High Court of Ireland Decisions

Judgment

Title:	A.B. -v- C.D.
Neutral Citation:	[2016] IEHC 541
District Court Record Number:	2016 7320 P
Date of Delivery:	03/10/2016
Court:	High Court
Judgment by:	Humphreys J.
Status:	Approved

Neutral Citation: [2016] IEHC 541

THE HIGH COURT

[2016 No. 7320P]

BETWEEN

A.B.

PLAINTIFF

AND

C.D.

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of, October, 2016

1. The plaintiff is the Deputy Chief Executive Officer of Hospital X in which the defendant was placed, at the time of the application. The defendant is a convicted prisoner who is serving a life sentence for murder in Wheatfield Prison, but who was admitted to Hospital X on 8th August, 2016 as a result of a self-inflicted injury to his neck with a home-made weapon. The wound was not healing and the defendant refused to take prescribed medications and in addition exacerbated his injury by inflicting further

wounds upon himself.

2. The position at the time the application was made to me was that the defendant, in the view of the hospital, required "*immediate and continuing intra-venous antibiotic administration to reduce the immediate possibility of sepsis in his present condition*". The hospital was of the view that because of what they considered to be his psychiatric condition, he was likely to become uncooperative and might well require sedation.

3. The defendant was awaiting a bed in the Central Mental Hospital. While in Hospital X he was assessed by a Senior Registrar in Psychiatry, whose report referred to the view of the forensic consultant psychiatrist attached to Wheatfield that the defendant had paranoid ideas of delusional intensity, very limited engagement by the defendant, and "*a likely schizophreniform psychosis*". The author of the report states her opinion (to which I will return) that the defendant is unwilling to accept that he has a serious injury and he "*lacked capacity to agree to the surgical procedure proposed by the ENT team*" as he does not understand the issue, does not believe the medical advice given and is unable to properly weigh up the risks to him and communicate his comprehension and view. While surgery is not currently required, the same would appear to apply to less invasive medical treatment.

4. Medical treatment was commenced, quite properly, by the hospital prior to court application, on the basis of the doctrine of necessity. The hospital now says that there is no specific legislation that permits the administration of medical treatment or surgery to the defendant other than by wardship or recourse to the inherent jurisdiction of the court, which it has invoked.

5. On 10th August, 2016, I heard from Mr. Donal McGuinness B.L., counsel for the plaintiff, as well as from Ms. Bernadette Parte, Solicitor, who I appointed as *Guardian ad Litem* for the defendant for the purposes of the application. Mr McGuinness' primary application was for an interlocutory order authorising the staff of Hospital X to administer all necessary medical and surgical treatment to protect the defendant's life and bodily integrity. On that date I made an order allowing the application and I now set out reasons for having done so.

Was the application one appropriate to be heard in camera?

6. Mr. McGuinness applied at the outset for the matter to be heard *in camera*, given what were described as "*security concerns*" for the hospital. Section 45 of the Courts (Supplemental Provisions) Act 1961 allows for what are described as lunacy matters to be heard otherwise than in public, but it does not follow that such matters must automatically be heard *in camera*. It appeared to me that an order restraining publication of the identities of the parties or the hospital concerned would sufficiently protect the rights of the parties and that the drastic step of an *in camera* hearing was not necessary. In any event the bald reference to security concerns was in my view too vague to properly ground an application for an *in camera* hearing. I therefore refused the application to be heard *in camera* but provided for reporting restrictions.

Should treatment be ordered on the basis of the evidence of mental incompetence in this application?

7. Where a patient lacks capacity, the court must act on his or her behalf in the patient's best interests. In the absence of special factors such as incurable and intolerable suffering, or the likelihood of a persistent vegetative state, those best interests generally militate in favour of receiving all treatment that is professionally recommended as prolonging life and indeed promoting the patient's medical welfare more widely.

