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# LIMITATIONS IN CANADIAN LAW ON THE RIGHT OF A PRISONER TO REFUSE MEDICAL TREATMENT

Donald G. Casswell\*

## INTRODUCTION

It is trite law that the consent of the patient is a prerequisite to any medical intervention.<sup>1</sup> In the famous words of Cardozo, J., in *Schloendorff v. Society of New York Hospital*:<sup>2</sup> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." However, there are certain situations in which the consent of the patient is not required as, for example, in emergency situations or situations in which the patient does not have the mental capacity to give or withhold consent. In the latter situation, the consent of some surrogate is required<sup>3</sup> and in the former situation, no consent is required.<sup>4</sup> Whether the situation is an emergency or one in which the patient lacks the necessary capacity is often a difficult factual question. However, the law on the matter is relatively clear.

An uncertain area of the law concerns the right of prisoners to give or withhold consent to medical treatment.<sup>5</sup> Does a prisoner enjoy the same right as any other person to give or withhold consent to medical treatment?

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The citations in this article do not conform to the Harvard Uniform System of Citations. Rather, they follow the author's instructions as to Canadian citation form.

1. *Hopp v. Lepp*, [1980] 2 S.C.R. 192, 112 D.L.R. (3d) 67, 13 C.C.L.T. 66; *Reibl v. Hughes*, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1, 14 C.C.L.T. 1.

2. 105 N.E. 92, 93 (N.Y.C.A. 1914). This statement by Cardozo, J., was referred to by Laskin, C.J.C. in *Reibl v. Hughes*, [1980] 2 S.C.R. at 890, 114 D.L.R. (3d) at 10.

3. Various persons may be authorized to give consent as, for example, a relative or guardian, a doctor or a hospital director. See E. PICARD, *LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA* 61 (2d ed. 1984).

4. *Marshall v. Curry*, [1933] 3 D.L.R. 260, 60 C.C.C. 136 (N.S.S.C.).

5. On the various underlying policy issues and legal positions possible, see Somerville: *Refusal of Medical Treatment in "Captive Circumstances"*, 63 CAN. B. REV. 59 (1985); Zelik: *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy*, [1976] PUBLIC LAW 153.

Text writers usually answer this question affirmatively.<sup>6</sup> It is submitted, however, that Canadian law on this point is unclear and, if anything, what little law there is directly on point suggests the contrary.<sup>7</sup> Two recent Canadian cases—the 1983 decision of the British Columbia Court of Appeal in *Attorney-General of British Columbia v. Astaforoff*<sup>8</sup> and the 1984 decision of the Quebec Superior Court in *Attorney-General of Canada v. Notre Dame Hospital; Niemic (third party)*<sup>9</sup>—have not clarified this area of the law.<sup>10</sup> Indeed *Niemic* may have further complicated the situation by importing into the analysis an inappropriate application of the *Canadian Charter of Rights and Freedoms*.<sup>11</sup> The purpose of this essay is to examine the judgments in *Astaforoff* and *Niemic*.

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6. See, e.g., PICARD, *supra* note 3, at 63.

7. Leigh v. Gladstone, 26 T.L.R. 139 (K.B. 1909). American jurisprudence is fairly certain on the analysis to be used in such cases: the legitimate interests of the state's correctional system are to be balanced against the constitutional rights of the prisoner refusing treatment. The state interests identified are (1) deterrence of crime, (2) removing offenders from society for a given period of time, (3) rehabilitation of offenders, and (4) maintaining internal prison security. See Pell v. Procunier, 417 U.S. 817, 822-23 (1974). The constitutional rights of a prisoner, while necessarily limited by the fact of imprisonment, are not totally abrogated. See Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). The constitutionally protected rights which are of primary relevance in such cases are the right to privacy and the right to procedural due process. However, while the analysis to be followed is fairly certain, the results of particular cases are, it is submitted, as difficult to predict as in Canadian jurisprudence. For considerations of the leading American cases, see Tagawa: *Prisoner Hunger Strikes: Constitutional Protection for a Fundamental Right*, 20 AM. CRIM. L. REV. 569 (1983); Greenberg: *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747 (1983); Powell: *Constitutional Law—Forced Feeding of a Prisoner on a Hunger Strike: A Violation of an Inmate's Right to Privacy*, 6 N.C. L. REV. 714 (1983); Ansbacher: *Force-Feeding Hunger-Striking Prisoners: A Framework for Analysis*, 35 U. FLA. L. REV. 99 (1983); Bennett: *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157 (1983); Sunshine: *Should a Hunger-Striking Prisoner Be Allowed to Die?*, 24 B.C. L. REV. 423 (1984).

