

The Queen v Leo [2009] NTSC 61

PARTIES: THE QUEEN
v
LEO, Christopher

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY APPELLATE
JURISDICTION

FILE NO: 20722217

DELIVERED: 19 NOVEMBER 2009

HEARING DATES: 28-29 OCTOBER and 19 NOVEMBER
2009

JUDGMENT OF: MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW – CUSTODIAL SUPERVISION ORDER – MAJOR
REVIEW

Custodial supervision order – unfit to stand trial – major review - aggravated assault – significant progress whilst in custody – intensive supervision required – no appropriate secure facilities outside correctional setting – conditions of custodial supervision order to facilitate improved opportunities for therapeutic activities.

Criminal Code 1984 (NT), ss 43ZG.

REPRESENTATION:

Counsel:

Crown:	N Rogers SC
Defendant:	M O'Reilly
Chief Executive Officer Department of Health and Families:	D Farquhar
Chief Executive Officer Department of Correctional Services:	G Macdonald

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service
Chief Executive Officer Department of Health and Families:	Cridlands MB
Chief Executive Officer Department of Correctional Services:	Solicitor General

Judgment category classification:	C
Judgment ID Number:	Mar 0913
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Leo [2009] NTSC 61
No. 20722217

BETWEEN:

THE QUEEN
Plaintiff

AND:

CHRISTOPHER LEO
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 19 November 2009)

Introduction

- [1] On 22 December 2008 I made a custodial supervision order in respect of Mr Christopher Leo for 12 months commencing 1 December 2008. Pursuant to s 43ZG of the *Criminal Code* I conducted a major review of that order and, on 19 November 2009 I confirmed that order.
- [2] I now set out my reasons for confirming the custodial supervision order and for adjustments made to the conditions.

Background

- [3] Prior to the offending which resulted in the supervision order Mr Leo was the subject of a guardianship order and the Department of Health and

Families had been involved in assisting Mr Leo since June 2007. For the purposes of the major review I received a report from Ms Penelope Fielding, the Director of Aged and Disability Services, which provided a summary of the history of the Department's involvement with Mr Leo and of his particular problems. The relevant parts of that summary are as follows:

“4. Mr Leo's Medical and Disability History

The Alice Springs Hospital file discloses a medical history of:

- Acquired brain injury;
- Alcohol induced dementia (Korsakov's syndrome);
- Behavioural disturbances;
- Global cognitive impairment with episodic aggression;
- Chronic liver disease, alcohol related cirrhosis and oesophageal varices;
- Chronic alcohol induced pancreatitis;
- Hepatitis B carrier;
- Seizure disorder – Grand Mal epilepsy; and
- Recurrent shoulder dislocation.

Mr Leo has had frequent admissions to hospital, often for poor control of his seizure disorder due to poor medication compliance. He usually does not complete the planned treatment as he leaves hospital, usually without medications. His ability to communicate has decreased, probably partly due to a decreased willingness to do so.

Mr Leo has attended the Central Australian Aboriginal Congress clinics on an infrequent basis, with a history of alcohol and ethanol abuse and seizures (which the note referred to as being likely related to alcohol withdrawal). The history of alcohol abuse has also lead to his chronic brain injury.

The earliest available psychological assessment was in 2007 by Mr Sean Ryan, Psychologist, for the Adult Guardianship Board. Mr Ryan noted several admissions to Alice Springs Hospital for

seizures and trauma, and the hospital's diagnosis of global cognitive impairment due to chronic brain injury from closed head trauma with alcohol related withdrawal seizure. Mr Ryan reported it was not possible to complete a formal cognitive assessment of Mr Leo as he was not compliant. Mr Leo's attention and concentration were vague, and he is illiterate and innumerate.

Mr Ryan identified evidence of global cognitive impairment including processing of information, short-term memory recall and executive functioning. Mr Ryan was of the opinion that Mr Leo was not able to live independently and required support in all areas of daily living:

‘He has a history of aggression, little insight into his condition, and poor judgment regarding his actions. All medication needs to be administered as he is non-compliant.’

On 30 May 2007 an adult guardian was appointed for Mr Leo.