8. Nonetheless, ordering medical treatment and especially surgical treatment contrary

to the wishes of an adult patient impinges upon the bodily integrity of the individual, so in the case of a patient of full age and capacity, leaving aside for a moment the position of prisoners or any other special cases, it normally needs to be clear that the person does indeed lack such capacity. That was the opinion of the Senior Registrar who signed the opinion exhibited on behalf of the hospital. But what was that opinion based on? It appeared to have two elements, one being information and opinion received from the psychiatrist at Wheatfield, and the second being her own interview with the defendant. That first element is hearsay upon hearsay (given that Hospital X's risk manager, not the Registrar, swore the affidavit), and furthermore emanates from a separate institution than that represented before me. It is therefore of limited weight for present purposes. As regards the interview with the defendant, it seems to have related only to the surgery itself (reference is made to "*explanation around the procedure*", "*risks of not having the procedure and the possible benefits of having it*", "*any understanding of the specifics of the procedure*", "*fears … about surgery*"). Only one question relates to anything else ("*I asked Mr. D. about what happened in Wheatfield prison and he responded 'there is something going on there' and refused to elaborate… He said the prison officers were beating [him] up*.") The report is silent as to how long this interview took but the account of it is brief, possibly because the author states that her team's role was (merely) to provide "*a second opinion for the ENT team*", who had already presumably formed their own view, although this is not deposed to.

9. The author of the report concedes that the defendant "*was somewhat cooperative with the interview*" and that "*[i]t was difficult to assess the full extent of his psychotic phenomena given limited engagement with the interview*". He was clearly dismissive of medical advice and denied the reality of his situation. However many individuals in society are in one degree or another of denial as to their health and medical position, and to one degree or another are unwilling or incapable of understanding the full medical ramifications of their situation. Does that of itself make them psychiatrically unwell? Probably not unless the concept of psychiatric illness is made unacceptably elastic. Where would such a doctrine end? With the totalitarian society, that uses the machinery of mental treatment against those who decline to submit to accepted truths.

10. And of course that is to assume that the defendant means what he says. Many people can affect an unwillingness to acknowledge or comprehend a problem in order to deflect having to deal with it, when what is really motivating them is not incapacity but simply a preference not to take the action under discussion. An obfuscatory response does not have to be taken at face value and might signal a wish not to be treated rather than mental illness. The author of the report does not seem to have taken the view that a more extensive history or assessment of the defendant's mental condition was required, armed as she was with the clear opinion from Wheatfield and the brief to produce only a second opinion for the ENT team. So there is no criticism of her at all. It does not appear from the report that she was told that the report was to be used for forensic purposes - if she had been so requested, one might have expected that brief to be acknowledged. There is no reference in the report to what the author thinks the defendant's mental illness actually is or to the methodology adopted to form the view on capacity, or to the degree of incapacity, or to how incapacity is assessed objectively. She does refer to "*paranoid thinking as above*" which I think is a reference to the allegation that prison officers were beating him up. But I am not sure that one could conclude, without more, that this allegation is such an appalling vista that it could only be the result of paranoia.

11. At the end of the day I would have to ask myself, if the defendant was not a prisoner, would I be happy to direct medical treatment for him based primarily on an interview that, while it appears to have fully done the job the author was set, does not appear to me to constitute a searching or even detailed investigation of the mental health of the defendant? I would have some hesitation in doing so. It seems to me that

if such an approach were adopted, only those who could compellingly display full understanding of their medical position could assert a right to refuse treatment; anyone else could be required to undergo any procedure that a medical team, backed up by a judge, thought was in their interests. If the application hinged on it being clear that this defendant lacked capacity I would have been minded to require further evidence before proceeding.

12. Ms. Parte's discussion with the defendant could be said to have illustrated paranoid elements to the defendant's thinking, but to so conclude might be to assume too much about why the defendant says what he says. Her brief was not and could not have been to provide medical opinion.

Does a prisoner enjoy a right to autonomy to refuse necessary treatment in any event?

13. I turn then to the patient's status as a prisoner. An order sentencing a person to life imprisonment, or to any other period, is a court order which must be obeyed like any other order. A spouse ordered to transfer an asset to another spouse cannot lawfully frustrate the court's order by destroying the asset. A person ordered to be imprisoned cannot lawfully frustrate the court's order by destroying himself.

