

In the matter of A Ward of Court (withholding medical treatment) (No. 2) [S.C. Nos. 167, 171, 175 and 177 of 1995]

High Court

5th May, 1995

Supreme Court

27th July, 1995

Constitution - Right to life - Right to die a dignified and natural death - Right of autonomy - Right of self-determination - Right to bodily integrity - Right to privacy - Requirements of the common good - Constitutional rights of family of ward of court - Whether family entitled to direct that medical treatment and care should cease - Constitution of Ireland, 1937, Article 40, ss. 1, and 3 and Article 41.

Wards of court - Medical practitioner - Patient in near persistent or permanent vegetative state - Maintenance of life by artificial feeding - Whether withdrawal of artificial feeding lawful - Invasive medical treatment - Whether artificial nutrition and hydration constituting "medical treatment" - Whether artificial nutrition and hydration "normal" - Whether ward terminally ill - Whether in the best interest of ward to prolong life by the continuance of such treatment.

Wards of court - Jurisdiction of the High Court in relation to affairs of persons of unsound mind - Parens patriae - Origins of jurisdiction - Courts of Justice Act, 1924 (No. 10), s. 19, sub-s. 1 - Courts of Justice Act, 1936 (No. 48), s. 9, sub-s. 1 - Courts (Supplemental Provisions) Act, 1961 (No. 39), s. 9.

Evidence - Standard of proof - Application relating to ward of court - Whether a lis inter partes - Whether sufficient if evidence clear and convincing - Role of court - Whether wishes of ward's committee and family to be taken into consideration.

Article 40, s. 1 of the Constitution of Ireland, 1937, provides as follows:-

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Article 40, s. 3 provides:-

- "1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Article 41, s. 1, states:-

- "1. The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and inprescriptible rights, antecedent and superior to all positive law.
2. The State, therefore, guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Section 9, sub-s. 1 of the Courts (Supplemental Provisions) Act, 1961, vests the jurisdiction in lunacy and minor matters, previously exercised by the Lord Chancellor of Ireland prior to 1922, in the President of High Court. Section 9, sub-s. 2, provides *inter alia* that the jurisdiction may be assigned by the President in the High Court to an ordinary judge of the High Court for the time being assigned in that behalf.

On the 26th April, 1972, when the ward was twenty-two years of age, she underwent a minor gynaecological operation under general anaesthetic. During the procedure she suffered three cardiac arrests which resulted in anoxic brain damage. In the following five or six months the ward showed minimal signs of recovery which did not continue. On the 24th October, 1974, she was made a ward of court. The ward remained under the care and supervision of the medical institution where she had been originally admitted for her operation in 1972.

The ward of court was initially fed through a nasogastric tube which she seemed to find somewhat distressing and after twenty years or so this was replaced by a gastrostomy tube in April, 1992. The ward required full nursing care. She was spastic and both arms and hands were contracted. Both her legs and feet were extended. Her jaws were clenched and she had a tendency to bite the insides of her cheeks and her tongue, her back teeth were capped to prevent the front teeth from closing. She could not swallow or speak. She was incontinent and bedridden. She had no capacity for speech or for communicating. A speech therapist failed to elicit any means of communication. She had a minimal capacity to recognise, and followed or tracked people with her eyes and reacted to noise. The ward's heart and lungs functioned normally. If she continued to be nourished by tube, the ward might have lived for many years but could have died if she developed some infection unless it was treated aggressively with antibiotics.

The applicant, who was the mother and committee of the ward, sought directions from the court as to the proper care and treatment of the ward. It was submitted on behalf of the applicant that by virtue of Article 41, s. 1, of the Constitution, it was the family's prerogative, acting *bona fide* in the interests of the ward, to decide whether the medical treatment being afforded to the ward should be withdrawn and that their decision was binding on the court as being made in pursuance of the family's inalienable and imprescriptible rights guaranteed under the Constitution.

It was submitted on behalf of the guardian *ad litem* and the Attorney General that it was for the court to decide all matters relating to a ward of court, not for the family or the carers, as by virtue of Article 40, s. 3, of the Constitution, the right to life was pre-eminent and all other fundamental rights must give way to it. Counsel on behalf of the institution where the ward was being cared for and treated submitted that as the ward had limited cognitive functions and was not in a persistent vegetative state nor terminally ill, the treatment being afforded to the ward should continue to prolong her life. It was submitted that the care and treatment was being administered in accordance with the ward's constitutional rights and was not intrusive or burdensome to the ward.

Held by Lynch J., in granting the relief sought by the applicant and in holding that the withdrawal of medical treatment was lawful, 1, that the ward was not fully in a persistent vegetative state but was nearly so and had minimal cognitive capacity.

2. That the standard of proof to be applied was that the evidence should be clear and convincing.

3. That as the ward was a ward of court, it was for the Court to decide all matters relating to the ward by virtue of the jurisdiction conferred on the Court, although the views of the family and carers were factors to be taken into consideration.

In re D. [1987] I.R. 449 followed.

4. That in determining the matter the Court was exercising the *parens patriae* jurisdiction which had been formerly exercised by the Lord Chancellors of Ireland prior to 1922 and which was now vested in the President of the High Court or, at his discretion, in an ordinary member of the High Court.

5. That although the State had an interest in preserving life this interest was not absolute in the sense that life must be preserved and prolonged at all costs and no matter what the circumstances.

6. That despite the fact that the right to life ranked first in the hierarchy of personal rights, it might nevertheless be subject to the citizen's right of autonomy, self-determination, privacy or dignity, when exercised by a competent citizen or on their behalf.

7. That the nourishment by gastrostomy tube being afforded to the ward was an abnormal, artificial way of receiving nourishment and constituted a form of medical treatment.

8. That the test to be applied by the Court in determining the issue was whether it was in the best interests of the ward that her life should be prolonged by the continuation of the abnormal, artificial means of nourishment, or, whether the medical treatment should be withdrawn.

Airedale N.H.S. Trust v. Bland [1993] A.C. 789 followed.

9. That the Court should adopt the viewpoint of a prudent, good and loving parent in deciding what course should be taken.

10. That the benefit to the ward of sustaining her life by abnormal artificial means of nourishment was far outweighed by the burdens of so sustaining life with absolutely no prospect of any improvement in the ward's condition.

11. That it was in the best interests of the ward that the artificial nourishment be terminated allowing her to die with all such palliative care and medication as was necessary to ensure a peaceful and pain-free death.

The institution, the guardian *ad litem* and the Attorney General appealed to the Supreme Court. The applicant sought to have the orders of the High Court varied in so far as they determined the standard of proof to be applied and the authority of the family.

Held by the Supreme Court (Hamilton C.J., O'Flaherty, Blayney and Denham JJ.; Egan J. dissenting), in dismissing the appeal, 1, that the trial judge in deciding the issues had exercised the *parens patriae* jurisdiction in lunacy and minor matters which had been previously vested in the Lord Chancellors of Ireland prior to 1922 and which was now vested in the President of the High Court by virtue of s. 9 of the Courts (Supplemental Provisions) Act, 1961 and which had been properly assigned to and exercised by the trial judge.

In re D. [1987] I.R. 449 applied.

2. That when a person was made a ward of court, the court was vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction was subject only to the provisions of the Constitution.

3. That the exercise by the court of the jurisdiction conferred on it by virtue of s. 9 of the Court (Supplemental Provisions) Act, 1961, did not, in any way, amount to a failure to protect the family in its constitution and authority.

4. That in the exercise of its jurisdiction the court's prime and paramount consideration must be the best interests of the ward.

5. That although the views of the committee and family of the ward were factors to be taken into consideration, they did not prevail over the court's views as to what was in the best interests of the ward.

Re J. (A Minor) (Wardship: Medical Treatment) [1991] Fam. 33 considered.

6. That the trial judge was correct in approaching the matter from the standpoint of a prudent, good and loving parent in deciding what course should be adopted for the ward.

7. That the treatment being afforded to the ward by means of a gastrostomy tube surgically inserted into her stomach was intrusive and an interference with the ward's bodily integrity and could not be regarded as a means of nourishment. The care and treatment being afforded to the ward constituted medical treatment and not merely medical care.

8. That the nature of the right to life and its importance imposed a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances.

9. That if the ward was mentally competent she would have had the right to forego or discontinue her treatment and the exercise of that right would be lawful in pursuance of her constitutional right to self-determination which was implicit in her right to bodily integrity and privacy. However, this right did not include the right to have life terminated or death accelerated, and was confined to the natural process of dying.

10. That the loss by the ward of her mental capacity did not result in any diminution of her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, or the right to refuse medical care or treatment.

11. That neither the requirements of the common good nor public order or morality required the exercise of the ward's constitutional rights to be restricted as there was no conflict between the exercise of the ward's rights and the right to life.

12. That the trial judge had applied the proper test in having regard to whether it was in the best interests of the ward that her life should be prolonged by the continuation of the artificial means of nourishment or whether she should be allowed to slip away naturally by the withdrawal of her treatment.

Airedale N.H.S. Trust v. Bland [1993] A.C. 789 followed.

13. That the trial judge had at all times regard for the constitutional rights of the ward, her family and the State, in considering whether it was in the best interests of the ward and had adopted the proper test having required clear and convincing proof of all relevant matters before reaching his decision.

Cases mentioned in this report:-

- Airedale N.H.S. Trust v. Bland* [1993] A.C. 789; [1993] 2 W.L.R. 316; [1993] 1 All E.R. 821.
- Attorney General v. X* [1992] 1 I.R. 1; [1992] I.L.R.M. 401; [1992] 2 C.M.L.R. 277.
- Auckland Area Health Board v. Attorney-General* [1993] 1 N.Z.L.R. 235.
- In re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421; [1990] 3 All E.R. 927.
- In re B. (A Minor) (Wardship: Sterilisation)* [1988] A.C. 199; [1987] 2 W.L.R. 1213; [1987] 2 All E.R. 206.
- Banco Ambrosiano s.p.a. v. Ansbacher & Co. Ltd.* [1987] I.L.R.M. 669.
- In re Birch* (1892) 29 L.R. Ir. 274.
- In re Conroy* (1985) 98 N.J. 321; 486 A 2d 1209.
- Cruzan v. Director Missouri Department of Health* (1990) 497 U.S. 261; 110 S. Ct. 2841.
- In re D.* [1987] I.R. 449; [1988] I.L.R.M. 251.
- In re Fiori* (1995) 652 A.R. 2d 1350.
- G. v. An Bord Uchtála* [1980] I.R. 32; (1978) 113 I.L.T.R. 25.
- In re Godfrey* (1892) L.R. Ir. 278.
- In re J. (A Minor) (Wardship: Medical Treatment)* [1991] Fam. 33; [1991] 2 W.L.R. 140; [1990] 3 All E.R. 930.
- Kennedy v. Ireland* [1987] I.R. 587; [1988] I.L.R.M. 472.
- McGee v. Attorney General* [1974] I.R. 284; (1973) 109 I.L.T.R. 29.
- In re The Matrimonial Home Bill, 1993* [1994] 1 I.R. 305.
- Murray v. Ireland* [1985] I.R. 532; [1985] I.L.R.M. 542.
- Norris v. The Attorney General* [1984] I.R. 36.
- O'Brien v. Keogh* [1972] I.R. 144.
- People (D.P.P.) v. J.T.* (1988) 3 Frewen 141.
- In re Quinlan* (1976) 355 A. 2d. 647; 70 N.J. 10.
- Quinn's Supermarket v. A.G.* [1972] I.R. 1.
- Rasmussen v. Fleming* (1987) 154 Ariz. 207; 741 P. 2d. 674.
- Ryan v. Attorney General* [1965] I.R. 294.
- State (C.) v. Frawley* [1976] I.R. 365.
- Union Pacific Railway Co. v. Botsford* (1891) 141 U.S. 250; 11 S. Ct. 1000.
- Walsh v. Family Planning Services Ltd.* [1992] 1 I.R. 496.

Notice of motion.

The facts have been summarised in the headnote and are fully set out in the judgments, *infra*.

By notice of motion dated the 7th March, 1995, the applicant sought an order directing that all artificial nutrition and hydration of a ward of court should cease, and directions as to the future care of the ward. By order dated the 13th March, 1995, the High Court (Lynch J.) directed that points of claim be delivered on behalf of the applicant and granted the institution and Attorney General liberty to respond. The General Solicitor for Wards was appointed guardian *ad litem* by the Lynch J. on the 20th March, 1995. By order dated the 22nd March, 1995, Lynch J. directed that the hearing of the substantive application on oral evidence be held *in camera* and that the judgment be delivered in public.

Points of claim were delivered on behalf of the applicant on the 14th March, 1995, and a reply was delivered by the institution on the 30th March, 1995. The application was heard by the High Court (Lynch J.) on the 4th, 5th, 6th and 7th April, 1995.

Peter Charleton S.C. (with him Stephen McCann) for the applicant.

Mary Laffoy S.C. (with her Denis McDonald) for the guardian ad litem.

Patrick Hanratty S.C. (with him Charles Meenan) for the institution.

Paul Gallagher S.C. (with him Donal O'Donnell) for the Attorney General.

Cur. adv. vult.

Lynch J.

5th May, 1995

This case raises issues for decision which have never come before the courts of this State previously. It would be otiose to dwell on the tragic nature of the case. The facts speak for themselves.

The facts

Over two decades ago the ward, who was then 22 years old, underwent a minor gynaecological operation under general anaesthetic. During the procedure she suffered three cardiac arrests resulting in anoxic brain damage of a very serious nature. Since that catastrophe the ward has been completely dependent on others, requiring total nursing care. She is spastic as a result of the brain damage. Both arms and hands are contracted. Both legs and feet are extended. Her jaws are clenched and because she had a tendency to bite the insides of her cheeks and her tongue, her back teeth have been capped to prevent the front teeth from fully closing. She cannot swallow. She cannot speak. She is incontinent.

In the first five or six months after the catastrophe, there were minimal signs of recovery which unfortunately did not continue but, if anything, faded with the passing years. For some twenty years she was fed through a nasogastric tube. Generally, but especially in the later years, she seemed to find this distressing and it was replaced by a gastrostomy tube in April, 1992, which required the administration of a general anaesthetic. Since then she has been fed through the gastrostomy tube with much greater ease and success. This tube became detached in December, 1993, and a new tube was inserted which came out the next day and had to be reinserted the following day under general anaesthetic.

The ward is, of course, bedridden. She is in a condition which is nearly, but not quite, what in modern times has become known as persistent or permanent vegetative state (P.V.S.). The completely P.V.S. patient is concisely but graphically described by Sir Thomas Bingham, Master of the Rolls, in the Court of Appeal in England in the case of *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 at p. 806 as follows:-

"P.V.S. is a recognised medical condition quite distinct from other conditions sometimes known as 'irreversible coma', 'the Guillain-Barré syndrome', 'the locked-in syndrome' and 'brain death'. Its distinguishing characteristics are that the brain stem remains alive and functioning while the cortex of the brain loses its function and activity. Thus the P.V.S. patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and can thus feel no emotion, whether pleasure or distress."

The problem with which this Court is now faced is admirably summarised by Lord Browne-Wilkinson in the House of Lords in the same case where at p. 878 of the report, he says:-

“I have no doubt that it is for Parliament, not the courts, to decide the broader issues which this case raises. Until recently there was no doubt what was life and what was death. A man was dead if he stopped breathing and his heart stopped beating. There was no artificial means of sustaining these indications of life for more than a short while. Death in the traditional sense was beyond human control. Apart from cases of unlawful homicide, death occurred automatically in the course of nature when the natural functions of the body failed to sustain the lungs and the heart.

Recent developments in medical science have fundamentally affected these previous certainties. In medicine, the cessation of breathing or of heartbeat is no longer death. By the use of a ventilator, lungs which in the unaided course of nature would have stopped breathing, can be made to breathe, thereby sustaining the heartbeat. Those like Anthony Bland who would previously have died through inability to swallow food can be kept alive by artificial feeding. This has led the medical profession to redefine death in terms of brain stem death, i.e., the death of that part of the brain without which the body cannot function at all without assistance. In some cases it is now apparently possible, with the use of the ventilator, to sustain a beating heart even though the brain stem, and therefore in medical terms the patient, is dead: ‘the ventilated corpse’.

I do not refer to these factors because Anthony Bland is already dead, either medically or legally. His brain stem is alive and so is he; provided that he is artificially fed and the waste products evacuated from his body by skilled medical care, his body sustains its own life. I refer to these factors in order to illustrate the scale of the problem which is presented by modern technological developments, of which this case is merely one instance. The physical state known as death has changed. In many cases the time and manner of death is no longer dictated by nature but can be determined by human decision. The life of Anthony Bland, in the purely physical sense, has been and can be extended by skilled medical care for a period of years.”

In the present case the ward’s heart and lungs function normally. Assuming that she is adequately furnished with nutrition and hydration (nourishment), her digestive system operates normally as do her bodily functions, although bowel movements require some assistance, but as she

cannot swallow and as her teeth are spastically clenched together, she cannot receive nourishment in the normal way and as already stated, is and has had to be tube-fed since the catastrophe. Assuming that she continues to be nourished by tube, she could live for many years but of course she might also die in the short term if she developed some infection such as pneumonia, unless it was treated aggressively with antibiotics.

The ward has no capacity for speech or for communicating. A speech therapist failed to elicit any means of communication. She has a minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes and reacts to noise, although the latter is mainly, if not indeed, wholly reflex from the brain stem and a large element of reflex eye tracking is also present in the former which, however, also has some minimal purposive content.

I have heard evidence from all the available members of the ward's family. They all say that in over two decades of visiting her, they have never detected any signs of recognition nor efforts at communication by her. The mother stated, in cross-examination by counsel for the institution, which is caring for the ward, that she disagreed with the suggestion, based on evidence to be tendered by the institution as already summarised by me, that the ward has any cognition whatever. The mother further stated that in over two decades of visiting, she had got no response whatever from the ward. She said that the ward just stares and that there is nothing in it unless it be "please let me go". In her view the ward is in a horrendous situation.

