“Katherine”) many times her fear of suffering a lingering death because of her Alzheimer's disease and degenerative dementia.
- Post-diagnosis Margot very frequently discussed with her husband, John Bentley (“John”) seeing, as a nurse, patients suffering from Alzheimer's disease and dementia, and frequently said, "Don't let it happen to me." John told her not to worry because she had made her living will and everything would be taken care of. Margot's typical response was, "I hope so, I hope so."
- To early 2000s Margot was an active, vibrant and creative person.
- 2010 Margot no longer recognized Danielle, Katherine, John or anyone else. Any communication became impossible.
- 2010 and following Margot does not speak and does not move except occasionally to rub her hand, arm or face. Her eyes are usually closed and she lies motionless in bed or slumped in a wheelchair. She is diapered.
- 2011 and following The Petitioners, John and Katherine, sought to have Margot’s wishes implemented by ceasing feeding. Margot does not indicate in any way, when food is brought to her, that she wishes to be fed. To feed her, Maplewood's personnel “prod” and "prompt" Margot with a spoon.

APPELLANTS' OPENING STATEMENT

The principal Appellant, Margot Bentley, is at the final stage (stage seven) of irreversible Alzheimer's disease. She has not indicated in any way that she recognizes her family or anyone else for at least three years. She does not speak. She does not move except occasionally to rub the back of her hand or her arm or face. Her eyes are closed most of the time and she lies motionless in bed or slumped in a wheelchair. She is diapered.

Margot Bentley does not indicate in any way, when food is brought to her, that she wishes to be fed.

When personnel employed by the Respondent, Maplewood, feed Margot Bentley, they "prod" or "prompt" her with a spoon to open her mouth, often repeatedly.

Margot Bentley did not consent to this procedure. Prodding her with a spoon is a battery.

The learned Chambers Judge erred in law by failing to find such prodding is a battery.

Instead, the learned Chambers Judge interpreted Margot Bentley's post-battery response (sometimes swallowing food that is placed in her mouth and sometimes not) as consent to being fed. The common law of battery does not support this approach to inferring consent to what is *prima facie* a battery.

In the absence of consent to the procedure that Maplewood is using, the learned Chambers Judge erred in law in failing to find that a battery is being committed, and that it must stop.

PART 1 – STATEMENT OF FACTS

1. Margot Bentley (“Margot”) was a nurse. She had seen the devastating effects of Alzheimer's disease and other forms of dementia. She made it very clear to her family, emphatically and repeatedly, that she did not want to exist in that state.

Petition Part 2, para. 22, 30 **Appeal Record ("AR") pp. 14, 16**

Affidavit #1 of John Bentley at para. 2, 12 to 14, 16, 17, 26 and Ex. E
Appellants' Appeal Book ("AAB") pp. 1, 3-5 and 15

Affidavit #1 of Katherine Hammond at para. 2, 9, 10 **AAB pp. 30, 32**

Affidavit #1 of Danielle Tuck at para. 7, 8 and 11 **AAB pp. 98-99**

Affidavit #2 of John Bentley at para. 19 **AAB p. 103**

2. Margot is at stage seven of seven, “Severe Dementia”, of the irreversible Alzheimer's disease with which she was diagnosed in 1999. The clinical characteristics of stage seven include the following:

“All verbal abilities are lost over the course of this stage. ... 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.”

Affidavit #1 of Dr. Andrew Edelson at para. 9-17 and Ex. B, ex. p. 3 **AAB pp. 22 - 23 and 29**

Affidavit #1 of Katherine Hammond at para. 11-14, 22-23, Ex. D, ex. p. 9 and Ex. L, ex. pp. 29-31 and 34 **AAB pp. 32-34, 53, 81-83, 86**

3. Since no later than 2010, Margot has not indicated in any way, when food is brought to her, that she wishes to eat.

Petition Part 2, para. 33 **AR p. 16**

Affidavit #1 of John Bentley at para. 2, 19, 20 **AAB pp. 1, 4**

Affidavit #1 of Dr. Andrew Edelson at para. 10 **AAB p. 22**

Affidavit #1 of Katherine Hammond at para. 2, 14 **AAB pp. 30, 33**

4. Margot is currently in a facility (the “Facility”) owned and operated by the Respondent, Maplewood Seniors Care Society (“Maplewood”). Maplewood is the employer of persons who work in and operate the Facility, and who are involved in Margot's presence in the Facility and the related matters described in the Petition. It is the actions of Maplewood's personnel which were the main focus of the hearing of the Petition, and which are primarily in issue on this appeal.

Petition Part 2, para. 4 – 6, 9, 15, 20 **AR pp. 12 - 14**

Response to Petition of Maplewood, Part 4, para. 1 **AR p. 68**

Affidavit #1 of John Bentley at para. 2, 19 **AAB pp. 1, 4**

Affidavit #1 of Katherine Hammond at para. 2 and 5 and Ex. A, ex. p. 5 **AAB pp. 30 - 31 and 46**

5. Despite the fact that when food is brought to her, Margot does not indicate in any way that she wishes to eat, Maplewood's personnel engage in an uninvited process of "prodding" and "prompting" Margot with a spoon or glass.