14. While suicide is not a crime, neither is it a lawful act (that hypothesis would be inconsistent with s. 2(2) of the Criminal Law (Suicide) Act 1993). Crimes, torts and lawful acts are not an exhaustive categorisation. Despite its de-criminalisation suicide remains an act contrary to public policy. A mentally competent person does not have any legal entitlement to kill themselves directly (if such entitlement existed, they could bring an action for trespass to the person against rescuers: an absurd proposition). But a mentally competent adult is entitled to kill themselves indirectly, by refusing food, hydration or medical treatment. Such a right is seen as flowing from the right to autonomy and bodily integrity of the individual.

15. This question has been recently considered by Baker J. in *Governor of X. Prison v. P.McD.* [2015] IEHC 259 (Unreported, High Court, 31st March, 2015). It is true that as Baker J. points out at paras 94 *et seq*., a prisoner retains the right to bodily integrity in prison in the sense that he or she cannot be harmed or neglected by the State (*Creighton v. Ireland* [2010] IESC 50 (Unreported, Supreme Court, Fennelly J., 27th October, 2010) at para. 4, *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 (Unreported, High Court, 22nd June, 2009). But it by no means follows from a prohibition on harming prisoners that the prisoner's full rights of autonomy have to be recognised. To do so to the extent of allowing a prisoner to refuse life-saving treatment (or food or hydration) would be to recognise a "right" of the prisoner to frustrate the lawful order of the court. There is no such right.

16. In *X. v. Germany* Application No. 10565/83 (1984) 7 E.H.R.R. 152 the European Commission of Human Rights noted that the conflict between the right of autonomy of a force-fed prisoner and the duty of the state to protect his life was "not solved by the Convention itself". Force-feeding that was in his best interests and that did not involve more constraint than necessary was not contrary to art. 3 of the Convention. The prisoner's application was declared inadmissible as a result.

17. In *Ciorap v. Moldova* (Application no. 12066/02, European Court Human Rights, 19th June, 2007), at para. 77 the Strasbourg Court stated that "*a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. … The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food*".

18. In *Herczegfalvy v. Austria* (Application no. 10533/83, European Court of Human Rights, 24th September, 1992, Series A, no. 244, p. 26) para. 83), the court held that where force-feeding and restraints are medically necessary, no violation of article 3 of the ECHR thereby arises.

19. Applying this decision, in *Ilijkov v. Bulgaria* (Application no. 33977/96, Commission decision of 20th October, 1997), the Commission rejected as manifestly ill-founded a complaint that force-feeding of a prisoner contravened art. 3 of the ECHR. The prisoner accepted (a necessary concession given previous Strasbourg caselaw) that it was not the case that "force feeding per se, as an act of disrespect for his will" was contrary to art. 3, but his challenge to the manner of force-feeding was rejected.

20. In *Gennadiy Naumenko v. Ukraine* (Application no. 42023/98, European Court of Human Rights, 10th February, 2004) (a case where a prisoner complained of having been compelled to take medication), the Court reiterated that therapeutic treatment in principle did not contravene article 3 if persuasively shown to be necessary.

21. In *Nevmerzhitsky v. Ukraine* (Application no. 54825/00, European Court of Human Rights, 5th April, 2005), the Strasbourg court addressed a complaint by a hunger-striking prisoner who had been subjected to force-feeding (see para. 38 onwards). The applicant in that case said that this caused him "*substantial mental and physical suffering*", that he had been "*handcuffed to a heating appliance in the presence of guards and a guard dog*" and "*held down by the guards while a special medical tube was used to feed him*" (para. 78). "*[F]orce had been used to feed him*" (para. 89). He was "*forced to swallow a rubber tube that was connected to a bucket with a special nutritional mixture*" (para. 90).

22. The court referred to previous caselaw to the effect that the principle of force-feeding was not contrary to the Convention although the manner of its administration could be, if inhuman or degrading (para. 93; citing *X. v. Germany* and *Ilijkov*). It reiterated the view that "*force feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food*" was not in principle to be regarded as contrary to art. 3 of the ECHR (para. 94) provided medical necessity was shown to exist (citing *Herczegfalvy*). The court concluded that medical necessity had not been shown and therefore force feeding "*resisted by the applicant*" (para. 98) contravened art. 3.

23. It seems abundantly clear therefore that there is no breach of human rights as such in the forcible administration of food, or on the same logic, hydration or medical or surgical treatment, to a non-consenting prisoner, provided that medical necessity has been clearly demonstrated. Why should the prisoner's rights under the Constitution be dramatically more extensive? One searches in vain for a compelling reason.

