ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF POLICE OFFICER REFERRED TO AT [5], [8], [73]-[75]

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000340
[2014] NZHC 1433

BETWEEN	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Applicant
AND	CANTERBURY DISTRICT HEALTH BOARD Second Applicant
AND	ALL MEANS ALL Respondent

Hearing: 19, 23 & 24 June

Appearances: C A Griffin for the First Applicant
J P Coates and G M Brogden for the Second Applicant
Respondent appears in Person
R Raymond - Counsel assisting the Court

Judgment: 25 June 2014

JUDGMENT OF PANCKHURST J

Introduction

[1] Mr All Means All is a serving prisoner. He has now been on a hunger strike for about 27 days. He has refused both food and liquid, but following admissions to Christchurch Hospital he has been hydrated on a number of occasions and has also taken some food. However, upon his return to prison he has resumed the hunger strike.

[2] The applicants, the Department of Corrections (Corrections) and the Canterbury District Health Board (the DHB), are concerned to establish their rights

and duties in relation to provision of medical treatment to Mr All Means All. They seek declarations to better define their respective responsibilities.

[3] Two forms of declaration are sought. The first, sought by Corrections, is a declaration that Mr All Means All may receive medical treatment by way of artificial hydration and nutrition when:

(a) his health or life is in peril in the judgement of a clinician, and

(b) he no longer is able to indicate whether he consents to treatment.

Alternatively, both the Department and the DHB seek a declaration that they have lawful excuse for not providing medical treatment, so long as Mr All Means All continues to refuse consent to treatment.

The background

[4] Mr All Means All is 57 years of age. On 28 May 2014 he was sentenced to four months' imprisonment in the District Court in relation to six charges of threatening to kill. He had defended himself at a jury trial. He did so ably, in the assessment of the trial Judge. [1]

[5] On his reception at prison following the sentencing Mr All Means All stated that he would begin a hunger strike immediately; that he would not eat or drink anything. He had previously indicated an intention to do this both on a website and in the District Court. The reason he has given for this stand is that he considers a detective lied in giving evidence at his trial. The website asserted that the hunger strike was to "encourage the truth to finally surface".

[6] On 5 June the DHB filed an originating application seeking a declaration to clarify its legal obligation in relation to Mr All Means All's treatment or the non-provision of medical services to him. Given the exigencies of the situation, I appointed Mr Raymond as counsel to assist the Court. He has liaised with Mr All

[1] Sentencing notes of Judge Farish, *R v All* CRI-2012-009-010464, 28 May 2014 at [2].

Means All and, when appropriate, he has advocated on his behalf. I am most grateful for the assistance which he has provided to the Court.

[7] The DHB application was precipitated by an admission to hospital on 3 June. Mr All Means All was seen by doctors, refused fluids and was therefore discharged. He returned to prison. However, on Thursday 5 June he was re-admitted to Christchurch Hospital. On this occasion he consented to receiving intravenous rehydration. He also agreed to take food.

[8] The fact that Mr All Means All co-operated reflected an arrangement which had been brokered by Mr Raymond. The detective in question agreed to take advice and to consider his position in relation to the allegation that he had given untruthful evidence.

[9] On Wednesday 11 June Mr All Means All was discharged back to prison. By then his medical condition was much improved, but he resumed the hunger strike. The strike lasted for five days before, on Monday 16 June, he was again re-admitted to hospital and received similar treatment. This time he did so in light of the fact that this hearing was scheduled to commence a few days later, and it was essential that he be able to attend and in a fit state to participate at the hearing.

[10] On Wednesday 18 June Mr All Means All was discharged from hospital and returned to prison. He did not have anything to eat or drink before his appearance at the hearing on the afternoon of 19 June. That afternoon the matter was part-heard. Evidence was given by a psychiatrist, and I shall return to the psychiatric evidence shortly.

[11] Also during the course of the hearing Mr All Means All was asked to answer three questions. Mr Raymond assisted by ensuring that he understood the import of those questions and the importance of the answers which he supplied to them. The questions were:

(1) Do you consent to being hydrated and fed at the Health Services Centre at Christchurch Men's Prison? Answer: No, I do not consent.