8. 6 C.C.C.3d 503 (B.C.C.A.), *aff'g*, 6 C.C.C.3d 498 (B.C.S.C. 1983)

9. [1984] C.S. 426, 8 C.R.R. 382 (Que. S.C.).

10. In *Institut Philippe Pinel de Montréal v. Dion*, [1983] C.S. 438, 2 D.L.R. (4th) 234 (Que. S.C.), the Court was similarly faced with a patient who refused medical treatment. However, *Dion* involved a patient whom the Court found was unable to give or refuse consent because of psychiatric illness, Que. C.S. at 443, D.L.R.4th at 241. No question of competency to give or withhold consent to medical treatment arose on the facts in either *Astaforoff* or *Niemic*. This essay is concerned solely with the case of an adult prisoner who is competent to consent to or refuse medical treatment.

11. The CANADIAN CHARTER OF RIGHTS AND FREEDOMS is Part I of the CONSTITUTION ACT, 1982, which in turn is Schedule B to the CANADA ACT, 1982, U.K. 1982, c. 11. The CANADIAN CHARTER OF RIGHTS AND FREEDOMS, together with the rest of the CONSTITUTION ACT, 1982, was proclaimed in force by Her Majesty the Queen on April 17, 1982. (Proclamation: Registration SI/82-97, May 12, 1982.)

CANADIAN LAW PRIOR TO *ASTAFOROFF* and *NIEMIC*

The leading Anglo-Canadian case on the medical treatment of prisoners is the 1909 decision of the English Court of King's Bench in *Leigh v. Gladstone*.<sup>12</sup> Mrs. Marie Leigh, the plaintiff, was a suffragette who had been convicted of disturbing a meeting and resisting the police. She was sentenced to four months imprisonment with hard labour. Immediately upon entering prison, she committed acts of indiscipline (such as breaking several window panes) and refused to eat the food given to her. On the third day of her imprisonment, the plaintiff was forcibly fed by the prison doctor. The plaintiff admitted that no more force than was necessary to feed her was used. After two weeks of daily force feedings, either by mouth or nasally, the plaintiff was sick after each feeding. After approximately a month of such feedings, the plaintiff was very weak and could retain no food. After serving slightly more than one month of her four month sentence, the plaintiff brought action against the prison doctor who had fed her, the governor of the prison, and the Home Secretary, claiming damages for assault.

The case was tried before a jury. In charging the jury, Lord Alverstone, C.J., said that "it was wicked folly [for the plaintiff] to attempt to starve [herself] to death" and ruled:<sup>13</sup>

as a matter of law that it was the *duty* of the prison officials to preserve the health of the prisoners, and *a fortiori* to preserve their lives. (emphasis provided)

The report of the case does not indicate any authority having been cited by the Chief Justice in support of this ruling. In the result, after two minutes deliberation, the jury returned a verdict for the defendants.

It is submitted that the ruling in *Leigh v. Gladstone* is wrong. The decision is clearly contrary to the fundamental principle that every sane adult person has the right to determine what is done with his body.<sup>14</sup> One writer, Graham Zellick, argued persuasively<sup>15</sup> that *Leigh v. Gladstone* cannot be justified either by reference to the common law rule against attempting suicide<sup>16</sup> or on the basis of imprisonment alone. He summarized his position as

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12. See *supra* note 7.

13. *Id.* at 142. The second passage reproduced was not made during the charge to the jury. However, it is a quotation from the trial judge and is to the same effect as his words in charging the jury, *id.*, which were: "It was the duty. . . of the officials to preserve the health and lives of the prisoners, who were in the custody of the Crown."