24. It is also true, as Baker J. pointed out, that the English High Court has held that the right of a person of full age and capacity to refuse nutrition and hydration continued to exist for a detained prisoner (*Secretary of State for the Home Department v. Robb* [1995] Fam. 127 (Thorpe J.)). That court relied heavily on a decision of the Supreme Court of California in *Thor v. Superior Court*, 855 P.2d 375 (1993) which recognised four countervailing considerations against which such a right could be balanced: preserving life, preventing suicide, maintaining the integrity of the medical profession and protecting innocent third parties (p. 131). In Thorpe J's view, the first two considerations were outweighed by personal autonomy; an approach that rests shakily on a straight read-across of rights from the citizen of full age and capacity at liberty to the detained prisoner. Even apart from the sense that the whole formulation of the doctrine smacks at first sight of judicial legislation of a particularly trans-Atlantic stripe, it is particularly striking that no consideration is afforded to the importance of ensuring that effect is given to orders of the court, or even to maintaining order in prisons. No

institution can function in an ordered manner if its stakeholders are in the process of killing themselves, even by neglect or omission.

25. *Thor* was a judgment given by Arabian J. of the California Supreme Court. What appears not to have been drawn to the attention of Thorpe J. (or to the attention of the court in *P.McD*. either) is that *Thor* was decided on the basis of a specific Californian statutory provision, cited at pp. 744 to 745 of the report: "*Penal Code section 2600 expressly provides that a prisoner 'may ... be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public*.'" That express statutory provision makes the decision much less of an exercise in judicial legislation as far as California is concerned - but not as respects its adoption in other jurisdictions.

26. At p. 745 of *Thor*, Arabian J. deals with the question of whether the prisoner's rights are to be circumscribed by his status as prisoner in remarkably stark terms: "*In refusing to consent to further treatment, [the prisoner] Andrews is exercising his fundamental right of self-determination in medical decisions. Petitioner [the treating doctor, Dr. Thor] has offered no evidence that allowing him to do so undermines prison integrity or endangers the public. Thus, considering the magnitude of the right at issue in light of the clear legislative directive articulated in Penal Code section 2600, we hold that petitioner must accede to Andrews's decision and may not force him to accept unwanted treatment or care*" (footnote omitted).

27. The result in *Thor* has limited support in other U.S. caselaw. A similar conclusion was arrived at in *Zant v. Prevatte*, 248 Ga. 832, 286 S.E.2d 715 (Georgia, 1982) (Weltner J.), which is an early case consisting largely of a short set of assertions rather than detailed reasoning; and in *Stouffer v. Reid* 413 Md. 491 993 A.2d 104 (Maryland, 2010), although there the Court of Appeals of Maryland was heavily influenced by the decision in *Mack v. Mack*, 329 Md. 188, 618 A.2d 744 (1993) which related to a non-prisoner patient. It did not appear to satisfactorily address why there is any necessary read-across to the case of a prisoner.

28. By contrast, the vast preponderance of U.S. caselaw, both state and federal, that has examined the issue takes a strikingly different approach.

29. In *Commissioner of Correction v. Myers*, 379 Mass. 255, 399 N.E.2d 452, 458 (Massachusetts,1979), the Supreme Judicial Court of Massachusetts authorised the forcible medication of a non-consenting prisoner.

30. *White v. Narick*, 170 W.Va. 195, 292 S.E.2d 54 (West Virginia, 1982) was a case where a convicted murderer serving a life sentence began a hunger strike. The Supreme Court of West Virginia noted that competent (non-prisoner) patients have been allowed to refuse medical treatment (at 58) but held, nevertheless, that: "*[the state's] interest in preserving life is superior to White's personal privacy (severely modified by his incarceration) and freedom of expression right. Our research indicates that although only one appellate court has dealt with death resulting from hunger strikes, they are common in prisons throughout the country. Their main aim is to gain attention from prison officials and occasionally from the public, to manipulate the system. We cannot condemn fasting - Ghandi taught us about its force as a way to secure change. But prison officials must do their best to preserve White's life*" (footnote omitted).