One of the ward's sisters said that whenever she visits the ward, the latter cries and the sister interprets her reaction, if it is not merely reflex and if she has any emotion, as asking to be let go and the sister emphasised that the ward's wishes should be respected. The family also gave evidence that the ward even before the catastrophe hated both hospitals and medicine in general and that she would not want to be living as she now is. A statement from a brother of the ward, who is in Australia, was by agreement of the parties admitted in evidence. I quote from it omitting the name of the ward and making some slight alterations in the interests of anonymity:-

"Over two decades ago the ward was the victim of a medical catastrophe. Subsequent to this disaster it became clear that there was nothing that the medical profession could do to redress her injuries. Indeed, the medical care instigated over the last twenty years has been

to ensure that what life remains is sustained by artificial feeding and modern antibiotics and other medications, with little or no effort to restore her capabilities. No consideration has been given to the effect of this care on either the ward or her family. It has been, I believe, a dumb response founded on a misguided interpretation of moral and human ethics and has caused unnecessary suffering and pain to all concerned. This situation, which would not have arisen in previous generations because of recent medical advances in feeding and medications, has got to be challenged so as to allow nature to take its traditional and rightful place in this circumstance.

Even though I live in Australia and I am removed from the daily contact that must be endured by my mother and family in Ireland, I can on at least two occasions remember being summoned to the institution to witness the ward's passing. On both of these occasions I said my farewells to the ward as did other members of my family only to find that due to the medical intervention, the ward 'recovered'. This uncertainty is very stressful to everyone concerned and was, I believe, contributory to my father's early death. As far as I am concerned the ward is already dead and she should be allowed the dignity of passing into God's hand without any further intervention of human kind."

I have no doubt as to the veracity and reliability of the family's evidence and marrying it in with the evidence of the carers, I am satisfied that although the ward is not fully P.V.S., she is very nearly so and such cognitive capacity as she possesses is extremely minimal. A fully P.V.S. person cannot feel pain and has no capacity for pleasure or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S. There is no prospect whatsoever of any improvement in the condition of the ward.

The proceedings

This matter came before me having been assigned in that behalf by the President of the High Court, initially by way of a notice of motion dated the 7th March, 1995, and returnable for the 13th March, 1995, on behalf of the mother, who is the committee of the ward, addressed to the solicitors for the institution in which the ward is a patient and to the Chief

State Solicitor for the Attorney General, as well as to the Registrar of the Wards of Court Office. The notice of motion sought the following reliefs:-

- “(a) that the Court give direction as to the hearing of the trial of this issue on oral evidence commencing on Tuesday, the 4th April, 1995;
- (b) that the Court should give a direction as to whether it should appoint counsel to argue against the substantive application or should inform the Attorney General as to the application being made to allow his intervention in the public interest;
- (c) that the Court should give further directions as to the future care and treatment of its ward and in particular should order the discontinuance of all further artificial nutrition and hydration;
- (d) that the Court should direct compliance with its orders made in pursuit of the interests of its ward.”

Although nominally brought by the mother and committee of the ward, the motion and the subsequent proceedings had the full support of all the brothers and sisters of the ward. Her father is dead as already appears from her brother's statement which I have quoted.

On the 13th March, 1995, I directed that points of claim should be delivered on behalf of the family to the institution and the Attorney General, with liberty to those parties to respond if they so wished and I adjourned the matter for further mention to the 20th March, 1995. On the 20th March, I appointed the General Solicitor for Wards to be guardian *ad litem* of the ward with a view specifically to contradicting the case being made by the family. On that day I also heard submissions as to whether the hearing of the application should or should not be in public and I reserved my decision on that matter until the 22nd March. On the 22nd March, 1995, I ruled that the hearing of the substantive application on oral evidence should be *in camera*, both as to evidence and submissions but that the judgment should be delivered in public in such a manner as to preserve the anonymity of the ward, the family, the institution and the witnesses. A copy of that ruling is annexed hereto and this judgment is delivered in the manner indicated therein.

Points of claim were delivered on behalf of the family on the 14th March, 1995, in which the factual background was set out and it was claimed:-

- “1. An order that all artificial nutrition and hydration cease.
- 2. That the Court should give such directions as to care, having regard to the order of the Court, as are appropriate.”

A reply to the points of claim was delivered on behalf of the institution which is caring for the ward on the 30th March, 1995, in which issue was joined generally on the points of claim and furthermore para. 18 pleaded as follows:-

“Whatever order or determination this Honourable Court may be disposed to make upon the application of the family, the institution ought not be required to do any act contrary to its philosophy and code of ethics and there is no legal basis for any such requirement.”

At the substantive hearing before me, it was accepted by the family and by all the other parties that this plea of the institution was valid and that no order should be made by the Court against the institution, the obedience to which would contravene the philosophy and code of ethics of the institution.

I heard oral evidence over a period of four days commencing on Tuesday, the 4th April and ending on Friday, the 7th April, 1995, inclusive and I heard oral submissions from counsel for all four parties on Tuesday, the 11th April, 1995, and I reserved my judgment which I now deliver.

The oral evidence included evidence from medical and nursing practitioners and revealed a difference of opinion as to what was ethical, proper and appropriate regarding the continuing and future treatment and care of the ward. The family of the ward profess the Roman Catholic faith and on their behalf two Roman Catholic moral theologians were called and expressed the view that the course which the family wished to be followed is a morally acceptable one in the eyes of the Roman Catholic church. Another Roman Catholic moral theologian called on behalf of the institution took the opposite view. I was also supplied with a copy of a working paper prepared by the Church of Ireland discussing a statement issued in October, 1992, by the bishops of the Church of England on euthanasia.

What I have to decide is not the morality or otherwise of the course sought to be followed by the family but the lawfulness or otherwise of that course under the Constitution and the laws of this State. Nevertheless, the evidence of the moral theologians is of relevance for two reasons: first, as showing that in proposing the course which they do propose the ward's family are not contravening their own ethic (see *In re Quinlan* [1976] 355 A. 2d. 647) and secondly, the matter being *res integra*, the views of theologians of various faiths are of assistance in that they endeavour to apply right reason to the problems for decision by the Court and analogous problems. Indeed, the judgments in many of the cases cited

to me, including *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789, from which I have quoted already, discuss the moral and ethical issues raised by this sort of case with a view to ascertaining what the law ought to be and thus to assist in declaring what is indeed the law of the land.

In fact no issue as to the *bona fides* of the family arises in this case for decision. It was accepted by all the other parties and I accept that all the members of the family are completely *bona fide* and wish that the course which they propose be followed only because they honestly and indeed fervently believe that that course is in the true best interests of the ward. I should also say that no issue arose as to the standard of care afforded to the ward in the institution in which she has been a patient over the last two decades. It was accepted on behalf of the family that the standard of care has been and is excellent and could not be better as is indeed demonstrated by the fact that the ward has never had a bed sore.

The submissions and conclusions

The legal teams on behalf of the four parties prepared written submissions for the assistance of the Court which total ninety-three typescript pages. I am grateful to the four legal teams for the work which they put into these written submissions as further explained in their oral submissions and for their conduct of the case in general before me. I do not intend to set out, even in summary form in this judgment, all the various submissions made to me. They are available in written form if required to be referred to in the future. I shall deal specifically with just a few of the submissions.

The first relates to the question of proof. No issue arose as to the onus of proof. It was accepted that the onus of proof was on the family who wished to change the *status quo*. An issue did arise, however, as to the standard of proof. Counsel on behalf of the family submitted that the standard of proof should not be as high as in criminal cases, i.e., beyond a reasonable doubt but rather the civil burden of the probabilities should apply with a requirement of a somewhat higher degree of probability than the mere balance of probabilities. On the other hand counsel for the institution submitted that the standard of proof which should be applied in a case of such momentous importance, as is this case, should be the same as the standard of proof required in a criminal case, that is to say, beyond a reasonable doubt.

Counsel for the guardian *ad litem* submitted that the standard applied in some of the United States cases, that the evidence should be clear and

convincing, would be appropriate to be applied in this case. Counsel for the Attorney General submitted that either the clear and convincing standard or the standard in criminal cases beyond a reasonable doubt should apply.

I have come to the conclusion that the proper standard of proof which I should require in this case is that the evidence should be clear and convincing having regard to the gravity of the matter for decision. I do not think it appropriate to apply a higher standard. The Court should not require for itself such a high standard of proof as might effectively preclude the Court from reaching a decision in a matter brought before the courts specifically for its directions. In finding the facts as already set out in this judgment, I am satisfied that the evidence in support of such facts is clear and convincing.

Counsel for the family submitted that by virtue of Article 41, s. 1, of the Constitution, it was the family's prerogative, acting *bona fide* in the best interests of the ward, to decide whether life support in the form of tube nourishment, antibiotics and other medical or surgical treatments should be maintained or withdrawn and that their decision would bind the Court as being made in pursuance of their inalienable and imprescriptible family rights antecedent and superior to all positive law.

Article 41, s. 1, of the Constitution provides as follows:-

- “1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution, possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

Counsel for the other parties submitted that this Article related to the rights of the family as an institution or collective body of persons and referred to the decision of the Supreme Court in *In re The Matrimonial Home Bill*, 1993 [1994] 1 I.R. 305. They further submitted that Article 41, s. 1, did not apply in relation to the rights of individual members of the family such as the ward whose individual and personal rights were to be ascertained and enforced under other articles of the Constitution and especially Article 40, section 3. They also referred to s. 9 of the Courts (Supplemental Provisions) Act, 1961, and the decision of the Supreme Court in *In re D.* [1987] I.R. 449, and submitted that the ward is a ward of court, it is for the Court to decide the issues and not the family nor the carers, the Court being endowed with the *parens patriae* jurisdiction

exercised by the Lord Chancellors in Ireland prior to 1922. I accept the submissions of the other parties which is not of course to say that the views of the family and the carers do not carry weight with the court: of course they do. Nor is it to say that in the case of a patient who is not a ward of court, that it is necessary to apply to the court for directions as to the proper course of treatment or care to be followed.

The next submission which I wish specifically to deal with relates to the hierarchy of fundamental rights as put forward both on behalf of the guardian *ad litem* and on behalf of the Attorney General. Counsel on behalf of both these parties submitted that by virtue of Article 40, s. 3, of the Constitution, the right to life was pre-eminent and all other fundamental rights must give way to it. Article 40, s. 3, so far as relevant to this case, provides as follows:-

“1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”

Counsel for the guardian *ad litem* instanced the case of a person subjected to torture who wished, in pursuance of his right to bodily integrity, to kill himself and submitted that such a person would have no right to do so. Counsel on behalf of the Attorney General submitted that as all other fundamental rights, such as the right to bodily integrity or privacy or liberty or property, depend upon the person claiming such rights being a living person, the right to life must always be given pre-eminence and not sacrificed in favour of such other fundamental rights.

I do not think that these submissions are valid. Of course it should be so in the vast majority of cases but in the case mentioned by counsel for the guardian *ad litem*, I would think that if the torture was cruel enough and the prospects of relief remote enough, there must come a time when in the interests of privacy, dignity or autonomy, the victim would be within his rights in ending his own life if he had the means of doing so even before the enactment of the Criminal Law (Suicide) Act, 1993. Less dramatic circumstances must also give a competent patient a right to refuse further medical or surgical treatment which he reasonably regards as excessively burdensome when weighed against the prospective benefits (if any) of the treatment even when such refusal will probably result in death.

The State undoubtedly has an interest in preserving life but this interest is not absolute in the sense that life must be preserved and prolonged at all costs and no matter what the circumstances. Death is a natural part of life. All humanity is mortal and death comes in the ordinary course of nature and this aspect of nature must be respected as well as its life-giving aspect. Not infrequently, death is welcomed and desired by the patient and there is nothing legally or morally wrong in such an attitude. A person has a right to be allowed to die in accordance with nature and with all such palliative care as is necessary to ensure a peaceful and dignified death.

Another way of looking at Article 40, s. 3 of the Constitution is that under sub-s. 1 the right to life of the citizen is to be defended and vindicated and under sub-s. 2, the life of the citizen is to be protected from unjust attack and vindicated in the case of injustice done. It seems to me that the right to life of the citizen on the one hand and the life of the citizen on the other hand are two different concepts. The life of the citizen is to be protected and vindicated by the State pursuant to sub-s. 2 at the instance of the citizen or some appropriate person acting on his behalf pursuant to his right to life as guaranteed under sub-section 1. This reserves to the citizen within the limits required by the common good and public order and morality, autonomy over his own life. If competent, he may elect not to enforce his personal rights, including his right to life, despite an unjust attack or injustice done.

For example, in regard to the citizen's person, he may be seriously assaulted or seriously injured by the manifest negligence of another citizen and being competent may nevertheless decide not to vindicate the integrity of his person by appropriate proceedings through the courts. Likewise, in regard to his good name and defamation. Thus it has long been accepted that a competent terminally ill patient may elect not to allow or accept treatment which may prolong his life and if incompetent, that the medical carers, in agreement with the patient's family, may adopt the same course. This illustrates that despite the fact that the right to life ranks first in the hierarchy of personal rights, it may nevertheless be subjected to the citizen's right of autonomy or self-determination or privacy or dignity, call it what you will, whether exercised by himself, if competent, or on his behalf by agreement between carers and family all acting *bona fide* in the patient's best interests. Indeed, the patient himself being competent, may lawfully decline medical treatment even though not terminally ill which he reasonably considers to be excessively burdensome, having regard to the paucity of benefit to be realised thereby and notwithstanding that the absence of such treatment may lead to his death.

A distinction was drawn in the medical evidence between a patient who is terminally ill on the one hand and a patient who has an incurable disease on the other hand. A person is terminally ill who is suffering from a progressive disease which will result in his death within a matter of months and probably at the very outside, not more than six months. A person who has an incurable disease will suffer from that disease for the rest of his life but it will not get any worse or else it will progress and get worse so gradually that he may, despite the disease, live for many more years.

The ward is not suffering from a terminal disease in the foregoing sense of a progressive condition, although I think that there is some substance in what one of the doctors said, namely, "she would be terminally ill if not falsely maintained: it is horrendous". The ward's condition is static: it will never improve: she will never recover but, as already stated, she could live, assuming nourishment continues to be given to her for another twenty years or so. On the other hand she might develop pneumonia or some additional disorder from which she might die in the short term, but her present condition does not constitute a terminal illness. As I understand the medical evidence, the present practice by the medical and nursing professions in relation to patients is as follows and is a lawful and proper practice:

1. A competent terminally ill patient is lawfully entitled to require that life support systems be either withdrawn or not provided as the case may be.
2. In the case of an incompetent terminally ill patient, the carers, in agreement with appropriate surrogates, be they family or friends, *bona fide* acting in what they believe to be the best interests of the patient, may lawfully withdraw or refrain from providing life support systems.
3. In the case of incompetent terminally ill patients, where the carers believe such systems should be withdrawn or not provided but the surrogates disagree, a second medical opinion should be obtained from a suitably qualified independent medical practitioner. If his opinion agrees with the carers, they may lawfully act accordingly, preferably having got the agreement of the surrogates with the aid of such second opinion: if his opinion agrees with the surrogates, the appropriate life support systems should be maintained or provided, as the case may be.
4. In the case of an incompetent patient, whether terminally ill or not, where the surrogates believe that life support systems should

be either withdrawn or not provided and the carers disagree, such systems should be maintained or provided unless an order of the High Court to the contrary is obtained by the surrogates.

The last category is the position of the ward in the present case and I now endeavour to ascertain the legal position in the ward's case regarding the withdrawal of nourishment provided by means of either a nasogastric or a gastrostomy tube. The nasogastric tube was developed early in this century. It is uncomfortable and many patients have great difficulty in tolerating it. The gastrostomy tube was developed only in the early 1980s. It is much less stressful on the patient and is now widely used where long term artificial feeding is necessary. Neither tube allows the patient the pleasures of eating and drinking: the taste and the smell of food is bypassed.

It is said by the carers that the provision of nourishment by means of a tube must now be considered to be normal for the ward since she has been so nourished for over twenty years. I cannot see, however, that a method of providing nourishment that is manifestly artificial and therefore abnormal at the outset, can change its essential nature and be regarded as and become normal or ordinary, simply because it has continued for a long time. It may be that a patient may get used to the abnormal artificial method of providing nourishment and no longer find it burdensome, but that does not make tube feeding normal. In the ward's case, it is also clear that she never got used to the nasogastric tube. She reacted against it by pulling it out an enormous number of times, probably well over a thousand times and probably also by way of reflex reaction to an unpleasant stimulus and if there was any element of cognition in her rejection of the nasogastric tube, that makes it all the more emphatic. Its re-insertion, prior to its replacement by the gastrostomy tube in April, 1992, used to cause great distress to the ward.

The gastrostomy tube is now being used for three years. It is a far easier and more satisfactory way of delivering nourishment to the ward and is much less burdensome to her. That does not, however, make it in any sense a normal way of receiving nourishment. I gather from the evidence that there are now patients who are able to nourish themselves by way of gastrostomy tube. Such patients, of course, lose the pleasures of the table but may have much else to live for. Even in the case of such patients, however, nourishment by gastrostomy tube is an abnormal artificial way of receiving nourishment and is a form of medical treatment. In their case, the benefits of thus prolonging life far outweigh the burdens of the self-administered treatment of nourishment by gastrostomy

tube just as the benefits to the diabetic patient of prolonging life by self-injected medication far outweigh the burdens of such injections. I should also say that I see no difference in principle between the artificial provision of air by a ventilator and the artificial provision of nourishment by a tube.

In the case of the ward it was, of course, right and proper, following the initial catastrophe to initiate artificial feeding by nasogastric tube (the gastrostomy tube was not yet invented), in the hope that she might, over the next six months or so, recover to a significant extent. Once twelve months elapsed, however, the hope of any further improvement disappeared and *a fortiori* with each passing year. The Court is now faced with the task of deciding what is the balance or proportionality of the benefits to the burdens, having regard to all the circumstances of the ward and especially to her present condition and to the fact that no matter how long her life may be prolonged, there will never be any improvement in that condition.

Regarding what is the true question which has to be answered, I adopt what was said by Lord Goff in the House of Lords in *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789, at p. 868 of the report:-

"It is crucial for the understanding of this question that the question itself should be correctly formulated. The question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life. The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: should a doctor be entitled to switch it off, or pull the plug? And then it is asked: can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient's death? Such an approach has rightly been criticised as misleading, for example by Professor Ian Kennedy in his paper in 'Treat me Right, Essays in Medical Law and Ethics' and by Thomas J. in *Auckland Area Health Board v. Attorney-General* [1993] 1 N.Z.L.R. 235, 247. This is because the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care."