Mr Larry Cashion, Neuro-Psychologist undertook a review of M Leo in September 2008. Mr Cashion noted that Mr Leo is unable to exercise even a basic level of independent functioning. Mr Cashion noted that even with training in basic living skills, Mr Leo is unlikely to be able to learn to cook himself a meal, or comply with the minimum standards of personal hygiene. As such, any intervention program Mr Leo engaged in would require a high level of supervision.

‘The prognosis for Mr Leo, given his presenting issues, is relatively poor overall. I would expect that Mr Leo's cognitive abilities will stabilise over the short term if he continues to abstain from alcohol and complies with his medication regime. However, even in that case, it is likely that over the longer term Mr Leo's cognitive abilities and mental health will decline due to the combined effects of liver disease and ongoing neuropathy.’

Dr Kevin Smith, Forensic Psychiatrist, concluded that Mr Leo has dementia with grossly impaired memory function and epilepsy. Dr Smith found Mr Leo has physical atrophy of the brain, as well as alcohol related cirrhosis of the liver and alcoholic chronic pancreatitis.

In 2007 the Office of the Public Guardian is noted as being concerned about Mr Leo's ongoing seizures and resulting shoulder dislocation requiring medical intervention for replacement. A case conference at Alice Springs Hospital (ASH) was scheduled to consider a procedure to correct the shoulder dislocation requiring a general anaesthetic and a possible six week stay in ASH.

5. Previous Management History

Christopher Leo, (also known as Christopher Peters) is from Ernabella but raised by his mother with his two sisters and two brothers in Alice Springs. ... He has no regular place of abode, having previously lived with his sister and other family but has resided on an itinerant basis in Alice Springs for most of his life. He made frequent complaints of being assaulted when in the community.

Mr Leo was referred to A&DP on 4 June 2007. CCIS notes for 2007 report difficulty in locating Mr Leo. Records note Mr Leo residing with a family member in Alice Springs, with personal care support funded [sic] to be provided by Tangentyere Council. The family member ... reports concern as Mr Leo comes home drunk most times and threatens the children.

Future plans are discussed with a range of providers. Tangentyere Council report Mr Leo as aggressive at their office.

In the absence of resolution on longer term plans a number of short term plans are put in place, including funding Tangentyere Council for weekends and providing Mr Leo with financial management through the Tangentyere Council bank.

6. Risk Assessment

Dr Smith reviewed the Alice Springs Hospital file and noted that typical presentations to the Emergency Department of the hospital include:

‘... brought in by police at request of family who were concerned about aggressive, agitated and threatening behaviour. Family reports an increase in disorganized and unpredictable behaviour and talking to himself over past few weeks despite no alcohol abuse.’

The Discharge Summary following Leo's admission to the Mental Health In-Patient Unit following the assault ... states that:

'there are frequent occasions, often at unpredictable times, when Mr Peters was quite aggressive, with verbal outbursts and attempts to assault staff members of the ASH and family members at home. In response to no obvious precipitant he began shouting about his money and not being an old man – he also picked up a chair and threw it at another client. His discharge diagnosis was noted as behavioural disturbance due to Acquired Brain Injury and alcohol misuse and he was not considered to have a psychiatric illness.'" [footnotes omitted]

- [4] It was against this background that on 15 August 2007 Mr Leo assaulted the female victim who was an employee of the Tangentyere Council who knew Mr Leo and had been one of a number of people working to assist him. The circumstances of that assault and the background to the custodial supervision order made on 22 December 2008 are set out in brief reasons delivered by me on 22 December 2008 at the time the order was made. The relevant parts of those reasons are as follows:

“By an indictment dated 2 November 2007 Christopher Leo was charged with unlawful assault in circumstances of aggravation that the victim suffered harm and, secondly, that the victim is a female and Mr Leo is a male. The offence was alleged to have occurred on 15 August 2007 in Alice Springs.

