

**COURT OF APPEAL**

On appeal from the Order of the Honourable Justice Greyell,  
of the Supreme Court of British Columbia, pronounced February 3, 2013

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)

AND:

EUTHANASIA PREVENTION COALITION and  
EUTHANASIA PREVENTION COALITION - BC

INTERVENORS

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**FACTUM OF THE INTERVENORS, EUTHANASIA PREVENTION COALITION AND  
EUTHANASIA PREVENTION COALITION-BRITISH COLUMBIA**

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### **OPENING STATEMENT**

The Euthanasia Prevention Coalition (“EPC”) addresses the broader public interest implications that arise from the question of whether or not un-coerced oral spoon feeding and hydration of incapable patients represents battery as a matter of law.

This case raises fundamental questions about the provision of basic nutrition and hydration as basic necessities of life to individuals who are not communicative. It also raises issues with respect to the Health Care (Consent) and Care Facility (Admissions) Act, R.S.B.C. 1996 (Supp.), c. 181 (Hereinafter “HCCF”) and the application of advance directives to basic care.

Health care providers have an obligation to provide oral nutrition and hydration to patients who are incapable of making decisions on their own, regardless of previous declarations by the patient.

International law and practice support the findings made in the lower court below that oral feeding and hydration are not health care but rather basic activities of daily living and that the process of feeding people who require assistance to be fed is not battery.

**PART 1: STATEMENT OF FACTS**

1. The Appellants appeal the decision of Greyell J. (the “chambers judge”), dated February 3, 2013. They argue that the Respondents in feeding Mrs. Bentley are committing a battery and that Mrs. Bentley has not consented to the feeding/battery. The Respondents deny that the provision of nutrition and hydration by oral means constitutes battery, and reject that Mrs. Bentley consented to any battery in accepting spoon feeding or hydration.

2. EPC accepts the facts as set out by the Respondents in their materials and adopts and relies upon the findings of fact made by the chambers judge.

3. The chambers judge made a number of findings of fact regarding Mrs. Bentley and her un-coerced acceptance of food and drink. The Appellants attempt to differentiate the process of providing nutrition and hydration from the actual provision of nutrition and hydration. The chambers judge recognized that forced feeding could constitute battery in certain instances, but found that no such force or coercion were present in this case and rejected any claim to battery in these circumstances.

4. Upon a careful review of the evidence, and contrary to assertions made by the Appellants, the chambers judge found that Mrs. Bentley was capable of consenting to the feeding process by her actions, but that she required assistance in order to be fed. The chambers judge did contemplate and found that Mrs. Bentley consented to the process of being fed, and in any event was not subject to any act of forced or coerced feeding.

**Reference: Reasons of the Chambers Judge, ¶ 56, 59-60.**

5. The court found that oral spoon-feeding of nutrition and hydration is not medical treatment / healthcare. This is not subject to appeal before this court.

**Reference: Reasons of the Chambers Judge, ¶84**

6. The chambers judge found that Mrs. Bentley required assistance in order to receive nutrition and hydration, stating that:

Mrs. Bentley's advanced Alzheimer's disease makes her an adult who needs support and assistance. Mrs. Bentley is unable to feed herself because she is physically incapable of lifting a spoon or glass to her mouth. Her disability requires that she be assisted with prompting in order to receive adequate nutrition and hydration.

**Reference: Reasons of the Chambers Judge, ¶130**

7. The chambers judge recognized the problem that exists with respect to the cessation of nutrition and hydration to patients in Mrs. Bentley's position, noting that "... the right to refuse oral nutrition and hydration on behalf of an adult who is incapable of making that decision is not widely recognized at this time" and that there are "several substantive and procedural problems with such a decision being made on an adult's behalf, including the risk that she has changed her mind since expressing her wishes".

**Reference: Reasons of the Chambers Judge, ¶143**

8. The chambers judge found that requiring health care providers to withdraw assistance with oral nutrition and hydration from adults who need support and assistance leaves the health care providers vulnerable to criminal charges and civil liability. Further, it puts them in a position where they are being asked to deny their basic legal and moral obligations in respect of the provision of necessities of life. This finding is not subject to appeal before this court.

**Reference: Reasons of the Chambers Judge, 145, 152.**

9. The chambers judge concluded that Mrs. Bentley was capable of making a decision to accept oral nutrition and hydration and was consenting to being provided with nutrition and hydration. In addition, the chambers judge found that if Mrs. Bentley was incapable of making a decision whether to accept oral nutrition and/or hydration, then the withdrawal of such would constitute neglect within the meaning of the *Adult Guardianship Act*, and would require that actions be taken to rectify that neglect. Moreover, she found no evidence of coercion or forced feeding in this case.

