

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2021-019-000734
[2021] NZFC 12436**

IN THE MATTER OF	THE SUBSTANCE ADDICTION (COMPULSORY ASSESSMENT AND TREATMENT) ACT 2017
BETWEEN	CANTERBURY DISTRICT HEALTH BOARD Applicant
AND	[LL] Respondent

Hearing: 7 December 2021

Appearances: A Bailey for the Patient
Dr F Todd – Responsible Clinician

Judgment: 9 December 2021

RESERVED JUDGMENT OF JUDGE J K HAMBLETON

[1] Dr Fraser Todd, responsible clinician for [LL], has applied pursuant to s 46(1) of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 for an order pursuant to s 46 extending her treatment period by a further 56 days.

[2] [LL], represented by Mr Andrew Bailey, opposes the order being made.

Background

[3] On 4 October 2021, Dr Garilov issued a compulsory treatment certificate under the Act in respect of [LL], who was detained for treatment at the Waikato Hospital. His Honour Judge Twaddle reviewed the certificate on 12 October. After interviewing [LL] and then hearing evidence from other parties, he determined the criteria for compulsory treatment were met and continued [LL]'s compulsory status by making a compulsory treatment order under the Act.

[4] [LL] has been a patient at the Nova Star facility since then.

[5] The findings made by His Honour Judge Twaddle were set out at paragraph [21] of his decision and were that:

- (a) [LL] has a longstanding severe alcohol abuse disorder. She has habitually consumed large amounts of alcohol, craves for alcohol and cannot do without it. All attempts at controlling her use of alcohol in the past have been unsuccessful, and her use of alcohol has continued despite her suffering harmful consequences (liver damage, neurological damage including weakness in her legs, tremors, cognitive impairment).
- (b) [LL]'s alcohol addiction poses a serious danger to her health or safety in that it has caused liver and neurological damage, prevents her from caring for herself adequately, exposes her to family violence and to the risk of setting fire to her home.
- (c) [LL]'s alcohol consumption has affected her memory. She is not able to weigh up information as part of a decision-making process, lacks insight into the severity of her condition, and lacks ability to make sound decisions about her need for treatment, voluntary treatment is most unlikely to be effective in addressing her alcohol addiction. She had had the opportunity of voluntary engagement with CADS but had not taken up those opportunities. A warrant was required to get her to hospital for the purposes of that first application. Compulsory treatment is a last resort but, at this stage, had been reached where it was the only option and the proposed treatment plan was appropriate.

The Law

[6] Paragraph 46 of the Act provides that:

46 Application for extension of compulsory treatment order

- (1) If, after completing the review of the patient under [section 45](#), the responsible clinician considers that the criteria for compulsory treatment continue to be met and that there are reasonable grounds to believe that the patient suffers from a brain injury, the responsible clinician may apply to the court to extend the compulsory treatment order.

[7] Section 47 of the Act provides the Court's power to extend the order and it may do so if satisfied that in relation to the patient the criteria for compulsory treatment continue to be met and there are reasonable grounds to believe that the patient suffers from a brain injury.

[8] The s 47 criteria refer back to earlier provisions of the Act, namely ss 7, 8, 9 and 10.

[9] Section 7 sets out the criteria for compulsory treatment and reads as follows:

7 Criteria for compulsory treatment

A person may be subject to compulsory treatment under this Act only if—

- (a) the person has a severe substance addiction; and
- (b) the person's capacity to make informed decisions about treatment for that addiction is severely impaired; and
- (c) compulsory treatment of the person is necessary; and
- (d) appropriate treatment for the person is available.

[10] Section 8 defines the meaning of the substance of a severe substance addiction:

8 Meaning of severe substance addiction

- (1) A severe substance addiction is a continuous or an intermittent condition of a person that—
 - (a) manifests itself in the compulsive use of a substance and is characterised by at least 2 of the features listed in subsection (2); and
 - (b) is of such severity that it poses a serious danger to the health or safety of the person and seriously diminishes the person's ability to care for himself or herself.

- (2) The features are—
 - (a) neuro-adaptation to the substance;
 - (b) craving for the substance;
 - (c) unsuccessful efforts to control the use of the substance;
 - (d) use of the substance despite suffering harmful consequences.

[11] Section 9 sets out the definition of capacity for this legislation which is as follows:

9 Capacity to make informed decisions

For the purposes of section 7(b), a person’s capacity to make informed decisions about treatment for a severe substance addiction is severely impaired if the person is unable to—

- (a) understand the information relevant to the decisions; or
- (b) retain that information; or
- (c) use or weigh that information as part of the process of making the decisions; or
- (d) communicate the decisions.

[12] Section 10 records that compulsory treatment is to be the option of as last resort.

[13] Section 47 also refers to a brain injury which is defined in s 4 of the Act as meaning an “acquired enduring neurocognitive impairment”.

Discussion

[14] Mr Bailey explained at the commencement of the hearing that his instructions were to challenge:

- (a) The determination that [LL]’s capacity to make informed decisions about treatment for her addiction is severely impaired;
- (b) Whether there was a need for treatment;
- (c) Whether the appropriate treatment is available; and
- (d) That she had a brain injury.

[15] The only aspect of the criteria not challenged by [LL] is that she has a severe substance addiction.

[16] Mr Bailey's cross-examination of the medical report and evidence given by Dr Todd focused primarily on the issue of capacity.

[17] Dr Todd's evidence was that [LL] had been tested in two ways in relation to capacity. The first was a routine test which he described as examining superficial understanding. Dr Todd referred to it as a tool rather than an assessment. The second test referred to by Dr Todd as a BEAT test was done to assess frontal lobe executive function. Dr Todd said that the frontal lobe is the most affected by alcohol abuse and yet it is that area that helps people execute decision-making functions.

