SUPREME COURT OF SOUTH AUSTRALIA

(Applications Under Various Acts or Rules: Application)

H LTD v J & ANOR

[2010] SASC 176

Judgment of The Honourable Justice Kourakis

15 June 2010

CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - MISCELLANEOUS OFFENCES - OTHER MISCELLANEOUS OFFENCES AND MATTERS

HEALTH LAW - MISCELLANEOUS MATTERS

HIGH COURT AND FEDERAL COURT - HIGH COURT OF AUSTRALIA - ORIGINAL JURISDICTION - MATTERS IN WHICH HIGH COURT HAS ORIGINAL JURISDICTION - COMMONWEALTH AS A PARTY

PROCEDURE - MISCELLANEOUS PROCEDURAL MATTERS - DECLARATIONS - JURISDICTION

First defendant a resident in a high care unit of plaintiff's facilities – first defendant informed plaintiff to end life by ceasing to take any food, water or medical treatment necessary for particular conditions suffered – first defendant proposes to give plaintiff direction not to provide nutrition, hydration and insulin - plaintiff seeks declarations which will allow it to determine the extent to which it can lawfully comply with direction of first defendant to be given to achieve stated intention – Commonwealth opposes directions sought with respect to consequences of the Aged Care Act 1997 (Cth) on the proposed course of conduct – Attorney-General (SA) supports directions sought concerning operation of certain provisions of Criminal Law Consolidation Act 1935 – whether there is a "matter" before the Court – whether Court has jurisdiction to make negative declarations contingent upon circumstances which may change – whether first defendant has common law right to refuse food, water and medical treatment – whether Aged Care Act 1997 (Cth) alters common law position – whether Court should make declarations sought.

Plaintiff: H LTD Counsel: MR JK WARREN - Solicitor: LYNCH MEYER
First Defendant: J Counsel: MS IR BERZINS - Solicitor: INGA R BERZINS & ASSOCIATES
Second Defendant: THE COMMONWEALTH OF AUSTRALIA Counsel: MS SJ MAHARAJ QC WITH MR P D'ASSUMPCAO - Solicitor: AUSTRALIAN GOVERNMENT SOLICITOR
Intervener: ATTORNEY-GENERAL (SA) Counsel: MR MG HINTON QC (SOLICITOR-GENERAL) - Solicitor: CROWN SOLICITOR (SA)

Hearing Date/s: 12/05/2010 to 21/05/2010

File No/s: SCCIV-10-512

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Held: first defendant has asserted a right to lawfully embark upon proposed course – plaintiff refrained from undertaking to comply with first defendant's direction – therefore there is an underlying matter sufficient to enliven Court's jurisdiction and to justify the making of declarations – first defendant has common law right to refuse food, water and medical treatment – provisions of Criminal Law Consolidation Act 1935 apply where there is a duty to provide food, water or medical treatment - duty negated by proposed direction - Aged Care Act 1997 (Cth) impliedly adopts common law position without altering it – declarations made in substantially the same form as those sought by plaintiff.

Aged Care Act 1997 (Cth) s 2.1, 53.2, 54.1, 56.1, 65.1, 96.1; *Constitution* (Cth) s 73, s 75, s 76, s 77; *Criminal Law Consolidation Act 1935* (SA) s 13A, s 14, s 23, s 24, s 29, s 30; *Guardianship and Administration Act 1993* (SA) s 25, s 59; *Judiciary Act 1903* (Cth) s 38, s 39; *Supreme Court Act 1935* (SA) s 31; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 6, s 7, s 8, s 16, referred to.
Ainsworth v Criminal Justice Commission (1993) 175 CLR 564; *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229; *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, applied.
In re the Judiciary and Navigation Acts (1921) 29 CLR 257; *Croome v Tasmania* (1997) 191 CLR 119; *JN Taylor Holdings Ltd v Bond* (1993) 59 SASR 432; *Messier-Dowty Ltd v Sabena SA (No 2)* [2000] 1 WLR 2040; *Crane v Gething* (2000) 97 FCR 9; *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235; *In re Joel Caulk* 125 N.H. 226; 480 A.2d 93 (NH, 1984); *Home Secretary of State for the Home Department v Robb* [1995] 1 All ER 677; *Schneidis v Corrective Services Commission* (Unreported, Supreme Court of New South Wales, Administrative Law Division, Lee J, 8 April 1983), discussed.
Leigh v Gladstone (1909) 26 TLR 139; *Airedale NHS Trust v Bland* [1993] AC 789; *Bouvia v Superior Court*, 179 Cal.App.3d 1127, 225 Cal.Reptr 297 (Cal.App. 2 Dist, 1986); *R v Taktak* (1988) 34 A Crim R 334, considered.

WORDS AND PHRASES CONSIDERED/DEFINED

"MATTER" - "SUICIDE"

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1 **KOURAKIS J:** The plaintiff (H Ltd) owns and operates aged care facilities and retirement villages in South Australia and the Northern Territory. The first defendant, J, is a resident in a high care unit in one of its facilities.

2 J, who was born on 29 May 1936, contracted polio as a child. She overcame that condition and went on to train and work as a teacher. She married and has a daughter who is now aged 48, a son aged 44 and a 13 year old grandson.

3 J now suffers from post polio syndrome and Type 1 diabetes. J regularly takes insulin to control her diabetic condition. Without regular doses of insulin J will lapse into a diabetic coma. J's health has deteriorated greatly in recent years. About 10 years ago J noticed a right sided weakness which has deteriorated to the point where she now has no use of her right sided limbs. She finds using her left limbs painful, and their movement is extremely limited. J spends all her waking hours in a wheelchair. When in bed she is unable to move or change position. There is no prospect of any improvement in her condition. J requires assistance for all of her basic toileting and hygiene needs.

4 On 19 January 2010, J wrote to H Ltd informing it of her intention to end her life by ceasing to take any food, water and insulin. She wrote of a despair which she could no longer endure. On 4 March 2010 J made an anticipatory direction pursuant to the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). The anticipatory direction has statutory force should J ever be in the terminal phase of a terminal illness or in a persistent vegetative state. The anticipatory direction instructs medical practitioners not to provide hydration and nutrition to J and requests only palliative care even if that care shortens her life.

5 When the proceedings first came on before me J was not represented. Arrangements were made to find legal representation through the Attorney-General's office. As a result, J instructed Ms Berzins who has appeared as her counsel. Ms Berzins gave J advice about an Enduring Power of Attorney. Consequently on 7 May this year J appointed her children to be her enduring guardians with power to consent or refuse medical treatment in the event that she became medically incapacitated and instructed them to refuse nutrition, hydration and medication except for palliative care purposes.

6 I will discuss the legal effect of the anticipatory direction and the enduring Power of Attorney further below.

7 In these proceedings H Ltd seeks declarations which will allow it to determine, at least with a reasonable degree of certainty, the extent to which it can lawfully comply with a direction, which J intends to give it to achieve her stated intention. The proposed direction instructs H Ltd not to provide or administer nutrition or insulin. It also instructs H Ltd not to provide hydration other than for the purpose of oral hygiene and to palliate pain and discomfort. I attach a copy of J's proposed directions as an appendix to these reasons. I shall refer to it as the direction.

8 J supports the orders sought by H Ltd. The Commonwealth opposes the declarations sought with respect to the consequences of the *Aged Care Act 1997* (Cth) on the course of conduct proposed by J. The Attorney-General for the State of South Australia supports the making of orders concerning the operation of the *Criminal Law Consolidation Act 1935* (SA) (the CLCA) in broadly similar terms to those sought by H Ltd. For the reasons which follow, I am of the view that there is an underlying legal controversy which is both sufficient to enliven the jurisdiction of this Court and to justify the making of the declarations broadly in the form in which they have been sought. In my view, the duties on which the statutory provisions in question are largely premised only operate where there is sufficient mutual co-operation to allow them to be performed. The duties are not breached if a person, who would otherwise be protected by them, refuses to allow them to be discharged.

Jurisdiction

9 Section 39(2) of the *Judiciary Act 1903* (Cth) is enacted in exercise of the power in s 77(iii) of the Constitution. It confers jurisdiction on the courts of the State "in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it". Jurisdiction may be conferred on the High Court in any matter arising under a law of the Commonwealth.[1] In these proceedings the plaintiff seeks declarations as to the construction and effect of the *Aged Care Act 1997* (Cth). Insofar as these proceedings constitute a "matter", this Court is therefore exercising federal jurisdiction.[2] If the action constitutes a matter, the Court exercises federal jurisdiction in determining whether to grant the declarations sought both as to the effect of the *Aged Care Act 1997* (Cth) and the CLCA because the issues arise out of the one and the same matter.[3]

10 The jurisdiction conferred by s 39(2) the *Judiciary Act 1903* (Cth) is subject to specified "conditions and restrictions". The former s 39(2)(d) of the *Judiciary Act 1903* (Cth), which prohibited courts of summary jurisdiction that were not

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1 Section 76(ii) of the Constitution.

2 *Northern Territory v CPAO* (1999) 196 CLR 553 at 589-91, 623-4; *Australia Pacific v Airservices Australia* (2000) 203 CLR 136 at 155 [52].

3 *Philip Morris Incorporated and Another v Adam P Brown Male Fashions Proprietary Limited* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570.

constituted by a Magistrate from exercising federal jurisdiction, imposed a condition on the investment of jurisdiction pursuant to s 77(iii) of the Constitution. It is not so clear that the provisions made as to appeal by s 39(2)(a) and (c) are conditions on the conferral of jurisdiction; they are perhaps more aptly described as regulations of the jurisdiction so conferred.[4] In any event, s 73(ii) of the Constitution guarantees a right of appeal to the High Court from courts exercising federal jurisdiction, subject to statutory regulation like that enacted by s 39(2)(c) of the *Judiciary Act 1903* (Cth). There is therefore on the face of s 39(2) no applicable condition which affects the grant of jurisdiction in this matter.