I take the view that the proper and most satisfactory test to be applied by the Court in this case is the best interests test, i.e., whether it is in the best interests of the ward that her life, such as it is at present, should be prolonged by the continuation of the abnormal artificial means of nourishment, or, whether she should be allowed to slip away naturally by the withdrawal of such abnormal artificial means which would happen, I am satisfied on the evidence, within two weeks or so and without pain or distress. I am well aware of the difficulties involved in applying this test. As was pointed out in argument and also in many of the cases cited to me, a patient in the whole of his health and in the full flush of youth, may have expressed robust views about not being maintained in an incapacitated condition but when actually in such a condition, might be very anxious to cling on to such life with such limited pleasures that still might remain to him. Moreover, it must be difficult for a young person in perfect health to give a rational direction as to the prolongation or otherwise of his life, if he should have the misfortune to become drastically disabled so as to require some form of artificial life support. Thus it is suggested that it must be still more difficult for another person to decide whether a patient unable to communicate and dependant on artificial life support, would wish such support to be maintained or not, or to decide whether the maintenance or removal of the life support was in the true best interests of the patient.

All these difficulties are undoubtedly present in this case but they do not relieve the Court of the duty of deciding the matter one way or the other. The test is whether having heard and considered the whole case and the authorities cited to me, I am of opinion that it is or it is not in the best interests of the ward that her life should be prolonged by the continuance of the abnormal artificial means of nourishment, whether by nasogastric or gastrostomy tube. Whilst the best interests of the ward is the acid test, I think that I can take into account what would be her own wishes if she could be granted a momentary lucid and articulate period in which to express them and if, despite what I have already said, I can form a view on the matter. I think that it is highly probable, and I find the evidence of the family on this aspect of the case to be clear and convincing, that the ward would choose to refuse the continuance of the present regime to which she is subjected involving abnormal artificial feeding and total nursing care with all the indignities inherent in such care and would instead choose the withdrawal of such abnormal artificial feeding resulting in an immediate reduction of bodily functions and their attendant

indignities and a peaceful death in accordance with nature within two weeks or so.

The Court should approach the matter from the standpoint of a prudent, good and loving parent in deciding what course should be adopted. The mother of the ward in this case is such a parent and although it is for the Court rather than for her to decide the matter, her views and those of the family must carry considerable weight with the Court. I have come to the conclusion that the benefit to the ward of sustaining her life by the present abnormal artificial means of nourishment is far outweighed by the burdens of so sustaining life with absolutely no prospect of any improvement in the ward's condition. Accordingly, I find that it is in the best interest of the ward that the abnormal artificial nourishment, whether by nasogastric or by gastrostomy tube, should be terminated, thus ceasing artificially to prolong her life to no useful purpose and allowing her to die in accordance with nature with all such palliative care and medication as is necessary to ensure a peaceful and pain-free death.

On behalf of the ward I therefore consent to the withdrawal and termination of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube, and I declare that such withdrawal and termination are lawful. I have not heretofore mentioned anything about antibiotics or other means of treating infections or other pathological conditions which may arise because the institution agrees that they will not use any such means of treatment other than for palliative purposes. For the avoidance of doubt I also consent to the non-treatment of infections or other pathological conditions which may affect the ward save in a palliative way to avoid pain and suffering and I declare that such non-treatment is also lawful.

I do not make any order against the institution which is caring for the ward because the medical and nursing staff have stated that the withdrawal and termination of nourishment by tube, whether nasogastric or gastrostomy, would be contrary to their philosophy and code of ethics as it would also of the institution and its proprietors.

I authorise the family to make such arrangements as they consider suitable and appropriate for the admission of the ward to an institution which would not find it contrary to their philosophy and ethics to proceed in accordance with the consents and declarations which I have already given.

I put a stay on such authorisation to the family, the stay to continue for twenty-one days from the perfection of the order of the Court and in the event of any of the parties appealing to the Supreme Court within that

time, then the stay will continue until the determination of the matter by the Supreme Court. During the period of the stay, the ward should, subject to further order, remain in the institution which is presently caring for her and should continue to be treated in accordance with the philosophy and ethics of that institution, including continued nourishment by tube.

All parties shall have liberty to apply in relation to any matter arising out of this judgment or the proceedings.

The Attorney General, the institution and the guardian *ad litem* appealed against the orders of the High Court by notices of appeal dated the 12th, 17th and 24th May, 1995, respectively.

By notice to vary dated the 24th May, 1995, the applicant sought to have the High Court orders varied in respect of the standard of proof which had been applied and the authority of the family to determine the matters relating to the ward. The appeal was heard by the Supreme Court on the 14th, 15th, 20th, 21st and 22nd June, 1995.

Patrick MacEntee S.C. and Peter Charleton S.C. (with them *Marguerite Bolger*) for the committee and family of the ward.

Peter Kelly S.C. (with him *Denis McDonald*) for the guardian *ad litem*.

Patrick Hanratty S.C. (with him *Charles Meenan*) for the institution.

John Rogers S.C. (with him *Donal O'Donnell*) for the Attorney General.

Cur. adv. vult.

Hamilton C.J.

27th July, 1995

By order of the High Court (Lynch J.) perfected on the 10th May, 1995, the learned trial judge did:-

- (1) consent on behalf of the ward to the withdrawal and termination of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube and declared that such withdrawal and termination was lawful;
- (2) consented on behalf of the ward to the non-treatment of infections or other pathological conditions which may affect the ward saving in a palliative way to avoid pain and suffering and declared such non-treatment to be lawful;
- (3) authorised the committee and family of the ward to make such arrangements as they considered suitable and appropriate for the admission of the ward to an institution which would not find it contrary to their philosophy and ethics to proceed in accordance with the consensus and declarations made;
- (4) stayed such authorisation to the said committee and family of the ward for a period of 21 days from the date of perfection of the said order and in the event of any of the parties lodging within that time an appeal to the Supreme Court the stay to continue until the determination of such appeal, and further ordered that -
- (5) during the period of such stay the ward shall until further order remain in the said institution and shall continue to be treated in accordance with the philosophy and ethics of the said institution including continued nourishment by tube.

The effect of the said orders is that, if implemented, and nourishment is withdrawn from the ward, she will die in a comparatively short time.

The said orders were made pursuant to an application therefor by the committee of the ward, being the ward's mother, which application was supported by the members of the family of the ward but opposed by the Attorney General; by the institution in which the ward is being maintained and cared for; and by the General Solicitor for Wards of Court who, by order of the High Court made on the 20th March, 1995, had been appointed guardian *ad litem* of the ward.

The jurisdiction of the learned trial judge to hear and determine the application and to make the aforesaid orders arose in the following circumstances:-

- (1) The ward, who was born in 1950, suffered irreversible brain damage as a result of treatment administered to her on the 26th April, 1972.
- (2) On the 14th October, 1974, the then President of the High Court did, pursuant to a petition presented on her behalf by her father,

declare the ward to be of unsound mind and incapable of managing her person or property.

- (3) The ward's father was on the 17th May, 1975, appointed committee of the person and estate of the ward.
- (4) On the death of the father of the ward on the 23rd January, 1988, the then President of the High Court did on the 11th July, 1988, appoint the ward's sister to be committee of the person and of the estate of the ward.
- (5) On the 8th March, 1994, the said committee was permitted to retire as committee of the person and of the estate of the ward and the ward's mother was appointed committee of such person and estate in her stead.
- (6) In points of claim delivered on the 14th March, 1995, the committee and family of the ward sought:-
 - (a) an order that all artificial nutrition and hydration cease;
 - (b) that the Court should give such directions as to care having regard to the order of the Court as are appropriate.

Jurisdiction of the High Court

Historically, the jurisdiction over wards of court and their estates attached to the British Crown as *parens patriae* and the administration of such jurisdiction was delegated to the Lord Chancellor of England.

In practice the authority to administer the jurisdiction rested on a special entrustment under Sign-manual issued to each successive Lord Chancellor by a letter in lunacy.

This jurisdiction was by the Lunacy (Ireland) Act, 1901, made exercisable by such judges of the Supreme Court as might be similarly entrusted under Sign-manual.

By virtue of the terms of the Government of Ireland Act, 1920, the said jurisdiction became exercisable by the Lord Chief Justice of Ireland.

By virtue of the provisions of s. 19 of the Courts of Justice Act, 1924, there was transferred to the Chief Justice and made exercisable by him all such jurisdiction in lunacy and minor matters as had been formerly exercised by the Lord Chancellor of Ireland and was at the passing of the Act exercised by the Lord Chief Justice of Ireland.

This subsection also provided that:-

“ . . . An appeal shall lie to the Supreme Court from the exercise by the Chief Justice of the jurisdiction transferred by this section.”

By virtue of the provisions of s. 9, sub-s. 1, of the Courts of Justice Act, 1936, this jurisdiction was transferred to the President of the High Court or such judge of the High Court assigned in that behalf by him and was further vested in the President of the High Court by virtue of the provisions of s. 9 of the Courts (Supplemental Provisions) Act, 1961.

The President of the High Court assigned Lynch J. to exercise the jurisdiction vested in him in relation to this application.

Nature and extent of jurisdiction

The nature and extent of the jurisdiction vested in the President of the High Court, or in an ordinary judge of the High Court when so directed by the President of the High Court, was considered by this Court in *In re D.* [1987] I.R. 449.

In the course of his judgment in that case Finlay C.J. stated at p. 452 of the report:-

“The jurisdiction of the High Court in lunacy matters is provided for in s. 9 of the Courts (Supplemental Provisions) Act, 1961. Subsections 1 and 2 read as follows:-

- ‘(1) There shall be vested in the High Court the jurisdiction in lunacy and minor matters which -
- (a) was formerly exercised by the Lord Chancellor of Ireland,
 - (b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and
 - (c) was by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936, vested, immediately before the operative date in the existing High Court.
- (2) The jurisdiction vested in the High Court by subsection (1) of this section shall be exercisable by the President of the High Court or, where the President of the High Court so directs, by an ordinary judge of the High Court for the time being assigned in that behalf by the President of the High Court.’

I am satisfied that this section must be construed as vesting a jurisdiction in the High Court, as both sub-sections 1 and 2 of it describe it as doing, the extent of which jurisdiction is described and identified by subclauses (a) and (b) by reference to jurisdictions formerly exercised, and by subclause (c) by reference to jurisdictions previously vested in the former High Court.

It does not, as did s. 19 of the Act of 1924, transfer any jurisdiction but rather directly vests it.”

Later in his judgment he stated at p. 454 of the report:-

“It would appear that the jurisdiction in lunacy matters exercised by the former Lord Chancellors of Ireland was vested in them by a letter in lunacy addressed to each successive Chancellor by each successive sovereign. The terms of and the interpretation to be placed on this ‘letter in lunacy’ is dealt with by Ashbourne L.C. in *In re Birch* (1892) 29 L.R. Ir. 274, at p. 275, in the following terms:-

‘The terms of the Queen’s Letter in Lunacy expressly state the nature of the jurisdiction it confers. It commences: “Whereas it belongeth unto us in right of our royal prerogative to have the custody of idiots and lunatics and their estates in that part of the United Kingdom called Ireland . . . We therefore . . . have thought fit to entrust you with the care and commitment of the custody of the idiots and lunatics and their estates.” These words amount to an express delegation by the Crown under the Sign-manual of its prerogative jurisdiction in Lunacy to the Lord Chancellor. The single purpose of the Crown is to benefit this afflicted class by confiding them to the care of its highest Judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the Sovereign extends over all idiots and lunatics, whether so found by legal process or not. That high prerogative duty is delegated to the Lord Chancellor, and there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such inquiries and examinations as justice to the idiots and lunatics may require. The Queen puts the care and commitment of the custody of idiots and lunatics before the care of their estates, thus showing with unmistakable clearness that the first and highest care of the Lord Chancellor should be given to the personal treatment of this afflicted class.’

In *In re Godfrey* (1892) 29 L.R. Ir. 278, in which judgment was delivered shortly after the case of *In re Birch* (1892) 29 L.R. Ir. 274 the Lord Chancellor made an order freeing a person alleged to be of unsound mind from detention in an institution upon finding that she was not any longer of unsound mind. The person had not at any time been a ward of court and there is no reference in the report to the ownership by her of any property. In fact it would be possible to infer

from some of the arrangements made by the Lord Chancellor with regard to the person concerned that she had no or negligible property. He made this order on the basis of his view of his general jurisdiction which he stated at p. 279 of the report in the following terms:-

‘The power given by the Queen’s Sign-manual creates a high and responsible duty in the Lord Chancellor towards these afflicted persons, calling on him to act on their behalf whenever it may come to his notice that their liberty or happiness require his intervention, and this beneficent jurisdiction is not confined to those so found by process of law or narrowed to any special class. The power and duty so given and created afford in this case an illustration of the most salutary and protective exercise of the prerogative of the Sovereign.’

I am driven by these two decisions and by the statement of a former Lord Chancellor of Ireland as to what his understanding of his jurisdiction was and indeed the exercise by him of it, to the conclusion that it extended beyond the taking into wardship of persons who had property and the management and protection of their property as well as the protection of their person. Such a construction of the jurisdiction in lunacy matters vested by the Act of 1961 in the High Court seems to me to obtain significant support from a consideration of the provisions of Article 40, s. 3, sub-s. 2 of the Constitution where the obligation imposed on the State by its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the life and person of every citizen is put in equal place with the obligation to protect and vindicate the property rights of every citizen.”

The designation of people who for various reasons may be of unsound mind and incapable of looking after their affairs as ‘idiots and lunatics’ is representative of a by-gone age but the jurisdiction in regard thereto is quite clear.

As stated by Ashbourne L.C. in the passage quoted above:-

“The single purpose of the Crown is to benefit this afflicted class by confiding them to the care of its highest Judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the Sovereign extends over all idiots and lunatics, whether so found by legal process or not. That high prerogative duty is delegated to the Lord Chancellor, and there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such in-

quiries and examinations as justice to the idiots and lunatics may require. The Queen puts the care and commitment of the custody of idiots and lunatics before the care of their estates, thus showing with unmistakable clearness that the first and highest care of the Lord Chancellor should be given to the personal treatment of this afflicted class.”

When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution: there is no statute which in the slightest degree lessens the court’s duty or frees it from the responsibility of exercising that parental care.

That duty includes giving directions with regard to the care, maintenance and well-being of the ward. While a committee of the person of a ward is appointed by the court, such committee is subject to the directions of the court and all decisions with regard thereto are made by the court.

It is for this reason that the application made by the committee of the person of the ward, and supported by the members of the family of the ward, was necessary in the instant case.

In the exercise of this jurisdiction the court’s prime and paramount consideration must be the best interests of the ward. The views of the committee and family of the ward, although they should be heeded and careful consideration given thereto, cannot and should not prevail over the court’s view of the ward’s best interest.

As stated by Balcombe L.J. in *In re J. a Minor (Wardship: Medical Treatment)* [1991] Fam. 33 at p. 50:-

“In deciding in any given case what is in the best interests of the ward, the court adopts the same attitude as a responsible parent would do in the case of his or her own child; the court, exercising the duties of the Sovereign as *parens patriae*, is not expected to adopt any higher or different standard than that which, viewed objectively, a reasonable and responsible parent would do.”

It is quite clear from the judgment of the learned trial judge that he accepted that in dealing with the application before him he was exercising the *parens patriae* jurisdiction exercised by the Lord Chancellors in Ireland prior to 1922, which is now vested in the President of the High Court or at his direction, by an ordinary judge of the High Court for the time being assigned in that behalf by him.

At pp. 87 and 88 of the report, he stated:-

“As the ward is a ward of Court it is for the Court to decide the issues and not the family nor the carers, the Court being endowed with the *parens patriae* jurisdiction exercised by the Lord Chancellors in Ireland prior to 1922.”

He made it clear however that “the views of the family and the car-ers” would carry weight with the Court.

Condition of the ward

In view of the nature of the application made by the committee of the person of the ward and its consequences to the ward if successful it is desirable at this stage to set forth in detail the condition of the ward as found by the learned trial judge.

In his judgment he stated:-

“Over two decades ago the ward, who was then 22 years old, underwent a minor gynaecological operation under general anaesthetic. During the procedure she suffered three cardiac arrests resulting in anoxic brain damage of a very serious nature. Since that catastrophe the ward has been completely dependent on others, requiring total nursing care. She is spastic as a result of the brain damage. Both arms and hands are contracted. Both legs and feet are extended. Her jaws are clenched and because she had a tendency to bite the insides of her cheeks and her tongue, her back teeth have been capped to prevent the front teeth from fully closing. She cannot swallow. She cannot speak. She is incontinent.

In the first five or six months after the catastrophe, there were minimal signs of recovery which unfortunately did not continue but if anything faded with the passing years. For some twenty years she was fed through a nasogastric tube. Generally, but especially in the later years, she seemed to find this distressing and it was replaced by a gastrostomy tube in April, 1992, which required the administration of a general anaesthetic. Since then she has been fed through the gastrostomy tube with much greater ease and success. This tube became detached in December, 1993, and a new tube was inserted which came out the next day and had to be reinserted the following day under general anaesthetic.

The ward is, of course, bedridden. She is in a condition which is nearly, but not quite, what in modern times has become known as persistent or permanent vegetative state (P.V.S.) . . .

In the present case the ward's heart and lungs function normally. Assuming that she is adequately furnished with nutrition and hydration (nourishment), her digestive system operates normally as do her bodily functions, although bowel movements require some assistance, but as she cannot swallow and as her teeth are spastically clenched together, she cannot receive nourishment in the normal way and as already stated, is and has had to be tube-fed since the catastrophe. Assuming that she continues to be nourished by tube, she could live for many years but of course she might also die in the short term if she developed some infection such as pneumonia, unless it were treated aggressively with antibiotics.

The ward has no capacity for speech or for communicating. A speech therapist failed to elicit any means of communication. She has a minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes and reacts to noise, although the latter is mainly, if not indeed, wholly reflex from the brain stem and a large element of reflex eye tracking is also present in the former which, however, also has some minimal purposive content . . .

I am satisfied that although the ward is not fully P.V.S., she is very nearly so and such cognitive capacity as she possesses is extremely minimal. A fully P.V.S. person cannot feel pain and has no capacity for pleasure or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S. There is no prospect whatsoever of any improvement in the condition of the ward."