14. See *supra* note 2 and accompanying text.

15. See Zellick, *supra* note 5.

16. In any event, attempting suicide ceased to be an offence in Canada in 1972, Can. Stat. c. 13, § 16 (1972), which repealed section 225 of the *Criminal Code*, R.S.C. 1970, c. C-34 (1970). It is, however, an offence contrary to section 224 of the *Code* to counsel, procure, aid, or abet a person to commit suicide.

follows:<sup>17</sup>

The duty laid down in *Leigh v. Gladstone* is open to question, both as regards prisons and any more general application. The justification by reference to the particular fact of imprisonment is far from convincing. The perfunctory and uncritical acceptance of the decision by many commentators is surprising.

*Leigh v. Gladstone* has also been referred to as an example of the defence of necessity.<sup>18</sup> However, it is submitted that this defence is inapplicable against a person who has explicitly indicated that he does not wish to be "saved." However, *Leigh v. Gladstone* has not yet been overruled.

*ATTORNEY-GENERAL OF BRITISH COLUMBIA V. ASTAFOROFF*

Mary Astaforoff was a 69 year old Sons of Freedom Doukhobor who had been convicted of arson for the seventh time. She was sentenced to three years imprisonment and became, therefore, the responsibility of the federal prison system.<sup>19</sup> However, under an agreement between the federal and British Columbia governments, she was serving her sentence in a provincial jail in British Columbia.<sup>20</sup> She went on an intermittent hunger strike, declining to eat for 208 days out of approximately a year and a half. She recommenced her hunger strike and was in very poor health. Medical evidence indicated that she might not have long to live if allowed to continue refusing food. The medical evidence also indicated that she was rational and fully aware of what she was doing. She informed prison officials that she did not want any medical attention and that that request was to continue even if she became incapable of making rational decisions or slipped into unconsciousness. The Attorney-General of Canada brought a petition seeking an order directing the British Columbia jail officials "to provide such medical treatment as is deemed appropriate to preserve the life of . . . Mary Astaforoff, although she does not consent to such treatment."<sup>21</sup>

At first instance, Bouck, J., in oral reasons, characterized the issue as

17. See Zellick, *supra* note 5, at 185.

18. In *Southwark London Borough Council v. Williams*, [1974] 1 Ch. 734, 746 (C.A.), Edmund Davies, L.J., referred to *Leigh v. Gladstone* as follows: "As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril: for example, the forcible feeding of an obdurate suffragette, as in *Leigh v. Gladstone* (1909), 26 T.L.R. 139, 142, where Lord Alverstone, C.J., spoke of preserving the health and lives of the prisoners who were in the custody of the Crown; . . ."

19. Under Canadian law, persons sentenced to a term of imprisonment of two years or more become the responsibility of the federal penitentiary system.

20. The only federal penitentiary for women is at Kingston, Ontario, some 3500 kilometres from Astaforoff's home province, British Columbia. Incarcerating her in a provincial jail allowed her to remain in British Columbia.

21. *Astaforoff*, 6 C.C.C.3d at 503.

follows:<sup>22</sup>

As I see it, my responsibility is to decide whether, under the particular circumstances of this case, there is a legal duty cast upon the province to force-feed the respondent against her will in order to prevent her from committing suicide. If there is this duty, then should I make the order compelling the prison officials to carry it out?

Without reference to any authority<sup>23</sup> and, in particular, without referring to *Leigh v. Gladstone*, Bouck, J., held that "no law compels the provincial officers to apply force to her against her will."<sup>24</sup> He reasoned as follows:<sup>25</sup>

What Mary Astaforoff is trying to do is commit suicide. The law does not countenance suicide. While it is not a crime, the *Criminal Code* says it is an offence to counsel or procure a person to commit suicide, or aid or abet a person in the commission of suicide: s. 224. But idly standing by without encouraging a person to commit suicide is no crime. A mere spectator to a suicide cannot be convicted of criminal offence.

