Opinion

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EUTHANASIA BY OMISSION IN AUSTRALIA
WHAT THE PARLIAMENT DOES NOT ALLOW, THE COURTS ALLOW

By Dr John I Fleming

In a landmark decision on 29 May 2003, Morris J of the Supreme Court of the State of Victoria, Australia made the following ruling:

1. the provision of nutrition and hydration via a percutaneous endoscopic gastrostomy ("PEG") to BWV constitutes medical treatment within the meaning of the *Medical Treatment Act* 1988; and

2. the refusal of further nutrition and hydration, administered via a PEG, to BWV constitutes refusal of medical treatment, rather than refusal of palliative care, within the meaning of the *Medical Treatment Act* 1988.[1]

'BWV' is a Melbourne woman suffering from Pick's disease. According to representations made to the court BWV has been unable to move or communicate for three years. Medical experts who examined the woman said that she had no prospect for recovery, that there is no treatment available that would change the course of the disease although some symptoms might be alleviated depending on their severity and nature.[2]

Pick's disease is a type of frontal lobe dementia. The Alzheimer's Association has described it in these terms:

> The frontal lobe is the part of the brain that governs mood, behaviour, judgement and self-control. Damage leads to alterations in personality and behaviour, changes in the way a person feels and expresses emotion, and loss of judgement.
>
> Frontal lobe dementia causes progressive and irreversible decline in a person's abilities over a number of years.
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> Pick's disease is a type of frontal lobe dementia, named after the German neurologist who first described it in 1892. Pick's disease affects the frontal

[1] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 104

[2] ABC Online, www.abc.net.au/cgi-bin/common/printfriendly.pl?, 29 May 2003

> lobes, but in some cases can affect the temporal lobe of the brain. If the temporal lobe is damaged memory is more likely to be affected.[3]

Pick's disease causes an inevitably progressive deterioration in the brain. Life expectancy from onset is two to fifteen years with death usually being caused from another illness such as an infection.

In June of 2002 the husband (aged 70 years) called the Voluntary Euthanasia Society of Victoria (VESV) to seek counselling.[4] He was visited by a representative of VESV and they went to see BWV. The VESV representative advised the man to make an application to the Victorian Civil and Administrative Tribunal (VCAT) to be declared the woman's guardian so that he could order the feeding tubes to be removed. VCAT heard the matter in December 2002. Representations were made to the Tribunal by Right to Life Victoria, which argued that tube feeding is part of palliative care and therefore should not be withdrawn. In the event VCAT decided "to appoint the Public Advocate as guardian and it indicated the opinion that tube feeding constituted medical treatment and should be ceased."[5]

After seeking further medical and legal advice the Public Advocate sought a ruling from the Supreme Court.

VESV recognised that death from suffering and dehydration may take 7 to 14 days. They further recognised that, despite the opinion of "many palliative care specialists" that dying this way is pain free "provided there is expert palliative care", which might be true in patients "very close to death", it might not be the case for patients who were "not terminally ill". VESV concluded that

> It would be inhumane to contemplate the possibility of allowing unrecognized suffering to continue for such a period without complete relief.[6]

In short, VESV seems to be of the opinion that patients should be sedated if they are going to have their nutrition and hydration removed.

The matter came to the Supreme Court of Victoria and was heard by Morris J. Morris J summarised BWV's condition in his judgement:

> Although the brain stem of BWV continues to function normally, the medical evidence is that the damage to the cortex is irreparable. There is no prospect of any recovery, or improvement of any kind in BWV's condition.[7]

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[3] http://www.alzvic.asn.au/pdf/ad11.pdf

[4] *VESV Report*. Number 122 (May 2003), 1

[5] *Ibid.*

[6] *Ibid.*, 3

[7] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 7

What's the point of tube feeding?
According to the three medical witnesses "the provision of nutrition and hydration, via the PEG, is futile, in the sense that it has no prospect whatever of improving her condition."[8]

This evidence is intriguing.
The point of providing nutrition and hydration via the PEG is to provide sustenance and hydration to the patient who could not be fed and hydrated in any other way. Clearly this was not futile as the medical witnesses alleged. BWV was not dying of starvation and dehydration. Nutrition and hydration was not being provided to stall the inexorable progress of Pick's disease. Why then should it have been judged on criteria not relevant to its purpose? It is about as sensible as arguing for the withdrawal of morphine because it is not slowing the inexorable progress of cancer.

Morris J seems to have accepted this advice uncritically, almost as if the fact that it came from the medical profession was enough to insulate it from the kind of scrutiny that such a statement coming from mere mortals (ie laymen in terms of medicine) would certainly have invited.