On 4 December 2007 I recorded a finding in accordance with s 43T of the *Criminal Code* that the accused was unfit to stand trial by reason of being unable to plead and unable to understand the proceedings. I directed that a special hearing take place before a jury which, according to the Act, was required to determine whether the elements of the offence were proven. That special hearing took place on 31 March 2008 and the jury returned verdicts of guilty that Mr Leo committed the offence of unlawfully assaulting [the victim] and that the circumstances of aggravation were proven. In accordance with the provisions of the Code, I then declared that

Mr Leo is liable to supervision under Division 5 and I ordered the appropriate reports.

A number of reports have been provided to me and they disclose that Mr Leo is suffering from dementia and a number of cognitive deficits. If Mr Leo was to reside in the community, in order for the community to be safe or at least for the risks to the community to be minimised, very close supervision would be required, particularly to ensure that Mr Leo was compliant with his medication regime and that matters personal to him were satisfied in order to prevent him from coming to harm. Mr Leo's history of non-compliance with his medication and his alcohol problem, coupled with his mental state, mean that without the very close supervision and without compliance with his medication regime, he is at high risk of re-offending.

I am required by the Act to keep the restrictions on Mr Leo's liberty to a minimum that is consistent with the safety of the community. This is yet another case in which an offender with mental disabilities has been required and will be required to be held in prison custody for longer than the offence committed would otherwise require. As counsel have pointed out this morning, if Mr Leo had pleaded guilty to the offence in the Court of Summary Jurisdiction, he would have received a relatively short sentence and certainly would have been released well before now.

However, because he has been declared liable to supervision, like a number of other offenders who have been declared liable to supervision by reason of their mental state, Mr Leo faces the prospect of remaining in gaol for far longer than the offence would otherwise merit. As I have said before, this is indeed a most unfortunate situation as, despite the best efforts of those involved in the prison system and our Health Department, custody in a gaol is quite inappropriate for people like Mr Leo and they cannot receive the necessary treatment and support that should be available to them and would be available to them if an appropriate facility to house these people existed in the Territory. The need for that facility is acute and growing rapidly.

Having made those observations, I must commend those who have been endeavouring to put in place an appropriate regime for Mr Leo. Notwithstanding the best endeavours of those who have been addressing the problem, the lack of resources means that physically, the necessary supervision cannot be achieved if Mr Leo was at large in the community. As a consequence, the risk to the community

would be significant. No family placement is available. Consistent with the provisions of the Criminal Code, I am left with no alternative but to make a custodial supervision order.

I make a custodial supervision order. Mr Leo is committed to custody in a prison under the control of the Director of Correctional Services.

Section 43ZG of the Code directs that when I make a supervision order, I must fix a term that is appropriate for the offence concerned and specify the term in the order. Section 43ZG(2) prescribes that the term fixed is to be equivalent to the period of imprisonment that would, in my opinion, have been the appropriate sentence to impose if Mr Leo had been found guilty of the offence charged.

The victim of the offence knew Mr Leo. Late in the morning of 15 August 2007, she was at her place of employment with the Tangentyere Council in Alice Springs. She was walking along a footpath and Mr Leo was standing at the bubbler outside the administration office. As she approached Mr Leo, she said 'Good morning, Christopher' and kept walking. The victim then heard a bang and Mr Leo went 'Ooh' as he kicked the water dispenser. The victim just glanced and kept walking. In the words of the victim: 'The next minute he was behind me, punching into me, into the back – into my back and my head and so forth.' The victim was unable to remember how many times she was punched. She does not remember going to ground but was on the ground and Mr Leo kicked her in the back.

The victim was taken to hospital, where she remained for a few hours. She had marked tenderness around the right shoulder joint, with a limited range of movement. Clinically, the victim was suffering from internal bleeding of the right shoulder but x-rays disclosed that there was no fracture or dislocation. The victim was required to wear a sling for two months and undergo physiotherapy. She also sustained a bruise to her right forehead and tenderness over the right shin and knee, together with a sore back, headache and loss of skin over the right elbow.

In her victim impact statement the victim said she had a bump on her head which took months to go away and she described the other bruising and bleeding. She needed medication for pain for some weeks and experienced difficulties in eating and sleeping, as a

consequence of which she lost a significant amount of weight. The victim also developed a stutter which appears when she is in stressful circumstances. As a consequence of the injuries and the mental reaction to the attack, the victim had several months off work. In a very reasonable observation, the victim said: 'I know this man needs help and believe the court will decide what should happen with him.'