None the less, it is the duty of every person to use reasonable care in preventing a person from committing suicide. What is reasonable depends upon the facts. For example, if a jail guard sees a prisoner trying to hang himself in his cell, then it seems reasonable he should take steps to prevent the inmate from taking his own life. On the other hand, if a person climbs to the top of a bridge and threatens to jump, the law does not impose a legal duty on anyone to risk his own life by climbing the bridge in attempting to get the person down. In that situation, it is reasonable if steps are taken to encourage the jumper by shouts or other methods of communication not to jump. . . .

I am aware of the responsibility of the court to preserve the sanctity of life. It is a moral as well as a legal duty. However, in the circumstances of this case the facts are against the motion of the Attorney-General of Canada. She has a long history of fasting. Her health is very poor. There is the danger she might die by applying the procedure necessary to get nutrients into her stomach. She is free to leave the prison, but she chooses to remain there and

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22. *Id.* at 502.

23. Bouck, J., indicated that counsel had referred him to "a number of American authorities discussing the principles involved," but there is no indication of whether he was referred to *Leigh v. Gladstone*. He stated that "[b]ecause it is necessary to deal with the application right now, I do not have the luxury of analyzing the law in as much detail as the arguments justify." *Astaforoff*, 6 C.C.C.3d at 499.

24. *Id.* at 503.

25. *Id.* at 502-03.

starve herself to death. Given these facts, I cannot find it is reasonable that the Attorney-General for British Columbia and the prison authorities under his direction should force-feed her in order to prevent her suicide.

Bouck, J.'s, references to "the sanctity of life" and "the *duty* of every person to use reasonable care in preventing a person from committing suicide" (emphasis provided) are reminiscent of *Leigh v. Gladstone*, and certainly consistent therewith. However, there is some lessening of the extent of the duty: reasonableness is the touchstone.

On appeal to the British Columbia Court of Appeal, the ruling at first instance was affirmed. Taggart, J.A., for the Court, in reasons which were once again oral, held that the Attorney-General of Canada had not succeeded in clearly establishing that the duty contended for existed and that, therefore, the order sought would not be granted. Two important points must be made. First, while Taggart, J.A., did not rule that the provincial prison officials were under a duty to force feed Astaforoff, neither did he hold that they were not under such a duty. He stated:<sup>26</sup>

[T]here is a discretion conferred on the court as to the making of a declaratory order such as the one sought here. Before making such an order, I think, one would wish to be as certain as one can possibly be that there exists a duty . . . such as that contended for by the Attorney-General of Canada. I think one would not make the declaratory order sought unless there was clear authority for making it. Such a declaration would have implications going far beyond the circumstances of the case with which we are immediately concerned.

From the submissions which have been made to us by the parties I am not satisfied that there is a clear case for the making of the declaratory order sought by the Attorney-General of Canada. Having said that, *I hasten to add that I am not satisfied either that such a duty does not exist.* I say only that in the emergent circumstances in which this case comes before us, and having regard for the necessity of giving a judgment as expeditiously as possible, I am not satisfied that this is a case where the court should make the declaration sought. (emphasis provided)

Thus, Taggart, J.A., specifically leaves open the possibility that *Leigh v. Gladstone* may state the law: prison officials may be under a duty to treat.

Second, Taggart, J.A., drew a clear distinction between the question of whether there was a duty on the prison officials to provide medical treatment to a prisoner against his wishes and the question of whether there was a

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26. *Id.* at 506.

power in the authorities to do so. He stated:<sup>27</sup>

I should emphasize that we are here concerned solely with the existence of the duty contended for by the Attorney-General of Canada. Put in the negative, we are not concerned with the power of the corrections authorities, or indeed of any other prison authorities, to forcibly feed prisoners under their care and control. I emphasize again that we are not concerned with power, but rather with the existence of a duty.

Therefore, even if prison officials are not under a duty to treat, they may have the power to do so. From the prisoner's perspective, the distinction is irrelevant: in either case, he would have no action against the officials for treating him without his consent.