(2) Do you consent to being hydrated and fed if transferred to Christchurch Hospital for treatment? Answer: No, I do not consent.

(3) Do you direct that you are not to be hydrated and fed if, before 28 July 2014 [Mr All Means All's release date], you become unconscious or otherwise incapable of giving or refusing consent to medical treatment? Answer: Yes, I do.

[12] The hearing was then adjourned to the following morning. However, on Friday 20 June Mr All Means All indicated at the outset that he was tired, unable to concentrate and that he did not want the hearing to continue. I accepted this and the hearing was adjourned to Monday 23 June. Over the weekend Mr All Means All was re-admitted to hospital, where he was both hydrated and accepted food. He was brought direct from the hospital to the hearing on Monday morning. He participated actively that day and again yesterday when the hearing was completed within a half day.

Mr All Means All's mental state

[13] Four psychiatrists have examined or endeavoured to examine him. The first was Dr Stephen Duffy in the emergency department of the hospital on 3 June. Mr All Means All was un-cooperative and little progress could be made.

[14] However, on 5 or 6 June Dr Erik Monasterio saw Mr All Means All at the prison. He concluded that he had no mental health history and Dr Monasterio could find no obvious need for psychiatric treatment.

[15] On 8 June, when Mr All Means All was back in hospital, he was seen by Dr Bryan Deavoll, who also gave oral evidence at the hearing. Dr Deavoll described Mr All Means All as a "doggedly determined gentleman". He concluded:

> I do not believe that there is any type of psychiatric disorder at play here and thus do not feel that any type of psychiatric treatment is warranted or likely to be of any benefit.

[16] And then on 9 June in the hospital Dr Colin Peebles saw Mr All Means All and formed this opinion:

> In my opinion Mr All is not suffering from a major mental disorder. I could find no evidence to support a diagnosis of a Major Depressive Episode or other affective disorder, a significant anxiety disorder, a psychotic disorder or a cognitive disorder.
>
> I have only met Mr All on one occasion and it is difficult for me to make definite comments about his personality type or the presence of a diagnosable Personality Disorder. However, his decision to refuse food and fluids appears to be motivated by a strong sense of right and wrong, and is most likely influenced by some degree of rigidity in his thinking style and approach to problem-solving. …
>
> In my opinion, Mr All retains the capacity to consent to or refuse medical treatment. In particular I believe he is able to understand and retain the information relevant to making decisions about his medical care, he is able to believe that information, and he is able to weigh that information in the balance to arrive at a choice.

[17] I have now had the benefit of seeing and hearing Mr All Means All making submissions in Court and questioning witnesses over a couple of days. It was obvious to me that he understood the issues raised in the course of the hearing, despite their complexity. I observed nothing untoward in relation to his demeanour, save perhaps for an element of inflexibility, consistent with the obsessional traits described particularly by Dr Peebles. I am in no doubt that he is competent to have given the indications he has in relation to medical treatment. I turn therefore to consider the applications.

Should an application authorising artificial hydration and nutrition be granted?

The declaration

[18] This declaration was sought by Corrections in the alternative. However, it is logical to consider it first. Indeed, most of the evidence and the submissions were directed to this aspect. The terms of the declaration sought are that:

> All Means All is to be provided medical treatment by way of artificial hydration and nutrition at any point at which:

(i) a clinical judgement is made that his health and/or life is in peril without such treatment, and

(ii) All Means All is no longer able to indicate whether he consents to that treatment.

Relevant provisions & declarations

[19] The starting point in considering this declaration is s 11 of the New Zealand Bill of Rights Act 1990. The section confers the right to refuse to undergo medical treatment:

> Everyone has the right to refuse to undergo any medical treatment.

"Everyone", however, is not to be read entirely literally. A person must have capacity and the competence to make an informed and rational decision. As of now at least, there can be no doubt as to Mr All Means All's capacity to make a decision refusing medical treatment.