11 However, the jurisdiction with respect to matters arising under Commonwealth laws is, even though conferred on State courts by s 39(2), not made exclusive of the jurisdiction of State courts. Section 38 of the *Judiciary Act 1903* (Cth) only makes the jurisdiction conferred on the High Court by s 75 of the Constitution exclusive of the jurisdiction of State courts. Section 39(1) of the *Judiciary Act 1903* (Cth) makes any additional jurisdiction *actually* conferred on the High Court exclusive of the jurisdiction of State courts. However, jurisdiction in matters arising under Commonwealth laws has not been expressly conferred on the High Court[5] and therefore s 39(1) does not make that particular head of federal jurisdiction exclusive of the jurisdiction which belongs to State courts to decide such matters. State courts may therefore retain a State jurisdiction, of which they have not been deprived, to determine disputes arising out of the application of Commonwealth law.[6] However, by reason of the paramountcy of Commonwealth laws, the conferral of jurisdiction by s 39(2) of the *Judiciary Act 1903* (Cth) probably means that State courts can not exercise any State jurisdiction, assuming that it is capable of co-existing at all with the federal jurisdiction so conferred, over the same matters other than in accordance with any exceptions, qualifications and procedures prescribed by or under Commonwealth laws regulating that jurisdiction.[7] It follows that if this action constitutes a matter this Court is exercising federal jurisdiction and must exercise it as all Ch III courts must. However, if no matter is constituted by these proceedings, for example because the declarations sought are hypothetical only, then arguably this Court may exercise a State jurisdiction to make the declarations sought pursuant to s 31 of the *Supreme Court Act 1936* (SA) even though there is no matter on which the conferral of federal jurisdiction by s 39(2) of the *Judiciary Act 1903* (Cth) could operate. That proposition may be strengthened if an application for an advisory opinion not only does not raise a matter, but does not call for an exercise of judicial power at all.[8] Arguably to

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4 Cowan and Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) at 217-218.

5 Section 30 of the *Judicary Act 1903* (Cth) confers jurisdiction in matters arising under the Constitution or involving its interpretation or in trials of indictable offences against the laws of the Commonwealth.

6 Cowan and Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) at 220-3.

7 Cowan and Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) at 235-8.

8 Cf Cowan and Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) at 15; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2. See also *AMP Fire & General Insurance Co Ltd v Dixon* [1982] VR 833 at 837.

exercise State jurisdiction over "non matters" is not inconsistent with the conferral of Commonwealth jurisdiction over "matters" arising under Commonwealth law precisely because the Commonwealth's power to confer jurisdiction, or grant exclusivity over it, is limited to the conferral of judicial power over matters. However, if it is not an exercise of judicial power, it is difficult to see just what efficacy, if any, an advisory declaration would have.

12 Be all that as it may, the Commonwealth has been joined as a party. Jurisdiction in matters in which the Commonwealth is a party is conferred directly on the High Court by s 75(iii) of the Constitution and made exclusive of the jurisdiction of State courts by s 38 of the *Judiciary Act 1903* (Cth). Indeed the operation of s 38 on the jurisdiction conferred by s 75(iii) may strictly be unnecessary because State courts can have no State jurisdiction in matters in suits against the Commonwealth.[9] It follows that, except insofar as jurisdiction is conferred by s 39(2) of the *Judiciary Act 1903* (Cth), this Court has no jurisdiction in suits in which the Commonwealth is a party. Moreover, it would in my view be inconsistent with ss 38 and 39 of the *Judiciary Act 1903* (Cth), and possibly repugnant to Ch III of the Constitution, to exercise a State jurisdiction to hear a suit against the Commonwealth that does not involve a matter.

13 It follows that, because the Commonwealth is a defendant to this action, this Court only has jurisdiction to hear this action if it constitutes a matter. If it does and this Court has jurisdiction accordingly, then in the exercise of that jurisdiction this Court has the power to make a declaration pursuant to s 31 of the *Supreme Court Act 1935* (SA). The questions of the existence of the matter and the proper exercise of the power to make declarations are related and I will deal with them together.

14 Finally, I observe that the federal jurisdiction conferred by s 39(2) is limited to matters otherwise falling "within the limits" of the jurisdiction of the State courts. This Court has the jurisdiction exercised by the Courts of Chancery and the King's Bench before the *Judicature Act* reforms. Chancery always exercised a jurisdiction with respect to the observance of laws, breach of which, would result in a public mischief. The Court of King's Bench exercised a criminal jurisdiction. It also exercised a supervisory jurisdiction over the administrative acts of public officers; the power of the Commonwealth to impose sanctions on H Ltd may be affected by these declarations. Moreover, this Court is a superior court. Accordingly, if these proceedings raise a matter, it is a matter which falls "within the limits" of the jurisdiction conferred on this Court by the *Supreme Court Act 1935* (SA).

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[9] Cowan and Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) at 47; *Ex parte Goldring* (1903) 3 SR (NSW) 260.

Is there a matter in which a declaration should be made?

15 The Commonwealth submits that there is no matter before the Court and that no declaration should be made. The plaintiff, the first defendant and the State submit to the contrary.

16 The plaintiff submits that the course of action proposed by J gives rise to an existing controversy over legal rights and obligations. In particular the plaintiff's obligation to provide food, hydration and insulin (sustenance) in the face of J's proposed instructions is in question. J takes the position that the provision of sustenance against her consent would constitute the commission of an offence. At the very least it would in my view be a breach of the contractual relationship between J and the plaintiff, which I am prepared to infer from the fact of her residency in a high care unit, even though I have not been informed of the financial arrangements which have been made.

17 The Commonwealth confines its submission to the declarations sought with respect to the *Aged Care Act 1997* (Cth). It contends that there is no "existing controversy as to the status of past or future events". The Commonwealth also submits that the circumstances in which the responsibilities embodied in the Principles and the Charter made pursuant to the *Aged Care Act 1997* (Cth) may be applicable are at this stage too uncertain and subject to too many contingencies for there to be an existing controversy. Furthermore, it makes the submission that the power of the Secretary of the Department to impose sanctions on approved providers pursuant to s 65.1 of the *Aged Care Act 1997* (Cth) is discretionary.

18 The Attorney-General for the State of South Australia confines his submissions to the declarations sought with respect to the CLCA. He submits that there is a real and present controversy. Emphasis is placed on the fact that J has already executed an Enduring Power of Guardian pursuant to s 25 of the *Guardianship and Administration Act 1993* (SA) instructing her guardians that in the event that she becomes mentally incapacitated she is not to administered insulin or any other medication except for palliative purposes and that she is not to be provided with any nutrition or hydration.

19 The discussion of the essential nature of a matter usually commences with the following passage from *In re the Judiciary and Navigation Acts*.[10] There Knox CJ, Gavan, Duffy, Powers, Rich and Starke JJ said:

> It was suggested in argument that 'matter' meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word 'matter' in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If

[10] (1921) 29 CLR 257.

> the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one. But it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law. … All these opinions indicate that a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law. The adjudication of the Court may be sought in proceedings *inter partes* or *ex parte*, or, if Courts had the requisite jurisdiction, even in those administrative proceedings with reference to the custody, residence and management of the affairs of infants or lunatics. But we can find nothing in Chapter III. of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[11]

20 In *Ainsworth v Criminal Justice Commission*,[12] Mason CJ, Dawson, Toohey and Gaurdron JJ said:

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'.[13] (Footnotes omitted)

21 In my view, the action brought by H Ltd raises for adjudication by this Court a matter within the constitutional meaning of that term. J has asserted a right to lawfully embark upon a course which will shorten her life free from any interference from H Ltd which is in a position to frustrate her plans. She proposes to exercise that right by giving the direction in due course. H Ltd has refrained from giving an undertaking to comply with that direction and has reserved the right to take such steps as it may need to take to comply with its legal obligations. These proceedings are brought to resolve the resulting controversy and uncertainty as to whether such rights as J may have to personal integrity and self-determination must be respected by H Ltd.

22 In *Croome v Tasmania*,[14] the High Court held that an action in which a declaration was sought because of uncertainty over whether conduct in which the applicant proposed to engage was an offence constituted a "matter". In my view, it is not a material distinction with this case that in *Croome* the inconsistency of a law of Tasmania with a law of the Commonwealth was in question.

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[11] *In re the Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-7. See also *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 37.

[12] (1993) 175 CLR 564.

[13] *Ainsworth v Criminal Justice Commission* (1993) 175 CLR 564 at 581-2. See also *AMP Fire & General Insurance Co Ltd v Dixon* [1982] VR 833 at 837.

[14] (1997) 191 CLR 119 at 126-7, 135-7.

23 The standing of the plaintiff in this case can not be doubted.[15]

24 The Commonwealth, in the administration of the *Aged Care Act 1997* (Cth), and H Ltd, as an approved provider, have an interest in the determination of the reach of that Act and would be bound, in any future litigation, by such declarations as I may make.

25 Even though no prosecuting authority is a party to these proceedings, any declarations I were to make on the proper construction of the CLCA would have legal and practical consequence for H Ltd. H Ltd has a real interest in having this Court declare how those sections would operate on the direction J proposes to give. It will be able to discharge its responsibilities to J with greater legal certainty and direct its employees accordingly. It will be able to explain its conduct to its residents and others if there were to be public controversy about its response to J's conduct. H Ltd may also be able to rely on any such declarations, in the event that it were prosecuted to argue that the prosecution which proceeded on any different construction to that declared by me of the applicable provisions of the CLCA, was an abuse of process.[16] Moreover, the approval of H Ltd under the *Aged Care Act 1997* (Cth) may be affected by the Commonwealth's view of whether any of the potentially applicable provisions of the CLCA is breached.[17] The construction I give to those sections will bind the Commonwealth and H Ltd in any such dispute.