Application by the committee of the person

It was because of the said condition of the ward that her mother, the committee of the person of the ward, with the full support of all the brothers and sisters of the ward, sought the orders hereinbefore referred to.

In making the said application the committee and other members of the family were, as stated by the learned trial judge:-

“completely *bona fide* and wish that the course which they propose be followed only because they honestly and indeed fervently believe that that course is in the true best interests of the ward.”

It was accepted on behalf of the family that the standard of care given to the ward has been and is excellent and could not be better.

The committee and family of the ward considered that by virtue of the provisions of Article 41, s. 1 of the Constitution that it was the family’s prerogative, acting in the best interests of the ward, to decide whether life support in the form of tube nourishment, antibiotics and other medical or surgical treatments should be maintained or withdrawn and that their decision should bind the Court as being made in pursuance of their inalienable and imprescriptible rights antecedent and superior to all positive law.

Proceedings in the High Court

The proceedings in this case were instituted by a notice of motion dated the 7th March, 1995, brought by the committee of the ward and addressed to:-

- (i) the solicitors for the institution in which the ward was being cared for (hereinafter referred to as the institution),
- (ii) the Chief State Solicitor on behalf of the Attorney General, and
- (iii) the Registrar of the Wards of Court Office.

On the 13th March, 1995, the learned trial judge directed that points of claim should be delivered on behalf of the family to the institution and the Attorney General with liberty to these parties to respond if so wished.

On the 20th March, 1995, the learned trial judge appointed the General Solicitor for Wards of Court to be guardian *ad litem* of the ward with a view specifically to contradict the case being made by the family.

On that day, he also heard submissions from the parties on the issue as to whether the hearing of the application should or should not be heard in public.

On the 22nd March, 1995, the learned trial judge ruled that the hearing of the substantive application on oral evidence should be *in camera*, both as to evidence and submissions but that the judgment should be delivered in public in such a manner as to preserve the anonymity of the ward, the family, the institution and the witnesses.

Points of claim were delivered on behalf of the family on the 14th March, 1995, in which the factual background was set out and it was claimed:-

- “1. An order that all artificial nutrition and hydration cease.
2. That the Court should give such directions as to care, having regard to the order of the Court, as are appropriate.”

A reply to the points of claim was delivered on behalf of the institution which is caring for the ward on the 30th March, 1995, in which issue was joined generally on the points of claim and furthermore para. 18 pleaded as follows:-

“Whatever order or determination this Honourable Court may be disposed to make upon the application of the family, the institution ought not be required to do any act contrary to its philosophy and code of ethics and there is no legal basis for any such requirement.”

At the substantive hearing it was accepted by the family and by all the other parties that this plea of the institution was valid and that no order should be made by the Court against the institution, the obedience to which would contravene the philosophy and code of ethics of the institution.

Written submissions were prepared and submitted to the Court on behalf of each of the parties to the proceedings and oral evidence was heard by the learned trial judge over a period of four days. In addition he heard oral submissions on behalf of all the parties.

The learned trial judge delivered his judgment on the 5th May, 1995.

Judgment of the High Court

As stated by the learned trial judge the application in this case raised “issues for decision which had never come before the courts of this State previously”.

The application before the High Court and the appeal from the order of the High Court to this Court raises moral, legal, and constitutional questions of a profound and fundamental nature, questions literally of life and death.

These issues were:-

- (a) whether in the circumstances of the ward’s condition the course proposed by the committee and family of the ward *viz.* the withdrawal of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube and the non-treatment of infections or other pathological condi-

lator, lungs which in the unaided course of nature would have stopped breathing, can be made to breathe, thereby sustaining the heartbeat. Those like Anthony Bland who would previously have died through inability to swallow food can be kept alive by artificial feeding. This has led the medical profession to redefine death in terms of brain stem death, i.e., the death of that part of the brain without which the body cannot function at all without assistance. In some cases it is now apparently possible, with the use of the ventilator, to sustain a beating heart even though the brain stem, and therefore in medical terms the patient, is dead: "the ventilated corpse".

I do not refer to these factors because Anthony Bland is already dead, either medically or legally. His brain stem is alive and so is he: provided that he is artificially fed and the waste products evacuated from his body by skilled medical care, his body sustains its own life. I refer to these factors in order to illustrate the scale of the problem which is presented by modern technological developments, of which this case is merely one instance. The physical state known as death has changed. In many cases the time and manner of death is no longer dictated by nature but can be determined by human decisions. The life of Anthony Bland, in the purely physical sense, has been and can be extended by skilled medical care for a period of years'."

The learned trial judge accepted the description of the condition of persistent or permanent vegetative state (P.V.S.) given by Sir Thomas Bingham, M.R., in the Court of Appeal in England in the *Bland* case as follows:-

"P.V.S. is a recognised medical condition quite distinct from other conditions sometimes known as 'irreversible coma', 'the Guillain-Barre syndrome', 'the locked-in syndrome' and 'brain death'. Its distinguishing characteristics are that the brain stem remains alive and functioning while the cortex of the brain loses its function and activity. Thus the P.V.S. patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and can thus feel no emotion, whether pleasure or distress."

The learned trial judge, having carefully considered the evidence in this case, was satisfied that “although the ward is not fully P.V.S., she is nearly so and such cognitive capacity as she possesses is extremely minimal”.

He found that:-

“she has a minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes and reacts to noise, although the latter is mainly, if not indeed, wholly reflex from the brain stem and a large element of reflex eye tracking is also present in the former which, however, also has some minimal purposive content.”

He considered the evidence given by all the members of the family who stated that in over two decades of visiting her, they have never detected any signs of recognition nor efforts at communication by her. He had no doubt as to the veracity and reliability of the family’s evidence and marrying such evidence with the evidence by the persons having care of the ward, came to the conclusion that:-

“although the ward is not fully P.V.S. she is nearly so and such cognitive capacity as she possesses is extremely minimal.”

He then went on to say that -

“A fully P.V.S. person cannot feel pain and has no capacity for pleasure or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward’s state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S. There is no prospect whatsoever of any improvement in the condition of the ward.”

These findings by the learned trial judge were based on credible testimony and as such are binding on this Court.

It is clear from the evidence and the findings of the learned trial judge that, since the catastrophe that caused the injury to the ward on the 26th April, 1972, her life has been prolonged in the condition described by means of providing nourishment through either a nasogastric or a gastrostomy tube inserted in her body.

The learned trial judge stated that:-

“The nasogastric tube was developed early in this century. It is uncomfortable and many patients have great difficulty in tolerating it.

The gastrostomy tube was developed only in the early 1980s. It is much less stressful on the patient and is now widely used where long term artificial feeding is necessary. Neither tube allows the patient the pleasures of eating and drinking: the taste and the smell of food is bypassed.

It is said by the carers that the provision of nourishment by means of a tube must now be considered to be normal for the ward since she has been so nourished for over twenty years. I cannot see, however, that a method of providing nourishment that is manifestly artificial and therefore abnormal at the outset, can change its essential nature and be regarded as and become normal or ordinary, simply because it has continued for a long time. It may be that a patient may get used to the abnormal artificial method of providing nourishment and no longer find it burdensome, but that does not make tube feeding normal. In the ward's case, it is also clear that she never got used to the nasogastric tube. She reacted against it by pulling it out an enormous number of times, probably well over a thousand times and probably also by way of reflex reaction to an unpleasant stimulus and if there was any element of cognition in her rejection of the nasogastric tube, that makes it all the more emphatic. Its re-insertion, prior to its replacement by the gastrostomy tube in April, 1992, used to cause great distress to the ward.

The gastrostomy tube is now being used for three years. It is a far easier and more satisfactory way of delivering nourishment to the ward and is much less burdensome to her. That does not, however, make it in any sense a normal way of receiving nourishment. I gather from the evidence that there are now patients who are able to nourish themselves by way of gastrostomy tube. Such patients, of course, lose the pleasures of the table but may have much else to live for. Even in the case of such patients, however, nourishment by gastrostomy tube is an abnormal, artificial way of receiving nourishment and is a form of medical treatment. In their case, the benefits of thus prolonging life far outweigh the burdens of the self-administered treatment of nourishment by gastrostomy tube just as the benefits to the diabetic patient of prolonging life by self-injected medication far outweigh the burdens of such injections. I should also say that I see no difference in principle between the artificial provision of air by a ventilator and the artificial provision of nourishment by a tube."

The learned trial judge later stated:-

"I take the view that the proper and most satisfactory test to be

applied by the court in this case is the best interests test, i.e. whether it is in the best interests of the ward that her life, such as it is at present, should be prolonged by the continuation of the abnormal, artificial means of nourishment or whether she should be allowed to slip away naturally by the withdrawal of such abnormal, artificial means which would happen, I am satisfied on the evidence within two weeks or so and without pain or distress."

In adopting this test, the learned trial judge was adopting the test suggested by Lord Goff in the *Bland* case at p. 868 of the report where he stated:-

"... the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care."

The learned trial judge further stated:-

"Whilst the best interests of the ward is the acid test, I think that I can take into account what would be her own wishes if she could be granted a momentary lucid and articulate period in which to express them and if, despite what I have already said, I can form a view on the matter. I think that it is highly probable, and I find the evidence of the family on this aspect of the case to be clear and convincing, that the ward would choose to refuse the continuance of the present regime to which she is subjected involving abnormal, artificial feeding and total nursing care with all the indignities inherent in such care and would instead choose the withdrawal of such abnormal, artificial feeding resulting in an immediate reduction of bodily functions and their attendant indignities and a peaceful death in accordance with nature within two weeks or so."

This finding by the learned trial judge that the ward would choose to refuse the continuance of the present regime to which she is subjected involving abnormal artificial feeding and total nursing care with all the indignities inherent in such care and would choose the withdrawal of such abnormal, artificial feeding resulting in an immediate reduction of bodily functions and their attendant indignities and a peaceful death in accordance with nature within two weeks or so was based on evidence from the family which he found to be clear and convincing.

He then went on to say:-

"The Court should approach the matter from the standpoint of a prudent, good and loving parent in deciding what course should be adopted. The mother of the ward in this case is such a parent and al-

though it is for the Court rather than for her to decide the matter, her views and those of the family must carry considerable weight with the Court. I have come to the conclusion that the benefit to the ward of sustaining her life by the present abnormal, artificial means of nourishment is far outweighed by the burdens of so sustaining life with absolutely no prospect of any improvement in the ward's condition. Accordingly, I find that it is in the best interest of the ward that the abnormal artificial nourishment, whether by nasogastric or by gastrostomy tube, should be terminated, thus ceasing artificially to prolong her life to no useful purpose and allowing her to die in accordance with nature with all such palliative care and medication as is necessary to ensure a peaceful and pain-free death."

Appeal

The Attorney General, the institution and the guardian *ad litem* of the ward have appealed to this Court against the said judgment of and order made by the learned trial judge.

The committee and family of the ward have applied to vary the judgment of the High Court only in respect of the following:-

1. That the application of a standard of proof requiring evidence to be clear and convincing before medical treatment is not continued is not in accordance with law and in particular is at variance with the standard applied in civil law of a balance of probability and is at variance with the standard, which on the evidence, medical practitioners called on behalf of the family and committee apply to decisions of this kind. It is submitted that the correct standard of proof is not one beyond a probability.
2. That the authority of the family, and in this case the mother and committee of the ward, is to be upheld by the Court pursuant to Article 41, s. 1 of the Constitution and that she therefore has the right to require that the medical treatment which staves off the fatal pathology from which the ward is suffering should not be continued. It is submitted that this authority extends to the requirement that artificial nutrition and hydration be not continued through a tube that is already in place. In the alternative to the foregoing it is submitted that this authority extends to requiring that no further medical intervention by way of antibiotics, by way of replacement of the PEG tube when same becomes displaced be

performed and that the ward be not further distressed by the reinsertion of a nasogastric tube on the failure of the PEG tube.

Rights of family

Article 41, s. 1 of the Constitution provides as follows:-

- “(1) The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution, possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- (2) The State, therefore, guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

It was submitted on behalf of the family that by virtue of this Article of the Constitution, it was the family's prerogative, acting *bona fide* in the best interests of the ward, to decide whether life support in the form of tube nourishment, antibiotics and other medical or surgical treatments should be maintained or withdrawn and that their decision would bind the Court as being made in pursuance of their inalienable and imprescriptible family rights antecedent and superior to all positive law.

This submission was rejected by the learned trial judge on the grounds that as the ward was a ward of court “it is for the Court to decide the issues and not the family nor the carers, the Court being endowed with the *parens patriae* jurisdiction exercised by the Lord Chancellors in Ireland prior to 1922”.

He made it clear however that, in the exercise of that jurisdiction, the views of the family would ‘carry weight’ with the Court and in particular stated:-

“The Court should approach the matter from the standpoint of a prudent, good and loving parent . . . The mother of the ward in this case is such a parent and although it is for the Court rather than for her to decide the matter, her views and those of the family must carry considerable weight with the Court.”

The exercise by the Court of the jurisdiction now vested in it by s. 9 of the Courts (Supplemental Provisions) Act, 1961, does not, in any way, amount to a failure to protect the family in its constitution and authority.

In this case, the ward was made a ward of court on the 24th October, 1974, pursuant to a petition in that regard presented on her behalf by her father, who was appointed committee of the person and estate of the ward; upon his death, the ward's sister was appointed her committee: when she

was permitted to retire as such committee, her mother was appointed committee in her stead.

The family had invoked the jurisdiction of the Court and the Court then became responsible for all decisions with regard to the person and estate of the ward and the nature of that jurisdiction - *parens patriae* - has been described earlier during the course of this judgment.

In the exercise of such jurisdiction, the Court will have regard to, but not be bound by, the wishes of the committee and members of the family. The ultimate responsibility for making any necessary decision rests on the Court.

This does not encroach on the rights of the family because in many cases it is necessary to protect the personal rights of members of the family guaranteed by Article 40 of the Constitution.

I am satisfied that the learned trial judge was correct in rejecting the submission made on behalf of the committee and family of the ward; that he had jurisdiction to make the decision and that in the exercise of such jurisdiction he had regard to all relevant factors including the wishes of the family, and I would refuse the application to vary his judgment on this issue.

*Notices of appeal on behalf of the Attorney General,
the guardian ad litem of the ward and the institution*

Each of the above named parties have appealed against the judgment and order of the learned trial judge and each party has submitted grounds of appeal.

Many of the grounds are common to all the said parties and can be briefly summarised as follows:-

1. (a) The order of the High Court fails to vindicate the life of the ward in accordance with the provisions of the Constitution of Ireland and in particular Article 40, s. 3, sub-ss. 1 and 2.
- (b) The withdrawal of nutrition, hydration and basic medical care of the type provided in this case by the institution from a person with cognition (even if it be extremely minimal) is contrary to Articles 40, s. 3, sub-ss. 1 and 2 of the Constitution.
- (c) The order of the High Court fails to vindicate the ward's right to be fed and receive basic nourishment which is a basic and fundamental right of all citizens under the Constitution and in particular under Article 40, s. 3, sub-ss. 1 and 2 of the Constitution.

- (d) The decision of the learned trial judge in consenting to the withdrawal of nourishment from the ward was predicated upon an assessment of the quality of life of the ward which is impermissible under the provisions of the Constitution and, in particular Article 40, ss. 1 and 3.
2. The learned trial judge erred in law in holding that the test to be applied was whether “it is or is not in the best interests of the ward that her life should be prolonged by the continuance of the abnormal means of nourishment whether by nasogastric or gastrostomy tube”.
 3. The learned trial judge erred in law in applying a principle more appropriate to the case of a terminally ill patient to the case of a ward who is not terminally but merely chronically ill.
 4. The learned trial judge misdirected himself in fact and law in holding that the provision of nourishment to the ward by means of a gastrostomy tube was a form of medical treatment.
 5. The learned trial judge erred in law in holding that the standard of proof which should be applied in cases of this nature should be that the evidence be “clear and convincing” rather than “beyond reasonable doubt”.
 6. In addition to the foregoing, there were appeals against certain findings by the learned trial judge, which will be dealt with during the course of this judgment.

Submissions

All the parties made submissions, written and oral, to the Court which were of considerable assistance to me and other members of the Court.

I do not at this stage intend to summarise these submissions but will refer to them when dealing with the issues raised in this appeal.

Issues

As I have already stated the application before the High Court and the appeal from the order of the High Court raise moral, legal constitutional and ethical issues of a profound and fundamental nature, questions literally of life and death.

As stated by Sir Thomas Bingham M.R. when dealing with similar issues in *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 at p. 808 of the report:-

“The present appeal raises moral, legal and ethical questions of a profound and fundamental nature, questions literally of life and death. The case has naturally provoked much public discussion and great anxiety. Strong and sincerely held opinions have been expressed both in favour of the decision under appeal and against it. The issues are such as inevitably to provoke divisions of opinion. But they are fairly and squarely before the court, which has had the benefit of eloquent and erudite argument. It cannot shirk its duty to decide. It is, however, important to be clear from the outset what the case is, and is not, about. It is not about euthanasia, if by that it meant the taking of positive action to cause death. It is not about putting down the old and infirm, the mentally defective or the physically imperfect . . . The issue is whether artificial feeding and antibiotic drugs may lawfully be withheld from an insensate patient with no hope of recovery when it is known that if that is done the patient will shortly thereafter die.”

I refer to this passage for the purpose of emphasising that the issues in the present appeal are somewhat similar to the issues in the *Bland* case and are not about euthanasia and are not about putting down the old and the infirm, the mentally defective or the physically infirm but are about the question whether, under our law and Constitution, artificial feeding and antibiotic drugs may be withheld from the ward, who is and has been for more than twenty three years in a coma and has no hope of recovery, when it is accepted that if that is done, the ward will shortly thereafter die.

It is important to emphasise that the Court can never sanction steps to terminate life.

As stated by the then Taylor L.J. in *Re J. (A Minor) (Wardship: Medical Treatment)* [1991] Fam. 33 at p. 53:-

“That would be unlawful. There is no question of approving, even in a case of the most horrendous disability, a course aimed at terminating life or accelerating death. The court is concerned only with the circumstances in which steps should not be taken to prolong life.”

