



## In the Witness Box

with Bruce Leishman

### What do you do?

Lawyer, Minter Ellison. I was previously Associate to Justice Michael Kirby at the High Court.

### What book are you reading?

*Any Human Heart* by William Boyd.

### Who would be your ideal housemate?

Somebody who isn't at home very often.

### What's your favourite movie?

Manhattan Murder Mystery and Election.

### What was your least favourite law subject?

One of those mindless procedure subjects.

### And your favourite law subject?

Jurisprudence.

### Who do you admire in the legal profession?

People who work for the rights of minorities.

### If you weren't a lawyer, what would you be doing?

Something uber-glam and transatlantic for LVMH (or so I like to think).

# PEG Feeding: Medical treatment, not palliative care

**By Dominique Saunders, Special Counsel - Russell Kennedy,  
Chair - Administrative Law and Human Rights Section LIV and  
Jennifer Holdstock, Russell Kennedy**

A recent decision<sup>1</sup> of the Victorian Civil and Administrative Tribunal ("the Tribunal") has sparked much public interest. The matter heard by the Tribunal concerned a guardianship application for a woman diagnosed with Pick's disease (a form of progressive dementia) and unable to make medical treatment decisions for herself. She has reached the terminal stage of the disease and it was put forward in medical evidence that she has no cognitive capacity, and no prospect of any recovery. The woman's husband had asked to be appointed his wife's guardian so that on her behalf he could refuse the artificial nutrition and hydration that she receives. The Tribunal came to the view that when the whole regime is considered, artificial nutrition and hydration is 'medical treatment'. In coming to its determination the Tribunal commented:

*"We are careful to draw a distinction between cases where, in medical terms, treatment is futile so that discontinuation of the treatment may be justified and cases where discontinuation may not be justified because the treatment has the purpose of providing a medical benefit to the patient - that is the medical treatment has a medical purpose (for instance, a diagnostic or curative purpose). In all cases an accurate diagnosis is essential and any consideration of further treatment will depend on the prognosis for the conditions being treated in any individual patient."*<sup>2</sup>

The significance of the decision is important in terms of the statutory interpretation of the *Medical Treatment Act 1988* (Vic) ("the Act") definitions of 'palliative care' and 'medical treatment'. The Tribunal determined that artificial means of nutrition and hydration, provided by means of a percutaneous endoscopic gastronomy tube, is medical treatment, rather than palliative care. Palliative care is defined in s3 of the Act as including the provision of reasonable medical procedures for

the relief of pain, suffering and discomfort, or the reasonable provision of food and water. The Tribunal interpreted the medically assisted or artificial means of nutrition and hydration as being outside the scope of the reasonable provision of food and water. They accepted the submissions put forward by the Office of the Public Advocate that: *"the provision of food and water cannot be said to be reasonable when it is provided to a person who is dying, not for the primary purpose of palliation, but with the aim of deferring or suspending the process of dying"*.<sup>3</sup>

The Tribunal was satisfied, after hearing evidence from the family, that there were reasonable grounds for believing that the patient would consider the medical treatment to be unwarranted.

The Tribunal emphasised that: "the question is never whether the patient's life is worthwhile but whether the treatment is worthwhile"<sup>4</sup>.

Right to Life Australia Inc were allowed to file submissions in relation to these proceedings and put forward the view that it was in the broad public interest that the Tribunal find that the removal of nutrition and hydration would amount to criminal behaviour. The Tribunal appointed the Public Advocate as guardian and clarified that its decision does not mean that the guardian must take any action. Rather, its decision allowed for the appointment of a guardian and empowered the guardian to make decisions in the best interests of the patient. Any action that the Public Advocate may take in relation to the refusal of medical treatment remains to be seen. ■

<sup>1</sup> BWV [2003] VCAT 121.

<sup>2</sup> para 17 of Summary of Decision.

<sup>3</sup> para 12 of Summary of Decision.

<sup>4</sup> para 21 of Summary of Decision.