26 In my opinion, for the above reasons this action constitutes a matter.

27 There being a matter, the next question is whether it is appropriate to make the declarations sought. The considerations which must be weighed in exercising the discretion were considered in *JN Taylor Holdings Ltd (in liq) v Bond*.[18] King CJ said:

> Authoritative judicial statements make it clear that the jurisdiction to grant declaratory relief is very wide and that judicial pronouncements appearing to restrict the circumstances in which such relief will be granted relate to the sound exercise of the discretion rather than to jurisdiction: … By 1970 the Privy Council could say in *Rediffusion (Hong Kong) Ltd v Attorney-General (Hong Kong)* [1970] AC 1136 at 1158 that to exclude the jurisdiction it must appear 'that the questions were purely abstract questions the answers to which *were incapable* of affecting any existing or *future legal rights* of the plaintiffs' [emphasis mine]. …
>
> I can find no warrant for the imposition by the courts of a self-denying restriction on their jurisdiction to grant declaratory relief. In my opinion there is no jurisdictional limit. The court's power to grant such relief is 'only limited by its own discretion' (*Hanson v Radcliffe (supra)* at 507), and the boundaries of judicial power: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582. …

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15 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investments Management Ltd* (2000) 200 CLR 591; *Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

16 Cf *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 at 243-5.

17 *Aged Care Act 1997* (Cth) s 8.3.

18 (1993) 59 SASR 432.

> The proposition that there is no limit to the jurisdiction of the court to grant declaratory relief would be an incomplete and misleading statement of the true position unless there be added the further proposition that there are circumstances which are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of a declaration. Examples of such decisively contra-indicative circumstances can be found in the cases. A declaration will not be made except in matters 'which have a real legal context, and to the determination of which the Court's procedure is apt': *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation (supra)* per Hutley JA at 61. There must be some person who has a true interest in opposing the declaration. The question raised must not be purely theoretical. There must not only be a party with a true interest in opposing the declaration, but the plaintiff must have a real interest in having the question determined: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, per Lord Dunedin at 448. That interest may exist although the apprehended impact on the plaintiff may be no more than a future possibility: *Hordern-Richmond Ltd v Duncan* [1947] 1 KB 545. If, however, the determination of the question could not affect the plaintiff's legal rights or commercial or personal interests now or in the future, that is to say would 'produce no foreseeable consequences for the parties' (*Gardner v Dairy Industry Authority* (1977) 52 ALJR 180 at 188, per Mason J), see generally *Ainsworth v Criminal Justice Commission (supra)* at 581-582, the declaration would almost certainly be refused.[19]

28 Special care must be taken before making negative declarations because they are necessarily contingent on circumstances which may change but as Lord Woolf MR explained in *Messier-Dowty Ltd v Sabena SA*,[20] they can be of great assistance in cases such as this:

> The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice. For example, where a patient is not in a position to consent to medical treatment declarations have an important role to play. Without the use of negative declarations, recent extensions in the use of declaratory relief, including the beneficial intervention of the courts in cases concerning mentally incapacitated people would not have been possible.[21]

29 There is also reason to take particular care where a declaration is sought with respect to future conduct.[22] However, the utility of declarations as to whether future conduct would or would not be a contravention of the criminal law has often been recognised. In *Crane v Gething*,[23] French J (as he then was) explained:

> There is a distinction to be drawn between the case in which declaratory relief is sought in relation to past conduct, whether or not the subject of pending criminal proceedings and that in which declaratory relief is sought in relation to proposed or apprehended conduct: *Commissioner for Corporate Affairs v Sansom* [1981] WAR 32 at 36 (Burt CJ).

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19 *JN Taylor Holdings Ltd v Bond* (1993) 59 SASR 432 at 435-7.
20 [2000] 1 WLR 2040.
21 *Messier-Dowty Ltd v Sabena SA (No 2)* [2000] 1 WLR 2040 at 2050H-2051A [41].
22 *IMF (Australia) Ltd v Sons of Gwalia Ltd* (2005) 143 FCR 274.
23 (2000) 97 FCR 9.

> Reservations have been expressed even in the latter category of case. But it has been accepted that the capacity of courts to declare that conduct which has not yet taken place will not be in breach of a contract or a law 'contributes enormously to the utility of the jurisdiction': *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 (Barwick CJ). This is notwithstanding, as Menzies J observed (McTiernan J agreeing) that the court, in exercising its discretion, would 'take into account in an appropriate case, the principle that, in general, matters of criminal law should be dealt with at trial for alleged offences' (at 311). Viscount Dilhorne in *Imperial Tobacco* could 'well see the advantages of persons being able to obtain rulings on whether or not certain conduct on which they proposed to embark will be criminal' although he observed that 'it may be a defect in our present system that it does not provide for that' (at 741). But the system does so provide to some extent. In *Royal College of Nursing (UK) v Department of Health and Social Security* [1981] AC 800, a declaration was granted that departmental advice relating to termination of pregnancy by medical induction did not involve the commission by hospital staff implementing it of any offence against the *Abortion Act* 1967 (UK). There was no discussion in the House of Lords of the desirability of the relief sought. It was accepted sub silentio. There was such discussion in *Airedale National Health Service Trust v Bland* [1993] AC 789 in which a declaration was sought that the Trust and attending responsible physicians could lawfully discontinue life-sustaining treatment and medical support for a young patient in a permanent vegetative state resulting from injuries sustained in a sporting accident three and a half years previously. Lord Goff recognised 'that strong warnings have been given against the civil courts usurping the function of the criminal courts' and referred to statements in the *Imperial Tobacco* case that a declaration as to the lawfulness or otherwise of future conduct would be 'no bar to a criminal prosecution, no matter the authority of the court which grants it'. The jurisdiction existed to grant such a declaration and it would be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as that before the court (at 862). See also Lord Browne-Wilkinson at 880 and Lord Mustill at 888.[24]

30 A declaration as to liability to criminal prosecution will, generally, only be given in exceptional circumstances because:

> whether or not conduct is criminal may depend critically upon a range of precise facts and circumstances which cannot always be accurately estimated in advance. Another reason for this approach is that in our system, the determination of whether particular conduct is criminal or not is, in serious cases, generally left to a jury, not a Judge.[25]

31 Martin CJ made declarations concerning criminal liability in proceedings very similar to these in *Brightwater Care Group (Inc) v Rossiter*[26] for these reasons:

> [18] The court will only grant declaratory relief in respect of the criminality of a proposed course of conduct in exceptional circumstances: *Imperial Tobacco v Attorney-General* [1981] AC 718, 742. That approach is taken for a number of sound reasons, including the fact that whether or not conduct is criminal may

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[24] *Crane v Gething* (2000) 97 FCR 9 at 21-2 [27].

[25] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 at [18]; and see *Croome v Tasmania* (1997) 191 CLR 119; *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 at 240, 243; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718 at 742. See also *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263-4 [41]; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50.

[26] [2009] WASC 229.

depend critically upon a range of precise facts and circumstances which cannot always be accurately estimated in advance. Another reason for this approach is that in our system, the determination of whether particular conduct is criminal or not is, in serious cases, generally left to a jury, not a Judge.

[19] But the cases recognise that in exceptional circumstances, declarations may be made in respect of conduct that could be the subject of criminal charges: *Commissioner for Corporate Affairs v Sansom* [1981] WAR 32, 36. Those cases also establish that in this respect there is a vital distinction between making a declaration with respect to the lawfulness of conduct which is proposed but has not occurred, and making a declaration as to whether or not conduct which has occurred constitutes a criminal offence. Declarations in respect of proposed future conduct add to the practical utility of this jurisdiction, but a declaration in respect of conduct which has occurred has little practical utility and would usurp the jurisdiction and role of the criminal courts, and for those reasons, will not be made: *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* [1972] HCA 19; (1972) 126 CLR 297, 305.

[20] The exceptional nature of the jurisdiction I am exercising imports two significant constraints. They are:

1. I should only answer questions directly and explicitly raised by the facts of this particular case, and refrain from making any observations with respect to any other hypothetical scenarios; and

2. I should only grant declaratory relief if I am satisfied that I have received all the evidence which is relevant to the issues to be determined, and all the facts necessary to determine the issues which arise have been established to an appropriate level of satisfaction.[27]

32 I acknowledge that there is no existing cause of action between the parties but that is plainly enough not a necessary condition for the grant of a declaration. The circumstances referred to in [21] – [25] above which caused me to conclude there is a matter underlying these proceedings also persuade me that declarations should be made. Much of the uncertainty that would otherwise attend a declaration concerning future conduct and the operation of the law, especially the criminal law, on that conduct, can be dealt with by the form of the declaration which is made. I do not propose to make declarations in the form: "H Ltd will/will not contravene a legal provision if". Instead I will make declarations as to the proper construction of the legislative provisions and their operation on a direction such as the direction J proposes to give.

Common Law right to self-determination

33 The common law right to refuse food and water was considered by Martin CJ in *Brightwater Care Group(Inc) v Rossiter*.

34 Mr Rossiter was a quadriplegic and, as a result, was generally unable to move. He could move his foot and wriggle one finger. He was a resident of a

[27] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 at [18]-[20].

residential care facility for people with disabilities operated by Brightwater Care Group (Inc) (Brightwater). He was totally dependent upon others, generally those employed by Brightwater, for the provision of the necessaries of life. The services which he requires included regular turning, cleaning, assistance with bowel movements, physiotherapy, occupational therapy and speech pathology. Mr Rossiter was unable to take nutrition or hydration orally but he was not terminally ill, nor was he dying. Mr Rossiter had clearly and unequivocally indicated to representatives of Brightwater that he wished to die. He directed the staff of Brightwater to discontinue the provision of nutrition and general hydration.