In determining the period of imprisonment that would have been appropriate, I take into account not only the objective circumstances of the offending but the fact that Mr Leo suffers from cognitive deficits and other mental difficulties.

...

If I had been sentencing Mr Leo under the *Sentencing Act*, after making allowance for the plea of guilty, I would have fixed a term of 12 months' imprisonment. ..."

- [5] In addition to making the custodial supervision order, I directed that a detailed management plan be carried into effect with respect to the management and treatment of Mr Leo while he was the subject of the custodial supervision order.

Current Situation

- [6] For the purposes of the major review I have been provided with very helpful reports by Mr Daryl Murdock, the Manager of the Disability Support Team of the Aged and Disability Program in Alice Springs, Ms Lynda Jarvis, Senior Manager of the Aged and Disability Program in Central Australia and Ms Fielding. Both Mr Murdock and Ms Fielding also gave evidence. They were impressive witnesses and I accept their evidence.

- [7] There is no dispute that Mr Leo suffers from chronic organic brain disease and his prognosis is poor. Inevitably, his condition and level of functioning will deteriorate. Everyone involved in this unfortunate case agrees that Mr Leo cannot be released into the community without close and intensive supervision. Unsupervised, Mr Leo would inevitably resume consuming alcohol and cease taking his medication. Violence would almost certainly follow. Unsupervised, Mr Leo would pose an extreme risk of significant harm to both himself and the public.
- [8] Everyone involved also agrees that confinement in a correctional centre is not the ideal setting for Mr Leo, but at present it is the only option available which can secure protection of the public and of Mr Leo from harm and, hopefully, assist in providing Mr Leo with the support that he requires. The conclusion reached by Ms Jarvis was expressed in the following terms:

“The recommendation of the author is that Mr Leo remains at ASCC. As previously reported to the Court, Mr Leo’s complex range of behavioural and neurological issues present a poor overall prognosis and demonstrate his requirement for both a high level of supervision that can be enforced, and for behaviour management as an integral component of a therapeutic management plan. At the time of this report no such community-based service exists in either Alice Springs or Darwin. Therefore DHF are not able to support Mr Leo on a non-custodial supervision order in the community.”

- [9] In supporting the recommendation by Ms Jarvis, Ms Fielding said:

“9. Recommendation

In her risk assessment, Ms Lynda Jarvis recommends, that based on the risks to Mr Leo, staff and the community, Mr Leo is cared for within the Correctional setting.

Following my review of the CCIS notes, the various reports assessing Mr Leo's disability and his behaviour I approve the recommendation by Ms Jarvis.

Ms Jarvis' recommendation remains consistent with the information provided in the range of reports and previous risk assessment. Key considerations include:

- Mr Leo's situation deteriorates in the community where he becomes aggressive, becomes destructive of property and at risk of attacking others with minimal provocation;
- The poor prognosis for Mr Leo, with a stabilisation of Mr Leo's cognitive abilities if he is [in] an environment that allows him to abstain from alcohol and comply with his medication regime;
- Mr Leo's history of poor compliance with medication contributing to the risk of re-offending; and
- Inability to tolerate frustration in the community.

Mr Leo is not a suitable candidate for community management, due to the risk to community safety and to the client himself; and the requirement for the service to be delivered in a secure environment.

[10] Mr Leo has now been in custody since 16 August 2007. Within constraints that accompany residence in a correctional setting, special arrangements have been made for Mr Leo to receive assistance from Correctional Services officers and Aged and Disability Services personnel. One Correctional Services officer has received special training. Others have volunteered to assist with respect to Mr Leo and have received "on the job" training. The efforts of these Correctional Services officers and the Aged and Disability

Services personnel are to be commended and their work is to be actively encouraged.

[11] Following the introduction of the management plan of 11 December 2008, according to the report of Mr Murdock significant progress has been made toward some of the goals identified in the management plan. That progress was summarised by Mr Murdock:

“9. Progress achieved against the management plan

Several key goals were indicated in the management plan dated 11 December 2008 and significant progress has been made towards these goals. An itemised list is as follows:

- Decrease Aggressive and/or Assaultive behaviour directed by Christopher at ASCC staff and/or fellow inmates

Mr Leo has no documented aggressive or assaultive incidents since the time of his last court hearing in December 2008.