Affidavit #1 of Katherine Hammond at para. 39 and Ex. L, ex. p. 30 **AAB pp. 37 - 38 and 82**

Reasons, para. 29 - 32 and 87 **AR pp. 89 - 90 and 106**

6. There is no finding of fact by the learned Chambers Judge that Margot consented to this process of "prodding" and "prompting".

PART 2 – ERRORS IN JUDGMENT

7. It is submitted that the judgment appealed from contains the following errors:
 - A. The learned Chambers Judge erred in law by failing to address whether Margot 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 Margot to prove a "clear refusal of consent", rather than placing the onus on Maplewood to prove consent by Margot 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 Margot.

PART 3 – ARGUMENT

Right of Personal Autonomy

8. "Everyone has the right to decide what is to be done to one's own body."

Ciarlariello v. Schacter, [1993] 2 S.C.R. 119 at p. 135

9. "The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection."

Fleming v. Reid (1991), 82 D.L.R. (4th) 298 (Ont. C.A.) at p. 312e

10. Touching that is not consented to is battery.

Malette v. Shulman (1990), 67 D.L.R. (4th) 321 (Ont. C.A.), at para. 17

Fortey v. Canada (Attorney General) (1999), 63 B.C.L.R. (3d) 185, 1999 BCCA 314, at para. 40-41

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] S.C.R. 181, at para. 41 (S.C.C.) per: Abella, J., LeBel, Deschamps, and Charron, JJ. concurring, affirming 2007 MBCA 9

11. The learned Chambers Judge did not address or apply the relevant legal principles on this issue.

No Consent to being “Prodded” or “Prompted”

12. The learned Chambers Judge made no finding that Margot consented to being “prodded” or “prompted” by Maplewood’s personnel.

13. Such a finding would have been contrary to Margot’s repeated communications with her family that she does not want to exist in her present condition. Margot’s wishes

in that regard, which were expressed when she had capacity, remain valid and enforceable at common law notwithstanding her later incapacity.

Malette v. Shulman, *supra*, at para. 23-25

Fleming v. Reid, *supra*, at p. 316e

A.C. v. Manitoba (Director of Child and Family Services), *supra*, at para. 2 (Man C.A.); affirmed 2009 SCC 30, [2009] S.C.R. 181, at para. 39 to 45, 81 and 101 per: Abella, J., LeBel, Deschamps, and Charron, JJ. concurring

14. Despite the absence of consent by Margot to Maplewood's procedure of "prodding" and "prompting", the learned Chambers Judge did not address the legal significance of that lack of consent.

15. It is submitted, with respect, that the learned Chambers Judge erred in law through this approach. In the absence of a finding of fact that Margot consented to being "prodded" or "prompted", the learned Chambers Judge erred in failing to find that a battery was and is thereby committed.

16. The learned Chambers Judge cited no authority for the unstated proposition which is inherent in the Reasons. That proposition is to this effect: In the context of touching that is not consented to and which is contrary to a person's expressed wishes, consent may nevertheless be inferred *ex post facto* by interpretation of non-verbal reactions.

17. The Appellants are unaware of any authority for this proposition or approach.

Reversal of Onus

18. It is further submitted that the learned Chambers Judge erred in law by, in effect, reversing the onus on the issue of consent. The Reasons suggest (at para. 127) that there is a need to demonstrate a “clear instruction to withdraw the assistance with feeding” and (at para. 139) that there is a need for “clear refusal to consent to providing nourishment by prompting with a spoon or glass.”

Reasons, para. 127 and 139 **AR pp. 115 and 119**

19. The learned Chambers Judge cited no authority for the proposition that a person who is the victim of an alleged battery must prove a “clear refusal to consent” or anything of the kind. As a matter of common law, consent to the undisputed “prodding” and “prompting” that is taking place may be pleaded as a defence, and must be proved by the party that raises such a defence. There is no such proof here.

Conclusion

20. The learned Chambers Judge made no finding that Margot consented to being “prodded” or “prompted.”

21. In the absence of proof of consent, a battery was and is being committed through Maplewood's actions.

22. For these reasons, his Lordship erred in law in failing to find that the “prodding” and “prompting” of Margot constitutes battery.

PART 4 - ORDER REQUESTED

23. That the appeal be allowed and that the declarations requested in Part 1, paragraphs 1 to 6 of the Petition be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 10, 2014

Kieran A.G. Bridge
Counsel for the Appellants

LIST OF AUTHORITIES

	Page No.
1. <i>A.C. v. Manitoba (Director of Child and Family Services)</i> , 2007 MBCA 9; affirmed 2009 SCC 30, [2009] S.C.R. 181	_____
2. <i>Ciarlariello v. Schacter</i> , [1993] 2 S.C.R. 119	_____
3. <i>Fleming v. Reid</i> (1991), 82 D.L.R. (4th) 298 (Ont. C.A.)	_____
4. <i>Fortey v. Canada (Attorney General)</i> (1999), 63 B.C.L.R. (3d) 185, 1999 BCCA 314	_____
5. <i>Malette v. Shulman</i> (1990), 67 D.L.R. (4th) 321 (Ont. C.A.)	_____