**Reference: Reasons of the Chambers Judge, ¶ 145, 153.**

**PART 2: ISSUES ON APPEAL**

10. Whether the uncoerced provision of food and water to an adult unable to do so for herself constitutes battery at law.



**PART 3: ARGUMENT**

**A. The Spoon Feeding of patients who either consent to be fed or are incapable of consenting cannot be Battery.**

11. The chambers judge did not err in law in finding that Mrs. Bentley consented to the provision of oral nutrition and hydration and that, more importantly, the withdrawal of oral nutrition and hydration to an adult who lacked capacity would constitute neglect.

12. The chambers judge expressly found as a fact that:

a. Mrs. Bentley is able to differentiate between flavours and is more accepting of sweet foods over other foods;

**Reference: Reasons of the Chambers Judge, ¶ 49, 59.**

b. Mrs. Bentley was unable to feed herself and is unable to secure nourishment and/or hydration by her own independent efforts.

**Reference: Reasons of the Chambers Judge, ¶ 19.**

c. Mrs. Bentley is willing and capable of making the decision to accept or refuse food and drink which she does by refusing to open her mouth, her only means by which she can communicate;

**Reference: Reasons of the Chambers Judge, ¶ 59, 60.**

d. Mrs. Bentley's previous instruction was too unclear to be considered a valid advance directive as to her intentions; and that,

**Reference: Reasons of the Chambers Judge, ¶112**

e. Mrs. Bentley was not subject to coercion or force in the administration of food and drink orally.

**Reference: Reasons of the Chambers Judge, ¶59-60**

13. The Appellants do not appeal any findings of fact by the chambers judge (including on the applicability of the HCCF). They limit their appeal to the chambers judge's findings on the feeding procedure and whether it constitutes battery.

14. The chambers judge considered whether the Respondents' obligations to feed Mrs. Bentley constituted battery, finding that there was no battery, force or coercion.

**Reference: Reasons of the Chambers Judge, ¶ 59, 60, 145.**

15. Moreover, despite finding that Mrs. Bentley consented to being orally provided with nutrition and hydration, the chambers judge proceeded to consider the situation from the perspective of a patient who would not be capable of consenting.

16. While treatment without consent may constitute battery, consent vitiates alleged battery.

**Reference:** Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th edition (Markham: LexisNexis Canada, 2006), p. 80.

*Fortey v. Canada*, 1999 BCCA 314

*Battrum v. British Columbia*, 2009 BCSC 1276

17. In situations where a person lacks capacity to consent, battery is also negated where the incapacitated person requires food or drink or another service as a necessity of life and where deprivation would expose third parties to civil and criminal liability. This court in *Fortey v. Canada* acknowledged that even in the case of medical treatment there is an exception to be made in cases of alleged battery where the person is incapable of making a rational decision regarding that treatment. In fact, failure to provide treatment could result in a claim of negligence as occurred in *Fortey*.

**Reference:** *Fortey v. Canada*, 1999 BCCA 314, ¶42-44, 62-63

18. In *Fortey*, an intoxicated person was taken into custody by the police. When the police asked him if he wanted medical attention, he angrily refused. The trial judge ruled that the police should have known that because of his severe intoxication at the

time that the plaintiff was incapable of making a rational decision regarding medical treatment, and that as a result the police were negligent. The Court of Appeal dismissed the appeal

**Reference:** *Fortey v. Canada*, 1999 BCCA 314, ¶1-5, 69.

19. Lacking a clear, specific, and current refusal from Mrs. Bentley herself, the correct role of the health care provider is to assist her in living her life, including providing her with nutrition and hydration. As a result, if Mrs. Bentley were unable to consent to the provision of oral nutrition and hydration because of her Alzheimer's, then the health care providers would not be committing a battery in assisting her to eat and drink. To the contrary, they have an obligation to assist her by providing her with the basic necessities of life, including aiding her by providing oral nutrition and hydration. Indeed, even if such an advance directive could be applicable in the circumstances as a binding health care wish, it would only be applicable where it is sufficiently clear and specific to Mrs. Bentley's circumstances at that particular time.