How the starting point conditions the Judge's final decision
Having settled this crucial matter so easily, we can now see how it is that this first decision conditions the rest of the judgment. Feeding and hydration artificially delivered are to be judged not in terms of what such delivery is intended to do, sustain the body of a non-dying person (palliative care), but in terms of its ability to ameliorate, control or arrest a disease condition which its administration is not intended to achieve (medical treatment).

Given that this is Morris J's starting point, and it is, in my view mistaken notwithstanding the learned physicians upon which he relies to settle that starting point, it is not to be wondered that Morris J reaches the conclusions that he does. After all, his ultimate conclusion is to be found in this first decision which now acts as his operational premise.

So with that in mind Morris J now proceeds to consider the law, whether or not tube-feeding is "medical treatment" which can be withdrawn rather than "palliative care" which cannot be withdrawn under the *Medical Treatment Act* 1988 (*the Act*) (see especially ss 3, 4, and 5B).

And the *Medical Treatment Act* 1988 says this:
"medical treatment" means the carrying out of –

a) an operation; or
b) the administration of a drug or other like substance; or
c) any other medical procedure – but does not include palliative care.[9]

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[8] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 8

Morris J disposes of the first of the three criteria for defining "medical treatment" very quickly.

> It is clear that the administration of artificial nutrition and hydration in this case is not an operation.[10]

But is it a "medical procedure"? Morris J provides us with his "opinion" as to what the term "medical procedure" means:

> In my opinion, a medical procedure can generally be described as a procedure that is based upon the science of diagnosis, treatment or prevention of disease or injury, or of the relief of pain, suffering and discomfort.[11]

Having given us the benefit of his opinion (without any real attempt at justifying why that opinion is legally or in any other way correct) Morris J then says this:

> Unquestionably in my judgment the use of a PEG for artificial nutrition and hydration, or for that matter any form of artificial feeding, is a "medical" procedure.[12]

But the difficulty in Morris's reasoning is easy to identify. How does feeding (nutrition and hydration) meet the requirements of his own definition unless you accept that the Morris definition of "medical procedure" is limitless?

You don't need any "science of diagnosis" to know that people need to be fed and watered. There is no particular "science" involved in recognising that if people are not fed and watered they will starve and dehydrate. Hunger is not a disease or an injury. And it is really stretching the whole "medical" thing to say that the alleviation of the distress of hunger is somehow "medical".

Now having already accepted the alleged futility of tube feeding where BWV is concerned on the say so of expert medical witnesses, Morris J *says* that he is not willing to follow suit when it comes to "medical opinion as to whether or not the administration of nutrition and hydration through a PEG is, or is not, medical treatment in the context of *the Act*, because the expression 'medical treatment', when used in the Act, carries a special statutory meaning."[13]

Notwithstanding what he has just said, he *in fact* relies upon his medical experts to back up a judgment which is based upon a definition/opinion about what the words

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[9] Section 3, *Medical Treatment Act* 1988

[10] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 74

[11] *Ibid.*, at para 75

[12] *Ibid.*, at para 76

[13] *Ibid.*, at para 24

really mean statutorily. At paras 76 and 77 Morris J acknowledges that he has *in fact* relied upon the evidence given to the Court by Dr Woodward, Professor Ashby, and Professor Horne, that the use of a PEG is a "medical" procedure because of the way it has been put in place and because

> Artificial nutrition and hydration will inevitably require careful choice of and preparation of materials to be introduced into the body, close consideration to dosage rates, measures to prevent infection and regular cleaning of conduits.[14]

This is all very curious as a process of reasoning since the provision of food and fluids to any sick person, or really any person at all, if the person is to have a healthy diet, relies upon the same criteria.

- "Careful choice of materials to be introduced into the body" in the context means that we should choose carefully the foodstuffs that are apposite for health and well-being;

- "Close consideration to dosage rates" is what any good cook does when providing a balanced meal without "overfeeding" people and especially so when providing for children and the elderly;

- "Measures to prevent infection and regular cleaning of conduits" describes pretty well standard procedures in any kitchen so that the food is cooked in sanitary conditions, and the feeding implements provided are clean and infection free.

Here we have medicalising language to condition the interpretation of what is, in reality, the ordinary course of events in the provision of food and fluids. But what is so significant about feeding through the PEG that one can attach a special "medical treatment" tag to it? It matters not whether people are sustained by food carried by chopsticks, knife and fork, spoon, straw, or tube so much as that they are sustained. It may be that the process of attaching the PEG is a medical procedure, but it would not necessarily follow that the feeding is medical. By analogy, the creation of a tracheotomy may be a medical procedure, but the breathing which it allows is certainly not.