35 Martin CJ made declarations that Brightwater was neither required nor entitled to use force to feed and hydrate Mr Rossiter against his wishes. Martin CJ articulated the right of autonomy, or self-determination, recognised by the common law in these terms:

> [24] Another principle well established at common law is the principle which has been described in the cases as the right of autonomy or self-determination. Lord Hoffmann has described this right as being related to respect for the individual human being and in particular for his or her right to choose how he or she should live his or her life: *Airedale National Health Service Trust v Bland* [1993] AC 789, 826. Included within the right of autonomy or self-determination is the right, described as long ago as 1914 in the United States by Justice Cardozo, as the right of 'every human being of adult years and sound mind … to determine what shall be done with his own body: *Schloendorff v Society of New York Hospital* 211 NY 125 (1914), 129.
>
> …
>
> [26] The corollary of that requirement is that an individual of full capacity is not obliged to give consent to medical treatment, nor is a medical practitioner or other service provider under any obligation to provide such treatment without consent, even if the failure to treat will result in the loss of the patient's life. That principle has been established by decisions in each of the major common law jurisdictions, including the United States (*Bouvia v Superior Court of Los Angeles County* 179 Cal App 3d 1127 (1986), 1137 and 1139-1141); Canada (*Nancy B v Hotel-Dieu Quebec* (1992) 86 DLR (4th) 385; *Malette v Shulman* (1990) 67 DLR (4th) 321, 328); the United Kingdom (*Airedale NHS Trust v Bland*, 857 (Lord Keith) and 864 (Lord Goff); *Ms B v An NHS Hospital Trust* [16]-[21]); New Zealand (*Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, 245) and Australia (*Hunter and New England Area Health Service v A*, [9]-[15]).
>
> …
>
> [31] Another corollary of the principles to which I have referred is that a medical practitioner or service provider who provides treatment contrary to the wishes of a mentally competent patient breaks the law by committing a trespass against the person of that patient: *Marion's case*, 264 and 309-310.[28]

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[28] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 at [24], [26], [31].

36 I would respectfully adopt those statements of principle and no useful purpose will be served by reviewing the authorities discussed by Martin CJ before reaching his conclusions. I hold that there is no general common law duty on providers of high care residential services to provide sustenance to a resident who refuses it.

37 A similar conclusion, but in slightly different circumstances, was also reached in *Hunter and New England Area Health Service v A*,[29] shortly before the decision in *Brightwater*. The reasons of McDougall J in that case repay consideration and raise as an issue whether the refusal of treatment or sustenance must be "informed". *Hunter* concerned the obligation of a health service to provide dialysis to a patient who had lost consciousness following septic shock and renal failure. Mr A was kept alive by mechanical ventilation and kidney dialysis. Hunter & New England Health Service (the Health Service) which operated the hospital in which he was cared for became aware that a document apparently prepared by Mr A a year earlier, indicated that he would refuse dialysis. The Health Service commenced the proceedings seeking declarations to the effect that the document was a valid "Advance Care Directive" given by Mr A, and that it would be justified in complying with his wishes as expressed in that directive.

38 McDougall J referred to the following two conflicting interests recognised by the common law:

> (1) a competent adult's right of autonomy or self-determination — the right to control his or her own body; and
>
> (2) the interest of the State in protecting and preserving the lives and health of its citizens.[30]

39 His Honour continued:

> It is in general clear that, whenever there is a conflict between a capable adult's exercise of the right of self-determination and the State's interest in preserving life, the right of the individual must prevail. (I note, but leave to one side, because it does not arise in this case, the situation where the State takes drastic action to deal with a widespread and dangerous threat to the health of its citizens at large.) In *Airedale NHS Trust v Bland* [1993] AC 789 at 859, Lord Keith of Kinkel said that the State's interest is not absolute, and does not compel treatment of a patient contrary to the patient's express wishes. In the same case, Lord Goff said (at 864) that:
>
> > '[I]t 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 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. ...

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[29] (2009) 74 NSWLR 88.

[30] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 90 [5].

> [t]o this extent, the principle of the sanctity of human life must yield to the principle of self-determination.'[31]

40 McDougall J distilled the common law resolution of the conflicting interests which he had identified to the following principles:

> (1) Except in the case of an emergency where it is not practicable to obtain consent (see at (5) below), it is at common law a battery to administer medical treatment to a person without the person's consent. There may be a qualification if the treatment is necessary to save the life of a viable unborn child.
>
> (2) Consent may be express or, in some cases, implied; and whether a person consents to medical treatment is a question of fact in each case.
>
> …
>
> (4) At common law, next of kin cannot give consent on behalf of the person. …
>
> (5) Emergency medical treatment that is reasonably necessary in the particular case may be administered to a person without the person's consent if the person's condition is such that it is not possible to obtain his or her consent, and it is not practicable to obtain the consent of someone else authorised to give it, and if the person has not signified that he or she does not wish the treatment, or treatment of that kind, to be carried out.
>
> (6) A person may make an 'advance care directive': a statement that the person does not wish to receive medical treatment, or medical treatment of specified kinds. If an advance care directive is made by a capable adult, and is clear and unambiguous, and extends to the situation at hand, it must be respected. It would be a battery to administer medical treatment to the person of a kind prohibited by the advance care directive. Again, there may be a qualification if the treatment is necessary to save the life of a viable unborn child.
>
> (7) There is a presumption that an adult is capable of deciding whether to consent to or to refuse medical treatment. However, the presumption is rebuttable. …
>
> (8) If there is genuine and reasonable doubt as to the validity of an advance care directive, or as to whether it applies in the situation at hand, a hospital or medical practitioner should apply promptly to the court for its aid. ….
>
> …
>
> (10) It is not necessary, for there to be a valid advance care directive, that the person giving it should have been informed of the consequences of deciding, in advance, to refuse specified kinds of medical treatment. Nor does it matter that the person's decision is based on religious, social or moral grounds rather than upon (for example) some balancing of risk and benefit. Indeed, it does not matter if the decision seems to be unsupported by any discernible reason, as long as it was made voluntarily, and in the absence of any vitiating factor such as misrepresentation, by a capable adult.

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[31] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 92 [17].

> (11) What appears to be a valid consent given by a capable adult may be ineffective if it does not represent the independent exercise of persons volition: if, by some means, the person's will has been overborne or the decision is the result of undue influence, or of some other vitiating circumstance.[32]

41 McDougall J recognised that an adult's apparent consent may be ineffective if he or she were incompetent in law to give it or if the consent was otherwise vitiated by factors like fraud or undue influence.[33] However, McDougall J rejected the contention that a refusal of treatment must be in any sense "informed". He said:

> [28] Another factor that has been suggested to vitiate refusal of treatment is the absence of, or failure to provide, adequate information. I do not accept the proposition that, in general, a component adult's clearly expressed advance refusal of specified medical procedures or treatment should be held to be ineffective simply because, at the time of statement of the refusal, the person was not given adequate information as to the benefits of the procedure or treatment (should the circumstances making its administration desirable arise) and the dangers consequent upon refusal. As I have said, a valid refusal may be based upon religious, social or moral grounds, or indeed upon no apparent rational grounds; and is entitled to respect (assuming of course that it is given freely, by a competent adult) regardless. But more fundamentally, the concept of informed refusal seems to me to involve some degree of confusion.
>
> [29] There is no doubt that an apparent consent to medical treatment may be vitiated if, there being an adequate opportunity explanation of the treatment and its benefits and dangers, no proper explanation is given. See, for example, *Rogers v Whitaker* (at 489) …
>
> [30] In circumstances where it is practicable for a medical practitioner to obtain consent to treatment, then, for the consent to be valid, it must be based on full information, including as to risks and benefits. But the question with which I am concerned is whether an advance refusal of consent to certain specified forms of medical treatment equally needs to be supported by the provision of all adequate information. The reason for obtaining consent to treatment is to justify in law what would otherwise be a battery (I leave aside the emergency situation where consent cannot be obtained). A consent that is based on misleading information is clearly of no value; and a consent based on insufficient information is not much better. But once it is accepted that religious, social or moral convictions may be of themselves an adequate basis for a decision to refuse consent to medical treatment, it is clear that there is no reason that a decision made on the basis of such values must have taken into account the risks that may follow if a medical practitioner respects and acts upon that decision. This is so a fortiori where there is no discernible rational basis for the decision. No question arises of justifying what would otherwise be unlawful, and factors to be taken into account in determining whether something is or is not unlawful do not have application by analogy.[34]

42 On the other hand, in *Brightwater* Martin CJ took a different view:

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[32] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 97-8 [40].
[33] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 94 [26]-[27].
[34] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 94-5 [28]-[30].

> As I have mentioned, it is clearly established that medical service providers have a legal duty to inform patients of all aspects and risks associated with any medical procedure before seeking their consent to that procedure. With respect to McDougall J, in the circumstances of this case, where it is perfectly feasible to ensure that Mr Rossiter is given full information as to the consequences of any decision to discontinue treatment before he makes that decision, I can see no reason why his medical service providers should not be under a similar obligation. This view is consistent with the views expressed in the English and Canadian cases to which I have referred, where emphasis is placed on the need for an informed decision to discontinue life support: *Airedale NHS Trust v Bland*, 864, and *Nancy B v Hotel-Dieu de Quebec*. There will obviously be cases in which it is not possible to obtain such a decision, but this is not one of them, and I will refrain from proffering any view as to what should be required in such cases. At the moment, on the evidence before me there is some doubt as to whether Mr Rossiter has been given the information that he would need to be fully informed on these issues.[35]

43 The view I take is more qualified. Where the question is whether the use of force is a trespass or assault, absent fraud or compulsion, the nature of, and the motives for, the refusal of consent is irrelevant. In this respect I agree with McDougall J that it is not necessary for the refusal to be informed.

44 Where, however, the question is whether the refusal of sustenance relieves another of a duty to provide it, much will depend on the nature of the duty which is imposed. I shall return to this question later. But for now it is convenient to set out my findings of fact on J's state of mind in deciding to bring her life to an early close, which findings allow a declaration to be made that the giving of the declaration negates any common law duty which H Ltd would otherwise have owed J.

45 J has been examined by a specialist Geriatrician and a specialist Palliative Care practitioner. Both were satisfied of her mental competence. There is no indication that J is depressed. She showed significant insight into her condition and explained to them, rationally and dispassionately, the reasons for her decision. Both doctors explained to J in some detail, the physiological consequences of her decision and the palliative care she could be given.