[20] There are two other fundamental rights in the Bill of Rights which I mention at this point. The first is enshrined in s 8, which relates to the right not to be deprived of life:

> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

Section 13, it seems to me, is also in play in relation to the issues raised by this proceeding:

> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

[21] The right to refuse, and the converse, the need for consent, are concepts which are well defined and well understood in the New Zealand context. The Health and Disability Commissioner Act 1994 envisaged the existence of a code of patient rights to be made under regulations.[2] In 1996 the Code came into force. It defines patients' rights, and the duties which rest upon health providers. The former includes

[2] Health and Disability Commissioner Act 1994, s 74(1).

the right to be treated with respect;[3] to have services provided in a manner that respects the dignity and independence of the individual;[4] and to have services provided that comply with legal, professional, ethical and other relevant standards.[5] Further, the Code provides that patients must be fully informed, including as to their medical condition, the available treatment options, the risks of treatment, the side effects; indeed, on all matters required to enable a patient to make an informed choice and provide an informed consent. [6]

[22] Against this background I set out the terms of right 7 to the extent it is relevant in this case. The right headed, "Right to make an informed choice and give informed consent" provides:

> (1) Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.
> …
>
> (5), Every consumer may use an advance directive in accordance with the common law.
>
> …
>
> (7) Every consumer has the right to refuse services and to withdraw consent to services.

Other parts of the rule refer to incompetent patients. I need not detail these parts.

[23] The New Zealand Medical Council has promulgated a code of good medical practice. Needless to say, it adopts an approach in line with the requirements of the Code. It provides specifically:[7]

> With rare and specific exceptions [a doctor] should not provide treatment unless:
>
> …
>
> - the patient has made an informed choice; and

[3] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 1(1)
[4] Right 3.
[5] Right 4(2).
[6] Right 6.
[7] Medical Council of New Zealand *Good Medical Practice*, April 2013 at [32].

- the patient consents to treatment.

[24] I note also that the World Medical Association has adopted a declaration relevant to degrading treatment of persons held in custody, and related matters. The Declaration of Tokyo was first published in 1975 and has been revised most recently in 2006. It has as its sixth proposition:

> Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.

The declaration then refers to the need for the capacity of the prisoner to be confirmed by at least two physicians, and for the consequences of the refusal of nourishment to be explained to the prisoner by a physician. New Zealand, I note, is a member of the World Medical Council.

[25] There is also the Declaration of Malta on Hunger Strikers, which was first adopted in 1991 and last revised in 2006. Clauses 12 and 13 of the declaration are relevant. They provide:

> 12. Artificial feeding can be ethically appropriate if competent hunger strikers agree to it. It can also be acceptable if incompetent individuals have left no unpressured advance instructions refusing it.
>
> 13. Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.

Corrections' contentions

[26] John Roper is the prison manager at Christchurch Men's Prison. He has provided both affidavit evidence and oral evidence for the purposes of this hearing. In it he described the implications from a prison perspective of a hunger strike. The level of his personal concern in relation to Mr All Means All was very evident as he gave evidence. I shall return to aspects of that evidence shortly.

[27] Ms Griffin made extensive submissions directed to why the declaration should be made. Before I refer to those submissions, I will briefly note the approaches taken by others who made submissions concerning this aspect.

The respondent's submissions

[28] Yesterday, Mr All Means All adamantly opposed my making this declaration. He relied upon the rights to which I have already referred in the New Zealand Bill of Rights, in particular ss 11 and 13. He submitted that intervention to nourish him would represent a breach of not only s 11, but equally of s 13: his right to freedom of thought, including the right to adopt and hold opinions without interference. He rejected the argument that his hunger strike could be equated to the deliberate infliction of self-harm, in that it was a course of conduct intended to cause death and, therefore, a form of suicide.

[29] He submitted there was no statutory or common law basis for the Court to intervene. And, he said that for this Court to do so would place doctors in an invidious situation where they would be confronted with clear ethical obligations on the one hand, and a contrary Court-made declaration on the other. Towards the end of his submissions he confirmed that his refusal of emergency medical treatment and palliative care stood, even at the point when he is unconscious or otherwise incapable.

The DHB submissions

[30] Mr Coates for the DHB emphasised the New Zealand medico-legal landscape in which informed consent is the cornerstone for the provision of medical services. He submitted that I should not abrogate that fundamental principle, even in the present circumstances. He, too, doubted that a hunger strike could be equated to suicide. He stressed the ethical dilemma that would be cast upon doctors if s 11, the right of a patient to refuse treatment, was not respected. In that regard he stressed the evidence provided by clinicians, to which I will refer shortly.