31. In *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623 (N.Y. App. Div., 1982), a convicted murderer engaged in a hunger strike, with the intention of committing suicide. Denman J. of the Appellate Division of the New York Supreme Court said: "*Even overlooking the fact that Chapman's status as a prisoner severely delimits his constitutional privileges, … it is self-evident that the right to privacy does not include*

the right to commit suicide" (p. 68).

32. In *In re Sanchez*, 577 F. Supp. 7 (S.D.N.Y., 1983), the U.S. District Court permitted force-feeding a civil contemnor engaged in a hunger strike, who was found to be attempting to frustrate the lawful authority of the court by pressurising a judge into granting his motion to vacate the contempt order and render himself mentally and physically incapable of testifying before a grand jury.

33. The New Hampshire Supreme Court has held that a prisoner may be forced to receive medical treatment to save his life: *In re Joel Caulk*, 125 N.H. 226, 480 A.2d 93 (New Hampshire, 1984). In that case, the Supreme Court of New Hampshire determined that the state's interests in the preservation of human life and the prevention of suicide outweighed whatever residual right of privacy the prisoner may have retained as an incarcerated person (at p. 97) and that the prisoner's decision to starve himself to death would have an adverse effect on maintaining an effective criminal-justice system (at p. 96).

34. In *Garza v. Carlson*, 877 F.2d 14 (8th Cir.1989), the US Court of Appeals for the Eighth Circuit held, in the context of a prisoner threatened with force-feeding, that "*preservation of prisoners' health is certainly a legitimate objective, and prison officials may take reasonable steps to accomplish this goal. Garza's rights under the Constitution were not violated by the threat of receiving involuntary nourishment*".

35. In *Department of Public Welfare v. Kallinger*, 134 Pa.Cmwlth. 415,580 A.2d 887 (1990), Pellegrini J. held at 134 Pa.Cmwlth. 415, 426 that "*The Commonwealth of Pennsylvania has an overwhelming interest in the orderly administration of its prison system. The Commonwealth must maintain prison security, order and discipline. It must also fulfil its duty to provide proper medical care to the inmates, thus preserving life and preventing suicide. These vital interests, along with the need to preserve the integrity of the physicians and psychiatrists working within the penal system, clearly outweigh any diminished right to privacy held by Kallinger. Accordingly, we order that Farview [State Hospital] can and must continue to provide appropriate nutrition through a nasogastric tube and appropriate medical care to Joseph Kallinger so long as he continues to refuse nutrition and medical treatment. Kallinger shall remain committed to Farview until such time as the medical and psychiatric staff feel it's appropriate for him to return to a State Correctional Institution*."

36. In *Martinez v. Turner*, 977 F.2d 421 (8th Cir.1992), an accused person remanded in custody alleged that officials violated his due process rights when they ordered that he be force-fed. The US Court of Appeals for the Eighth Circuit *summarily* dismissed his argument, finding that "*Martinez's claim that he was force-fed also fails to state a constitutional claim. The mere allegation of forced-feeding does not describe a constitutional violation. Bureau of Prison regulations authorize medical officers to force-feed an inmate if they determine that the inmate's life or permanent health is in danger. Attachments to Martinez's pleadings reveal that … medical officers determined that forced-feeding was necessary to his health*" (at p. 423). Certiorari of this ruling was denied by the US Supreme Court: *Martinez v. Turner* 507 U.S. 1009, 113 S. Ct. 1658, 123 L. Ed. 2d 277 (1993).

37. In *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358 (N.D.1995), the Supreme Court of North Dakota had to consider a declaratory judgment allowing for the forced diabetes monitoring of a prisoner together with possible forced administration of insulin, medication and food if ordered by a doctor. At p. 361, Meschke J. for the court said "*Ignoring the most relevant state interest here, Vogel would have us analyze this case apart from the prison setting where it arises. In a non-prison setting, the state interests that are generally identified as countervailing (but often subordinate) to the scope of a*

patient's autonomy include preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third persons [citing *Thor*, 855 P.2d at 383]. *In the case of a prison inmate, though, the state has an "important interest in maintaining the confinement of the prisoner and the integrity of its correctional system [that] must also be considered" in the balance*. Matter of Adoption of J.S.P.L., *532 N.W.2d 653, 662 (N.D. 1995). See also* Washington v. Harper, *494 U.S. 210*".