As in the Chambers judgment, the Court of Appeal referred to no authority in its judgment and, in particular, did not refer to *Leigh v. Gladstone*.<sup>28</sup>

*ATTORNEY-GENERAL OF CANADA V. NOTRE-DAME HOSPITAL; NIEMIC  
(THIRD PARTY)*

Jan Niemic, a citizen of Poland, had applied for permission to remain in Canada as a refugee. The Minister of Employment and Immigration refused to grant refugee status and ordered that Niemic be deported to Poland. While in detention awaiting deportation, Niemic swallowed a steel wire coat hanger which was approximately 20 centimeters long. He was taken to and admitted to Notre-Dame Hospital in Montreal. Niemic refused to allow doctors to treat him in any way, refusing all tests and examinations and declining to eat almost anything. In view of Niemic's refusal to consent to medical treatment, doctors at the hospital declined to treat him. He remained, however, hospitalized. Medical evidence indicated that Niemic was in grave danger; in particular, the wire might puncture his throat or stomach at any time. The Attorney-General of Canada moved for an order directing the hospital and the doctor to whom Niemic had been assigned to take all measures necessary for the treatment of Niemic, including feeding him and operating to remove the wire.<sup>29</sup>

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27. *Id.* at 505.

28. Mary Astaforoff, 72, was once again convicted of arson and was sentenced on October 3, 1985, in British Columbia County Court, to ten years imprisonment. See *GLOBE & MAIL*(Toronto) A4 (nat'l Ed. Oct. 4, 1985). She commenced a hunger strike and died November 1985. See *GLOBE & MAIL* (Toronto) A12 (nat'l Ed. Nov. 27, 1985).

29. I am grateful to Professor Julius H. Grey of the Faculty of Law, McGill University, for providing me with copies of the Notice of Motion and supporting Affidavits in *Niemic* and of the judgment therein as issued by the Court. Professor Grey appeared in the case as counsel for Niemic. While a court order authorizing treatment of a prisoner without his consent would clearly protect a doctor who provided such treatment from subsequent legal proceed-

The Chambers judge, Barbeau, J.S.C., in the result authorized the hospital and the doctor in charge of Niemic's care to take all steps necessary to treat Niemic. Barbeau, J.S.C., reasoned as follows:<sup>30</sup>

The case at bar involves the unusual situation of an adult person who is competent and able to make his intentions known, facing the dilemma described above. He relies upon the inviolability of his person and its corollary proposition, namely the right to withhold consent to medical acts capable of saving him from the ultimate consequences foreseen.

In the opinion of the court the principle of the inviolability of the individual is not absolute; the principle is in essence concerned with the protection of the individual and the preservation of his integrity and life. Respect for the life of a human being takes precedence over respect for his will, because to do so conforms with the essential interest of the human being.

The laws of this country include countless provisions all aimed at protecting life and the physical security of the individual. They consider human life an intangible value; they punish with vigour those who destroy or endanger it. While each human being is, in principle, master of his destiny, his right to self-determination remains subject to restrictions recognized by law.

Even though attempted suicide as defined in our law before 1972

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ings, *quaere* the ethical, as opposed to legal, position of the doctor. In particular, would the doctor be liable to professional disciplinary proceedings?

30. This is the author's translation. The original French of the judgment, as reported in *Niemic*, Que. C.S. at 426-427, and 8 C.R.R. at 383-384, is as follows:

La présente instance soulève le fait inusité de la personne adulte, capable d'agir et de faire connaître ses intentions, face au dilemme susdécrit. Il invoque l'inviolabilité de sa personne et son corollaire qui est celui de refuser son consentement à l'acte médical susceptible de lui é épargner les conséquences ultimes appréhendées.

De l'avis de la cour le principe de l'inviolabilité de la personne n'est pas absolu; essentiellement il est édicté en vue de la protection meme de la personne et de la conservation de son intégrité et de sa vie. Le respect de la vie, parce que conforme à l'intéret meme de la personne humaine, prime le respect de sa volonté.

Les lois de ce pays renferment des dispositions innombrables toutes orientées à protéger la vie et la sécurité physique de la personne humaine. Elles considèrent la vie humaine comme une valeur intangible; elles punissent avec vigueur ceux qui la suppriment ou y portent atteinte. Si chaque étre humain est, en principe, maitre de sa destinée son droit d'autodétermination demeure assujetti aux restrictions prévues à la loi.