- Decrease Social withdrawal from his peers and ASCC staff

Mr Leo has been successfully engaging with both his peers and staff at the facility. Whilst periods of no interaction are considerable, they are no longer the majority of Mr Leo’s available time.

- Increase Active Participation in productive, age and culturally appropriate activities

Mr Leo has begun to engage with productive activities that are age appropriate and culturally appropriate. This includes assisting in the delivery of prisoner meals and maintaining his cell’s cleanliness.

- Increase social interactions with peers/custodial staff

Social interactions with staff are limited by the nature of the custodial environment and will likely remain so. Despite this, Mr Leo has engaged staff in discussions around issues not specific to his wants and needs, therefore indicating an increase in social interaction.

Peer interactions are increasing over time. Mr Leo now accepts people he identifies as friends to visit the inside of his cell and has been observed to maintain conversations with other inmates on multiple occasions. He has at least weekly access to other sections of ASCC in order to visit with family and/or friends.

Mr Leo has a strong grasp on the prison routine and in such a highly structured environment is able to predict events throughout the day assuming there are no aberrations to the normal pattern. Timed activity sequencing assists Mr Leo in tasks that are not part of the normal routine.

- Increase ability to cope with new, or less familiar, situations/people etc

Mr Leo has been trialling a variety of new environments and activities as well as meeting new people, including re-accessing his family through visitation. Mr Leo has coped admirably with these new activities. Although after a relatively short period of time, approximately three weeks, he is unable to recall these family visits.

Identified support requirements to address the issues around coping with new situations and/or people such as styles of communication, interaction, staffing familiarity and single stage instruction combined with modelling have been implemented. However there are limitations inherent in a custodial setting and resourcing is limited.

The specific strategies detailed in the management plan for the achievement of the above goals, and what progress has been made on these items, are as follows:

- Visually Tracked Activity Sequencing Book

Mr Leo was not supplied with an activity sequencing book to keep with him as these programs rely on 100% reliable implementation by all custodial officers managing him in the placement and this was not able to be assured. Trialling has commenced with a timed activity sequence (At the beginning and end of an activity an alarm sounds to aid transitioning) and Mr Leo responds well to this system.

- Activity Sampling

Activity sampling and discrete trialling has commenced with Mr Leo accessing the education block and undertaking specific activities within the G Block library.

As ASCC security procedures require Mr Leo to be under the supervision of a correctional officer at all times, activities outside of G Block such as visits to Education and Industry blocks are reliant on the availability of ASCC correctional staff to escort and monitor him. The staffing level at ASCC can present a barrier to such activities occurring.

Mr Leo has demonstrated some excitement during painting tasks and other tasks which gradually increase his level of competence, for example at using dice games to promote his counting ability.

- Disability Awareness Training

Awareness training tailored for Mr Leo's needs was conducted at ASCC on 21 January 2009. The corrections officers who predominantly interact with Mr Leo along with the Acting Chief Prison Officer of G-Block were in attendance.

- Staffing and Living Arrangement Stability

Mr Leo has recently been moved three times in an appropriate fashion. This was done in order to share the cell block with a relative that he had a positive relationship with, and he was moved back on the relative's release. Whilst this does not provide a stability of living arrangement it is conducted for positive reasons. The PBSO remains the primary staffing contact for Mr Leo as other staff that are familiar with him have been rotated as per normal ASCC staffing arrangements.

Mr Leo has been moved from the isolated remand cell and placed into the cell blocks in the Maximum Security Block. Although he has an individual cell this places him in frequent and not directly supervised contact with other inmates. Mr Leo has coped well with this and has formed relationships with other prisoners and there have been no incidents since his previous court appearance. Mr Leo has used this to his advantage to access facilities such as kitchenettes without direct supervision.

