12-1984

Hunger Strikes and the State's Right to "Force Feed": Recent Australian Experience

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Published in Irish Jurist, Vol. 19, Issue 2 (Winter 1984), pp. 304-308.

HUNGER STRIKES AND THE STATE'S RIGHT TO "FORCE FEED" - RECENT AUSTRALIAN EXPERIENCE

Whether or not it is the nature of the protest itself which makes it unsuitable for resolution in a court-room situation, the case law relating to "hunger strikes" (and the State's response) is both sparse and insignificant. Perhaps on the basis of its uniqueness alone, the case of *Schneidas* v. *Corrective Services Commission and Others (1)* should be of particular interest to jurists on both sides of the Irish border.

The plaintiff had been sentenced to life imprisonment in 1980, for the murder of a prison warder. Apart from a few weeks in normal detention, from September 1979 until late March 1983 he had been detained in high security solitary confinement *(2)*.

By way of protest against his long term segregation the plaintiff sustained a hunger strike for some nine weeks prior to the hearing of this case. By 8 April 1983 his health had deteriorated to a point where upon medical evidence he was likely to suffer irreparable damage to vital organs and would eventually die unless food was taken. It was at this point that the defendants contemplated a programme of forced feeding. The plaintiff sought an injunction restraining all defendants "from administering food, drink or any other form of nourishment to the plaintiff without his consent". Schneidas also sought a direction to the effect that the defendants had no right to forcibly feed him.

The basis of the plaintiff's justification for his action (stated through affidavit) was that he felt no longer able to endure continued confinement under such segregation and as a protest he intended to continue to refuse food, unless the Corrective Services Commission agreed to change the conditions of his imprisonment. Unless his segregation was terminated he was willing to risk permanent injury or death as a consequence of his fast, rather than be forcibly fed.

It was on section 16(2) of the Prisons Act 1952 that Mr Justice Lee based his decision that the defendants had the right to give food to the prisoner against his will. Lee J. held that while force feeding a prisoner merely because he refuses food would be an unjustified assault, where the state of the prisoner's health reaches a "crucial stage" (where there is a likelihood of loss of organ function) forced feeding constitutes a "medical treatment" covered by section 16(2) and is therefore authorised by the statute.

(1) Supreme Court of New South Wales, Administrative Law Division: Lee J., 8 April 1983, unreported.

(2) Schneidas was detained under s.22 of the Prisons Act 1952 (N.S.W.) which provides for "administrative segregation" usually for periods of up to 6 months.

It is in relation to the common law arguments concerning the legitimacy of forced feeding, that the case has significance for other jurisdictions. The plaintiff alleged that any form of forced feeding would amount to an unlawful assault and as such the court should injunct the defendants from proceeding with it. The defendants on the other hand stated that even if the provisions of the Prisons Act did not justify their intended actions they would be justifiable at common law.

Of the few cases relied upon by the defendants, the principal authority was that of *Leigh* v. *Gladstone and Others (3)*. In that case a suffragette sued for assault while in prison, claiming that she had been forcibly fed against her will. She brought her action against the Home Secretary, the governor of the prison and the prison medical officer.

Lord Alverstone C.J., in his direction to the jury, said that it was the legal duty "both under the [Prison] Rules, and apart from the Rules, of the officials to preserve the health and lives of prisoners, who were in the custody of the Crown".

One commentator in Britain has suggested *(4)* that if the general duty proposed in *Leigh* v. *Gladstone* is a statement of the law concerning forced feeding, then a fair number of prison officials (and their political masters) would be guilty of manslaughter if they allowed a prisoner who refused to eat, to die. How then could the prison administrators of the Maze Prison in Belfast, stand exempt from liability in the case of the eight hunger strikers who died in the first half of 1981?

In a statement in 1974 the English Home Secretary observed that a prison doctor was not required by prison practice *(5)* to feed a prisoner against his will *(6)*. In the same year the British Medical Association issued an ethical statement in which the decision to feed by force was left to the individual doctor's conscience *(7)*.

The Home Secretary's views arose out of the public concern which followed the forced feeding of the Price sisters, convicted I.R.A. bombers who went on hunger strike to obtain their transfer to a prison in the North of Ireland. Two other prisoners were fed by force in 1975, but there appears to have been no recurrence in Britain of this practice since then.

The case of *Leigh* v. *Gladstone* has been criticised for two principal reasons *(8)*. Firstly, the case does not fully argue the question of the common law duty to force feed. In Schneidas' case Lee J. stated that even with the acknowledgment of the *Leigh* v. *Gladstone* position by Lord Edmund-Davies in *Southwark London Borough Council* v.

(3) (1909) 26 T.L.R. 139.
(4) Note, April 1974 [1974] *Crim. L.R.* 206-207.
(5) I.e. under standing orders or other instructions to employees.
(6) *H.C. Debs.*, Vol. 877, col. 451, 17 July 1974.
(7) [1974] *British Medical Journal* 2.52.
(8) See Bailey, Harris & Jones, *Civil Liberties; Cases and Materials* (London, 1980), p. 410.

Williams (9), he would not accept the existence of such a common law power *(10)*.

The second criticism was that the decision on duty runs counter to the common law principle of self-determination. Most commentators take the view that the common law rule on all forms of medical treatment should be that it may not be given to an individual who is capable of refusing his consent to it and does so. In his *Samples of Law Making* Lord Devlin develops this approach:

> "There is therefore plenty of room for a principle of law if one could not be found, which recognises the special position of doctors and gave them a good defence on the ground that they were acting for the benefit of the patient *(11)* and as a matter of necessity. Unlike every other system of law that I know of, the common law does not specifically recognise a defence of this sort. Here again its attitude is not one of specific hostility towards the practice of medicine. It dislikes the defence of necessity in whatever form it may be raised, and it does not consider that an act done without a person's consent, but for his benefit, is deserving of reward or even of immunity from the action of traspass" *(12)*.