Meme si la tentative de suicide prévue à nos lois avant 1972 a depuis été abrogée il n'en demeure pas moins que quiconque ne saurait, directement ou indirectement, conseiller, inciter, aider au [sic] encourager une personne à se donner la mort. A toute personne, au contraire, incombe l'obligation de protéger la vie et la sécurité de son semblable, voire selon les circonstances de lui procurer les choses nécessaires à la vie. La loi, assurant la protection et la promotion du maintien de la vie en tant que l'on se rende complice de ceux désireux de la détruire.

has since been repealed, it nevertheless remains the law that no one is permitted, directly or indirectly, to counsel, procure, aid or abet anyone to commit suicide. On the contrary, everyone is obliged to protect the life and security of his fellow man and even, in some circumstances, to provide him with the necessities of life. The law, ensuring the protection and promoting the maintenance of life as a fundamental value, does not permit anyone to become an accomplice of those wishing to destroy it.

It is important to emphasize that Barbeau, J.S.C., did not order the hospital or the doctor in charge of Niemic to perform the treatment necessary, which was what the Attorney-General's motion was seeking, but only authorized them to do so. The significance of this distinction is that it indicates that Barbeau, J.S.C., must not have thought that there was any duty on the hospital or the doctor in charge of Niemic to treat Niemic. While he did not expressly state this, it is necessarily implicit in the nature of the order he granted. However, this does not give any indication of whether he was of the view that the prison officials were under a duty or "merely" had the power, to treat Niemic without his consent. Even if they were under a duty to treat, had they not satisfied that duty by attempting to secure medical treatment for him and by bringing the matter to court?<sup>31</sup> Thus, while Barbeau, J.S.C., did not refer to *Leigh v. Gladstone*, once again, the judgment is one which is at least consistent with that case and which may even be in accord with its statement that prison officials are under a duty to treat a prisoner, even without his consent, if such treatment is medically necessary.<sup>32</sup>

Among the authorities upon which Barbeau, J.S.C., did rely,<sup>33</sup> however, was section 7 of the *Canadian Charter of Rights and Freedoms*. That section

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31. Given the seriousness of Niemic's condition, the prison officials, even if they had the assistance of a cooperative doctor, could not have treated him outside a regular hospital setting. This is unlike a force feeding, which can be done in a prison hospital setting.

32. *Leigh v. Gladstone* is not restricted to situations in which the prisoner's life is endangered: recall the passage from Lord Alverstone, C.J.'s, ruling.

33. The judgment as reported in the *Recueils de Jurisprudence (Cour Supérieure)* and in the *Canadian Rights Reporter* does not include the list entitled "Quotations and Authorities Consulted" (author's translation; the original French is: "Citations et Autorités Consultées") which is appended to the judgment as issued by the Court. That list reads as follows: "Art. 19, *Code Civil*; *Loi, Services de Santé & Service sociaux*, 1977, c. S-5 a43. (Qué); *Loi, Protection de la Santé publique*, 1977, c. P-35 (Qué); *In re Lodge & al*, 1979 (94) D.L.R. (3d) 326; *Loi, Emploi et immigration*, 1976 S.C. c. 52; Mayrand, *Inviolabilité de la Personne humaine*, 1975 Wilson & Lafleur; *Code criminel du Canada*, parties IV et VI; *In re Enfant Goyette*, 1983 C.S. 429; *Institut Pinel vs Dion*, 1983 CS 438; *Regina v. Carter*, 1982 (2) C.C.C. (2d) 343 (C. Supérieure); *Loi constitutionnelle 1982 (Charte des droits, art 7)*; Skegg, P.D.G., *Medical procedures*, 1974 (90) LAW QUARTERLY REVIEW 512." C.S. Montréal 500-05-003532-841, 1984/03/24.

provides:<sup>34</sup>

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

In my submission, this reference to section seven of the *Canadian Charter of Rights and Freedoms* in the list of authority appended to the judgment in *Niemic* may be cause for concern. Was Barbeau, J.S.C., suggesting that section seven authorizes the state to compel an individual, in this case, *Niemic*, to "enjoy" his "right to life," even if he does not want to? (*Niemic* clearly stated that he would rather die in Canada than return alive to Poland.) If so,<sup>35</sup> it is submitted that this application of a *Charter* guaranteed right is rather remarkable and completely inappropriate. While there is considerable controversy over the precise meaning and scope of "the right to life, liberty and security of the person" guaranteed by section seven of the *Charter*,<sup>36</sup> it is submitted that what law there is interpreting section seven and,