Counsel for Corrections

[31] Ms Griffin argued that the right enshrined in s 11 is not absolute. Mr All Means All's welfare is ultimately, she said, the responsibility of Mr Roper. The statutory scheme of the Corrections Act imposes a duty on the Chief Executive, prison managers and all officers to ensure "the safe custody and welfare of prisoners."[8] The standard of care provided must be comparable to that in the community,[9] while to that end regulations provide that medical officers (who are general practitioners) are bound to take "all practicable steps to maintain the physical and mental health of prisoners".[10] They are also subject to reporting duties designed to ensure the Chief Executive is aware of particular needs of prisoners and can therefore meet them.[11]

[32] Ms Griffin also submitted that in a prison context an inmate's autonomy remains intact, subject only to the intrusion brought about by these statutory provisions. She stressed that the duty of care owed to prisoners extends to suicide. It has long been recognised that "the care of prisoners who are at risk of suicide and self-harm is one of the prison service's most vital tasks", an observation of Lord Hoffman in a House of Lords decision decided in 2000,[12] and subsequently adopted in New Zealand two years later.[13] Indeed, under the Crimes and Corrections Acts the use of reasonable force[14] and, in a prison setting the use of restraint,[15] is authorised to prevent suicide, injury or self-harm.

[33] Against this background and while acknowledging that there is no express power in the Corrections Act authorising artificial hydration and nutrition, counsel submitted that a closely defined limitation upon the right of patients to refuse medical treatment was demonstrably justified in a free and democratic society. This, of course, was a reference to s 5 of the Bill of Rights Act, whereby limits to even fundamental rights may be recognised. She emphasised that such limitation could

[8] Corrections Act 2004, ss 8(1)(a), 12(b) and 14(1)(a).
[9] Sections 69(1)(g) and 75.
[10] Corrections Regulations 2005, reg 73(1).
[11] Reg 74.
[12] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 366.
[13] *Everitt v Attorney-General* [2002] 1 NZLR 82 (CA) at [62].
[14] Crimes Act 1961, s 41.
[15] Corrections Act 2004, ss 83(1) and 87.

only arise in the context of the prison environment. It reflected the duties to ensure the safe custody and welfare of prisoners and to guard against the infliction of self-harm and suicide. Ms Griffin submitted that the proposed limitation was one "prescribed by law" as required by s 5, in this instance the common law, and that it was recognised in a number of overseas jurisdictions, if not in New Zealand until this point.

[34] Counsel submitted that the limitation was identified by the terms of the declaration sought. In essence, Corrections seeks recognition of a common law limitation upon the right to refuse treatment to authorise the provision of artificial hydration and nutrition, but only when a clinician is satisfied that the health, or life, of a prisoner is at peril and the prisoner is no longer competent to provide an informed consent or refuse treatment. I understand the reference to health being in peril to refer to the long-term health of the prisoner.

[35] The argument continued that an exception couched in these, or similar terms, would be justified as a limitation upon s 11 and would meet the test posed by the Supreme Court in *R v Hansen*[16] and other cases. The test is that the limitation must meet a number of requirements. The objective of the limitation, here the preservation of Mr All Means All's life, must be of such importance as to warrant overriding the fundamental right to refuse medical treatment. The means, here the provision of artificial hydration and nutrition, must be reasonable and demonstrably justified. This requires a proportionality test involving three questions: is artificial hydration and nutrition designed to achieve the objective, that is save Mr All Means All's life; secondly, is the impairment of the right as minimal as possible, given the terms of the declaration; thirdly, is the limitation proportionate, in that the provision of artificial hydration and nutrition albeit against the will of a patient should save a life.

[36] Finally, Ms Griffin submitted that in the particular extreme circumstances of this case, this Court would be demonstrably justified in authorising medical treatment to save the prisoner's life. The proposed declaration responds to a life or

[16] *R v Hansen* [2007] 3 NZLR 1 (SC).

death situation and in a manner that intrudes upon Mr All Means All's autonomy and rights to the least possible extent.