- Inmate Mesh Considerations

During group activities undertaken by the PBSO inmate mesh consideration has proceeded well and the PBSO has repeatedly demonstrated consideration of this factor. For example discrete trialling was undertaken to determine how Mr Leo mixes with other prisoners with disabilities prior to undertaking joint activities.

- Reclassification in Order to Access ASCC Educational Programs

Reclassification has occurred and Mr Leo is now able to attend other areas of the prison. Mr Leo still requires supervision from the PBSO as other officers in education or laundry blocks are not able to supervise increased amounts of prisoners without support from other officers.

- Opt-out Communication Training

Opt-out training has not commenced although planning has taken place between DST staff and the PBSO. This will be incorporated within the activity sequencing programs yet to be fully implemented. When in non-task orientated situations Mr Leo retreats to his cell as he requires and has demonstrated the ability to verbally disengage from activities/people. Verbal disengagement is not always clear and his primary escape mechanism is repeating 'I'm alright now' as he retreats into his cell.

- Pocket Pictorial Album with Introductory Story

The pocket album has not yet been trialled with Mr Leo to determine if it is appropriate for his use.

- Antecedent Control Strategies

Training in antecedent control was provided to the PBSO and other correctional officers. This training is to assist them in becoming familiar with those events, situations and interactional styles that are more likely to increase Mr Leo's confusion and/or result in frustration. This awareness of antecedents is currently being utilised successfully by the PBSO to reduce setting events that initiate behaviours.

- Reinforcement Schedule

Mr Leo is unable to verbally complete a reinforcement inventory owing to his language and cognitive impairments. To develop a reinforcement schedule a vast amount of different reinforcers need to be trialled with Mr Leo in order to gain an index of what is a motivating factor for him. This process has begun and several minor reinforcers have been identified however Mr Leo's fixation on specific topics and memory impairments makes this a time consuming process.

In addition to these items identified in the management plan discrete trialling has commenced relating to general household and self-care activities. Mr Leo has been engaging with this in an enthusiastic fashion and is making progress on simple tasks such as making cups of tea. Social stories training, using pictorial representation has also commenced and Mr Leo is responding positively to this method of instruction.”

[12] Notwithstanding the progress towards identified goals, as I have said it is common ground that Mr Leo continues to require intensive supervision 24 hours a day in a secure environment. Mr Murdock expressed a view, with which I agree, that while incarceration in a correctional centre is far from ideal, the appropriate secure facility is not available outside a correctional centre. In these circumstances, Mr Murdock, Ms Jarvis and Ms Fielding all recommended continuation of custody within a correctional centre until a more appropriate secure facility becomes available. Mr Murdock summarised his view as follows:

“11. Summary and Recommendations

It is the writer's recommendation that the existing management regime at ASCC continue until such time as an appropriate community placement is available. The marginal increase in Mr Leo's skills, particularly relating to coping and tolerance, is envisaged by program staff to continue and will assist Mr Leo in his

future transition into a community based placement when available. Mr Leo's increased activity level in the ASCC environment, without significant escalation in challenging behaviour, presents clear indications that Mr Leo can manage increases in environmental stimulation with an appropriate and specialised support structure.

As previously reported to the court, Mr Leo's complex range of behavioural and neurological issues present a relatively poor overall prognosis and demonstrate that he requires a high level of supervision and behaviour management. Having close regard to Dr Cashion's report, any community-based placement will require specialist staff and the appropriate secure setting in which behavioural and risk management strategies can be effectively enforced in order to manage the risk Mr Leo's assaultive behaviour represents to the community. This would also include health and medication management; with a significant focus on management of issues relating to alcohol use.

At the time of preparing this report no secure community-based service exists in either Alice Springs or Darwin therefore DHF are currently unable to effectively support Mr Leo on a non-custodial supervision order in the community."

- [13] As the reports have noted, there is no appropriate secure environment available for Mr Leo outside the correctional setting. Difficulties have been experienced in securing the engagement of Mr Leo in therapy sessions and, as explained by Mr Murdock, in the absence of the type of security offered by a correctional facility, Mr Leo would "talk with his feet". Construction of a secure care facility independent of a correctional centre is planned to commence in July 2010 and it is hoped that it will be in practical operation nine months later. Such a facility would be a suitable residential facility for Mr Leo. However, in the present circumstances, the only practical solution is for Mr Leo to reside in a correctional centre.