There is a plethora of case law referred to by Mr. Justice Lee expressing the principle that no defence is available to a medical practitioner on a charge of assault merely from the fact that he acted in a patient's interest to save the patient's life *(13)*.

If the defendants' claim to some common law duty (or supervening defence) was based on the *Leigh* v. *Gladstone* principle and the general notion of necessity, their arguments appear tenuous indeed. Lee J. clearly indicated that "he would hesitate to come to a conclusion that the defendants' proposed conduct could be justified by reference to common law principle" *(14)*. The ultimate flaw in the claim to common law authority is that it rests almost solely on the *Leigh* v. *Gladstone* notion

(9) [1971] 1 Ch. 734 at 746.

(10) "They appear to be the only two authorities. On these authorities I would hesitate before I would hold that there was any power in a prison authority at common law to force-feed a person. In *Leigh* v. *Gladstone* (supra) the Chief Justice does not explain the legal basis for the adoption of the doctrine or principle which he applied, and why it should apply to prison authorities. Edmund-Davies L.J. merely referred to the case without making any comment upon it" - *Schneidas* v. *Corrective Services Commission,* at p. 11.

(11) S. 16 of the Prisons Act 1952 (N.S.W.) recognises such a defence by, as Lee J. indicates, creating both a power and a duty for "medical treatment" which will preserve "the health of the prisoner", remedy "any congenital or chronic condition" or protect the "life and health of the prisoner". In this sense Lee J. held that to force feed under certain circumstances came within the bounds of "medical treatment" and that such treatment could relate to questions of diet as well as any pre-existing medical condition.

(12) *Samples of Law Making* (1962), at p. 90.

(13) The defence of necessity is circumscribed in *R.* v. *Loughnan* [1981] V.R. 443. Even in its limited effect, its close connection with duress is clear.

(14) *Schneidas* v. *Corrective Services Commission,* at p. 12.

that a power is conferred and a duty imposed on prison officials to feed prisoners by force where necessary. It would appear that only where statutory provisions expressly (or by necessary impliction) create such powers and duties, would force feeding be legally justified.

> "Lord Alverstone's direction in *Leigh* v. *Gladstone* seems to lack legal foundation at least on the grounds on which the judge based his direction. There is an alternative explanation of the decision in *Leigh* v. *Gladstone.* It would have been sufficient to hold that there was a power to do so. Such a power could have been based on the citizen's right to prevent suicide which was at that time a felony" *(15).*

While that explanation would no longer hold good in England today, as suicide is no longer a criminal offence *(16),* it may be persuasive in jurisdictions such as the Republic of Ireland where such an offence still exists. Mr. Justice Lee in Schneidas' case seemed at pains to avoid any complicity in another man's suicide:

> "He [the plaintiff] has made it clear in his affidavit that he is prepared to take his own life by denying his body necessary food food and he is thus in the course of attempting to commit suicide: that is a crime under our law. He comes to this Court wanting me in effect to aid and abet the commission of that crime by removing an obstacle which stands in the way of carrying out that intention. I firmly refuse to do so" *(17).*

Mr. Justice Lee's interpretations both of the plaintiff's "intention" concerning his hunger strike, and the necessary degree of participation in any resulting death by an injuncting judge are open to question. In the present case the court must have been satisfied that this was a genuine suicide attempt. Otherwise it could not be argued that the plaintiff's claim to an injunction could in any way constitute an invitation to aid and abet attempted suicide.It might be argued that, irrespective of his physical state and his continued resolve at the time of making the application, the plaintiff's primary intention was to influence the minds of his keepers so that he might be removed from "administrative segregation" *(18).* Thus death by starvation, while being foreseen, would be the unintended consequence of the prison administration's failure to accede to his demands.

Although it was not put forward by counsel for the plaintiff, further responsibility to avoid the death of Schneidas might have been sheeted home to those charged with the administration of N.S.W. Prisons, on broad moral grounds. It could have been argued that his continued

(15) [1974] *Criminal Law Review* 207.

(16) The common law criminal offence of suicide was abolished by the Suicide Act 1961 (England). The Act however created the offence of manslaughter for the survivor of a suicide pact. Additional offences relate to aiding and abetting, counselling and procuring a suicide.

(17) *Schneidas* v. *Corrective Services Commission.*

(18) Provided for by s.22 of the Prisons Act 1952 (N.S.W.).

segregation for a period greatly in excess of that normally contemplated under the "administrative segregation" scheme, was either contrary to the purpose of the Prisons Act or qualified as "cruel, inhuman or degrading treatment or punishment" *(19)*. Article 10 of the U.N. International Covenant on Civil and Political Rights states that "All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person". Not only does the process of forced feeding challenge this dignity, but also it might be argued that any prolonged segregation while in prison is also degrading.

In order to clarify the issue of the State's legitimacy in force feeding a starving prisoner the legislature has two general options: either to affirm the law as stated by Lord Alverstone in *Leigh* v. *Gladstone* (that there remains a duty to feed where necessary), or to establish that there is a power but not a duty to force feed. The difficulty with the latter option, although at first blush the more logical course of action, is that it places on a very few people the increased responsibility of deciding whether a person lives or dies. In addition, each disputed case, as with Schneidas, will raise the complicated questions of what is legitimate medical treatment and what is the necessary moment at which it should be administered.

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(19) See International Covenant on Civil and Political Rights, as recognised in the Human Rights Commission Act 1981 (Commonwealth), ss. 3 and 5 and sch. 1. The provisions of this covenant may not be binding in State jurisdictions.