But the difference the judge thinks is important is that "medical" people as distinct from "lay people" carry out the task. He accepts that lay people can in fact do the necessary tasks at home, but this is not enough. No, what is different is that it has to be done "under regular medical and nursing supervision", and that the layperson can only get the skills "by drawing upon medical knowledge".[15]

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[14] *Ibid.*, at 76

[15] *Ibid.*, at para 77

Again, the reasoning here is curious. There are many things which experts once did that we all can do now. There are many medications which we can take either because we have self-diagnosed and the medications are available over the counter, or because the doctor prescribes the medication which we take under our own supervision. Equally, there are many ordinary things which go on in hospital under nursing or medical supervision such as feeding, diet, washing, exercise, and the like (and at times necessarily so when a person is sick) but which are not "medical" simply because they are done under "medical supervision".

The point here is that "medical and nursing supervision" is not a necessary or a sufficient condition for a procedure to be called "medical". In any case why does the judge go down this track at all since he says that notwithstanding the opinions of experts he is going to rely on the provisions of the law and whether or not PEG represents what he calls "prima facie medical treatment" under *the Act*?

When is a drug not a drug, and does it matter?

Morris J now turns his attention to the second part of the definition of "medical treatment", that which identifies as medical treatment "the administration of a drug or other like substance". Now the nutrition involved is Osmolite. Osmolite, says the judge,

> is quite different to most other *foods* in that it is intended to provide complete, balanced nutrition, without the need for *any other food* whatsoever.[16] [Emphasis added]

Having himself described Osmolite as *food*, Morris J moves by sleight of hand to reinterpret its real identity as "a drug or other like substance". He does this by again accepting the medicalising tendency of the medical profession and, this time, the pharmaceutical industry. Osmolite should be "fitted more closely into the category of a drug" because, he says,

a) it is referred to in 2002 MIMS Annual,
b) it contains a label which specifies that it should be used under the supervision of a physician, and
c) because Professor Horne said so.[17]

And why does Professor Horne say so? Because it is "formulated in concentrations that one would not normally expect in a food and would have consequences if it was administered in an inappropriately high or inappropriately low dosage."[18]

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[16] *Ibid.*, at para 78

[17] *Ibid.*,

[18] *Ibid.*

First, salt is referred to in MIMS as is charcoal together with a range of vitamins and minerals.[19] Are we seriously to believe that a mention in MIMS converts a food into a drug? Moreover the Dorlands Medical Dictionary defines "drug" as:

> Any chemical compound that may be used on or administered to humans or animals as an aid in the diagnosis, treatment, or prevention of disease or other abnormal condition, for the relief of pain or suffering, or to control or improve any physiologic or pathologic condition.[20]

Drugs are clearly for medical treatment, but 2002 MIMS Annual refers to Osmolite not as a drug but as *isotonic low residue liquid food*.[21] So, if reference in MIMS is what is important, then the correct conclusion to be drawn is that Osmolite is *food* not a *drug*. And MIMS also points out, "Osmolite is also appropriate as an oral feed for patients with altered taste perception"[22]. That is, Osmolite is a food which can be taken orally as well as by PEG. In any case Osmolite could never be used to treat BWV's medical condition, namely Pick's disease. What it can do is palliate one of the consequences of this disease, that is that BWV cannot receive food and drinks orally. And even if there is a crossover to "drug" in the use of Osmolite, the primary purpose of Osmolite is palliative which, under *the Act*, cannot be withdrawn. Put another way, the mere fact that one categorises a substance as a drug or like substance does not of itself mean that that substance may be counted as a drug for purposes of "medical treatment" within the meaning of the Act. Morris seems to indicate this when he says:

> Of course, that is not the end of the exercise: it is now necessary to consider whether the artificial nutrition and hydration in this case would also fall within the definition of "palliative care". This not only involves consideration of the words used in that definition, but also consideration of the extent of overlap between prima facie medical treatment and palliative care.[23]

I will return to this point later.

The second criterion that Morris J uses for justifying his conclusion that Osmolite is a drug meant to cure or alleviate BWV's medical condition is that it "contains a label which specifies that it should be used under the supervision of a physician". But morphine likewise requires the supervision of a physician from which it does not follow that *the Act* would condone its removal from a patient. Pain is just as much a by-product of a disease as the inability to swallow. But these symptoms *are not* the disease itself.