46 I have had the opportunity to observe J during the course of these proceedings. She was initially unrepresented. She has on occasions addressed me directly about her condition and her concerns. On the basis of the medical reports I have just referred to and my own observations of J, I am satisfied that she has a full understanding of the consequences of her decision. I am satisfied that she has made her decision after long reflection. It must be remembered that J has overcome significant adversity in her life after she contracted polio as a child. My impression is that J is a sensible person who has formed a considered decision based on the importance to her of an independent and dignified life. She has arrived at the decision independently, freely and rationally on the basis of a full understanding of her condition and the consequence of her decision.

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[35] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 at [30].

Suicide and the right to self-determination

47 The right of personal autonomy and self-determination is subject to some limitations. In *Hunter and New England Area Health Service v A*,[36] McDougall J referred to the special case where the right of an unborn child might conflict with the right of self-determination of his or her mother.[37]

48 Another possible limitation on the principle, which may be of more relevance to this matter, is discussed in several cases dealing with the position of prisoners who refuse food and water.

49 The responsibility of the manager of a prison for the care of a prisoner on a hunger strike was considered in *Home Secretary of State for the Home Department v Robb*.[38] Thorpe J held that a manager of a prison and all persons responsible for the care of prisoners could lawfully abide by a prisoner's refusal to receive nutrition and abstain from providing hydration and nutrition in those circumstances. Declarations to that effect were made. Thorpe J accepted as a fundamental principle of the law that every person's body is inviolate and proof against any form of physical molestation.[39]

50 Thorpe J declined to apply the direction of law given to a jury in the civil claim brought against a prison manager for forcefully providing sustenance in *Leigh v Gladstone*.[40] In that case, Lord Alverstone CJ directed a jury that it was the duty of prison officials to preserve the health of prisoners in their custody and that that duty extended to force feeding.[41]

51 The direction given by Lord Alverstone CJ appears to me, with respect, to wrongfully equate the limited duty of care imposed on prison management by the common law with a power to commit trespass and assault on the person of the prisoners in their custody. Given the miserable and life threatening conditions in which prisoners were historically kept there is more than a little irony in the suggestion that there is a common law power to use force to keep them alive.

52 Lord Alverstone's charge to the jury was also not followed by Lord Keith of Kinkel in *Airedale NHS Trust v Bland*.[42] Lord Keith said:

> … the principle of the sanctity of life … is not an absolute one. … it does not authorise forcible feeding of prisoners on hunger strike. It does not compel the temporary keeping

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36 (2009) 74 NSWLR 88.
37 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 at 93 [19]-[21].
38 (1995) 1 All ER 677.
39 *Home Secretary of State for the Home Department v Robb* [1995] 1 All ER 677 at 680H-J.
40 (1909) 26 TLR 139.
41 *Home Secretary of State for the Home Department v Robb* (1995) 1 All ER 677 at 681E.
42 [1993] AC 789.

> alive of patients who are terminally ill where to do so would merely prolong their suffering.[43]

53 In *Schneidis v Corrective Services Commission*,[44] a prisoner in an advanced state of starvation sought injunctions preventing the prison authorities from forcibly administering food, drink and nourishment without his consent. The injunction was refused by Lee J. The primary ground on which the injunction was refused was that the Department was subject to a statutory duty to supply prisoners with proper medical treatment. However, Lee J would also have relied on the authority of the jury charge of Lord Alverston CJ in *Gladstone* notwithstanding the doubts which have been expressed on the soundness of that direction. Lee J concluded his judgment by saying:

> I make it clear that I would not participate to any extent at all in the wilful destruction of the plaintiff's life; to injunct those who would save his life, would make me a participant.

54 Insofar as that passage suggests that self starvation is suicide, I respectfully take a different view for reasons which I give below. Insofar as it suggests that there is an unspecified ethical basis upon which a court may decline to make orders preserving a person's common law right to personal integrity, I know of no such ground.

55 In *In re Joel Caulk*,[45] the majority of the Supreme Court of New Hampshire held that the right to self-determination was subject to the right of the State to maintain an effective criminal justice system.[46] Caulk was serving a 10-20 year sentence for aggravated felonious sexual assault when he commenced a hunger strike. He was also facing prosecution on other charges which had not yet been heard. The State sought orders authorising the warden of the prison in which he was kept to arrange all procedures deemed medically necessary to preserve his life. The majority held that the State had a right to have prisoners serve periods of imprisonment already imposed and to properly prosecute pending charges. The majority also was of the view that there was a State interest "in the preservation of human life and the prevention of suicide". Douglas J, in a dissent which was preferred by Thorpe J in *Home Secretary of State for the Home Department v Robb*,[47] held as follows:

> We are all, however, concerned that prisoners not be starved against their will and that due process be fully accorded. I would, therefore, require that any prisoner seeking to avoid force-feeding must petition the institution for a hearing before a neutral official to determine (1) that the prisoner has no condition or demand he is seeking to extract or manipulate from corrections personnel in return for his not fasting; (2) that he is competent and is voluntarily and knowingly entering into his fast with an understanding of the consequences; (3) that he has been examined by a physician who has explained to

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43 *Airedale NHS Trust v Bland* [1993] AC 789 at 859. See also *Southwark London Borough Council v Williams* [1971] 1 Ch 734 at 736, 746.

44 (Unreported, Supreme Court of New South Wales, Administrative Law Division, Lee J, 8 April 1983).

45 125 N.H. 226, 480 A.2d 93 (NH, 1984).

46 *In re Joel Caulk*, 125 N.H. 226, 480 A.2d 93 (NH, 1984).

47 [1995] 1 All ER 677 at 682C.

> him the physical phases and reactions his body will endure (informed consent); (4) that he executes a voluntary release of all civil or criminal liability (including any claim under 42 U.S.C. § 1983) to the employees and government confining him; (5) that he waive appointment of any guardian seeking to exercise 'substituted judgment' for him when he deteriorates to the point of mental incompetency; and (6) that he agree that the authorities will neither aid nor assist him in any way by medical attention; in other words, he must die truly unassisted by the government.
>
> If all these conditions are met, then a prisoner may avoid force-feeding or intervention by agents of the government. If either the institution or the prisoner disagrees with the result of the hearing, it or he may seek relief (as here occurred) in the superior court.
>
> If these conditions are met, the State is not aiding or abetting a suicide, it is merely leaving an individual alone to speed the natural and inevitable part of life known as death. See RSA 630:4, I. It must be pointed out that the act Mr Caulk is committing is legal, even if it arguably can be called a suicide, because suicide is no longer a crime in New Hampshire. The State is not being manipulated in such instances as it may be if political or private demands are being sought by a hunger strike. Finally, this prisoner, unlike in the abortion context, is dealing with only his body, soul and consciousness rather than with that of another person. See *Wallace v. Wallace*, 120 N.H. 675, 684-85, 421 A.2d 134, 140 (1980).[48]

56 I would accept the distinction drawn by Douglas J in the last paragraph of his cited reasons between suicide and an individual merely speeding "the natural and inevitable part of life known as death" by refusing food and water. The approach of Douglas J has some support in American jurisprudence.[49] That distinction is supported by the common law on criminal responsibility for a man's suicide. In *Russell on Crime*,[50] the author refers to "self murder … as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death".[51] The authors note that a person killing another upon his desire or command is guilty of murder but the person killed "is not looked upon as a felo de se" because his assent is void. On the other hand a person who attempts or commits suicide by himself taking poison is regarded as a "felo de se". Similarly a man who unintentionally kills himself in an attempt to kill another is so regarded.[52]

57 It appears to me that the common law regarded as "self murder" only those suicides which were the consequence of acts or omissions which if directed to another would amount to murder.[53] If that is the basis on which the common law proceeded it is doubtful that self starvation is suicide. The common law recognised a duty, breach of which renders a death unlawful, in the case of a master not providing food to a servant.[54] A parent was also bound to provide for

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48 *In re Joel Caulk* 125 N.H. 226 at 236-7, 480 A.2d 93 at 100 (NH, 1984).
49 David Lanham, "The Right to Choose to Die with Dignity" (1990) 14 Crim L.J. 401 at 412-5.
50 (4th ed, 1865).
51 Greaves, *Russel on Crime* (4th ed, vol I, 1865) at 703.
52 Greaves, *Russel on Crime* (4th ed, vol I, 1865) at 703-4.
53 Sir James Stephen, *A History of the Criminal Law of England* (vol III, 1883) at 104.
54 Greaves, *Russel on Crime* (4th ed, vol I, 1865) at 678-9.

his or her child and a person supplied with sufficient food to properly care for the child of another is under a duty to support that child.[55] Similarly, a person who undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing so for himself and if through his neglect to perform this undertaking death ensues, he is criminally responsible.[56]

58 However, there is no indication in the texts that the common law recognised a duty to feed oneself.

59 It is generally accepted as a matter of community standards, and in law, that a competent adult is not under a duty to take life sustaining medication and that a refusal to do so is therefore not suicide.[57] Once that proposition is accepted it is difficult to maintain the proposition that self starvation is suicide as a matter of logic or by reference to consistent ethical principles. For example, the provision of food by percutaneous endoscopic gastronomy has been held to be medical treatment,[58] and an American court has held that a young quadriplegic woman had the right to hasten her death by directing the removal of a nasal gastric tube.[59]

60 The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) is not applicable to J's circumstances because she is neither terminally ill nor in a permanent vegetative state. However, the provisions to which I refer in the following paragraphs appear to me to proceed on the premise that a competent adult, and by virtue of s 6 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), a 16 year old, may refuse treatment and, that a refusal of medication or medically administered nutrition and hydration is not suicide.[60]

61 Section 7 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) allows a person over 18 years of age to give an anticipatory direction by which he or she can refuse medical treatment which becomes operative when he or she becomes incapable of making decisions about medical treatment. It would be incongruous to hold in the face of that provision that under the common law a competent adult is not entitled to give a similar contemporaneous direction when he or she find himself or herself in either of those states.