Evaluation

[37] I turn then to consider this very carefully presented argument against the equally strong opposition mounted to it by Mr All Means All, and to a lesser extent by counsel for the DHB. There are aspects of Corrections' argument that I accept as not only valid, but as bearing upon the issues in this difficult and distressing case.

[38] The first aspect concerns the nature and extent of the duties placed upon Corrections personnel from the Chief Executive down to prison officers. The primary purpose of the Act is that sentences are to be served in a "safe, secure, humane and effective manner".[17] This aspirational goal is reflected in the positive duty upon staff to ensure the "safe custody and welfare of prisoners".[18] I can well appreciate Mr Roper's anguish, against this background, in having to stand back, powerless, while a previously healthy man maintains a hunger strike. A prisoner refusing liquids as well as food is something he has not had to confront in all his years of service.

[39] I also accept Mr Roper's evidence that to his mind Mr All Means All's actions are akin to suicide, when the prevention of suicide is a vital task within the prison service. Mr Roper reasons that from his perspective there is no difference between the use of a ligature, or a sharp blade, to cause death and the present course of conduct undertaken to that same end. However, I disagree with this analogy for reasons I will explain shortly.

[40] Thirdly, I accept that prisoners are in a special situation and that their fundamental rights are curtailed to some degree at least. Most obviously, prisoners' freedom of movement is restricted,[19] as is their liberty.[20] In consequence, prisoners are dependent on others for the necessaries of life; shelter, sustenance and medical care. And, so I agree with and accept the submission that ultimately the day-to-day

[17] Corrections Act 2004, s 5(1)(a).
[18] Section 14(1)(a).
[19] New Zealand Bill of Rights Act 1990, s 18.
[20] Section 22.

welfare of Mr All Means All is the responsibility of the prison manager and his staff. This must make it difficult indeed to accept that Mr All Means All can negate the effectiveness of that responsibility by embarking on a hunger strike and then refusing all medical intervention.

Evaluation of the arguments

[41] Despite my acceptance of these points, I am not persuaded that justification exists to limit the s 11 right and make a declaration authorising medical treatment, despite Mr All Means All's refusal of consent. Five main reasons prompt me, reluctantly, to that conclusion.

[42] The first concerns the nature of the right itself . It is simplest to explain this by reference to a decision of the House of Lords in *Airedale NHS Trust v Bland*.[21] The case concerned a young man in a persistent vegetative state and whether a declaration authorising life support to be withdrawn should be upheld. I quote from two of the judgments, firstly Lord Keith:[22]

> The first point to make is that it is unlawful, so as to constitute both a tort and the crime of battery, to administer medical treatment to an adult, who is conscious and of sound mind, without his consent: In *In re F, (Mental Patient: Sterilisation)* [1990] 2 A.C. 1. Such a person is completely at liberty to decline to undergo treatment, even if the result of his doing so will be that he will die.

[43] Lord Goff in the same case began by making reference to the applicable principles of law. He first referred to the sanctity of human life and observed that "fundamental though it is", the principle is not absolute.[23] He continued in these terms: [24]

> … it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so. To this extent, the principle of the sanctity of human life must yield to the principle of self-

[21] *Airedale NHS Trust v Bland* [1993] AC 789.
[22] At 857.
[23] At 864.
[24] At 865.

> determination and for present purposes perhaps more important the doctor's duty to act in the best interests of his patient must likewise be qualified.

A few lines later Lord Goff said this:[25]

> I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

I adopt these statements of general principle. I consider they are almost decisive of the outcome in this case, unless there is authority for the proposition that hunger strikes in prison can form an exception to the general principles.

[44] It is convenient to refer to the issue of suicide and the analogy at this point. In my view, the analogy is inapt. It is not, I think, right to equate a hunger strike of the present kind with suicide by the use of a ligature or a sharp blade. Suicide is an intentional killing of oneself. Death is the desired and intended end result. That is not this case. Mr All Means All said yesterday and I quote from his submissions:[26]

> I have already stated and … I repeat it here: I love life. I want to live, but everybody has a fight at some stage in their life. Mine is I'm prepared to, if need be, die. But I'm not looking to death as a result. I am looking upon death only if need be. And I put it to you that is a very fundamental difference between that and a person hanging themselves.