Having regard to the provisions of Article 40, s. 3, sub-s. 2 of the Constitution, this statement of the law applies with even greater force in this jurisdiction. Even in the case of the most horrendous disability, any course of action or treatment aimed at terminating life or accelerating death is unlawful.

The broader issues to which attention has been drawn in this case are matters for the Oireachtas.

The Court is however bound to deal with the issues raised only in so far as they relate to this particular ward and the circumstances of this particular ward.

While consideration of the issues relating to this particular ward may involve regard to and consideration of the broader issues, my ruling in this matter will be based on and relate only to the circumstances and rights of this particular ward.

Having regard to the circumstances of this ward as outlined in the judgment of the learned trial judge, the issues which arise for determination in this appeal are:-

- (1) whether the course proposed by the committee and family of the ward and consented to by the learned trial judge was in the best interests of the ward;
- (2) whether the said course was lawful;
- (3) whether the said course involving, as it did, the withdrawal of the artificial means of nourishment and the non-treatment of infections or other pathological conditions which would inevitably result in her death was in breach of the constitutional rights of the ward;
- (4) whether the learned trial judge in consenting to the said proposed course, which would inevitably result in the death of the ward failed to respect, and so far as practicable to defend the personal rights of the ward, as guaranteed by the Constitution and, in particular, her right to life and failed to protect, such right from unjust attack;
- (5) whether the ward, if competent to make a decision to refuse such treatment, had the right to refuse such treatment;
- (6) if she had such right, did she lose such right by reason of her mental incapacity;
- (7) if not, can the decision to exercise such right be made on her behalf and if so, by whom;
- (8) the matters to be taken into account when such right is being exercised on behalf of the ward;
- (9) whether there was sufficient credible evidence to justify the finding of the learned trial judge that it was in the best interests of the ward that the provision of nourishment by artificial means be withdrawn.

Provisions of the Constitution relevant to the issues in this appeal

The following provisions of the Constitution are relevant to the issues raised in this appeal:-

Article 40, s. 1

“All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

Article 40, s. 3, sub-s. 1

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

Article 40, s. 3, sub-s. 2

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

Article 41, s. 1, sub-s. 1

“The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”

Article 41, s. 1, sub-s. 2

“The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

The right to life

The right to life is one of the fundamental rights which under the Constitution the State guarantees in its laws to respect and, as far as practicable, to defend, vindicate and protect as best it may from unjust attack.

The sanctity of human life is recognised in all civilised jurisdictions and is based on the nature of man.

The Constitution recognises this right and grants to it the protection set forth in the Constitution. The courts have recognised that the right to life springs from the right of every individual to life.

There are many other fundamental rights, express or implied, which are acknowledged by the Constitution and which are afforded similar protection.

It has been well established by many decisions of this Court that where there exists an interaction of constitutional rights, the first objective of the courts in interpreting the Constitution and resolving any problems thus arising should be to seek to harmonise such interacting rights.

As stated by the former Chief Justice, Finlay C.J., in the course of his judgment in the case of *The Attorney General v. X*. [1992] I.R. 1 at p. 57 of the report:-

“There are instances, however, I am satisfied, where such harmonisation may not be possible and in those circumstances I am satisfied, as the authorities appear to establish, that there is a necessity to apply a priority of rights.”

I am satisfied that in this case, if there was an interaction of constitutional rights which I was not capable of harmonising, the right to life would take precedence over any other rights.

The nature of the right to life and its importance imposes a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances. The problem is to define such circumstances.

The definition of such circumstances must, of necessity, involve a determination of the nature of the right to life acknowledged by the Constitution.

In the course of his judgment in *G. v. An Bord Uchtála* [1980] I.R. 32, Walsh J. stated at p. 69 of the report that:-

“The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation.”

In this statement, Walsh J. clearly recognises that the right to life necessarily implies various other ancillary rights which were not individually or specifically set forth in the Constitution and he enumerated such rights as applied in the case with which he was dealing.

He further stated that:-

“natural rights spring primarily from the natural right of every individual to life.”

These rights include the right to live life in its fullest content, to enjoy the support and comfort of her family, to social contact with her peers, to education, to the practice of her religion, to work, to marry and have children, to privacy, to bodily integrity and to self determination.

These rights are not, however, unqualified: they may be subject to the constitutional rights of others and to the requirements of the common good.

They, however, spring from the right to life which is recognised by the Constitution.

As the process of dying is part, and an ultimate, inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which is intended merely to prolong life.

This right, as so defined, does not include the right to have life terminated or death accelerated and is confined to the natural process of dying. No person has the right to terminate or to have terminated his or her life, or to accelerate or have accelerated his or her death.

In this case, the ward is in the condition described in the judgment of the learned trial judge, to portions of which I have referred in the course of this judgment.

Her life is being artificially maintained by the provision of life sustaining nourishment through a gastrostomy tube inserted in her body. Such treatment is in no way, nor intended to be, curative and she will continue to be in the condition in which she now is, and has been for over twenty years, if she continues to be provided with nourishment in this manner.

Right to bodily integrity, privacy and self-determination

There is no doubt but that the ward, if she were mentally competent, had the right, if she so wished, to forego such treatment or, at any time, to direct that it be withdrawn even though such withdrawal would result in her death.

This treatment involved a tube implanted surgically into her stomach through incisions in her abdominal wall and the provision of nutrition through that tube. Such treatment is intrusive, constitutes an interference

with the integrity of her body and cannot be regarded as normal means of nourishment.

Her right to bodily integrity is one of the unenumerated personal rights recognised in and protected by Article 40, s. 3 of the Constitution and was defined by Kenny J. in *Ryan v. A.G.* [1965] I.R. 294 at page 313.

The right to individual privacy is one of the unenumerated personal rights recognised by Article 40, s. 3 which the courts have identified.

In the course of my judgment in *Kennedy v. Ireland* [1987] I.R. 587, at p. 592, I stated:-

“Though not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others or by the requirements of the common good and is subject to the requirements of public order and morality.”

In the course of an article entitled “The Terminally Ill: The Law’s Concern” (1986) XXI Ir. Jur. (n.s.) 35, the President of the High Court stated:-

“... there are very powerful arguments to suggest that the dignity and autonomy of the human person (as constitutionally predicated) require the State to recognise that decisions relating to life and death are, generally speaking, ones which a competent adult should be free to make without outside restraint, and that this freedom should be regarded as an aspect of the right to privacy which should be protected as a ‘personal’ right by Article 40.3.1. But like other ‘personal’ rights identified by the Courts, the right is not an absolute one, and its exercise could in certain circumstances be validly restricted. For example, in the case of contagious diseases, the claims of the common good might well justify restrictions on the exercise of a constitutionally protected right to refuse medical treatment. But in the case of the terminally ill, it is very difficult to see what circumstances would justify the interference with a decision by a competent adult of the right to forego or discontinue life saving treatment.”

Though the learned President was writing extra-judicially, I agree with the views expressed in the said passage.

A competent adult if terminally ill has the right to forego or discontinue life-saving treatment.

An issue in this case was whether the ward was terminally ill or chronically ill.

It is quite clear from the evidence that, without the benefit of the nourishment provided by the treatment being afforded to her she would die within a short period of time and in this regard, she must be regarded as 'terminally ill'.

Consequently, I am satisfied that if she were mentally competent that she would have, in the circumstances of her condition, the right to forego the treatment or to have the treatment discontinued and that the exercise of that right would be lawful and in pursuance of her constitutional rights.

Neither the requirements of the common good nor public order or morality, in the circumstances of this particular case, require that the exercise of the ward's constitutional rights be restricted.

In so far as it may be relevant I have no doubt but that the treatment being afforded to the ward, constituted 'medical treatment' and not merely 'medical care'.

I agree with the statement made by Sir Stephen Brown in the course of his judgment in *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 at p. 894 where he stated:-

"In my judgment, the provision of artificial feeding by means of a nasogastric tube is 'medical treatment'."

By virtue of her mental incapacity the ward is unable to exercise that right and it has been submitted by all the appellants herein, including the Attorney General that having regard to the right to life of the ward, it was not open to any person or persons to exercise such right on her behalf.

If such submission were to be correct, the ward, by virtue of her incapacity, would be deprived of the opportunity to exercise, or have exercised on her behalf, a right enjoyed by other citizens of the State.

Article 40, s. 1 of the Constitution provides that:-

"All citizens shall, as human persons, be equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to the differences of capacity, physical and moral, and of social functions."

The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care or treatment.

The ward is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity.

In the circumstances of this ward there is no conflict between the exercise of these rights and the right to life, which the State is by the Constitution obliged to respect, defend, vindicate and protect from unjust attack. Her right to life necessarily implies the right to die a natural death.

By reason of the fact that the ward is a ward of court and the provisions of s. 9 of the Courts (Supplemental Provisions) Act, 1961, the responsibility for the exercise of and the vindication of these rights rested on the judge assigned in that behalf by the President of the High Court, in this case the learned trial judge, Lynch J.

In the exercise of this jurisdiction, the first and paramount consideration is the well-being, welfare or interests of the ward.

As stated by Lord Hailsham L.C. in *Re B. (A Minor) (Wardship: Sterilisation)* [1988] A.C. 199 at p. 202:-

“There is no doubt that, in the exercise of its wardship jurisdiction the first and paramount consideration is the well being, welfare, or interests (each expression occasionally used, but each, for this purpose, synonymous) of the human being concerned, that is the ward herself or himself.”

In *In Re J. (A Minor)(Wardship: Medical Treatment)* [1991] Fam. 33 Balcombe L.J. stated at p. 50:-

“In deciding in any given case what is in the best interests of the ward, the court adopts the same attitude as a responsible parent would do in the case of his or her own child: the court, exercising the duties of the Sovereign as *parens patriae* is not expected to adopt any higher or different standard than that which, viewed objectively, a reasonable and responsible parent would do.”

In addition, in this jurisdiction the court must have regard to the constitutional rights of the ward and defend and vindicate these rights.

Having considered the transcript of the evidence adduced at the hearing of the application and the judgment of the learned trial judge thereon, I am satisfied that he had at all times regard for the constitutional rights involved, including the rights of the ward, the family and the State and that in considering the issue "whether it was in the best interests of the ward that her life should be prolonged by continuance of the particular medical treatment which she was receiving" he adopted the proper test and approached the matter from, as he stated, "the standpoint of a prudent, good and loving parent" and required clear and convincing proof of all relevant matters before reaching what must be regarded as an awesome decision to consent to the withdrawal and termination of the abnormal

artificial means of nourishment by tube, thus ceasing to prolong her life to no useful purpose and allowing her to die.

The true cause of the ward's death will not be the withdrawal of such nourishment but the injuries which she sustained on the 26th April, 1972.

He had regard to the condition of the ward, to the fact that the treatment was intrusive and burdensome and of no curative effect, to the fact that the ward had only minimal cognitive function, had been in that condition for twenty three years, to the wishes of the mother and other members of the family, to the medical evidence and to the submissions by all the parties to the proceedings.

I can find no fault with the manner in which the learned trial judge exercised his jurisdiction in this tragic case and as there was ample evidence to support the conclusion which he reached and the order which he made, I would dismiss the appeal.

O'Flaherty J.

This appeal raises for decision whether we should uphold the decision of the High Court judge consenting on behalf of the ward to the withdrawal and termination of the abnormal, artificial means of nourishment by tube, whether by nasogastric or gastrostomy tube, and whereby he declared that such withdrawal and termination was lawful and whereby he consented on behalf of the ward to the non-treatment of infections or other pathological conditions which may affect the ward, save in a palliative way to avoid pain and suffering, and declared such non-treatment to be lawful.

No one has cast any doubt on any of the trial judge's findings of fact, the inferences he drew from them, his assessment of the witnesses, his findings of good faith on everyone's part and the excellence of the medical and nursing care provided for the ward at the institution to which she was confined.

Indeed, I do not understand that any serious attempt has been made in the course of the various submissions made in this Court about the judge's findings on the applicable law - except those who submit that he should not have made the orders that he did.

The matter for resolution is of immense moral, legal, medical, ethical and philosophical importance. Similar cases have been debated throughout the common law world and, in particular, in the United States of America.

Important as this case is, I believe that we must, nonetheless, abide by the rules we have set ourselves as an appellate court always to accord

privacy. (cf. *Ryan v. Attorney General* [1965] I.R. 294 and *Kennedy v. Ireland* [1987] I.R. 587).

Is it to be said that by reason of her mental incapacity these rights have been lost by the ward? I cannot find any constitutional or other rationale for making such a finding. On the contrary, I believe that it would operate as an invidious discrimination between the well and the infirm. (Cf. *O'Brien v. Keogh* [1972] I.R. 144).

I come then to the central issue in the case. I take the formulation of it from the judgment that Denham J. will deliver as follows:-

"A decision has now to be made whether to continue the medical treatment or not. To continue the treatment is as much a decision as not to do so. If the decision is to continue medical treatment, a consent has to be given on behalf of the ward for the invasive medical treatment. If the decision is to cease the medical treatment, a consent on behalf of the ward has also to be given."

In resolving that issue it is of the utmost importance to state that we are deciding this case on a specific set of facts. It must be clear that our decision should not be regarded as authority for anything wider than the case with which we are confronted. It is essential, therefore, to state what the case is *not* about.

This case is not about euthanasia; euthanasia in the strict and proper sense relates to the termination of life by a positive act. The declarations sought in this case concern the withdrawal of invasive medical treatment in order to allow nature to take its course.

The ward may be alive but she has no life at all. Lynch J. found as a fact that although the ward is not fully P.V.S., she is very nearly so and such cognitive capacity as she possesses is extremely minimal. Lynch J. continued to state that:-

"A fully P.V.S. person cannot feel pain and has no capacity for pleasure or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S."

Thus, the circumstances of the current case are clearly distinguishable from the position as regards, for example, a seriously mentally handicapped person. A mentally handicapped person is conscious of his or her situation and is capable of obtaining pleasure and enjoyment from life. It

is fanciful to attempt to equate the position of the ward in this case with that of a person whose life has been impaired by handicap. The analogy is both false and misleading; the quality of the ward's life was never in issue; she is not living a life in any meaningful sense. We are concerned here only with allowing nature to take its course and for the ward to die with dignity. We are not thereby going down any slippery slope or stepping into any abyss.

It is the fact that indubitably the ward is alive. All life is sacred. When much emphasis was placed on the importance our Constitution places on the right to life in the course of the debate here, I suggested that courts throughout the civilised world would regard their responsibilities as gravely as we do, whether or not constitutional provisions were as explicit in various jurisdictions. And see Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th November 1950) and Article 6 of the International Covenant on Civil and Political Rights (New York, 16th December, 1966).

I move to the concept of death. For those of religious belief, death is not an end but a beginning. In the submissions at bar on behalf of the committee of the ward death was said to be part of life - indeed the only certainty in life. Although, as Bryan MacMahon has written "each person attempts to mute or cancel the terror of impending death", (*The Storyman* by Bryan MacMahon (1994); Dublin, Poolbeg) in everyone's sub-conscious there is a hope of a peaceful and dignified death. We console the bereaved when a death occurs unexpectedly if the deceased was spared suffering.

In my judgment, this case is not about terminating a life but only to allow nature to take its course which would have happened even a short number of years ago and still does in places where medical technology has not advanced as far as it has in this country, for example. But now the advance of medical science may result in rendering a patient a prisoner in a ward from which there may be no release for many years without any enjoyment or quality of life: indeed without life in any acceptable meaning of that concept except in the sense that by means of various mechanisms life is kept in the body. As the Supreme Court of Arizona said in *Rasmussen v. Fleming* (1987) 154 Ariz. 207:-

"Not long ago the realms of life and death were delineated by a bright line. Now this line is blurred by wondrous advances in medical technology - advances that until recent years were only ideas conceivable by such science-fiction visionaries as Jules Verne and H.G. Wells. Medical technology has effectively created a twilight zone of

suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity.

As more individuals assert their right to refuse medical treatment, more frequently do the disciplines of medicine, law, philosophy, technology, and religion collide. This interdisciplinary interplay raises many questions to which no single person or profession has all the answers."

The stark dilemma that presents itself for resolution is: given the sanctity of life; given the right to self-determination and given an incompetent who cannot herself make a choice, since I hold that an incompetent does not lose the constitutional right of self-determination she would otherwise have had, how should the court exercise the choice for her because, as already indicated, a choice has to be made one way or the other.

What formula should the court use in making the choice?

In the United States of America this matter has been much litigated throughout the States. I refer to the most recent decision of an appellate State court (not, however, the Supreme Court - the patient died before the case could be brought to the State Supreme Court) - *In re Fiori* (1995) 652 A.R. 2d. 1350. I do so because Judge Popovich in the course of a very extensive opinion lists all the cases in the United States in which this problem has been addressed. They number over fifty. It appears that near judicial unanimity has been attained in the United States to permit a course similar to that sanctioned by the learned trial judge in this case.

In the course of his opinion, Judge Popovich elaborates on the methods that have been invoked by American courts to deal with these cases:-

"Absent the existence of a statute on the subject, the various legal precepts relied upon to authorise the withdrawal of sustenance from a person in a persistent vegetative state have been reduced to a 'best interest' analysis, 'substituted judgment' criterion or a 'clear and convincing' evidence standard of proof which draw their strengths from the federal or state constitutional rights of privacy. [Citations omitted].

Equally applicable to the right of an individual to forego life-sustaining medical treatment is the common law right to freedom from unwanted interference with bodily integrity ('self-determination') [Citations omitted].

the physiological conditions of death in ways that may be alarming. Highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. But those same advances, and the reorganisation of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: People are less likely to die at home, and more likely to die in relatively public places, such as hospitals or nursing homes.

Ultimate questions that might once have been dealt with in intimacy by a family and its physician have now become the concern of institutions. When the institution is a state hospital, as it is in this case, the government itself becomes involved."

The learned trial judge concluded that the State undoubtedly has an interest in preserving life but this interest is not absolute in the sense that life must be preserved and prolonged at all costs and no matter what the circumstances. He went on to say:-

"Death is a natural part of life. All humanity is mortal and death comes in the ordinary course of nature and this aspect of nature must be respected as well as its life-giving aspect. Not infrequently, death is welcomed and desired by the patient and there is nothing legally or morally wrong in such an attitude. A person has a right to be allowed to die in accordance with nature and with all such palliative care as is necessary to ensure a peaceful and dignified death."