62 Section 8 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) authorises the appointment of a medical agent who can make decisions about medical treatment when the appointee is incapable of doing so.

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55 Greaves, *Russel on Crime* (4th ed, vol I, 1865) at 682-5.

56 Greaves, *Russel on Crime* (4th ed, vol I, 1865) at 685; *R v Instan* [1893] 1 QB 450; *R v Taktak* (1988) 34 A Crim R 334.

57 David Lanham, "The Right to Choose to Die with Dignity" (1990) 14 Crim L.J. 401 at 410-13.

58 *Re BMV, Ex parte Gardner* (2003) 7 VR 487.

59 *Bouvia v Superior Court*, 179 Cal.App.3d 1127, 225 Cal.Reptr 297 (Cal.App. 2 Dist, 1986); David Lanham, "The Right to Choose to Die with Dignity" (1990) 14 Crim L.J. 401 at 415.

60 It is an object of the *Consent to Medical Treatment and Palliative Care Act 1995* to allow all persons over the age of 16 years of age to decide freely for themselves on an informed basis whether or not to undergo medical treatment (s 3(a)(i)); medical treatment is broadly defined (s 4).

Section 8(7) expressly excludes from the agent's authority the power to refuse the natural administration of food and hydration. Three points can be made about that provision. First, the provision recognises as lawful an agent's decision to refuse food and water when those substances are administered medically. Secondly, the appointee, when mentally competent, can hardly be denied the capacity to lawfully exercise the same power that s 8 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) allows an agent to exercise when he or she is not competent. Thirdly, the powers of a medical agent can be exercised whether or not the appointee has a terminal illness or is in a vegetative state.

63 The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) proceeds on the basis that instructions given by way of an anticipatory direction, or by a medical agent, are the equivalent of a contemporaneous direction by a competent adult. The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) does not give medical personnel who do not provide treatment in compliance with an anticipated direction or an agent's instruction, a general immunity from civil and criminal proceedings.[61] The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) must therefore proceed on the premise that both the refusal of medical treatment and conduct which abides by that refusal is lawful; if it were otherwise authorisations given pursuant to the Act would be ineffectual.

64 I acknowledge that there is a difference between food and medicine. There is also a difference between the taking of food by natural means and the medical administration of nutrition. However, those differences do not appear to me to be sufficient to sustain a distinction between suicide and the exercise of the right to self-determination. Similarly, if a competent adult is entitled to refuse life sustaining products, including nutrition, and it is not unlawful to respect that wish when he or she is in a vegetative state or has a terminal illness, there is no legal principle which could allow a distinction to be made between the refusal of a person who has those conditions and a person who does not. It would therefore be inconsistent with the provisions of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) to hold that the refusal of life sustaining nutrition, hydration or medication is suicide.

65 I acknowledge that for many any act of self-destruction is irrational and wrong. However, for the above reasons, I find that the refusal of sustenance and medication is not suicide within the common law meaning of that term.

Particular statutory provisions

66 Section 13A of the CLCA provides:

13A—Criminal liability in relation to suicide

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[61] Cf *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 16.

(1) It is not an offence to commit or attempt to commit suicide.

(2) Notwithstanding the provisions of subsection (1), a person who finds another committing or about to commit an act which he believes on reasonable grounds would, if committed or completed, result in suicide is justified in using reasonable force to prevent the commission or completion of the act.

(3) If on the trial of a person for the murder of another the jury is satisfied that the accused killed the other, or was a party to the other being killed by a third person, but is further satisfied that the acts or omissions alleged against the accused were done or made in pursuance of a suicide pact with the person killed, then, subject to subsection (11), the jury shall not find the accused guilty of murder but may bring in a verdict of manslaughter.

(4) The killing of another or an attempt to kill another in pursuance of a suicide pact shall, for the purposes of determining the criminal liability of a person who was a party to the killing or attempt but not a party to the suicide pact, be regarded as murder or attempted murder, as the case may require.

(5) A person who aids, abets or counsels the suicide of another, or an attempt by another to commit suicide, shall be guilty of an indictable offence.

(6) The penalty for an offence against subsection (5) shall be—

(a) subject to paragraph (b)—

(i) where suicide was committed—imprisonment for a term not exceeding fourteen years;

(ii) where suicide was attempted—imprisonment for a term not exceeding eight years;

(b) where the convicted person committed the offence in pursuance of a suicide pact and—

(i) suicide was committed—imprisonment for a term not exceeding five years;

(ii) suicide was attempted—imprisonment for a term not exceeding two years.

(7) A person who, by fraud, duress or undue influence, procures the suicide of another or an attempt by another to commit suicide shall (whether or not he was a party to a suicide pact with the other person) be guilty of murder or attempted murder, as the case may require.

(8) If on the trial of a person for murder or attempted murder the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that he is guilty of an offence against subsection (5), the jury may bring in a verdict that he is guilty of an offence against that subsection.

(9) In any criminal proceedings in which it is material to establish the existence of a suicide pact and whether an act was done, or an omission made, in pursuance of the pact, the onus of proving the existence of the pact and that the act was done, or the omission made, in pursuance of the pact shall lie on the accused.

(10) For the purposes of this section—

(a) ***suicide pact*** means an agreement between two or more persons having for its object the death of all of them whether or not each is to take his own life; and

(b) nothing done or omitted to be done by a person who enters into a suicide pact shall be treated as done or omitted to be done in pursuance of the pact unless it is done or omitted to be done while he has the settled intention of dying in pursuance of the pact.

(11) Where a person induced another to enter into a suicide pact by means of fraud, duress or undue influence, the person is not entitled in relation to an offence against the other to any mitigation of criminal liability or penalty under this section based on the existence of the pact.

67 I have already expressed my view that self-starvation is not suicide. Even if I am wrong about that conclusion, s 13A(2) of the CLCA does no more than provide a defence against a charge or action for assault if a person uses reasonable force to sustain the life of another. It does not, however, impose a duty on a person who finds another committing, or about to commit suicide in that way, to provide sustenance. Plainly enough if H Ltd were to signify its intention to abide by J's direction there would be no suicide pact pursuant to s 13A(4). Accordingly, with respect to s 13A, I would make declarations that if J gives H Ltd the direction and if the plaintiff were to signify its intention to proceed in accordance with the direction, it will not have entered into a suicide pact within the terms of s 13A(4).

68 Nor would it by so doing, aid, abet or counsel the suicide of J. Respecting the right of personal autonomy recognised by the law cannot constitute that offence. Moreover, a person who is not under a duty to prevent the commission of an offence does not aid and abet it by failing to prevent it[62] or by communicating that he or she will not act to prevent it, unless by so doing he or she, as a matter of fact, encourages the commission of the offence.

69 Section 14(1) of the CLCA provides:

(1) A person (the defendant) is guilty of the offence of criminal neglect if—

(a) a child or a vulnerable adult (the victim) dies or suffers serious harm as a result of an unlawful act; and

(b) the defendant had, at the time of the act, a duty of care to the victim; and

(c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and

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[62] *R v Taktak* (1988) 34 A Crim R 334 at 344.

> (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.
>
> Maximum penalty:
>
> (a) where the victim dies—imprisonment for 15 years; or
>
> (b) where the victim suffers serious harm—imprisonment for 5 years.

70 I accept the submission of the Solicitor-General that, on a proper construction of s 14, it applies only to a defendant's failure to take steps to protect a victim from the consequences of the unlawful conduct of another. If J embarks on her proposed course of conduct such conduct that she may engage in will not be unlawful for the reasons I have given. The bare fact that J ceases to accept sustenance does not make H Ltd's failure to provide it a contravention of s 14(1)(d) of the CLCA. More difficult questions would arise if H Ltd were to become aware or ought to have become aware that members of their staff were themselves not providing appropriate care for J should the direction be revoked. I need not consider those issues in order to make the declaration sought in these proceedings, which will be limited to the operation of s 14 on the direction alone, absent any such complicating circumstances.

71 Division 7A of the CLCA comprises a number of sections which make it an offence to engage in conduct which causes or may cause serious harm. Division 7A expressly does not to apply to conduct which causes harm where the victim has lawfully consented to that harm.[63] However, a person may only consent to harm if the nature of the harm and the purpose for which it is inflicted fall within the limits that are generally accepted in the community. It is not possible to hold that suicide is generally accepted within the community because of the prohibition of any conduct which may aid and abet suicide and from the prohibition against suicide pacts in s 13A. However, both s 23 and s 24 proscribe conduct which "causes harm". The form in which the sections are expressed does not contemplate the commission of an offence by omission. There is no textual basis which allows the identification of the circumstances in which a duty to act will arise. It would cut across, and be inconsistent with, common law principles and the specific duties which underpin the offences which I next consider, to imply in ss 23 and 24 an amorphous duty to act to prevent harm.

72 Section 29 of the CLCA provides:

> **29—Acts endangering life or creating risk of serious harm**
>
> (1) Where a person, without lawful excuse, does an act or makes an omission—
>
> (a) knowing that the act or omission is likely to endanger the life of another; and

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63 *Criminal Law Consolidation Act 1935* (SA) s 22.

(b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,

that person is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 15 years;

(b) for an aggravated offence—imprisonment for 18 years.

(2) Where a person, without lawful excuse, does an act or makes an omission—

(a) knowing that the act or omission is likely to cause serious harm to another; and

(b) intending to cause such harm or being recklessly indifferent as to whether such harm is caused,

that person is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 10 years;

(b) for an aggravated offence—imprisonment for 12 years.

73 In my view, the failure to provide sustenance will constitute an offence under this section only where there is a duty to provide it. In my view, if J were to give the direction H Ltd would have a lawful excuse not to provide her with sustenance. The lawful excuse is not founded in J's consent to the harm, because as I have observed suicide does not fall within the ambit of harm acceptable to the community. H Ltd has a lawful excuse because it would have no duty to provide sustenance where J has directed it not to do so.