[18] Dr Todd's said that the BEAT test in combination with clinical interview provided him with a comprehensive assessment of [LL]'s capacity.

[19] In the BEAT assessment administered on 5 November 2021, [LL] scored strongly in a number of areas but where she scored poorly was in the areas of working memory, incidental memory and prospective memory. Dr Todd explained that working memory allows a person to hold information in place, incidental memory allows you to transfer information and understanding to other situations and prospective memory enables you to take a decision being made now and relate it to a future circumstance. In each of those aspects [LL] was very limited in such a way that it was Dr Todd's assessment, taking into account his clinical expertise and the definition of capacity in the Act, that she lacked capacity.

[20] Dr Todd then related the memory aspects where [LL] scored poorly to situational decision-making that she had demonstrated as illustrating the absence of capacity. Examples provided were that a significant predictor for relapse is going home to family where there is a history of difficult or absent support and to a partner who was, himself, facing addiction issues and drinking. He said [LL]'s thinking about how she might live if she were discharged or released from orders shows she is not understanding that what has been tried in the past will not work in the future. She shows an absence of ability to sensibly plan for a future that allows for sobriety. There

was discussion regarding whether or not [LL] is in denial and if she is at a point where she can manage the urge to drink. Dr Todd said a lack of capacity damages a person's ability to use thinking and behavioural strategies to control urges.

[21] Dr Todd was adamant that [LL] does not understand information relevant to these decisions, does not retain information and then has an inability to weigh up information. He reminded me in his evidence that to meet the severe impairment test under s 9 the patient only needs to fail one of those limbs of the capacity test.

[22] Dr Todd's evidence was that treatment is benefiting [LL]; her capacity has improved since submission, her thinking is clearer and she communicates well. Her understanding has improved but Dr Todd is not convinced that retention has improved. The fact of some improvement is good but not sufficient to say that [LL] is other than severely impaired. In particular, the clinicians still need to see improvement in her working and prospective memory and it is very difficult to say when that will occur.

[23] Dr Todd was also very clear that the treatment mandate ceases when a patient has regained capacity at a threshold above that defined in the legislation. His evidence was that the Act treats capacity, not ensuring treatment for addiction when capacity has been reclaimed. When a patient has regained capacity, even if the clinicians think they will relapse, the patient is released because their mandate to hold them is only related to capacity. Therefore, the treatment recommended by the doctors will continue but only until [LL] regains capacity.

[24] Dr Todd's evidence with respect to treatment whilst a person lacks capacity was highly relevant to the submission that compulsory treatment is not necessary.

[25] [LL]'s position is that she has gained the benefits that she will from this treatment, that she is demoralised from having not succeeded in a review of her status the week prior and if she is made to remain her motivation may be similarly affected. This is why she takes the position that the appropriate treatment is not available.

[26] Dr Todd's evidence was that he accepts [LL] is demoralised. He said if she understands that a decision about when she is able to go home depends on her gaining

capacity, then that may motivate her to take the steps she needs to take concerning treatment within the programme that will assist her to do that.

[27] [LL]'s evidence was that if the order were not extended, she would go to her mother's and her two sisters. She would not go to her partner's home. She was living with her mother predominantly before she was placed under the Orders. She said "mentally she has work to do", that she would do that by attending AA and making contact again with CADS. She is still in a relationship with the partner referred to. She believed, until the clinicians made enquiries, that he was seeking treatment. She understands that is not the case, but she says if he was drinking it would not affect her decision to not drink or ability to decide that. She says the plan is the same as she has had previously. She said she does not see benefits to her remaining at Nova because she cannot move forward. She said "it is the same stuff going round and round".

[28] In respect to the other limb of the s 47 test, which is the requirement that there is a brain injury, Dr Todd's evidence was that the cognitive impairment and physical problems suffered by [LL] (as evidenced in Judge Twaddle's earlier report) are evidence of a brain injury. He particularly said that the difficulty with walking stems from cerebellum damage caused by consumption of methylated spirits. His evidence was that he understood 'enduring' to mean that it persists.

Decision

[29] Having heard the evidence, I advised [LL] that I had determined that the criteria under s 47 were met and I would be extending the order but reserved my reasons and written decision.

[30] [LL] has accepted she has a severe substance addiction.

[31] Dr Todd's evidence is that her working memory, incidental memory and prospective memory are each very limited and, as a consequence, she lacks the ability to understand information relevant, retain information and use or weigh information. As identified by Dr Todd, that assessment of [LL] means that she is unable to do more than one of the decision-making processes identified in s 9, and only one of those is necessary to meet the threshold of severe impairment. I, therefore, find that [LL]'s

capacity to make informed decisions about treatment for addiction is severely impaired.

[32] In my view, compulsory treatment is necessary. I remind myself, as His Honour Judge Twaddle did, that compulsory treatment is necessary only if voluntary treatment is unlikely to be effective in addressing the severe substance addiction and it is a last resort.

[33] [LL]'s evidence at the fixture was that Nova was the same stuff going round and round and yet her plan for release was as she has previously tried. Those methods failed to control or limit her addiction which then, as her addiction became more severe, has meant that she has suffered cognitive harm. I am particularly concerned at her evidence that she would attend AA when she has previously done so but still was drinking, that she would engage with CADS, when that has been a difficulty in the past, and that she remains in a relationship with a person who is addicted to alcohol, still drinking and not engaged in treatment.

[34] Appropriate treatment for [LL] is available through the Nova Star facility.

[35] I accept the evidence from Dr Todd that [LL] has a brain injury as a result of her addiction to alcohol.

[36] For the above reasons I am satisfied that the criteria in s 47 is met. I extend the treatment order for a period of 56 days.

Judge JK Hambleton
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 09/12/2021