I agree. Mr All Means All is undertaking a protest. Whether his cause is sensible or not is beside the point. His intention is to bring pressure to bear on the person who he believes is guilty of misconduct. Death is an unwanted end result of the means Mr All Means All has adopted, but it is certainly not his desire, nor his intention.

[45] The second reason that I do not accept Corrections' argument concerns the New Zealand context. As Mr Coates pointed out in his submissions, the Cartwright Inquiry report was delivered in 1988. In 1990, the New Zealand Bill of Rights Act was passed. Four years later the Health and Disability Commissioner Act was enacted, and in 1996 the Code became operative. I have referred to the key

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[25] At 864.

[26] *Chief Executive of the Department of Corrections and Canterbury District Health Board v All*, 24 June 2014, closing submissions, at 26.

concepts, the emphasis upon patient rights, including informational rights, and what is perhaps the paramount requirement, the need for informed consent before medical services may be provided.

[46] It seems to me that New Zealand has plotted its own course, at least in terms of the emphasis it has accorded to informed consent. Counsel's researchers revealed no other country which has a provision equivalent to s 11, enshrining the right to refuse medical treatment. In consequence, cases in other jurisdictions which have had to consider this very issue do so, not by reference to an express provision of their constitution or charter, but by reference to other more general of their fundamental rights.

[47] The third reason which prompts me not to accept Corrections' argument is that I do not consider the reasoning in the various cases from other jurisdictions persuasive, much less demonstrative in justifying recognition of a common law limit upon the right to forgo medical treatment.

[48] Two of the cases to which Ms Griffin referred were decisions of the European Court of Human Rights. One concerned a Ukrainian prisoner who was force fed through a rubber tube in the context of a hunger strike.[27] The other concerned a Swiss hunger striker in relation to whom a declaration was made that the State could artificially hydrate and feed him.[28] The European Court upheld what counsel referred to as "state intervention" in both cases.

[49] In the Ukrainian case the principal issues were whether force feeding was degrading treatment amounting to torture and whether continued detention of the prisoner was in violation of the European Convention. The reasoning included reference to a conflict between the right to life, an obligation upon the state, and the individual's right to physical integrity. The Court held that the former may prevail in some circumstances. I have not found either of these decisions persuasive, nor easily applicable on their terms in a New Zealand context.

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[27] *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 (ECHR).
[28] *Rappaz v Switzerland* (73175/10) Second Section, ECHR 26 March 2013.

[50] A number of United States cases have also been cited. Perhaps the most accessible of them is *Lantz v Coleman*, a 2009 decision of the Superior Court of Connecticut.[29] Coleman was on a hunger strike. The Court granted an injunction authorising the administration of intravenous fluids and the use of a nasogastric feeding tube. The judgment includes this:[30]

> The majority of state and federal courts addressing the issue of whether the state may intervene in an inmate hunger strike have made an effort to balance the interests of the state in the preservation of life and the orderly administration of the prison system and the interests of innocent dependents against the prisoner's right to self-determination and privacy. For one or more reasons, they have upheld the state's right to intervene.
>
> The five factors stated in case law allowing state intervention have been the orderly administration and security of the prison system, the prevention of manipulation by the prisoner of the prison and judicial system, the preservation of life, the protection of innocent dependents and the maintenance of ethical integrity of the medical professionals involved.

[51] Other sources, including a paper published in the Stanford Law Review in 2005,[31] which analysed 15 cases in which medical intervention was authorised and three in which it was not, are revealing. Mr Raymond referred extensively to this paper and supported a critique of the trend of reasoning adopted in the United States cases.

[52] Two of the criticisms impressed me as particularly cogent. United States courts have placed reliance upon the orderly administration and security of prisons, and the prevention of prisoner manipulation of both prison and judicial systems, as justifying state intervention. Evidence to this effect is referred to in the cases. For example, copycat behaviour and the incitement of riots are raised as risks to prison administration. The paper demonstrates, however, that these claims rest upon assertion. None of the cases contain examples, or proof of the occurrence of problems of the kind discussed, rather witnesses simply assert a risk of their occurrence.

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[29] *Lantz v Coleman* 978 A. 2d 164 (Conn Super Ct 2009), 51 Conn Supp 99.
[30] At 169.
[31] Mara Silver "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation" (2005) 58 Stan L Rev 631.