**Reference:** *Scardoni v. Hawryluck*, 2004 CanLII 34326, ¶54-55.

**B. Health Care Providers have an obligation to provide oral nutrition and hydration to patients who are incapable of making decisions on their own, regardless of previous declarations by the patient.**

20. This common law exception to battery is further reinforced by the obligations imposed on health care providers. The appellants' interpretation of the law of battery would place the health care providers involved in the absurd situation where they risk being sued for battery if they do feed Mrs. Bentley, but risk the possibility of criminal charges and administrative charges of neglect being levied against them if they don't feed her.

21. By withholding or withdrawing oral nutrition and hydration, health care providers would be failing to provide a basic necessity of life. In doing so, they would be hastening the patient's death by dehydration and starvation.

22. A finding that the provision of nutrition and/or hydration to Mrs. Bentley is a battery would put her health care providers in an untenable moral conflict by failing to provide a basic necessity of life to a patient. University of Virginia Biomedical Ethics Professor Lois Shepherd writes that hand feeding is one area in which advance directives should not be honoured. She states that asking this from health care providers is inherently unreasonable in that it asks people to deny their basic impulses to treat others humanely for unjustifiable reasons. With respect to oral feeding, she asks a simple question:

....how can doctors and nurses, or anyone, be asked to refrain from providing food and water to individuals who presently want it, who would experience the provision of food and water as pleasurable and as a form of care, and who would die without it? I do not think they can be asked to do this.

**Reference:** Lois Shepherd, "Asking Too Much: Autonomy and Responsibility at the End of Life", (2009) 26 J. Contemporary Health Law & Policy 72, page 77, 81.

23. Moreover, the Respondents have a statutory obligation to provide assistance pursuant to the Adult Guardianship Act and other statutory instruments, as detailed by the chambers judge – and the withdrawal of oral nutrition and/or hydration of a person who is incapable of deciding for themselves would be in breach of those provisions. This is particularly so where the administration of food and drink is unforced and uncoerced.

**Reference:** Reasons of the Chambers Judge, ¶ 129-145.

24. In addition to the ethical and administrative obligation, the Canadian Criminal Code requires that anyone who has a legal duty, such as the health care providers herein, provide the necessities of life to a person under their charge if that person is unable to do so. Failure to do so can result in criminal culpability, a fact that the chambers judge was alive to.

**Reference:** *Criminal Code*, R.S.C. 1985, c. C-46, s. 215.

Reasons of the Chambers Judge, ¶146-152

25. Any finding that would require health care providers to cease to provide the basic necessities of life, including oral nutrition and hydration, or consider the undertaking of that obligation as an assault or battery, is simply not tenable as a matter of law or morality. It would place health care providers in a moral quagmire and expose them to criminal and civil culpability.

26. This fact is supported by international practices and policies that question the applicability of advance directives with respect to oral nutrition and hydration and address the feeding process in meeting that basic obligation.

27. The United Kingdom General Medical Council (“GMC”) report entitled “Treatment and care towards the end of life: good practice in decision making” clearly endorses this view of oral nutrition. The GMC stipulates that “all patients are entitled to food and drink of adequate quantity and quality and to the help they need to eat and drink.”

**Reference:** General Medical Council, “Treatment and care towards the end of life: good practice in decision making”, online: General Medical Council <[http://www.gmcuk.org/Treatment\\_and\\_care\\_towards\\_the\\_end\\_of\\_life\\_\\_\\_English\\_0513.pdf\\_48902105.pdf](http://www.gmcuk.org/Treatment_and_care_towards_the_end_of_life___English_0513.pdf_48902105.pdf)>, ¶109.

28. A footnote in the GMC report further emphasizes that the providing of food and drink by mouth constitutes basic care, and is akin to the offer of hygiene and pain relief, and must be offered to patients so long as the patient is able to swallow without risk. It also asserts that an advance refusal of food and drink is of no force or effect.

The offer of food and drink by mouth is part of basic care (as is the offer of washing and pain relief) and must always be offered to patients who are able to swallow without serious risk of choking or aspirating food or drink. Food and drink can be refused by patients at the time it is offered, but an advance refusal of food and drink has no force.

**Reference:** General Medical Council, “Treatment and care towards the end of life: good practice in decision making”, online: General Medical Council <[http://www.gmcuk.org/Treatment\\_and\\_care\\_towards\\_the\\_end\\_of\\_life\\_\\_\\_English\\_0513.pdf\\_48902105.pdf](http://www.gmcuk.org/Treatment_and_care_towards_the_end_of_life___English_0513.pdf_48902105.pdf)>, fn. 31.