38. In *Laurie v. Senecal*, 666 A.2d 806 (1995) the Supreme Court of Rhode Island gave short shrift to the argument that a prisoner had the right to refuse food and hydration. Weisberger C.J. said: "*It has been argued in this case as it was in In re Caulk, supra, and Thor supra, that starving oneself is not an act of suicide but by some leap of logic constitutes merely setting certain natural forces in motion. The same argument might be presented in the event that a prisoner should slash his wrists with a razor blade and then resist all efforts to staunch the bleeding. The similarity between the two instances is that the person who desires to end his or her life deliberately sets a force in motion that will be fatal unless intervention occurs. We believe that the state has a right, and indeed a duty, to intervene in such circumstances. It has been declared by the Legislature of this State in G.L. 1956 (1993 Reenactment) § 42-56-1(b) that the Department of Corrections has been established "to provide for the custody, care, discipline, training, treatment, and study of persons committed to state correctional institutions ..." We believe that in such circumstances it would be in total disregard of this duty to stand idly by while a healthy adult decided to end his or her life by starvation just as it would if he or she decided to end his or her life by some more dramatic means such as hanging, slashing of wrists, or swallowing some type of poison*." That finding encapsulates the central point: the purpose of the prison service is to provide for the custody of offenders and persons committed to custody, in accordance with court orders. Such orders and the consequent duty of the prison service to implement them are inconsistent with an alleged right to die by refusing medical or surgical treatment, food or hydration. One does not have to go as far as to find a duty on the State to intervene in order to find a right to intervene. *Thor* was distinguished on the grounds that by reason of the pre-existing quadriplegia of the prisoner, it was a case "*involving the right of a surrogate decision maker to end medical treatment that had the effect of prolonging the act of dying without any reasonable hope of curing a terminal condition*", and thus quite distinct from a case where the prisoner is not likely to die if he or she accepted treatment, food and hydration as advised.

39. In *In re Grand Jury Subpoena John Doe v. United States*, 150 F.3d 170 (2d Cir.1998), the US Court of Appeals for the Second Circuit upheld force-feeding of a civil contemnor on hunger strike. In a per curiam judgment, the court said that "*In reviewing the district court's force-feeding order of June 25, 1998, we, like the majority of courts that have considered the question, hold that such an order does not violate a hunger-striking prisoner's constitutional rights* [citing *Martinez, Caulk, Von Holden, Vogel, Kallinger, Laurie* and *Myers*]. *Although Doe, as a civil contemnor, has been convicted of no crime, the institution where he is housed is still responsible for his care while incarcerated. Other compelling governmental interests, such as the preservation of life, prevention of suicide, and enforcement of prison security, order, and discipline, outweigh the constitutional rights asserted by Doe in the circumstances of this case*" (at 172).

40. A similar conclusion allowing forced intervention to preserve the life of a prisoner was arrived at by the Iowa Supreme Court in *Polk County Sheriff v. Iowa District Court for Polk County*,594 N.W.2d 421 (Iowa 1999).

41. The US District Court for the Northern District of Alabama dealt with an application by the Immigration and Naturalization Service for forced medical treatment, nutrition and hydration of a prisoner in *In Re Soliman*, 134 F. Supp. 2d 1238 (N.D. Ala. 2001).

Smith J. cited a litany of previous federal (*Doe, Sanchez, Martinez , Garza*) and state (*White, Von Holden*) decisions supportive of forced feeding or medication of prisoners, noting at p. 1255 that "*Federal Courts generally have approved of force-feeding hunger striking inmates, regardless of whether the person was a convicted prisoner, a pre-trial detainee, or a person held pursuant to a civil contempt order*".