[53] An even more substantial criticism is a failure to confront two Supreme Court decisions,[32] which recognise the right of the individual to refuse lifesaving medical treatment. Neither, I note, concerned a prisoner hunger strike, but the fundamental right to refuse treatment was accepted by the United States Supreme Court. A failure to seriously confront these decisions and weigh that right in the balance seems to me to be a serious weakness in relation to the cases of which *Coleman* is an example. By contrast the three cases, where intervention was not authorised, do consider this consideration.

[54] The position in the United Kingdom is rather more straightforward. The leading case is *Secretary for State for the Home Department v Robb*.[33] Justice Thorpe held that the right of an adult of sound mind to self-determination prevailed over any countervailing interest of the State, regardless of the prison context and the exigencies of a hunger strike. He placed reliance upon *Bland*, to which I have already referred. The Judge also made reference to some of the earlier United States authorities authorising state intervention. Ms Griffin rightly pointed out that this is a 1994 case. She questioned whether the United Kingdom Courts would look more closely at the European Court of Human Rights' decisions today. Unfortunately, there are no more recent hunger strike cases from the United Kingdom.

[55] What guidance, then, do the overseas cases provide? More particularly, do they provide a basis for the recognition in this country of a common law limit upon the right to refuse medical treatment? In my view, the answer is no. Indeed, I consider the reverse is the case.

[56] This brings me to the fourth reason. Corrections filed an amended originating application in which it sought the declaration I have previously outlined. This evoked a strong and immediate response from a number of hospital clinicians. An exchange of emails occurred over last weekend when the clinicians learned of the terms of the proposed Corrections declaration. The emails passed between the Chief

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[32] *Cruzan v Director, Missouri Dept of Health* 497 US 261 (1990) *Washington v Glucksberg* 521 US 702 (1997).
[33] *Secretary for State for the Home Department v Robb* [1995] 1 All ER 677 (Fam)

Medical Officer, the Chief of Medicine and an emergency medicine specialist. I quote from two of the emails. In the first the author said:

> I do not believe that we would be in a position to act on behalf of the Corrections Service by carrying out this act against Mr All Means All in a DHB facility. Thus, unless the Corrections Service has a plan and the capacity to provide Mr All Means All with fluid against his will, the order would be without effect.

[57] Another colleague expressed his concerns in these terms:

> Given he is considered competent, DHB staff would find it ethically unsound to forcibly provide intravenous hydration to Mr All Means All. And they would almost certainly refuse to do so. I have met and treated the gentleman and I personally on moral and ethical grounds would not forcibly give IV hydration to him. I would expect my colleagues to have a similar view.

[58] Within the emails there is also reference to risks involved in the intravenous administration of fluids and, more particularly, in the nasogastric administration of liquid food, particularly if a patient is actively resisting treatment. Oral evidence was given to the effect that resistance may be less problematic while the patient is incapacitated, but with gradual improvement as hydration proceeds resistance may become a very significant issue.

[59] In my view the dilemma borne of well-defined ethical rights on the one hand, and a court declaration to the opposite effect on the other, is a very serious matter. The United States cases implied that any such dilemma would be solved by the making of a court order. I do not share that view in the New Zealand context. Nor do I find it at all surprising that the clinicians have expressed themselves in the emphatic way that they have. The World Medical Association declarations proscribing the administration of artificial hydration and nutrition without consent speak for themselves; and this is an aspect which has not, to my knowledge, been adequately addressed in the cases in other jurisdictions.

[60] The fifth and final reason is what I shall term the desirability of simplicity and certainty. The Bill of Rights Act and the Code are in harmony. The provisions of the Code are well understood and also applied routinely in practice in New Zealand. Recognition of a limitation upon the right to refuse treatment, which

is enshrined in s 11, would be destructive of the order that in my judgment prevails at present.

[61] Put shortly, doctors know where they stand. A limit of the kind contended for will give rise to an ethical dilemma. I am also concerned that prisoners minded to maintain a hunger strike will best be served by the certainty provided by the current medico-legal rights and duties. The imposition of a limitation of the kind sought by Corrections would, I think, invite prisoners to become involved in manipulative conduct, whereas the present order provides less scope for them to do so.