I agree with this reasoning and with the importance the judge accorded to the wishes of the ward's family (and in which regard I endorse everything he had to say about the extraordinary love and devotion that they have lavished on the ward) and for the reasons that I have set out I would regard the best interests of the ward to be that the choice that should be made is that nature should take its course in this case without artificial means of preserving what technically is life, but life without purpose, meaning or dignity.

I would dismiss the appeals.

Egan J.

The background to this case has been fully set out in the judgments of my colleagues. The ward is a young woman who for over twenty years has been in a near persistent vegetative state (P.V.S.). She receives artificial nutrition and hydration through a gastrostomy tube which goes through her abdomen into her stomach. If this tube were removed she

would die in a matter of weeks. If, however, this artificial nutrition and hydration is continued, she may live for many years.

This young woman is a ward of court. Her committee (who is her mother) and all her brothers and sisters are anxious that artificial nutrition and hydration should now cease and that she should be allowed to die.

Lynch J. in the High Court made an order which, as the judge assigned in that behalf by the President of the High Court, he had jurisdiction to make. The principal part of his order was as follows:-

“Doth hereby consent on behalf of the ward to the withdrawal and termination of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube, and doth declare that such withdrawal and termination are lawful.”

An appeal against this order by the Attorney General, the institution where the ward has been, and still is, an inmate and the General Solicitor for Wards of Court as guardian *ad litem*, has now been heard by this Court. A number of cases have been cited but they are not binding in this jurisdiction and I do not propose to attempt to analyse them with a view to seeking any common principle. There is, in any event, the distinguishing factor that we have in this jurisdiction a written Constitution.

Reliance was placed on Article 40, s. 1, which provides that “All citizens shall, as human persons, be held equal before the law”. Reliance was also placed on Article 40, s. 3, sub-s. 1, which provides that “the State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen,” and Article 40, s. 3, sub-s. 2, which provides that “the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

If this appeal were to succeed on any of these Constitutional provisions, particularly Article 40, s. 3, sub-s. 2, it might be thought that the Court was of opinion that the members of the family of the ward by seeking the cessation of artificial nutrition and hydration were attempting to launch an “unjust attack” upon the life of the ward. I fully accept, however, that this is very far from being their motive and that they are truly activated by the highest possible feelings of deep concern for the condition of the ward and for what they genuinely believe would be in her best interest. It should be mentioned at this stage that there is agreement by all parties that, insofar as there can be a choice regarding the withdrawal of sustenance, the paramount factor must be the best interests of the ward.

The method of providing sustenance is intrusive and would, if the ward were of sound mind, require her consent. She is not, however, capable of giving such consent nor, on the other hand, is she capable of refusing consent. It was argued that the Court in attempting to decide whether or not to consent, would be entitled to have regard to what the ward herself would have been likely to decide if she had control of the situation. There was little or no useful evidence, however, in this regard. The views of the family would also be relevant but the final decision would lie with the Court.

What principles or factors should guide the Court in determining the best interests of the ward? It appeared to be tacitly accepted that a cessation of the method of nutrition and hydration would be wholly permissible if the ward had not cognitive function. In truth, she has almost none. The learned trial judge found that she was "in a condition which is nearly, but not quite, what is known as persistent or permanent vegetative state (P.V.S.)". His actual finding in this regard was as follows:-

"She has a minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes and reacts to noise, although the latter is mainly, if not indeed, wholly reflex from the brain stem and a large element of reflex eye tracking is also present in the former which, however, also has some minimal purposive content."

It was not contended that a degree of cognitive function, however minimal, ought to preclude the Court from consenting to the withdrawal of the tube. It appeared to be conceded that consent could properly be given if the intrusive method was painful and burdensome. The evidence, however, would not justify such a finding nor was such a finding made. I also reject any argument based on an allegation that the ward is terminally ill. Unless the tube is removed there is an undisputed possibility that she may live for many years.

The removal of the tube would, as already stated, result in death within a short period of time. It matters not how euphemistically it is worded. The inevitable result of removal would be to kill a human being. In view of the constitutional guarantees it would require (and I deem the right to life to be highest in the hierarchy of rights) a strong and cogent reason to justify the taking of a life.

As previously stated, this is not a case of no cognitive function. Such function is present, however minimal and however close to P.V.S. If slightly more cognitive function existed, would a right to withdraw

sustenance still be claimed to be permissible? Where would the line be drawn? Cognition in a human being is something which is either present or absent and should, in my opinion, be so recognised and treated. Any effort to measure its value would be dangerous.

The ward's condition has been described as "horrendous" and has been a source of deep distress to her family for a long period of time. Many other families endure great distress when a member continues to survive notwithstanding great physical or mental handicaps. This in no way lessens the sympathy which one inevitably feels for this particular family but regretfully, in my opinion, does not justify the orders made in the case.

Blayney J.

The appeal is concerned with a very tragic human problem.

The ward is a woman now aged forty-five. At the age of twenty-two, in the course of a minor surgical procedure for which she had been given a general anaesthetic, she had three heart arrests which caused her to suffer gross brain damage. As a result, she has since then been in a near persistent vegetative state - P.V.S. She has been kept alive by artificial nutrition and hydration, at first delivered by a nasogastric tube, and now for the last three years through a gastrostomy tube going directly through the wall of her abdomen into her stomach. Were it not for this artificial nutrition and hydration, the ward would die.

The ward's mother, who is her committee, and all her brothers and sisters, take the view that this artificial feeding should now cease and that the ward should be allowed to die. She, accordingly, brought a motion to the High Court in March of this year seeking, *inter alia*:-

1. That the Court should give further directions as to the future care and treatment of its ward and in particular should order the discontinuance of all further artificial nutrition and hydration.
2. That the Court should direct compliance with its orders made in pursuit of the interests of its ward.

This motion was heard on oral evidence over five days in the following month. The parties represented at the hearing were the committee of the ward, the institution which is caring for the ward, the Attorney General and the General Solicitor for Wards of Court as guardian *at litem* of the ward. In a reserved judgment delivered on the 5th May, 1995, Lynch J. granted the order sought by the ward's mother. The material part of his order was as follows:-

“Mr. Justice Lynch the judge assigned in that behalf by the President of the High Court:-

- (1) Doth hereby consent on behalf of the ward to the withdrawal and termination of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube, and doth declare that such withdrawal and termination are lawful.
- (2) Doth hereby consent on behalf of the ward to the non-treatment of infections or other pathological conditions which may affect the ward, save in a palliative way to avoid pain and suffering, and doth declare such non-treatment to be lawful.
- (3) Doth hereby authorise the said committee and the family of the ward to make such arrangements as they consider suitable and appropriate for the admission of the ward to an institution which would not find it contrary to their philosophy and ethics to proceed in accordance with the consents and declarations hereinbefore recited.

Separate appeals were brought against this order by the institution, the Attorney General and the guardian *ad litem* of the ward, and on behalf of the committee and family of the ward a notice was served to vary the judgment in certain minor respects.

As appears from the part of the order of the High Court cited above, Lynch J., had been assigned to hear the case by the President of the High Court so, in hearing the case he was exercising the jurisdiction vested in the President of the High Court by s. 9 of the Courts (Supplemental Provisions) Act, 1961. That section provides as follows:-

- “9. (1) There shall be vested in the High Court the jurisdiction in lunacy and minor matters which -
- (a) was formerly exercised by the Lord Chancellor of Ireland,
 - (b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and
 - (c) was, by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936, vested, immediately before the operative date, in the existing High Court.
- (2) The jurisdiction vested in the High Court by subsection (1) of this section shall be exercisable by the President of the High Court, or, where the President of the High Court so directs, by an ordinary judge of the High Court for the time being assigned in that behalf by the President of the High Court.”

This section may be summarised by saying that there is now vested in the High Court, and exercisable by the President of the High Court or by a judge of the High Court assigned by him, the jurisdiction formerly exercised by the Lord Chancellor of Ireland in lunacy and minor matters. And it was this jurisdiction which was exercised by Lynch J. in making the orders which he did. The first thing that has to be done, accordingly, in considering this appeal is to examine the nature of the jurisdiction formerly exercised by the Lord Chancellor of Ireland and the manner in which it was exercised.

Lord Ashbourne L.C. described the nature of the jurisdiction in the case of *In re Birch* (1892) 29 L.R. Ir. 274 at p. 275:-

“This is a case of much importance, and involves a consideration of the duties of the Lord Chancellor in Lunacy. His jurisdiction depends on the Queen’s Sign-manual, which delegates to him an authority personal to the Sovereign herself over the persons and estates of idiots and lunatics. From the earliest times this jurisdiction had been recognized as forming part of the royal prerogative - as a high duty in the Sovereign in his capacity as *parens patriae*: its exercise has from time to time been regulated by various enactments, but no statute has in anywise curtailed the powers delegated to the Lord Chancellor by virtue of the Sign-manual. The exercise of this great personal duty was not inappropriately entrusted to the Lord Chancellor, who was frequently in former times some great ecclesiastic, and who has always been one of the greatest officials of the realm.

The terms of the Queen’s letter in Lunacy expressly state the nature of the jurisdiction it confers. It commences:-

‘Whereas it belongeth unto us in right of our royal prerogative to have the custody of idiots and lunatics and their estates in that part of the United Kingdom called Ireland . . . We therefore . . . have thought fit to entrust you with the care and commitment of the custody of the idiots and lunatics and their estates.’

These words amount to an express delegation by the Crown under the Sign-manual of its prerogative jurisdiction in Lunacy to the Lord Chancellor. The single purpose of the Crown is to benefit this afflicted class by confiding them to the care of its highest Judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the Sovereign extends over all idiots and lunatics, whether so found by legal process or not. That high prerogative duty is delegated to the Lord Chancellor, and there is

no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such inquiries and examinations as justice to the idiots and lunatics may require.”

And in *In re Godfrey* (1892) 29 L.R. Ir. 278, Lord Ashbourne L.C., said in his judgment at p. 279:-

“Under the Queen’s Sign-manual, the Lord Chancellor is intrusted with the care and commitment of all idiots and lunatics in Ireland. The power given by the Queen’s Sign-manual creates a high and responsible duty in the Lord Chancellor towards these afflicted persons, calling on him to act on their behalf whenever it may come to his notice that their liberty or happiness require his intervention, and this beneficent jurisdiction is not confined to those so found by process of law, or narrowed to any special class.”

It is clear from these passages that the jurisdiction conferred on the Lord Chancellor was primarily a duty and responsibility to care for all persons who were *non compos mentis* and that in the performance of that duty and the exercise of that responsibility the Lord Chancellor had delegated to him an authority personal to the Sovereign herself over the person and estates of idiots and lunatics. This authority clearly gave to the Lord Chancellor extremely wide powers which, as Lord Ashbourne states, had never been curtailed by statute, and they are to be exercised whenever the liberty or happiness of persons *non compos mentis* required his intervention.

It is this jurisdiction which was exercised by Lynch J. in making the orders appealed against, and the sole question for this Court is whether the orders or any of them should be set aside on the ground that, in making them, Lynch J. committed some error in law. Before dealing with the submissions of the appellants that the decision of the learned trial judge was wrong in law, I should set out for completeness the findings of facts made by the learned trial judge which have not been disputed:-

“Over two decades ago the ward, who was then 22 years old, underwent a minor gynaecological operation under general anaesthetic. During the procedure she suffered three cardiac arrests resulting in anoxic brain damage of a very serious nature. Since that catastrophe the ward has been completely dependent on others, requiring total nursing care. She is spastic as a result of the brain damage. Both arms and hands are contracted. Both legs and feet are extended. Her jaws are clenched and because she has a tendency to bite the insides of her cheeks and her tongue, her back teeth have been capped to prevent the

front teeth from fully closing. She cannot swallow, she cannot speak, she is incontinent.

In the first five or six months after the catastrophe, there were minimal signs of recovery which unfortunately did not continue, but, if anything, faded with the passing years. For some twenty years she was fed through a nasogastric tube. Generally, but especially in the later years, she seemed to find this distressing and it was replaced by a gastrostomy tube in April, 1992, which required the administration of a general anaesthetic. Since then she has been fed through the gastrostomy tube with much greater ease and success. This tube became detached in December, 1993, and a new tube was inserted which came out the next day and had to be reinserted the following day under general anaesthetic.

The ward is, of course, bedridden. She is in a condition which is nearly, but not quite, what in modern times has become known as persistent or permanent vegetative state (P.V.S.) . . .

In the present case the ward's heart and lungs function normally. Assuming that she is adequately furnished with nutrition and hydration (nourishment), her digestive system operates normally as do her bodily functions, although bowel movements require some assistance, but as she cannot swallow and as her teeth are spastically clenched together, she cannot receive nourishment in the normal way and as already stated, is and has had to be tube fed since the catastrophe. Assuming that she continues to be nourished by tube, she could live for many years but of course she might also die in the short term if she developed some infection such as pneumonia, unless it was treated aggressively with antibiotics.

The ward has no capacity for speech or for communicating. A speech therapist failed to elicit any means of communication. She has a minimal capacity to recognise, for example, the long established nursing staff and to react to strangers by showing distress. She also follows or tracks people with her eyes and reacts to noise, although the latter is mainly, if not indeed, wholly reflex from the brain stem and a large element of reflex eye tracking is also present in the former which, however, also has some minimal purposive content . . .

I have no doubt as to the veracity and reliability of the family's evidence and marrying it with the evidence of the carers, I am satisfied that although the ward is not fully P.V.S., she is very nearly so and such cognitive capacity as she possesses is extremely minimal. A fully P.V.S. person cannot feel pain and has no capacity for pleasure

or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S. There is no prospect whatsoever of any improvement in the condition of the ward."

Both Mr. Rogers for the Attorney General and Mr. Kelly for the guardian *ad litem* submitted that the removal of the gastrostomy tube would be an unjust attack on the ward's life and so contrary to Article 40, s. 3, sub-s. 2, of the Constitution. They differed on the Court's right to consent on behalf of the ward to the removal of the tube. Mr. Rogers submitted that the Court had no jurisdiction to do this: Mr. Kelly submitted on the other hand that while the Court had jurisdiction it would be a breach of the ward's constitutional rights to give consent. They also submitted that the ward's personal right to life under Article 40, s. 3, sub-s. 1 would be breached by consent being given.

In my opinion these submissions must be rejected. The jurisdiction being exercised by the learned trial judge as *parens patriae* imposed on him both a duty and responsibility to care for the welfare and happiness of the ward. In carrying out this duty and exercising this responsibility in the difficult particular circumstances obtaining, one of the things he had to weigh up was whether it was for the benefit of the ward that her life should continue to be prolonged. He also had to take into consideration the ward's right to die. Where a person who is *compos mentis* has a condition which, in the absence of medical intervention, will lead to death, such person has a right in law to refuse such intervention. It seems to me that the learned trial judge, in coming to his conclusion, could not be said to have failed to respect the ward's right to life and *a fortiori*, could not be accused of having made an unjust attack on the ward's life. He said in his judgment:-

"I have come to the conclusion that the benefit to the ward of sustaining her life by the present abnormal artificial means of nourishment is far outweighed by the burdens of so sustaining life with absolutely no prospect of any improvement in the ward's condition. Accordingly, I find that it is in the best interest of the ward that the abnormal artificial nourishment, whether by nasogastric or by gastrostomy tube, should be terminated, thus ceasing artificially to prolong her life to no useful purpose and allowing her to die in accordance

O'Connor J. said in her judgment:-

“The State’s artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment.”

In addition, Rehnquist C.J., who delivered the majority judgment of the court, clearly treated artificial nutrition and hydration as constituting medical treatment.

Once it is accepted that the learned trial judge was entitled to infer that the artificial nutrition and hydration was medical treatment, it follows that he was also entitled to draw the inference that it was abnormal. Normal food and drink could never be categorised as medical treatment.

Counsel for the institution laid great stress on the fact that the ward has some cognitive capacity. He argued that this put the ward’s case in a completely different category to the case of *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789, but the learned trial judge did not follow blindly the decision in that case. What he did was to adopt the test proposed by Lord Goff, i.e. “whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care”, and applied that to the special facts of the ward’s case. And one of the facts he had found was that the ward was not fully P.V.S., but was very nearly so, and such cognitive capacity as she possessed was extremely minimal.

The evidence of the doctor caring for the ward in the institution was that even if the ward was fully P.V.S. this would make no difference to his attitude. His concern, and that of the nursing staff, would still be to continue to care for the ward. One cannot but admire and be grateful that such high standards of medical care are available for P.V.S. patients. But the question remains in law as to whether it is right in every case that it should be availed of. Each case is special and the decision of the High Court in the present case in exercise of its special jurisdiction over persons *non compos mentis* is confined to the particular facts of the case.

Before concluding there is one further matter to which I wish to refer. The learned trial judge clearly treated the case as being a *lis inter partes*. He referred to the onus of proof being on the committee and he held that the standard of proof was that the evidence should be clear and convincing. It seems to me to be doubtful, however, if this approach was correct. In a *lis inter partes*, the proceedings are adversarial and one consequence of this is that the court is confined to deciding the case on the material placed before it by the parties. It cannot of its own motion seek additional information or require any particular witnesses to be called. But such is

not the position of the High Court when exercising the former jurisdiction of the Lord Chancellor as seems clear from the following statement, already cited earlier, from the judgment of Lord Ashbourne L.C. in *In re Birch* (1892) 29 L.R. Ir. 274, at page 276:-

“That high prerogative duty is delegated to the Lord Chancellor, and there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such inquiries and examinations as justice to the idiots and lunatics may require.”

If in the present case the learned trial judge had wanted to have a further examination made of the ward, he would have been entitled to direct one. He could not have done so in a *lis inter partes*. In the circumstances it seems to me that there was no need for the learned trial judge to deal with the onus of proof or the standard of proof but it must be added that the fact that he did so does not in any way affect the decision at which he arrived.

I am satisfied that the learned trial judge correctly exercised the jurisdiction vested in him and I would dismiss this appeal.

Denham J.

This case concerns a patient who is a ward of court. It is an appeal against a judgment of the High Court delivered on the 5th May, 1995; and an order perfected on the 10th May, 1995, which stated, *inter alia*, that Lynch J. being the judge assigned in that behalf by the President of the High Court:-

- “(1) Doth hereby consent on behalf of the ward to the withdrawal and termination of the abnormal artificial means of nourishment by tube, whether nasogastric or gastrostomy tube, and doth declare that such withdrawal and termination are lawful.
- (2) Doth hereby consent on behalf of the ward to the non-treatment of infections or other pathological conditions which may affect the ward, save in a palliative way to avoid pain and suffering, and doth declare such non-treatment to be lawful.”