74 A duty to take care for the welfare of another is incapable of performance unless there is an element of co-operation on the part of the person who is owed the duty. Where that co-operation is withdrawn, the effect will usually be to negate the duty and absolve the person who would otherwise owe the duty from any obligation.

75 In some circumstances, however, the duty may extend to taking steps to secure the co-operation of the person protected by the duty. It may also extend to ensuring the withdrawal of co-operation is a voluntary and informed decision.

76 The duty imposed by s 29 of the CLCA which may be breached by an omission is enlivened by the bare forseeability of the harm. The duty is not based on any other circumstances like the dependency or vulnerability of the protected person. For those reasons, I hold that the duty does not include an obligation to take steps to overcome a refusal of assistance by the protected

person. Nor is it necessary for a defendant to enquire into the state of mind of the person who refuses assistance.

77 Section 30 of the CLCA provides:

> **30—Failing to provide food etc in certain circumstances**
>
> Where—
>
> (a) a person is liable to provide necessary food, clothing or accommodation to another person who is—
>
> (i) a minor; or
>
> (ii) suffering from an illness; or
>
> (iii) disabled; and
>
> (b) the person, without lawful excuse, fails to provide that food, clothing or accommodation,
>
> that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 3 years.

78 Generally, a person will not be liable to provide the necessary sustenance where the person whom he or she is otherwise liable to sustain withholds the mutual co-operation which is necessary to discharge that liability. However, the duty on which s 30 of the CLCA operates arises from a relationship of dependency in which the protected person is in a vulnerable position. For those reasons, the duty may be breached where, for example, the protected person who has refused food is not in a position to make a rational decision. In such circumstances it may be necessary for the person who is liable to provide the necessities referred to in the section to take at least some steps to provide them notwithstanding the refusal. However, given my findings about the quality of J's consent made in [46] above, I need not circumnavigate the outer limits of that duty and can declare that if J gives the direction, H Ltd is not "liable to provide necessary food" within the meaning of that expression in s 30 of the CLCA.

The *Aged Care Act 1997* (Cth)

79 The objects of the *Aged Care Act 1997* (Cth) (which I shall refer to in this section of my reasons as the Act) include the provision of funding for aged care and the promotion of high quality care and accommodation for the aged.[64] Part 2.1 of the Act regulates the approval of providers of aged care services. The plaintiff is an approved provider.

80 Chapter 4 of the Act imposes certain responsibilities on approved providers. An approved provider has a responsibility to provide to persons in its care, the

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[64] *Aged Care Act 1997* (Cth) s 2.1(1)(b).

care and services which are specified in the Quality of Care Principles.[65] In the provision of residential care, approved providers must not act in any way which is inconsistent with the rights and responsibility of care recipients which are specified in the User Rights Principles.[66] Both the User Rights Principles and the Quality of Care Principles are statutory instruments made by the Minister pursuant to s 96.1 of the Act.

81 Pursuant to s 65.1 of the Act, the Secretary of the Department of Aged Care may impose sanctions on an approved provider which does not comply with its responsibilities. Those sanctions include the revocation or suspension of the provider's approval. Section 53.2(1) of the Act provides that the failure of an approved provider to meet a responsibility imposed pursuant to Chapter 4 of the Act, which does not give rise to an offence, has no consequence under any law other than the Act. Where, however, the failure also constitutes a breach of an obligation under another law, the operation of that other law is not affected by s 53.2 of the Act.[67] It follows that the consequences of the acts or omissions of an approved provider under Commonwealth and State statutes and the common law are not affected by the Act, but the mere legal circumstance that those acts or omissions also breach a ch 4 responsibility has no consequence beyond those provided for by the Act itself. The relevant consequence of that construction to these proceedings is that the responsibilities imposed by s 53.2 of the Act are imposed only for the purposes of the Act and do not, of themselves, impose a duty to provide those services for the purposes of any other law.

82 Schedule 1 of the Quality of Care Principles 1997 (the Care Principles) approved by the Minister impose responsibilities on approved providers of residential care services. Item 1.10 of Sch 1 obliges the provider to provide meals and refreshments of adequate variety, quality and quantity for each resident. Pursuant to Pt 2 of Sch 1, an approved provider must provide daily living assistance for bathing, showering and personal hygiene. Residents must also be supported emotionally. Medical treatments and procedures must be delivered in accordance with the instructions of a health professional. Part 3 of Sch 1 requires the provision of hygiene products and pharmaceutical supplies to residents receiving a high level of residential care. Importantly emotional support and nursing services including palliative care must be provided. The provision of medication is made subject to the requirements of State and Territory law.

83 Schedule 2 of the Care Principles establishes accreditation standards for approved providers. An approved provider is expected to ensure that residents receive the appropriate clinical care, and such specialised nursing care, that they require. The provider is expected to properly manage their medication and to provide pain management and palliative care. It is a requirement that residents

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[65] *Aged Care Act 1997* (Cth) s 54.1.
[66] *Aged Care Act 1997* (Cth) s 56.1(l).
[67] *Aged Care Act 1997* (Cth) s 53.2(2).

receive adequate nourishment and hydration. Standards for skin care, continence management, and oral and dental care are also established.

84 Part 3 of Sch 2 of the Care Principles deals with residents' lifestyle. Approved providers are expected to provide emotional support and to assist residents to achieve maximum independence. They must ensure that the residents' right to privacy and dignity are respected and that their individual interests, customs, beliefs and cultural and ethnic backgrounds are fostered. Item 3.9 provides:

> Each resident (or his or her representative) participates in decisions about the services the resident receives, and is enabled to exercise choice and control over his or her lifestyle by not infringing on the rights of other people.

85 A Charter of Residents' Rights and Responsibilities (the Charter) is included as Sch 1 to the User Rights Principles 1997 (Rights Principles). It declares that each resident of a residential care service has the right to a quality of care appropriate to his or her needs. The Charter enshrines residents rights to personal independence and the right to maintain control over, and make decisions about, their personal life, financial affairs and possessions.

86 In my opinion, on a proper construction of the obligations contained in items 1.10 of Sch 1 and 2.10 of Sch 2 of the Care Principles, an approved provider does not have a responsibility to provide nutrition or hydration where a resident voluntarily and rationally directs the provider not to provide those services. Nor do items 2.4, 2.7, 3.7 and 3.10 of Sch 1 and Items 2.4 and 2.7 of Sch 2 of the Care Principles require an approved provider to administer insulin where a resident makes an independent decision after proper consideration to refuse it.

87 It would be inconsistent with those parts of the Care Principles and the Charter which enshrine the independence of residents and their rights to make choices affecting their personal lives to extend the responsibility to provide food and hydration to those residents who exercise a lawful choice not to accept them. The Charter and Care Principles recognise that residents remain in control of their personal lives. However, it must again be observed that the duty on aged care residential providers is owed to persons who are dependent on the proper discharge of their responsibilities. The duty therefore extends to ensuing that the refusal is voluntary, rational and informed.

88 It does not advance the objects and purpose of the Act and the particular function served by the Care Principles to construe them to require the provision of care which the resident rationally refuses. The purpose is to manage the quality of care provided through statutorily approved, and government assisted, aged care providers for the protection and benefit, of residents. That purpose is not advanced by requiring the provision of food, hydration and medicine to residents who rationally refuse to take it. The imposition of the obligations in the

Care Principles is premised on their being sufficient co-operation from the resident to allow the service to be provided. There is no indication that the Act intended to alter the common law position and deny residents their common law rights. Certainly there is no indication that the purpose of the Act was to authorise the use of force against the considered wishes of the resident in the provision of those services.

89 By reason of my findings concerning J's state of mind, I am in a position to make declarations that H Ltd will not breach its responsibilities under the Act by ceasing provision of nutrition, hydration and insulin if J were to give the direction.

90 J is likely to request the provision of palliative nursing care and medication if she embarks upon the course she proposes. Other than with respect to the administration of insulin, it is not possible to declare with sufficient certainty how the medical treatment provisions of the Care Principles will operate in the circumstances which may eventuate as the physiological consequences of abstinence from food, water and insulin develop. However, I expect that my approach to the construction of the most immediately pressing provisions of the Care Principles will provide some guidance when that time comes.

Revocation of the direction

91 The negation of duties by the direction is dependent on the continuing operation of the direction. If the direction is withdrawn or revoked, in whole or in part, the duties will again be enlivened. More than that, the absolution of H Ltd from its responsibilities depends on it continuing to believe on reasonable grounds that the direction has not been withdrawn or revoked. If it does not have that belief its failure to provide care may result in criminal or civil sanctions. For that reason, the declarations will be limited to circumstances where H Ltd has that belief.

92 Moreover, given the momentous nature of the declarations sought, I will require an undertaking from H Ltd as to the practical steps it will take to meet this requirement.

The Enduring Power of Attorney

93 Section 25 of the *Guardianship and Administration Act 1993* (SA) provides:

> **25—Appointment of enduring guardian**
>
> (1) A person of or over 18 years of age may, by instrument in writing, appoint a person as his or her enduring guardian.
>
> (2) An instrument is not effective to appoint an enduring guardian unless—

(a) it is in the form set out in the Schedule or in a form to similar effect; and

(b) it has endorsed on it an acceptance in the form or to the effect of the acceptance set out in the Schedule signed by the person appointed as the enduring guardian; and

(c) it is witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate set out in the Schedule.

...

(5) Subject to this Act and the conditions, limitations or exclusions (if any) stated in the instrument, an instrument appointing an enduring guardian authorises the appointee or, if there is more than one appointee, the appointees jointly or severally (as the case may be)—

(a) to exercise the powers at law or in equity of a guardian if the person who makes the appointment subsequently becomes mentally incapacitated; and

(b) in that event, to consent or refuse consent to the medical or dental treatment of the person, except where the person has a medical agent available and willing to act in the matter.

(6) The powers conferred by an instrument appointing an enduring guardian must, unless the Board approves otherwise, be exercised in accordance with any lawful directions contained in the instrument.