Conclusion

[62] These reasons, in combination, bring me to the view that there is no justification to limit the right in s 11 and grant the declaration sought. The argument fails because I am not persuaded that there is a reasonable limit prescribed by the common law and capable of recognition in this country, given our detailed and well defined system of rights and duties in relation to informed consent to the provision of medical services.

[63] That said, I acknowledge that the prison manager and Corrections have advanced every possible argument in support of their position and their desire to have the power to intervene. That Mr Roper and his staff will have to live with the resulting anguish is regrettable, but unavoidable.

[64] Needless to say, this judgment reflects the present situation, in particular the answers and directions that Mr All Means All has given in a courtroom setting in relation to the provision of medical treatment. Should the position change at any time in the future, no doubt the prison authorities and health professionals will respond to such change as is appropriate.

Should a declaration that Corrections and the DHB have "lawful excuse" not to provide medical treatment without the consent of Mr All Means All be granted?

[65] Corrections seeks:

> A declaration that the first applicant has lawful excuse for the purposes of the Crimes Act 1961, the Corrections Act 2004 and any relevant common law duty not to provide All Means All with treatment by way of nutrition and hydration absent the consent of Mr All Means All.

[66] The DHB seeks a declaration to similar effect, but framed by reference to compliance with any competent refusal of consent, or any advance directive from Mr All Means All. That is, compliance with a refusal of consent will found a legal excuse for non-provision of medical services. In substance, although not in form, the declarations are not I think materially different.

[67] Comparatively little was advanced in support of the legal excuse declarations. Mr All Means All and counsel assisting did not make submissions directed to this aspect.

[68] There is nothing novel in a declaration of this kind. Hospital authorities in particular have sought, and obtained, not dissimilar declarations before taking action to discontinue treatment.[34] In principle, there is no reason to adopt a different approach in the present context.

[69] Right 7(1) of the Code recognises that the prohibition on the provision of medical services, save with the informed consent of the patient, is subject to exceptions being "… where any enactment, or the common law, or any other provision of this Code provides otherwise." Hence, there is room for doubt and the comfort of a declaration may well be appropriate in some cases.

[70] Corrections officers are subject to the duties to which reference has already been made. More general duties of care are cast under the Crimes Act, including a duty to provide necessities to vulnerable adults and to protect them from injury.[35] A major departure from the standard of care expected of a reasonable person subject to such a duty may result in liability for manslaughter.[36] Doctors, of course, are subject to this duty.

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[34] *Auckland Area Health Board v AG* [1993] 1 NZLR 234; *Hutt District Health Board v B* [2011] NZFLR 873.
[35] Crimes Act 1961, s 151.
[36] Section 150A(2).

[71] Nothing has been advanced in opposition to my making a lawful excuse declaration in this case. The hearing has served to clarify the issues, including Mr All Means All's competency and his wishes in relation to medical treatment, both now and in the future. I am well satisfied that the declaration sought should be made.

[72] However, I consider that a joint declaration in the following terms is appropriate:

> Persons owing a duty of care to Mr All Means All will have lawful excuse for not providing medical treatment to him while he continues not to give informed consent to such treatment, or an advance directive refusing consent is in place.

[73] Obviously this declaration leaves scope for future change in relation to giving consent. I also reserve leave to counsel with reference to the exact terms of the declaration.

Name suppression

[74] At the commencement of the hearing I made an interim order suppressing the name of the detective whose evidence is said to have been untruthful and who is, therefore, the supposed cause of this hunger strike. I endeavoured to better understand the background to, and basis for, this grievance by questioning Mr All Means All in the course of his submissions yesterday. I made no or little progress.

[75] The suggestion was also raised that this was a matter suited for reference to the Independent Police Complaints Authority for full and proper investigation. This would ensure due process, in that the detective would have the opportunity to respond to the allegation. But this suggestion found no favour.

[76] In these circumstances I am satisfied that continuation of the order is appropriate. This man should not be identified in relation to an untested allegation and while a hunger strike is in train. Accordingly, I make a permanent order for

suppression of the detective's name and of any particulars capable of leading to his identification.

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