29. This is comparable to the United Nations' Convention on the Rights of Persons with Disabilities, Article 25, wherein the United Nations specifically states that parties to the Convention shall "prevent discriminatory denial of health care or health services or food and fluids on the basis of disability".

**Reference:** United Nations, "Convention on the Rights of Persons with Disabilities"

30. Queensland Health sets out various rules regarding end-of-life care. The Queensland policy provides that it is only artificial feeding that, constituting a 'life-sustaining measure', can be withdrawn or withheld pursuant to an advance health directive and as such, an advance directive would not apply to oral feeding. Spoon feeding of nutrition is viewed as distinct from artificial feeding.

**Reference:** Queensland Health (Australia), "Withholding and Withdrawing life-sustaining measures from adult patients Implementation Guideline 1", 2010, ¶¶2.2, 3.2, 5.4.

31. The Scottish Council on Human Bioethics (the "SCHB"), a Scottish non-profit organization made up of doctors, lawyers, psychologists, ethicists and other professionals from disciplines associated with medical ethics, has prepared a position statement wherein it stated its position that:

32. The benefit of receiving nutrition and hydration cannot be assimilated to a treatment since they are the essential elements required to stay alive. Thus nutrition and hydration should be given to all patients, except in the last stages of a terminal illness if the burden of the intervention outweighs its benefit and the intention is to relieve suffering rather than to hasten death.

**Reference:** Scottish Council on Human Bioethics "Position statement regarding Withdrawing or withholding of nutrition and/or hydration" online: Scottish Council on Human Bioethics  
<[http://www.schb.org.uk/downloads/publications/position\\_04\\_withholding\\_nutrition.pdf](http://www.schb.org.uk/downloads/publications/position_04_withholding_nutrition.pdf)>

33. With respect to advance directives, the SCHB notes that advance directives do not generally include basic care – which it defines as “procedures or medications which are solely or primarily aimed at providing comfort to a patient or alleviating that person’s pain, symptoms or distress. It includes the offer of oral nutrition and hydration”, and considers this as basic comfort care and not medical treatment or healthcare.

**Reference:** Scottish Council on Human Bioethics “Position statement regarding Withdrawing or withholding of nutrition and/or hydration” online: Scottish Council on Human Bioethics

<[http://www.schb.org.uk/downloads/publications/position\\_04\\_withholding\\_nutrition.pdf](http://www.schb.org.uk/downloads/publications/position_04_withholding_nutrition.pdf)>

34. As demonstrated by the survey of applicable international policies and practices there is no controversy with respect to the position that oral feeding constitutes a basic activity of daily living that is excluded from the purview of advance directives.

35. There are significant problems that would occur if advance directives with respect to eating and drinking were recognized – including the question of how to know if the patient changed their mind? Therefore, even if the Appellants are correct in their assertion regarding Mrs. Bentley’s previous instructions, they are of no force and effect in these circumstances.

36. There is also no controversy that health care providers have an ethical and legal duty to provide their patients with oral nutrition and hydration. Patients who are incapable of expressing their current desires must be provided with nutrition and hydration by oral means. Failure to do so is an assault on their basic dignity and humanity and can leave health care providers open to charges of neglect, charges under the Criminal Code and negligence claims. Deprivation of basic food and water to incapable patients would ultimately promote the abuse of seniors and persons with disabilities in a manner that is untenable by any reasonable legal standard in Canada.

37. The Respondents have both a legal and a moral obligation to provide nutrition and/or hydration to their patients. The appellant’s argument that the procedure applied to feed Mrs. Bentley (what they describe as “prodded” or “prompted”) constitutes battery

is incorrect in law, ignores the trial judge's findings of fact, and would result in an absurdity in terms of health care professionals being unable to comply with their professional obligations out of a fear of running afoul of tort law.



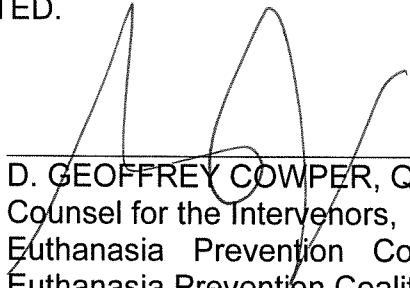
**PART 4: NATURE OF ORDER SOUGHT**

38. EPC asks that the Appeal be dismissed.

39. EPC does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 23, 2015



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## LIST OF AUTHORITIES

<b><u>LEGISLATION</u></b>	<b><u>PARA(s)</u></b>
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