Future Plans

- [14] Given that Mr Leo must continue to reside in a correctional centre, I requested that consideration be given to creating an improved environment within the correctional setting which would enable greater access by Health and Disability workers to Mr Leo and improved opportunities for therapeutic activities. Notwithstanding the significant efforts made to create special opportunities for Mr Leo, it was apparent from the evidence that he was not receiving the optimum therapeutic intervention. I invited the Department of Health to provide submissions as to the conditions of the supervision order which the Department believes would provide the best opportunity for future rehabilitative services to be provided to Mr Leo. I also invited the Department of Justice to respond to those submissions.
- [15] The Department of Health submitted that the supervision order should include the following conditions which identify a role for staff of the Aged and Disability Services Program and provide opportunities for such staff to remove Mr Leo from the correctional setting from time to time in order to bring him into contact with family and the community. It is this contact and limited freedom that those treating Mr Leo believe will provide the best therapy for him, provided he is willing to engage and cooperate with personnel and to comply with the necessary restrictions. The particular orders sought were as follows:
- “4. In respect of his mental impairment, Mr Leo will be managed by staff of the Aged and Disability Services Program and other persons authorised by the Chief Executive Officer of the

Department of Health and Families (“the Disability Management Team).

5. The management of Mr Leo’s mental impairment will be consistent with the Recommended Goal Summary and Management Plan, dated 11 December 2008, including that the Disability Management Team intend that a member of that team will have face to face contact with Mr Leo on an average of three times per week.
6. The Director and the Superintendent of ASCC are authorised to permit Mr Leo to participate in the Management Plan, including:
 - (a) by ensuring that the Disability Management Team has access to Mr Leo in ASCC, as requested, during ordinary business hours, Monday to Friday;
 - (b) by granting Mr Leo leave of absence from ASCC, as recommended by the Disability Management Team, for the purposes consistent with the Management Plan.
7. While participating in the Management Plan including while on leave of absence from ASCC pursuant to it, Mr Leo shall:
 - (a) be under the supervision and care of the Disability Management Team for all times he is outside ASCC;
 - (b) comply with directions given by the Disability Management Team; and
 - (c) maintain a complete abstinence from alcohol, cannabis and non-prescribed drugs.
8. When Mr Leo is outside ASCC on an authorised leave of absence:
 - (a) the Disability Management Team may utilise and direct security personnel, for the purpose of ensuring Mr Leo’s compliance with the terms of his leave; and

- (b) in the event of Mr Leo failing to comply with a direction of the Disability Management Team, the security personnel are authorised to take all reasonable action to restrain or contain Mr Leo, in order to maintain the safety of Mr Leo and the community, until such time as:
 - (i) Mr Leo’s behaviour and/or actions no longer represent a risk to himself or others and he can be safely returned to ASCC; or
 - (ii) Police apprehend Mr Leo for failing to comply with a term of this Order.

9. In the event of Mr Leo failing to comply with a term of this Order, the Police are hereby authorised to apprehend him as soon as practicable and bring him before this Court.”

[16] The Department of Justice consented to these conditions. Counsel for Mr Leo submitted that cl 5 should be more prescriptive and require face to face contact on a minimum average of three times per week, but in my view such a condition would have been inappropriate. Mr Leo is a patient with significant cognitive impairments and those treating him should be left with a discretion as to the extent of contact appropriate from time to time. The Court should be slow to “micro-manage” in these circumstances and the case for such management was not made out.

[17] The proposals were sensible and beneficial to Mr Leo. They achieved the correct balance between maintaining the safety of the public while endeavouring to provide the necessary therapeutic services for Mr Leo that are possible within the constraints necessary to ensure protection of the public. Importantly, as the submissions of the Department of Health noted,

these terms sought “to reinforce that Mr Leo has a special status as a supervised person, and must not be treated as a convicted prisoner”.

[18] For these reasons the custodial supervision order was confirmed and incorporated continuation of the previous management plan and the proposed terms to which I have referred. I ordered that a review take place on 15 June 2010.