42. In *People* ex rel. *Illinois Department of Corrections v. Millard* 782 N.E.2d 966 (2003), the Appellate Court of Illinois, Fourth District, granted relief to prison administrators for force feeding and forced medication of a prisoner on hunger strike, Appleton J., writing for the majority, stated that "*In reviewing the trial court's force-feeding order of September 27, 2001, we, like the majority of courts that have considered the question, hold that such an order does not violate a hunger-striking prisoner's constitutional rights* [citing *Soliman, Doe, Vogel, Kallinger, Caulk, White, Von Holden*]" Very little authority went the other way. Appleton J. disagreed with *Zant* which he said "*failed to consider compelling penological objectives such as the preservation of life, prevention of suicide, and the enforcement of prison security, order, and discipline*" (at 971).

43. In *Commissioner of Correction v. Coleman*, 303 Conn. 800, 38 A.3d 84, 95-97 (2012), the Supreme Court of Connecticut held that the state could force-feed a prisoner who was engaged in hunger strike as a protest, and that such force-feeding did not contravene US or international law. The decision is notable and indeed welcome for its (relatively rare in the US context) reliance on ECHR jurisprudence. In this case reliance was placed on some of the already-cited Strasbourg decisions accepting the lawfulness in principle of forced medication or feeding of prisoners.

44. There have been a number of other recent decisions, largely to the same effect. For example, in *Aamer v. Obama* 742 F. 3d 1023 (2014), a case dealing with force-feeding in Guantanamo Bay, the US Court of Appeals for the DC Circuit emphasised that "*the overwhelming majority of courts have concluded, as did [the district court Judge] and as we do now, that absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death. See* [Freeman v. Berge, *441 F.3d 543, 547 (7th Cir.2006)*] *at 546*; Commissioner of Correction v. Coleman ... *Petitioners point to nothing specific to their situation that would give us a basis for concluding that the government's legitimate penological interests cannot justify the force-feeding of hunger-striking detainees in Guantanamo*."

45. It is clear that the Californian statutory provision itself ruled out a consideration of wider interests such as the need to give effect to court orders. It would be truly bizarre if a Californian decision which turned on the wording of a particular local statute were to be held to have effectively determined the Irish and English law on an alleged entitlement of prisoners to refuse medical treatment, *via* the domino effect of the *Thor*, *Robb* and *P.McD*. decisions.

46. What would perhaps be even more bizarre would be a situation created by the *Robb* decision and its acceptance in *P.McD*., whereby a single state court finding in *Thor* was swallowed whole and recast as the law of these islands, despite it being massively outweighed by an avalanche of precedent, both at state and federal level, going the other way. Not a single one of the decisions of what the US Court of Appeals for the DC circuit recently called "*the overwhelming majority of courts*" finding no legal violation in forced medical treatment, feeding or nutrition of mentally competent adult prisoners was opened or cited to the court in *P.McD*.

47. Nor, with the exception of a couple of glancing and relatively unreasoned references to *Caulk* by way of disagreement ([1995] Fam. 127 at 131 and 132), were any of those

cases cited in *Robb*.

48. I prefer in the circumstances of this case to be guided by the "*overwhelming majority*", rather than follow decisions such as *Robb* and *P.McD*., which derive from such a wholly unrepresentative fragment of previous caselaw.

49. Prisoners seek to kill themselves directly or indirectly for various reasons, as noted in the U.S. jurisprudence. Some by way of political or religious protest, others perhaps as a manifestation of one degree or another of mental impairment, and others simply to cheat justice. Sometimes, as with Hermann Göring's evasion of the verdict of the Nuremberg International Military Tribunal in 1946, and that of Robert Ley in 1945 before his trial began, that cheating of justice is by a direct route. Alternatively, and here one thinks of one interpretation of Slobodan Miloševiæ's death in 2006, the route is more indirect, by consciously seeking to bring on ill-health. The question to my mind is whether the court wants to stand by and watch justice be evaded? That question needs only to be posed in order to be answered in the negative. There is no right to evade the implementation of the criminal justice system, either before, during or after trial, and whether directly or indirectly. In addition, the state interest in preventing prisoners killing themselves either directly or indirectly also supports the maintenance of order in prisons for a series of reasons spelled out in the U.S. caselaw. If one really wanted to follow *Thor*, *Robb* and *P.Mc.D*. to the inevitable and repugnant *reductio ad absurdum*, one would have to cast the Görings of this world as pioneers of human rights and autonomy in utilising direct or indirect self-destruction to thwart the machinery of justice even in the face of the conscience of humanity.