34. Section 57 of the CONSTITUTION ACT, 1982 provides that "[t]he English and French versions of this Act are equally authoritative." As indicated, *supra* note 11, the CANADIAN CHARTER OF RIGHTS AND FREEDOMS is Part I of the CONSTITUTION ACT, 1982. See also *R. v. MacIntyre*, 69 C.C.C. 2d 162 (Alta. Q.B. 1982).

35. Since section seven of the CHARTER is merely included in a list of authorities consulted by Barbeau, J.S.C. and appended to his judgment, it is impossible to know precisely what use, if any, he made of this provision in his analysis. The result in *Niemic* suggests the possibility of an application of the section which is considered in the text of the essay. However, it is possible that Barbeau, J.S.C. was referring to section 7 as constitutionally reinforcing the common law right of a patient to informed consent as defined in *Hopp v. Lepp* and *Reibl v. Hughes*. This latter possibility, which I submit would be entirely appropriate, may be indicated by Barbeau, J.S.C.'s, reference to *Institut Philippe Pinel de Montréal v. Dion*. In *Dion*, Durand, J.S.C., had stated:

"The backbone of our democratic system is respect for human beings, from both an intellectual and a physical point of view. We cannot force another person to do anything without his express or implied consent, with obvious exceptions as provided in various statutes. This principle, which underlines our whole legal system, both civil and criminal, was . . . finally enshrined in 1982 in s. 7 of the CANADIAN CHARTER OF RIGHTS AND FREEDOMS." (This is the English translation of the Dominion Law Reports, at 2 D.L.R. at 236. The original French of the judgment is as follows: "La clé de voute de notre système démocratique est le respect de la personne humaine, tant dans son aspect intellectuel que physique. On ne peut forcer autrui à faire quoi que ce soit sans son consentement exprès ou tacite, sauf évidemment les exceptions prévues par diverses lois. Ce principe, que est sous-jacent à tout notre système juridique, tant civil que penal, avait . . . été . . . enfin enchassé en 1982 dans l'article 7 de la *Charte canadienne des droits et libertés*." Que. C.S. at 439-440.) Because of this uncertainty, I must in fairness say "if so."

36. For example, does section seven import property rights into "liberty and security of

indeed, the other *Charter* guaranteed rights, proceeds on the implicit assumption that those rights are intended to provide protection to the individual against the state. In short, section seven should operate as a shield on the arm of the individual to be used against the state, not as a sword in the hand of the state to be used against the individual.

#### CONCLUSION

The leading case of *Leigh v. Gladstone* holds that prison authorities are under a duty to impose medical treatment upon a prisoner if the prisoner withholds consent to necessary medical treatment. In particular, a prisoner may be force fed to prevent him from starving himself to death. This is an exception to the general rule that every sane adult person, enjoying the right to inviolability of his person, has the particular right to withhold consent to medical treatment.

How, if at all, have the recent judgments in *Astaforoff* and *Niemic* affected the statement of the law given in *Leigh v. Gladstone*?

First, neither *Astaforoff* nor *Niemic* even mentioned *Leigh v. Gladstone*. In particular, neither case explicitly overruled *Leigh v. Gladstone*.

Second, did either case implicitly overrule *Leigh v. Gladstone*? It is submitted that they did not. As already indicated, the British Columbia Court of Appeal in *Astaforoff*, while not ordering the force feeding of *Astaforoff*, explicitly declined to state that prison officials were not under a duty to provide necessary medical treatment to a prisoner even if against his wishes. In other words, the Court explicitly declined to overrule the statement of law set out in *Leigh v. Gladstone*. Further, the Court was careful to state that even if prison officials were not under a duty to treat a prisoner against his wishes, they might have the power to do so. Thus, even absent a duty to treat, if prison officials went ahead and treated a prisoner against his wishes, those officials might have a good defence to any criminal or civil proceedings subsequently initiated by the prisoner. This result would at least be consistent with the result in *Leigh v. Gladstone*.