The order was sought by the family of the ward of court. The decision of the High Court has been appealed by the Attorney General, the institution wherein the ward is being cared, and the guardian *ad litem* of the ward. The family of the ward have sought to vary the judgment (a) insofar as it determines the standard of proof, and (b) insofar as it limits the authority of the family.

Facts

The ward has no capacity to communicate. She cannot speak. A speech therapist failed to elicit any means of communication. She has a minimal capacity to recognise long established nursing staff and to react to strangers by showing distress. She tracks people with her eyes and reacts to noise although the latter is mainly, if not wholly, reflex from the brain stem. The eye tracking also represents brain stem reflex with minimal purposive content.

The ward's family state that in over 20 years of visiting her they have never detected any signs of recognition nor efforts at communication by her. The ward's mother disagreed with evidence that the ward had any cognition. It was her evidence that in over two decades of visiting she got no response whatsoever from the ward, that the ward just stares and there is nothing in it unless it be "please let me go". It was her view that the ward was in a horrendous situation.

P.V.S.

An issue before the High Court was whether the ward was in a persistent vegetative state (P.V.S.). The condition was defined by Sir Thomas Bingham, Master of the Rolls, Court of Appeal in England in *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 (hereinafter referred to as the *Bland* case) at p. 806 as:-

"P.V.S. is a recognised medical condition quite distinct from other conditions sometimes known as 'irreversible coma', 'the Guillain-Barré syndrome', 'the locked-in syndrome' and 'brain death'. Its distinguishing characteristics are that the brain stem remains alive and functioning while the cortex of the brain loses its function and activity. Thus the P.V.S. patient continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive functions and can thus feel no emotion, whether pleasure or distress."

I adopt this as an appropriate definition of P.V.S. Many of the cases cited to this Court, and referred to in this judgment, relate to persons in a P.V.S.

State of health of the ward

The learned trial judge found the state of health of the ward to be as follows:-

"I have no doubt as to the veracity and reliability of the family's evidence and marrying it in with the evidence of the carers, I am satisfied that although the ward is not fully P.V.S., she is very nearly so and such cognitive capacity as she possesses is extremely minimal. A fully P.V.S. person cannot feel pain and has no capacity for pleasure

or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully P.V.S. There is no prospect whatsoever of any improvement in the condition of the ward."

There was no appeal against those findings of fact of the learned trial judge as to the ward's condition, and they stand.

The ward's family is a loving family. The members have continued, over the last 23 years, to visit her and treat her as a family member. Her father has died since the catastrophe, but there was evidence from her mother, her sisters and brothers. All support the application. The family's *bona fides* was not in issue, Lynch J. found:-

"In fact no issue as to the *bona fides* of the family arises in this case for decision. It was accepted by all the parties and I accept that all the members of the family are completely *bona fide* and wish that the course which they propose be followed only because they honestly, and indeed fervently, believe that that course is in the true best interests of the ward."

The first issue to be determined is whether the Court has jurisdiction in this case. I am satisfied that it has and that it is a jurisdiction *parens patriae*. I agree with the judgments of the Chief Justice and Blayney J. which consider this matter comprehensively.

The Attorney General, the institution in which the ward is placed currently, and the Solicitor General as guardian *ad litem* of the ward appealed from the decision of the High Court. The family sought a variation in the order.

Submissions on behalf of the Attorney General

- (a) Counsel for the Attorney General submitted that the ward was not in a P.V.S. state but was in a near P.V.S. state, that this factor distinguishes the case from the cases cited in other jurisdictions. He argued that the fact that there is minimal cogitative function must affect the issue. He accepted that a near P.V.S. state may be worse for the individual than a P.V.S. state, but that the ward is not brain dead, she is alive.

- (b) He agreed that if a person of full capacity is terminally ill he has a right to refuse medical treatment. Further if an incapacitated person is terminally ill his family and carers, if agreed, may make a decision as to medical treatment. But if the patient is not terminally ill, if there is the element of cognition, as here, then the decision to refuse medical treatment may not be made. It is the duty of the State to protect life. There is no element of choice for the Court because of the supremacy of the right to life.
- (c) He submitted that the quality of the ward's life is a question of judgment but that that judgment is impermissible to our courts. She is alive, she has cognition, and the Court has no jurisdiction to decide the issue in favour of the applicant. If the State (Court) were ever to take into account the quality of life which it was called upon to protect it would mean that the State provided less protection for the most disadvantaged or most vulnerable citizens who are the very persons most in need of State protection. In this instance, he submitted, where there is disagreement between the family and the carers in relation to an incapacitated person, this Court has no jurisdiction to make a decision that would lead to the death of the ward.
- (d) Mr. Rogers submitted that the test would be that of the normal medical practice of the medical profession. Once that is determined, then the decision is made. That here the doctors caring for the ward would continue to so do.
- (e) He submitted that it was appropriate to ask what society could do for the ward. If society *can* sustain life, then life *must* be sustained. Care is available for this ward and, he submitted, that being so, there is no option but to insist on the continuance of that care, as the State is defending and vindicating the life of the ward by allowing the institution to continue to feed and treat her in the manner which it proposes.
- (f) Further, he submitted that no-one can exercise a right in self-determination on behalf of the ward. The issue is for the doctors in accordance with medical practice, the responsibility for the decision rests with the doctors; the medical duty is the *test*.
- (g) He referred to *In re. B. (a minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421 (Down Syndrome Child) and

said that that case uniquely illustrates why the quality of life should not be adopted as a test. That the Irish court does not have such a jurisdiction, because of Article 40 of Bunreacht na hÉireann.

- (h) He submitted that in our jurisdiction, under the Constitution there is a special recognition of the right to life. It is different to that in other countries e.g., United States of America. The Executive cannot impinge on that right - *State (C.) v. Frawley* [1976] I.R. 372, and if the Executive cannot do it, then it is not capable of being done by anyone. He referred to the judgment of Hederman J. (a dissent) in *The Attorney General v. X.* [1992] I.R. 1, at p. 62.
- (i) He submitted that after 20 years it is the normal and natural thing to infuse food into the ward's alimentary tract. If there is ordinary care that society *can* offer, then there is a *duty* to give it to people who cannot make a decision: the care is there and must be availed of; this Court cannot assume a decision for an incompetent patient - only a doctor acting on a clinical decision can so do. It is for the doctor to decide what is clinically best for the patient. If the patient is competent, they can refuse medial care. If a patient is incompetent, the doctor has an absolute duty to prolong the life of the patient even though the purpose of feeding her in the first place was to see if she would recover and that is no longer possible.
- (j) He submitted the judgment of the High Court permitting the withdrawal of the treatment is to cause the death of the ward. If the benefits and burdens test were applied here, then it would apply to many people. He argued that the Court should not decide the case on the benefits and burdens test, and further that the surrogate, substituted judgment, test is a manifestation of the worst danger of the benefits and burdens test.

Submissions on behalf of the institution

Mr. Hanratty appeared on behalf of the institution. No order was made by the High Court against the institution, thus, matters regarding it were not in issue.

- (1) He asked the Court to look at the Code of Ethics of the institution.
- (2) He said it was clear that this Court must understand the nature and extent of the cognitive understanding of the ward. He submit-

ted that this case is entirely different to that of a P.V.S. patient; that cognitive function either exists or it does not and is not a quantitative concept; that there is cognitive function in this case.

- (3) Further, he said that this Court will have to make a decision in the constitutional framework.

He agreed that he did not have to go beyond Lynch J.'s decision of minimum cognitive function. He submitted that the ward was in an entirely different situation to either Anthony Bland (*Airedale N.H.S. Trust v. Bland* [1993] A.C. 789) or *In re Quinlan* [1976] 355 A. 2d. 647. He argued that life is a light, that her life may not have the same luminosity as other people's but that we are not entitled to say, just because it is not so luminous, that her light is not sufficient.

He submitted that Article 40 was a protection of the ward's most treasured right, her right to life. The right to life was at the top of the hierarchy of rights. In this case, there is a conflict between the right to life on the one hand, and, on the other hand, the right to privacy and bodily integrity. Where it is not possible to harmonise conflicting rights there is a necessity to apply a priority of rights and this must be examined both in relation to the individual and the general welfare of society. In the hierarchy of rights, under the Constitution, the right to life is superior to the right of privacy and the right of bodily integrity.

He stated that in circumstances where the medical means necessary to prolong life constitute a gross or disproportionate interference with a person's right to privacy, and/or bodily integrity and/or a right to die in comfort and with dignity, then these rights may take precedence over the right to life. In such circumstances the State's obligation to vindicate a person's right to bodily integrity, and/or privacy and/or right to die in comfort and with dignity, may take precedence over the right to life. In such circumstances the State's obligation to vindicate a person's right to bodily integrity, and/or privacy and/or right to die in comfort and with dignity, is greater than its obligation to vindicate the person's right to life. What constitutes a gross or disproportionate interference with a person's right to bodily integrity is a question of fact to be determined by reference to the circumstances of each particular case. The provision of nutrition and hydration by a nasogastric tube or a gastrostomy is, on the evidence submitted, a simple medical procedure. It does not constitute such a gross or disproportionate interference with a person's right to bodily integrity and/or right to die in comfort and with dignity as would justify these rights taking precedence over the right to life.

He submitted that the treatment and care, as outlined in the evidence, is not a burden on, nor causes discomfort to, nor is disproportionate to, the ward. Thus, the ward's right to life has precedence over her other rights.

He submitted that this Court must formulate the correct question to answer. He said it was not the question posed by Lord Goff in *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 at p. 868 of the report:-

"The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life".

Rather, Mr. Hanratty said the question for this Court is:-

"Why should the life not be protected?"

He said there were two stages to the test.

First, are there any circumstances in which the life of a human person with cognitive function can be taken lawfully?

He said that the answer to that would be in the affirmative.

Secondly, is this one of those cases?

He submitted that it was not.

Mr. Hanratty said that there may be circumstances where there is clear and unambiguous evidence of an anticipatory direction by the patient, but that the court would have to be satisfied beyond reasonable doubt; in this case there was no such evidence. Mr. Hanratty agreed that the ward had a right of choice, but he submitted also that she had lost the right by reason of her incapacity.

He submitted that the best interests test was not the right test - it had to be a constitutional test. He submitted that the starting point for the test is in Article 40, s. 3, sub-s. 1, and Article 40, s. 3, sub-s. 2. He accepted that the ward has a human life with cognition and that there were circumstances in which such a life can be lost. He believed that this was not one of them. There were circumstances where the burden of treatment was such that it is permissible. If the treatment necessary to preserve life were such an intrusion on her then the issue might arise, but that that was not the case here. Here it was the other way: the burden of treatment was necessary to sustain life. It was submitted that nothing that was being done to the ward was burdensome to her: that nothing that was being done to her causes her distress. Mr. Hanratty said the question to be answered was:-

"Am I absolutely satisfied that the burden of treatment to keep her alive is sufficient to take away this person's life? Am I satisfied beyond all reasonable doubt?"

could not amount to a vindication of life to require or allow the cessation of basic nutrition and hydration for the ward in circumstances where:-

- (a) The ward has cognition;
- (b) She does not have a terminal illness;
- (c) Food and water are essential requirements of human beings from their birth to their death and have always been provided notwithstanding the inability of a human to provide it for himself, and;
- (d) The basic medical treatment envisaged is of a type that is consistent with the level of care to which even the most vulnerable and disadvantaged people in society must be entitled if the provision of medical care to those people is not to be effectively withdrawn.

He submitted that it would be very wrong to assume, because of the very serious limitation of the ward's mental and physical capacity, that she is suffering pain or indignity, or that she would prefer to die. It is simply not possible to make this judgment. She should continue to be given all necessary sustenance and treatment to maintain her life by whatever means are most appropriate in terms of her comfort and welfare.

Submissions of behalf of the family

Mr. MacEntee on behalf of the family, submitted that this case turns on the meaning of the word "life" in Article 20. The process of dying belongs to life. The ward is alive but what is sought is to have the permission of the Court to allow the ward to proceed with her life in its dying aspect. Unlawfully and unjustifiably she is being prevented from completing her life by dying. The ward, as any other citizen, has a right to privacy, the right to autonomy. The status of the ward did not diminish her rights. The right to life is the right to continue life to the point of dying unless there is consent to medical intervention. That there is no difference between the rights of the sentient and insentient but that one must look to a device to give a voice to the insentient. He also argued that there has been medical intervention and as a result of that the ward is not terminally ill, but that if it were not for the medical treatment she would be terminally ill. That she had been placed in a circular situation. He submitted that the decision of the High Court should be upheld.

Proof

The onus of proof lies on the family, who have brought this application. Lynch J. concluded that the proper standard of proof is that the evidence should be clear and convincing. There are two standards of proof: beyond all reasonable doubt or on the balance of probability. It has been noted in fraud cases that the burden should not be:-

“ . . . drawn lightly or without due regard to all the relevant circumstances, including the consequences . . . ”

Banco Ambrosiano s.p.a. v. Ansbacher & Co. [1987] I.L.R.M. 669 at 691.

In this case, the onus rests on the family to prove their case on the balance of probabilities, but the Court should not draw its conclusions lightly or without due regard to all the relevant circumstances, including the consequences for the ward, the family and the carers involved.

Spiritual aspect

The ward and her family profess the Roman Catholic faith. Great care has been taken by the mother of the ward to ensure that no steps are taken contrary to the family's faith. Evidence was given on their behalf by two theologians. This is a court of law, and the Constitution and law are applied: not moral law. However, the religious beliefs of the ward and her family are one of several factors for the Court to consider when evaluating the *bona fides* of the family and as Lynch J. said:-

“... the evidence of the moral theologians is of relevance for two reasons: first, as showing that in proposing the course which they do propose the ward’s family are not contravening their own ethic, see *In re Quinlan* [1976] 355 A. 2d. 647 and secondly, the matter being *res integra*, the views of theologians of various faiths are of assistance in that they endeavour to apply right reason to the problems for decision by the court and analogous problems.”

Case law

The Court has not been directed to any precedent on the issue in this jurisdiction. Reference has been made to cases in other jurisdictions which, although useful, have only a limited value as:

- (a) The facts are not identical to the facts of this case.
- (b) This Court must come to a decision in accordance with Bunreacht na hÉireann.

Consent

Medical treatment may not be given to an adult person of full capacity without his or her consent. There are a few rare exceptions to this e.g., in regard to contagious diseases or in a medical emergency where the patient is unable to communicate. This right arises out of civil, criminal and constitutional law. If medical treatment is given without consent it may be trespass against the person in civil law, a battery in criminal law, and a breach of the individual's constitutional rights. The consent which is given by an adult of full capacity is a matter of choice. It is not necessarily a decision based on medical considerations. Thus, medical treatment may be refused for other than medical reasons, or reasons most citizens would regard as rational, but the person of full age and capacity may make the decision for their own reasons.

If the patient is a minor then consent may be given on their behalf by parents or guardians. If the patient is incapacitated by reason other than age, then the issue of capacity to consent arises. In this instance, where the patient is a ward of court, the court makes the decision.

Bodily integrity

The requirement of consent to medical treatment is an aspect of a person's right to bodily integrity under Article 40, s. 3 of the Constitution, which right was first recognised by Kenny J. in *Ryan v. Attorney General*, [1965] I.R. 294 where he stated at p. 313:-

"In my opinion, one of the personal rights of the citizen protected by the general guarantee is the right to bodily integrity. I understand the right to bodily integrity to mean that no mutilation of the body or any of its members may be carried out on any citizen under authority of the law except for the good of the whole body and that no process which is or may, as a matter of probability, be dangerous or harmful to the life or health of the citizens or any of them may be imposed (in the sense of being made compulsory) by an Act of the Oireachtas."

Mrs. Ryan pursued her case against the State. However, the right to bodily integrity must be recognised by private individuals as well as the State: see *The People (D.P.P.) v. J.T.* (1988) 3 Frewen 141 at page 158.

Medical treatment

At issue in the High Court was whether the nutrition and hydration of the ward is medical treatment. The ward is currently being fed a specific formula through a gastrostomy tube. The facts as found by the learned trial judge were:-

“The nasogastric tube was developed early in this century. It is uncomfortable and many patients have great difficulty in tolerating it. The gastrostomy tube was developed in the early 1980s. It is much less stressful on the patient and is now widely used where long term artificial feeding is necessary. Neither tube allows the patient the pleasures of eating and drinking; the taste and the smell of food is bypassed.

It is said by the carers that the provision of nourishment by means of a tube must now be considered to be normal for the ward since she has been so nourished for over twenty years. I cannot see, however, that a method of providing nourishment that is manifestly artificial and therefore abnormal at the outset, can change its essential nature and be regarded as and become normal or ordinary, simply because it has continued for a long time. It may be that a patient may get used to the abnormal artificial method of providing nourishment and no longer find it burdensome, but that does not make tube-feeding normal. In the ward's case, it is also clear that she never got used to the nasogastric tube. She reacted against it by pulling it out an enormous number of times, probably well over a thousand times and probably also by way of reflex reaction to an unpleasant stimulus and if there was any element of cognition in her rejection of the nasogastric tube, that makes it all the more emphatic. Its re-insertion, prior to its replacement by the gastrostomy tube in April, 1992, used to cause great distress to the ward.

The gastrostomy tube is now being used for three years. It is a far easier and more satisfactory way of delivering nourishment to the ward and is much less burdensome to her. That does not, however, make it in any sense a normal way of receiving nourishment. I gather from the evidence that there are now patients who are able to nourish themselves by way of gastrostomy tube. Such patients, of course, lose the pleasures of the table but may have much else to life for. Even in the case of such patients, however, nourishment by gastrostomy tube is an abnormal artificial way of receiving nourishment and is a form of medical treatment. In their case, the benefits of thus prolonging life

far outweigh the burdens of the self-administered treatment of nourishment by gastrostomy tube just as the benefits to the diabetic patient of prolonging life by self-injected medication far outweigh the burdens of such injections. I should also say that I see no difference in principle between the artificial provision of air by a ventilator and the artificial provision of nourishment by a tube.”