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[19] 1997 MIMS Annual, 21st Edition, 19-11181120, 1-3

[20] *Dorlands Illustrated Medical Dictionary 27th Edition*, WB Saunders Company, Philadelphia, 1988

[21] 2002 MIMS Annual, Twenty sixth Edition, June 2002, 19-1346

[22] *Ibid.*

[23] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 79

The third criterion is because Professor Horne says so on the basis that it is "formulated in concentrations that one would not normally expect in a food and would have consequences if it was administered in an inappropriately high or inappropriately low dosage." There are many artificially contrived foods which have high or low concentrations of certain components stretching from low fat items on the supermarket shelves to high protein foods used by athletes. Furthermore there would be consequences if these were used in inappropriately high or low dosages, just as one ought not to have too high a dosage of carrots!

What really is at stake here is not whether or not one can force a substance into one category or another, but the purpose for which the substance is being used. And Osmolite manifestly is not used to arrest, control, reverse, or ameliorate Pick's disease. On the contrary, its purpose is, in the case of BWV, to keep a non-dying person adequately sustained nutritionally with food and water. That the food and water have, in some sense, been *artificially* contrived does not make it medical anymore than GM foods are medical simply because they are human artefacts.

Morris J attempts to divine the intent of the parliament when it passed the Medical Treatment Act by reference to the speeches of a few key players. Space precludes a consideration of that argument except to say that Morris J makes an odd conclusion on the basis of that consideration.

> In my opinion the intent of parliament in excluding the provision of food and water from the concept of medical treatment was to ensure that the dying person would have food and water available for oral consumption, if the person wished to consume such food and water. It can hardly have been the parliament's intention that dying patients would be forced to consume food and water.[24]

When an unconscious person is provided with food and water artificially delivered one can hardly argue that they are "*being forced to consume food and water*", because *forcing* implies resistance. Why the use of such highly emotive and rhetorical expressions ("being forced") in what is meant to be an objective legal judgement? In fact what is happening is the provision of good palliative care as a compassionate response to someone at the edge of life. Interestingly the Judge now refers to Osmolite, not as a drug, but as "food and water". And what is clear about Parliament's intention is a prohibition on the removal of palliative care from a patient, and notwithstanding any opinion or belief of relatives.

Who gets to say what palliative care really is?

Morris J then goes on, contrary to the definition in *the Act,* to define palliative care as "not to treat or cure a patient, but to alleviate pain or suffering when a patient is dying." But *the Act* says this:-

"palliative care" includes-

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[24] Gardner; re BWV [2003] VSC 173 (29 May 2003), at para 85

a) the provision of reasonable medical procedures for the relief of pain, suffering and discomfort; or
b) the reasonable provision of food and water;[25]

Not only does this definition not define palliative care to exclude medical treatment, it positively requires that it be done. Moreover, nutrition and hydration reasonably and adequately provided ensures that the patient does not have the distress which starvation and dehydration undoubtedly bring. Moreover, BWV is not dying. That is precisely the reason why there is an application to remove the administration of nutrition and hydration, to get the patient dead much earlier than if they waited for the patient to die naturally of the underlying disease for which, in any case, there is no treatment.

The consequence of the BWV case is that tube-fed non-dying patients can, in the State of Victoria be legally and intentionally killed by starvation and dehydration. This is euthanasia by neglect of reasonable care. Rodney Syme of VESV seems to acknowledge this, that the removal of BWV's PEG "will lead to death by dehydration and starvation, possibly taking two to three weeks".[26] He regards BWV as hopelessly ill rather than terminally so at this stage. This "hopeless illness" is incurable and is causing intolerable and unrelieved suffering. He does not say who is suffering but it is certainly not BWV. He says that her situation fits the VESV official definition of euthanasia.

> An act taken by, or at the request of, a rational, informed person, whose intention is to be relieved of intolerable suffering, by hastening their dying in a dignified manner.

Chillingly Syme goes on to say:

> Appreciate that delivery of a lethal dose of sedative via her tube would allow her to depart peacefully and with more dignity than that possible with the accepted process, which allows death to occur over a period of weeks.

Morris J appears not to understand what Dr Syme understands very well, that his judgment is a pro-euthanasia judgment. The weak and the vulnerable in Australia will now sleep far less securely in their beds as a result of this case and the precedent it sets.

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[25] Section 3, *Medical Treatment Act* 1988

[26] See Rodney Syme, "Put heat on our MPs", *Herald Sun*, 30 May 2003