In *Niemic*, the Quebec Superior Court authorized treatment of the pris-

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the person"? Do "the principles of fundamental justice" referred to extend beyond procedural fairness to include examination of the fairness of the substantive law involved in a given case? On these questions and others, see, for example, Reference Re Section 94(2) of the Motor Vehicle Act, [1983] 4 W.W.R. 756 (B.C.S.C.); *Potma v. The Queen*, 41 Ont.2d 43 (C.A. 1983); *R. v. Morgentaler*, 47 Ont.2d 353 (H.C.), *aff'd*, 48 Ont.2d 519 (C.A. 1984) and also October 1, 1985, Ontario Court of Appeal, not yet reported; *R. v. Robson*, 19 C.C.C.3d 137 (B.C.C.A. 1985); *Singh v. Minister of Employment and Immigration*, 14 C.R.R.13, 58 N.R. 1 (S.C.C. 1985) *per Wilson, J.*; *Operation Dismantle, Inc. v. The Queen*, 13 C.R.R. 287, 59 N.R. 1 (S.C.C. 1985).

oner against his wishes. From the prisoner's perspective, this result is consistent with the result in *Leigh v. Gladstone*. But what of the reasoning used to arrive at that result? Is it consistent with the statement of the law in *Leigh v. Gladstone*? As already indicated,<sup>37</sup> the reasoning of Barbeau, J.S.C., may be consistent with that statement of the law. Certainly there is nothing in his judgment which is necessarily inconsistent with Lord Alverstone, C.J.'s, ruling.

Thus, it is submitted that neither *Astaforoff* nor *Niemic* overrules, either explicitly or by implication, the ruling in *Leigh v. Gladstone* that there is a duty on a prison official to forcibly treat a prisoner who withholds consent to necessary medical treatment.

In conclusion, then, statements in the textbooks to the effect that "[p]risoners have the same right to accept or refuse medical treatment as any other person"<sup>38</sup> may not be an accurate reflection of current Canadian law. Certainly, it is submitted that this is what the law should be, in order that prisoners be afforded the same right to inviolability as enjoyed by all other sane adult persons. As Margaret Somerville has written:<sup>39</sup>

A prisoner should only lose the exercise of those rights *essentially connected* with the fact of imprisonment, such as loss of the right to freedom of movement, or loss of those rights affected by the necessity to examine the prisoner for contagious disease. Any *additional interference* with the prisoner's physical or mental integrity must be with his fully "informed" consent.

It is submitted that this position is consistent with recent developments in Canadian prison law generally.<sup>40</sup> Further, section 7 of the *Canadian Char-*

37. See *supra* notes 31-32 and accompanying text.

38. See PICARD, *supra* note 3, at 63.

39. M. SOMMERVILLE, CONSENT TO MEDICAL CARE, 95-96 (1979).

40. For example, in *Martineau v. Matsque Institution Disciplinary Board*, [1980], 1 S.C.R. 602, 625, 635, both Dickson, J. (as he then was) and Pigeon, J., referred with approval to *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701, 716 (C.A.), in which Shaw, L.J. had stated, ". . . despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as the result of some punitive or other process." As Dickson, J., stated, at S.C.R. 622: "The rule of law must run within penitentiary walls." (This is reminiscent of White, J.'s words, delivering the opinion of the United States Supreme Court in *Wolff v. McDonnell*, 418 US. at 555-556: "There is no iron curtain drawn between the Constitution and the prisons of this country.") Admittedly, *Martineau* was concerned with rights relating directly to the "conduct of the [prisoner's] incarceration," to use the words of Shaw, L.J., in *Hull Prison*. But should that reasoning not apply equally to a prisoner's right to refuse medical treatment? It is submitted that it should.

*ter of Rights and Freedoms*<sup>41</sup> may well afford a shield to a prisoner resisting medical treatment without his consent. Unfortunately, as indicated in this essay, Canadian law on this particular issue is not certain and may be quite different: the 1909 decision in *Leigh v. Gladstone* may be law in Canada.

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41. See *supra* note 34 and accompanying text.