94 Section 59 of the *Guardianship and Administration Act 1993* (SA) provides:

59—Consent of certain persons is effective

(1) Where it is proposed to give medical or dental treatment (not being prescribed treatment) to a person to whom this Part applies, the consent of the appropriate authority to the treatment will be taken to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent.

(2) For the purposes of subsection (1), the appropriate authority is—

(a) if a guardian has been appointed in respect of the person under any Act or law, his or her powers as guardian have not been limited so as to exclude the giving of such consent and he or she is available and is willing to make a decision as to consent—the guardian;

(b) in any other case—

(i) a relative of the person; or

(ii) the Board, on application by—

(A) a relative of the person; or

(B) the medical practitioner, dentist or other health professional proposing to give the treatment; or

(C) any other person who the Board is satisfied has a proper interest in the matter.

95 The powers of guardian appointed pursuant to s 25 of the *Guardianship and Administration Act 1993* (SA) to refuse medical treatment are, unlike the powers of a medical agent appointed pursuant to s 8 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), not limited.

96 It is not necessary in this case to determine how the two Acts should be construed in the eventuality that an enduring guardian purports to exercise his or her power to give a direction which a medical agent can not give. That issue aside, in my view an enduring guardian may give such directions as may have been given by the appointee before he or she became incapacitated.

97 Moreover, pursuant to s 25(5) of the *Guardianship and Administration Act 1993* (SA) an enduring guardian must give medical directions in accordance with any specified conditions of his or her appointment. It follows that if, and for so long as, J becomes and remains mentally incapacitated, H Ltd is subject to the same instructions as those given to it by the direction. In those circumstances, similar declarations should be made with respect to the operation of the relevant statutory provisions in the event that J becomes mentally incapacitated.

Declarations

98 I propose, subject to hearing the parties on the precise form of the declaration, to make the following order:

Upon the plaintiff undertaking to:

(a) inform those of its employees who from time to time have the care of the plaintiff (its employees) of the terms of this order;
(b) instruct its employees to take reasonable care to notice any indication that the first defendant has given, or is attempting to give, a direction about her medical treatment and to report that indication to the most senior nurse then in charge of the care of the first defendant (the senior nurse);
(c) instruct the senior nurse to take reasonable care to ascertain the wishes of the first defendant as to her medical treatment upon noticing any indication, or receiving any information, that the first defendant has given, or may wish to give, a direction concerning her medical treatment.

This Court orders:

1. If the first defendant directs the plaintiff in terms of the direction attached to this order (the direction), for such period thereafter whilst the first defendant retains her mental competence and the plaintiff believes on reasonable grounds that the first defendant has not revoked the direction:

1.1 The plaintiff is under no duty and has no lawful justification to feed or provide nutrition to the first defendant even if there are likely to be consequences to her life or health;

1.2 The plaintiff is under no duty, and has no lawful justification to act to hydrate the first defendant, except for such incidental hydration as may be indicated in connection with oral hygiene or the use of mouth swabs to palliate pain and discomfort, even if there are likely to be consequences to her life or health;

1.3 The plaintiff is under no duty, and has no lawful justification, to act to administer insulin, even if there are likely to be consequences to her life or health.

2. If the first defendant directs the plaintiff in terms of the direction, for such period thereafter whilst the first defendant retains her mental competence and the plaintiff believes on reasonable grounds that the first defendant has not revoked the direction:

2.1 The plaintiff does not enter into a suicide pact with, and does not aid and abet the suicide of the first defendant within the meaning of those terms in s 13A of the *Criminal Law Consolidation Act 1935* by communicating its intention to act or by acting, in accordance with the direction;

2.2 For the purposes of s 14 of the *Criminal Law Consolidation Act 1935* the plaintiff is not under a duty to act to protect the first defendant from the consequences of her giving of the direction and compliance with that direction by any person who is responsible for the care of the first defendant;

2.3 For the purposes of ss 23 and 24 of the *Criminal Law Consolidation Act 1935* the plaintiff does not, by ceasing to administer nutrition, hydration and insulin to the first defendant, other than in compliance with the direction cause any harm which may ensue to the first defendant as a result;

2.4 For the purposes of s 29 of the *Criminal Law Consolidation Act 1935* the plaintiff has a lawful excuse for any omission by it to provide nutrition, hydration and insulin other than in accordance with the direction;

2.5 The plaintiff is not liable to provide the first defendant with food within the meaning of that phrase in s 30 of the *Criminal Law Consolidation Act 1935*.

3. If the first defendant directs the plaintiff in terms of the direction, for such period thereafter whilst the first defendant retains her mental competence and the plaintiff believes on reasonable grounds that the first defendant has not revoked the direction:

3.1 On a proper construction of the *Aged Care Act 1997* (Cth) the plaintiff does not have a responsibility to provide nutrition pursuant to Item 1.10 of Sch 1 of the Quality of Care Principles made pursuant to the Act (Quality of Care Principles) and Item 2.10 of the Sch 2 of the Quality of Care Principles or insulin pursuant to Items 2.4, 2.7, 3.7

and 3.10 of Sch 1 of the Quality of Care Principles and Items 2.4 and 2.7 of Sch 2 of the Quality of Care Principles or hydration pursuant to Item 1.10 of Sch 1 and Item 2.10 of Sch 2 of the Quality of Care Principles other than in accordance with the direction.

4. Whilst the Enduring Power of Guardian executed by the first defendant dated 7 May 2010 remains operative, where the first defendant becomes and remains mentally incapacitated:
   - 4.1 The plaintiff is under no duty and has no lawful justification to feed or provide nutrition to the first defendant even if there are likely to be consequences to her life or health;
   - 4.2 The plaintiff is under no duty, and has no lawful justification to act to hydrate the first defendant, except for such incidental hydration as may be indicated in connection with oral hygiene or the use of mouth swabs to palliate pain and discomfort, even if there are likely to be consequences to her life or health;
   - 4.3 The plaintiff is under no duty, and has no lawful justification, to act to administer insulin, even if there are likely to be consequences to her life or health.
5. Whilst the Enduring Power of Guardian executed by the first defendant dated 7 May 2010 remains operative, where the first defendant becomes and remains mentally incapacitated:
   - 5.1 The plaintiff does not enter into a suicide pact with, and does not aid and abet the suicide of the first defendant within the meaning of those terms in s 13A of the *Criminal Law Consolidation Act 1935* by communicating its intention to act or by acting, in accordance with the direction;
   - 5.2 For the purposes of s 14 of the *Criminal Law Consolidation Act 1935* the plaintiff is not under a duty to act to protect the first defendant from the consequences of her giving of the direction and compliance with that direction by any person who is responsible for the care of the first defendant;
   - 5.3 For the purposes of ss 23 and 24 of the *Criminal Law Consolidation Act 1935* the plaintiff does not, by ceasing to administer nutrition, hydration and insulin to the first defendant, other than in compliance with the direction cause any harm which may ensue to the first defendant as a result;
   - 5.4 For the purposes of s 29 of the *Criminal Law Consolidation Act 1935* the plaintiff has a lawful excuse for any omission by it to provide nutrition, hydration and insulin other than in accordance with the direction;
   - 5.5 The plaintiff is not liable to provide the first defendant with food within the meaning of that phrase in s 30 of the *Criminal Law Consolidation Act 1935*.
6. Whilst the Enduring Power of Guardian executed by the first defendant dated 7 May 2010 remains operative, where the first defendant; becomes and remains mentally incapacitated:

6.1 On a proper construction of the *Aged Care Act 1997* (Cth) the plaintiff does not have a responsibility to provide nutrition pursuant to Item 1.10 of Sch 1 of the Quality of Care Principles made pursuant to the Act (Quality of Care Principles) and Item 2.10 of the Sch 2 of the Quality of Care Principles or insulin pursuant to Items 2.4, 2.7, 3.7 and 3.10 of Sch 1 of the Quality of Care Principles and Items 2.4 and 2.7 of Sch 2 of the Quality of Care Principles or hydration pursuant to Item 1.10 of Sch 1 and Item 2.10 of Sch 2 of the Quality of Care Principles other than in accordance with the direction.

DIRECTION TO CEASE THE PROVISION AND ADMINISTRATION OF NUTRITION, HYDRATION, AND INSULIN

I, **[J]** of [address] **VERIFY AND DIRECT** as follows:-

1 I am a resident of a H Ltd Aged Care Facility.

2 By letter to H Ltd dated 19 January 2010 I gave notice of my intention to end my life by ceasing to eat or drink.

3 I have also verbally given notice of my intention to refuse the administration of insulin which I take for my diabetic condition and for a period of time on 19 April 2010 did refuse the administration of insulin.

4 At the request of H Ltd, I have been seen by [Dr H], and by [Dr P].

5 [Drs H and P] advised me of the consequences which will flow from the cessation of the provision or administration of nutrition and/or hydration and/or insulin and I had an opportunity to ask each of the doctors any questions I had in relation to those consequences.

6 I have read and understand the report of [Dr H] dated 4 February 2010 and the report of [Dr P] dated 24 March 2010.

7 I have had an opportunity to obtain legal advice from Ms Berzins, Solicitor of 256A Unley Road, Unley Park, SA, 5061 and have executed an Enduring Power of Guardian dated 7 May 2010.

8 I understand that if I refuse the provision or administration of nutrition, hydration, or insulin that over time I will die.

9 I hereby direct H Ltd that immediately upon the witnessing of my signature on the within document:-

   a. That I not be provided with any nutrition or hydration by mouth or medical administration except for such incidental hydration as may be indicated in conjunction with oral hygiene or the use of mouth swabs to palliate pain and discomfort;
   b. That I not be administered insulin or any other medication except for medication to palliate pain and discomfort.

10 I give this direction for my own personal reasons.

11 I understand that I may revoke this direction at any time.

DATED this day of 2010.

…….
[J]

……
WITNESS

……
PRINT NAME

……