50. For those reasons, I find Thorpe J.'s adoption in *Robb* of the Californian approach in *Thor* to be wholly unconvincing. By way of necessary consequence, I do not find the reasoning on this issue in *P.McD*. to be persuasive, because Baker J.'s attention does not seem to have been drawn to the origin of the test at issue which ultimately derives from a local Californian law; nor was she directed to the mountain of caselaw of a highly persuasive and coherent nature going the other way. *Robb* itself was decided as a form of moot case, as Thorpe J. acknowledges, and *P.McD.* was decided without much of a live contest on the issue because no-one in that case appeared to want to force-feed the prisoner. The decision perhaps illustrates the ongoing problem that courts are generally reliant on the parties to draw relevant materials to their attention. The actual outcome in *P.McD*. is not hugely problematic to the extent that the learned judge granted a declaration that the Prison Governor was entitled to give effect to the prisoner's wishes not to be fed or treated. If a prisoner wants to starve to death or die by medical neglect, it is a matter for executive discretion as to whether to allow them to do so in all the circumstances: it might be too prescriptive in the modern era to declare a positive *duty* to force-feed a person of full age and capacity in particular, at least in all cases (there might well be a duty to force-feed a minor or a person of impaired capacity, or perhaps in other particular circumstances). To that extent, *Leigh v. Gladstone* (1909) 26 T.L.R. 139 is of limited assistance (as *Robb* held). But insofar as the court in *P.McD*. declared that the prisoners decision "*is valid*" and "*should remain operative*" if he subsequently became incapable (para. 131), if that implies that such a valid and operative decision precludes the possibility of State action to override it if the executive (or persons, such as the plaintiff, acting on their behalf) so decides (whether with or without a court order), I would very respectfully conclude that such an approach is based on the false premise that a prisoner has a legal entitlement to exercise his or her autonomy in a manner which would frustrate the order of the court remanding or sentencing him or her. No such entitlement can co-exist with the doing of justice. A prisoner simply does not have any legal entitlement to cheat justice, and the court should not co-operate in him or her attempting to do so.

51. It appears to be a further logical consequence of such an approach that if medical necessity is established, the person having custody of the prisoner (or a person to whom

he or she has been entrusted) is entitled to administer such treatment, or if so decided, nutrition or hydration without the necessity of a court order, because the prisoner does not have a lawful entitlement to refuse consent in those circumstances. Having said that, seeking declaratory or injunctive relief may be a prudent step as the U.S. caselaw demonstrates. But in my view action taken by prison management to prevent a prisoner's life being put at risk by neglect such as refusal of medical treatment is not unlawful even without such relief having been granted.

52. Thus, I made an order compelling the defendant to undergo treatment, on the basis that as a prisoner in custody under a court order, he is not simply entitled to refuse treatment where this would either directly or ultimately put his life at risk and thereby frustrate the verdict and order of the court. To that extent, his rights to autonomy, privacy and bodily integrity are qualified by his status as a prisoner and his liability to undergo his sentence, which necessarily involves a prohibition on his frustration of that sentence by self-harm including harm by neglect or omission in relation to matters such as medical or surgical treatment, nutrition or hydration.

Order

53. For the foregoing reasons, the order I made on 10th August, 2016 was as follows:

> (i) that the identification of the defendant, the plaintiff and the hospital be prohibited under s. 45 of the Courts (Supplemental Provisions) Act 1961;
>
> (ii) that the application for the hearing to be held *in camera* be refused;
>
> (iii) that Ms. Bernadette Parte, solicitor, be appointed to act as *guardian ad litem* on behalf of the defendant for the purpose of the interlocutory application;
>
> (iv) that the plaintiff be authorised to administer all medical and/or surgical treatment that may be recommended by the medical staff of the hospital in the interests of the defendant's medical welfare;
>
> (v) that the plaintiff be authorised to use sedation and if necessary force in the administration of such treatment to the defendant;
>
> (vi) that the plaintiff be authorised to call upon the staff of the Irish Prison Service and/or the Garda Síochána if necessary to assist in the administration of such treatment to the defendant; and
>
> (vii) that the plaintiff pay the costs of the *guardian ad litem* for the purposes of the interlocutory application.