The above determinations by the High Court insofar as they are fact were made on credible evidence, and are binding on this Court. I am satisfied that feeding the ward a formula through a gastrostomy or nasogastric tube is a form of medical treatment.

A decision has now to be made whether to continue the medical treatment or not. To continue the treatment is as much a decision as not to do so. If the decision is to continue medical treatment, a consent has to be given on behalf of the ward for the invasive medical treatment. If the decision is to cease the medical treatment, a consent on behalf of the ward has also to be given.

Ordinary or extraordinary medical treatment

It is not pertinent whether the treatment is ordinary or extraordinary medical treatment. Consent of the adult with capacity is necessary for either ordinary or extraordinary medical treatment.

However, the nature of the medical treatment here is pertinent to the ward’s condition. The medical treatment is invasive. This results in a loss of bodily integrity and dignity. It removes control of self and control of bodily functions. When medical treatment is ingested, inhaled or applied then there is a voluntary co-operative effort by the patient and each time a voluntary effort occurs the patient reveals to their carers their continuing consent to treatment which invades the integrity of the body. When the treatment is administered by a tube or a needle, the element of co-operation by the patient is lost. Normally, the benefits of such invasive treatment are clearly in a patient’s best interest, but they are given to a patient in ways in which the individual has no control and are fundamentally different to non-invasive treatment. Whilst an unconscious patient in an emergency should receive all reasonable treatment pending a determination of their best interests, invasive therapy should not be continued in a casual or ill considered way.

Equality

If the ward were of full capacity as she is of full age, she would be required to consent before the current medical treatment were to be given to her. She is unable so to do. The issue then is whether anyone else can make the decision for her. Her family have applied to have the medical treatment stopped. Her committee (her mother) feels this should happen in her best interests. The carers where she is at present say she should continue to be fed through the gastrostomy. The Attorney General has argued that this Court cannot make a decision to cease the nutrition and hydration through the tube process. Yet, no matter what the medical condition of the ward, P.V.S., near P.V.S., or non P.V.S., she has a right of equality within the Constitution.

The Constitution specifically addresses the issue of equality in Article 40 stating:-

- “1. All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

Thus, all citizens as human persons are equal before the law. This is not a restricted concept, it does not mean solely that legislation should not be discriminatory. It is a positive proposition.

The right to equality arises in recognition that citizens are human persons. it exists as long as they are human persons. A citizen is a human person until death.

Due regard may be had to differences. It may be that in certain instances a person may not be able to exercise a right. But the right exists. The State has due regard to the difference of capacity and may envisage a different process to protect the rights of the incapacitated. It is the duty of the Court to uphold equality before the law. It is thus appropriate to consider if a method exists to give to the insentient person, the ward, equal rights with those who are sentient.

The right to life

Article 40, s. 3, of Bunreacht na hÉireann states:

- “1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”.

The right to life is the pre-eminent personal right. The State has guaranteed in its laws to respect this right. The respect is absolute. This right refers to all lives - all lives are respected for the benefit of the individual and for the common good. The State’s respect for the life of the individual encompasses the right of the individual to, for example, refuse a blood transfusion for religious reasons. In the recognition of the individual’s autonomy, life is respected.

The requirement to defend and vindicate the life is a requirement “as far as practicable”, it is not an absolute. Life itself is not an absolute.

The State stands firmly committed to protect personal rights. These are the rights personal to the individual. Some of them are enumerated e.g., life, person, good name and property. Some are unenumerated e.g., right to bodily integrity, right to work, right to earn a livelihood, right to marital privacy, right of access to the courts, right to travel.

In this case, the right to life is in issue. The State, under the Constitution, must protect “as best it may” that life from unjust attack. Thus, it also is not an absolute right, it is qualified.

Respect is given to the life of the ward. Her life is no less protected or guarded than any other person’s. Her rights as a citizen stand.

As she herself cannot make the necessary decision as to the medical treatment, an easy way to deal with the matter would be to say that no decision can then be made. However, that would not be to respect her life. That would be to refuse to her the rights given to other persons. That would be to say effectively that by her incapacity to make a decision she has lost that right. It would be to regard her life as less worthy of decision. Therefore, in order to respect her life a decision should be made.

In taking that decision it must be made so as to preserve, defend and vindicate her life. In view of the constitutional requirement that life be respected, that it be protected as best it may from unjust attack and that it be defended and vindicated as far as practicable, there is a clear constitutional presumption that the *status quo* in this case should continue. It is for the applicant on the balance of probabilities to establish that the life of the ward is best respected, protected and vindicated by the Court acceding to the application.

Sanctity of life

The right to life also encompasses the concept of the sanctity of life. It is a concept fundamental to our society. Life has a sacred value, an intrinsic worth. As Walsh J. said in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1, at p. 23, the Constitution:-

“reflects a firm conviction that we are religious people”.

That foundation is an aid in interpreting the law and the Constitution. In regard specifically to the right to life, it enables the interpretation to be inclusive of a spiritual or religious component. This approach is signalled in the first words of Article 40, s. 3, sub-s. 1, where the unqualified “respect” for life is stated. In respecting a person’s death we are also respecting their life - giving to it sanctity. That concept of sanctity is an inclusive view which recognises that in our society persons, whether members of religion or not, all under the Constitution are protected by respect for human life. A view that life must be preserved at all costs does not sanctify life. A person, and/or her family, who have a view as to the intrinsic sanctity of the life in question are, in fact, encompassed in the constitutional mandate to protect life for the common good - what is being protected (and not denied or ignored or overruled) is the sanctity of that person’s life. To care for the dying, to love and cherish them, and to free them from suffering rather than simply to postpone death, is to have fundamental respect for the sanctity of life and its end.

Common good

In analysing the right to life, attention must be given to the person’s right to life, privacy, autonomy and bodily integrity. Also, the common good, the interest of the community, in the protection of life, must be considered. It is an area where the two interests may appear to conflict.

The common good is achieved by the protection of life within the community. However, we recognise that a competent adult may decide that they do not consent to medical treatment. The State’s respect for the life of the person encompasses the right of the person to hold views such that, for religious or other reasons, they refuse medical treatment. In the acceptance of the person’s decision, their life is respected.

If that person is incapacitated and cannot make the decision is it appropriate to keep them alive in a manner which their family finds horrendous? Is it right for the decisions of doctors and carers or the State to override the family’s view? Is the right to life such that it must be main-

tained at all costs, in all circumstances, if the facilities exist? Does it become a question of whether the care *can* be given?

The primary constitutional concept is to protect life within the community. The State has an interest in the moral aspect of society - for the common good. But, balanced against that is the person's right to life - which encompasses a right to die naturally and in the privacy of the family and with minimum suffering.

Right to privacy

The right to privacy is an unenumerated right under the Constitution. The right to privacy was mentioned in *Ryan v. Attorney General* [1965] I.R. 294, and marital privacy was the basis for the decisions in *McGee v. Attorney General* [1974] I.R. 284. In *Norris v. Attorney General* [1984] I.R. 36, the majority refused the plaintiff's claim of privacy but its existence was noted. In two dissenting judgments the right of privacy was expressly recognised. Henchy J. stated at p. 71:-

“ . . . a right of privacy inheres in each citizen by virtue of his human personality, and that such right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40, section 3.”

He described the right of privacy as:-

“ . . . a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen’s core of individuality within the constitutional order) . . . the secret ballot . . . marital privacy . . . There are many other aspects of the right of privacy, some yet to be given judicial recognition . . .”

In *Kennedy v. Ireland* [1987] I.R. 587, Hamilton P. (as he then was) stated:-

“ ‘The right to privacy is not an issue, the issue is the extent of that right or the extent of the right to be let alone’ [Hamilton P. here in the report is quoting from McCarthy J. in *Norris v. Attorney General*.] Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality.

... The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic society."

Part of the right to privacy is the giving or refusing of consent to medical treatment. Merely because medical treatment becomes necessary to sustain life does not mean that the right to privacy is lost, neither is the right lost by a person becoming insentient. Nor is the right lost if a person becomes insentient and needs medical treatment to sustain life and is cared for by people who can and wish to continue taking care of the person. Simply it means that the right may be exercised by a different process. The individual retains their personal rights.

The right to privacy is not absolute. It has to be balanced against the State's duty to protect and vindicate life. However, "... the individual's right to privacy grows as the degree of bodily invasion increases".

See *In re Quinlan* (1976) 355 A. 2d. 647.

The increasing personal right to privacy in such a situation is consistent with the defence and vindication of life being "as far as practicable" (Article 40, s. 3, sub-s. 1) and the protection being "as best it may" (Article 40, s. 3, sub-section 2).

A constituent of the right of privacy is the right to die naturally, with dignity and with minimum suffering. This right is not lost to a person if they become incapacitated or insentient.

Dignity

An unspecified right under the Constitution to all persons as human persons is dignity - to be treated with dignity. Such right is not lost by illness or accident. As long as a person is alive they have this right. Thus, the ward in this case has a right to dignity. Decision-making in relation to medical treatment is an aspect of the right to privacy; however, a component in the decision may relate to personal dignity. Is the ward, as described by Brennan J. in his dissenting judgment in *Cruzan v. Director, Missouri Department of Health* (1990) 497 U.S. 261, "a passive prisoner of medical technology?" If that be so, is it in keeping with her right as a human person to dignity? Just as "the individual's right to privacy grows as the degree of bodily invasion increases": *In re Quinlan* (1976) 355 A. 2d. 647, so too the dignity of a person is progressively diminished by increasingly invasive medicine.

Right of choice

As part and parcel of their constitutional rights, a patient has a right to choose whether she will or will not accept medical treatment. This concept is the requirement of consent to medical treatment seen from another aspect.

The family

The family is the basic unit group of society, its special position in our community is recognised by the Constitution. Article 41, s. 1 states:-

- “1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State”.

This case concerns a ward of court and so the jurisdiction to make the decision in this situation lies with the court and not the family. The mother of the ward is the committee of the ward and her view is shared by the entire family. The family's view as to the care and welfare of its members carries a special weight. A court should be slow to disagree with a family decision as to the care of one of its number if that decision has been reached *bona fides* after medical, legal and theological advice and careful consideration.

In this case, the family is united in its view of what decision should be made. While that view does not determine the issue before this Court it is a factor to which the Court should give considerable weight.

The core of this case concerns personal rights. The personal rights of the ward. Article 41, on the other hand, has to do with the institution of the family. As Costello J. said in *Murray v. Ireland* [1985] I.R. 532 at p. 537 (having considered the judgment of Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294):-

“... the rights, in Article 41, s. 1, sub-s. 1, are those which can properly be said to belong to the institution itself as distinct from the personal rights, which each individual member might enjoy by virtue of membership of the family. No doubt if the rights of the unit group were threatened or infringed, any member of the family could move the court to uphold them, but the cause of action would then be the

threat to the rights granted to the unit, and not to those of its individual members.”

At issue in this case are the personal rights of the ward: not the rights of the fundamental unit group of the State. Thus, it is a matter which falls to be decided as a matter of personal rights rather than under Article 41.

Causation

Twenty three years ago, the ward suffered major injury to her brain during a minor gynaecological operation. If it were not for modern medical technology, utilised after the catastrophe, she would have died long since. She has been kept alive by modern medical science and the dedicated care and skill of the medical and nursing professions.

The cause of the original brain injury has cast a shadow over this whole case. Originally, communication between the family and the carers was neither open nor easy.

The evidence presents illustrations of a lack of communication between the medical profession and the family evocative of the Victorian era. This lack of communication stemmed from the long shadow of the original catastrophe and the subsequent court action. It was a difficult situation not only for the family but also for the doctors and carers. However, that situation has long since changed. Apart from the ward and the family, the personnel are different.

If this Court determines that the order of the High Court be upheld then, those acts so ordered being lawful, the ward would die shortly as a result of the medical catastrophe which occurred 23 years ago. This fact must not now cloud the decision to be made by the Court.

Duty of doctor

The doctors have a duty to the patient, the ward. The decision of the Court is a decision in accordance with the Constitution and the law and is wider than the doctor's clinical judgment. It takes into account other factors.

Summary

- (1) The patient is a ward of court.
- (2) This Court has jurisdiction on the application.
- (3) No medical treatment may be undertaken for or on behalf of the ward without the consent of the President of the High Court or his assignee, and this Court on appeal.
- (4) The jurisdiction of the court is that of *parens patriae*.
- (5) Consent should be obtained *before* medical treatment is given.
- (6) There are a few exceptions to the above rule e.g., a medical emergency.
- (7) This case is not one of those exceptions, and thus consent must be obtained for the medical treatment.
- (8) It does not matter whether the treatment is ordinary or extraordinary, non-invasive or invasive, consent has to be given for medical treatment.
- (9) It does not matter whether the illness is terminal or not, consent still has to be given for medical treatment.
- (10) If a person is not of full capacity then the issue arises as to who may consent on their behalf. In the case of a ward of court, as in this case, the decision is made by the court.
- (11) The decisions of a committee of a ward are overseen by the court.
- (12) The court makes its decision in accordance with the facts of each case, the Constitution and the law.
- (13) The giving of nutrition and hydration to the ward by way of gastrostomy tube is medical treatment.
- (14) The *test* is: whether it is in the best interests of the ward within constitutional parameters, taking into account factors including those enumerated in this judgment, for the court to consent to the medical treatment.
- (15) *Factors* which the court should take into consideration in determining the best interests of the ward in regard to the medical treatment include those set out in detail in this judgment.

Factors for the Court

The totality of the ward's situation must be considered. These factors have been dealt with in the body of the judgment. For the purpose of clarity they include the following:-

- (1) The ward's current condition.
- (2) The current medical treatment and care of the ward.
- (3) The degree of bodily invasion of the ward the medical treatment requires.
- (4) The legal and constitutional process to be carried through in order that medical treatment be given and received.
- (5) The ward's life history, including whether there has been adequate time to achieve an accurate diagnosis.
- (6) The prognosis on medical treatment.
- (7) Any previous views that were expressed by the ward that are relevant, and proved as a matter of fact on the balance of probabilities.
- (8) The family's view.
- (9) The medical opinions.
- (10) The view of any relevant carer.
- (11) The ward's constitutional right to:-
 - (a) Life.
 - (b) Privacy.
 - (c) Bodily integrity.
 - (d) Autonomy.
 - (e) Dignity in life.
 - (f) Dignity in death.
- (13) The constitutional requirement that the ward's life be (a) respected, (b) vindicated, and (c) protected.
- (14) The constitutional requirement that life be protected for the common good. The case commences with a constitutional presumption that the ward's life be protected.
- (15) The burden of proof is on the applicants to establish their application on the balance of probabilities, taking into consideration that this Court will not draw its conclusions lightly or without due regard to all the relevant circumstances.

Decision

The decision at issue is not a clinical medical decision. Nor is it grounded on whether the doctors and/or carers *can* keep the ward alive. Nor is not based on the availability or not of facilities. It is the test of what

is the best interest of the ward, within constitutional parameters, taking factors including those enumerated previously into account.

I shall consider each of the stated factors in the same order as set forth above and relate them to the ward's situation.

- (1) The ward's current condition as found by the learned trial judge has been set out previously in this judgment. His findings were not appealed.
- (2) The current medical treatment includes nutrition and hydration by way of gastrostomy; and daily medication of morphine, dysparnet, melleril and valium. The ward receives total nursing care on a twenty four hour basis, being turned every few hours, washed, fed via the gastrostomy tube, aided with bowel movements.
- (3) The medical treatment of the ward is invasive. It is delivered to her in a manner whereby no free will can be exercised.
- (4) The legal and constitutional process to be carried out in this case is that as the patient is a ward of court the court must make the decision as to the medical treatment. In reaching that decision the court should apply the test as set out herein.
- (5) The ward's life history has been set out in the judgment of the High Court and summarised in this judgment. She is in a, or near, persistent or permanent vegetative state in which she has remained for 23 years. No further time is required to increase diagnostic accuracy.
- (6) The prognosis for the ward is that her condition is irreversible. There is no possibility of return from her current condition. She is being kept alive by the medical treatment. If she does not receive the medical treatment she will die within two weeks. If she continues to receive the medical treatment she may live for a further 20 years.
- (7) The ward expressed no proved views as to what she would wish in such a situation. However, I am satisfied that she had a marked dislike of hospitals, medical procedures and she could not even bear the smell of hospital.
- (8) The mother, committee, of the ward, has taken great care, sought medical, theological and legal advice, and has a very strong view that the ward should not receive this medical treatment. The entire family agree with her view.
- (9) The medical personnel who care for the ward in the institution consider that the medical treatment should continue.

- (10) The nursing staff who care for the ward regard it as a privilege to care for her and would continue the medical treatment in issue.
- (11) The ward is a member of the Roman Catholic Church, as are her family. Great care has been taken by the family to reach a decision in accordance with the family ethic.
- (12) The ward retains her constitutional rights. At issue are her personal constitutional rights, within the framework of the common good. The ward has rights of life, privacy, bodily integrity, autonomy and dignity in life and death.
- (13) The ward's life is respected, this is an absolute, and the making of a decision on her medical treatment is indicative that her rights exist, though enforced through a process different to that of a competent person.
- (14) Deliberations on the issue commence with the constitutional presumption that the ward's life be protected.
- (15) The burden of proof is on the applicants.

Applying the test of the best interests of the ward, the mother and family arrived at a decision not to consent to the medical treatment.

The High Court in acceding to the application of the mother of the ward applied to the facts a test of the best interests of the ward. Lynch J. stated:-

“The test is whether having heard and considered the whole case and the authorities cited to me, I am of opinion that it is or it is not in the best interests of the ward that her life should be prolonged by the continuance of the abnormal, artificial means of nourishment whether by nasogastric or gastrostomy tube.”

This is the correct test which I have had the opportunity of setting out in further detail. Applying the factors recited herein, as a prudent, good and caring parent, in the best interests of the ward, the learned trial judge did not err in his order which is, in effect, not to consent to the medical treatment for the ward.

I would dismiss the appeal and uphold the order of the High Court.

Solicitors for the committee and family of the ward: *Eugene F. Collins.*

Solicitor for the guardian *ad litem*: *General Solicitor for Minors and Wards of Court.*

Solicitor for the Attorney General: *The Chief State Solicitor.*

Sarah Berkeley, Barrister