

## **Washington v Glucksberg; Vacco v Quill<sup>1</sup>**

United States Supreme Court:

Rehnquist CJ, O'Connor, Scalia, Kennedy, Thomas,  
Ginsburg, Breyer, Stevens, Souter JJ:

Unreported, 26 June 1997

The plaintiffs had sought declarations that legislation (in Washington and New York, respectively) making it an offence to assist another person to commit suicide<sup>2</sup> was contrary to the Constitution of the United States to the extent that the law prohibited a physician from assisting a mentally competent, terminally ill, suffering patient to voluntarily take his or her own life.

The argument in both cases relied on the 14th Amendment to the United States Constitution which says that no State shall

“deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.<sup>3</sup>

The argument in *Washington* was based on the assertion that the law represented an unreasonable restraint of liberty. The argument in *Vacco* was that the law unreasonably discriminated between two groups of persons: first, persons who were competent, terminally ill and dependent upon life-sustaining treatment and who had the right to insist that life-sustaining treatment be withdrawn, thereby occasioning their own death; and secondly, the competent, terminally ill who were not dependent upon life-support and who could not seek the assistance of a physician to end their life.

### **Held**

In *Washington*, the court held there is a legitimate distinction between withholding or withdrawing

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<sup>1</sup> <http://supct.law.cornell.edu/supct/supct.June.1997.html>.

<sup>2</sup> Nearly every State and Territory in Australia has similar legislation: see, eg, *Crimes Act 1900* (NSW), s 31C; *Criminal Code Act 1983* (NT), s 158; *Criminal Code Act 1899* (Qld), s 311; *Criminal Code 1924* (Tas), s 163; *Criminal Code Compilation Act 1913* (WA), s 288.

<sup>3</sup> Constitution of the United States of America, in M Shapiro and J T Rocco, *American Constitutional Law* (6th ed, Macmillan Publishing Co, New York), p 766.

treatment and actively assisting in the death of another person. In *Vacco*, the court held that the alleged difference between the two groups did not contravene the 14th Amendment since it did not amount to discrimination.

## Comment

It had been previously recognised<sup>4</sup> that the United States Constitution protects the right of a person to refuse unwanted medical treatment, even if it means that the person will die, but this right does not extend to, or include, a general right to die. The right to refuse treatment is a right grounded in the concept of autonomy and is a right to be free of unwanted bodily interference. It is not a right to die or a right to control the time and manner of one's death.

A law that does not infringe a fundamental right protected by the United States Constitution is valid if it can be shown that it is rationally related to a legitimate state interest. In *Washington* the state was able to identify a number of valid interests that were advanced by the legislation, namely interests in the preservation of human life;<sup>5</sup> the protection of the depressed or mentally ill;<sup>6</sup> the protection of the integrity of the medical profession;<sup>7</sup> the protection of vulnerable groups such as the poor, the elderly and the disabled;<sup>8</sup> and the state's interest in prohibiting euthanasia.<sup>9</sup>

In *Vacco v Quill* the argument relied on the "equal protection" clause of the 14th Amendment.

Cooke maintained:

"Equal protection of the laws does not mean that all persons must be treated alike by the state. Some kind of grouping or classification is permitted provided there is a reasonable basis for distinguishing the groups."<sup>10</sup>

The court decided that it did not have to answer the question of whether the law did discriminate between the physically able and the non-physically

able groups. It held that the legislation did not in fact discriminate at all:

"Everyone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; no one is permitted to assist a suicide."<sup>11</sup>

In obiter, the court suggested that there was a distinction between the right of the life-support dependant to demand that treatment be withdrawn, and the alleged right of others to seek assistance to die. This distinction was reasonable and advanced legitimate state interests. Accordingly, if the law in question did discriminate between the two groups, the discrimination was not contrary to the constitutional requirement.

In both cases, the patient plaintiffs had died before the litigation was concluded. As a result, the court only had to consider whether the legislation was invalid "on its face". The court, finding that the legislation did not discriminate against different groups, and was rationally related to a legitimate state interest, found that, prima facie, the legislation was valid. Notwithstanding his concurrence with the opinion of the court, Stevens J was of the view that it would be possible for an individual, terminally ill, suffering patient to bring a case to show that the legislation, "as applied" to the particular circumstances, was unconstitutional. The limited scope of the decision in these cases means that the door has been left open for further challenges.

In these cases the plaintiffs were seeking to find a protected constitutional right that would have limited the rights of the States to make laws denying physician-assisted suicide to those who desired it and who were competent, terminally ill and suffering. To make a similar argument in Australia, it would be necessary to find that physician-assisted suicide was either guaranteed by the Australian Constitution or allowed by a valid federal law, and therefore any State law that prohibited physician-assisted suicide was invalid in accordance with s 109 of the Constitution.

In Australia, the power to regulate the medical profession and the legislative power with respect to

<sup>4</sup> Since the decision in *Cruzan v Director, Missouri Dept of Health* 497 US 261 (1990).

<sup>5</sup> <http://supct.law.cornell.edu/supct/word-perfect/96-110.zo>, p 14 per Rehnquist CJ.

<sup>6</sup> *Ibid*, p 22.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*, p 23.

<sup>9</sup> *Ibid*, pp 24-25.

<sup>10</sup> E F Cooke, *A Detailed Analysis of the Constitution* (5th ed, Rowman & Allanheld, Totowa, NJ, 1984), p 125.

<sup>11</sup> <http://supct.law.cornell.edu/supct/word-perfect/95-1858.zo>, p 4 (emphasis in original).

criminal law rests largely with the States.<sup>12</sup> There is no specific federal power within the Constitution that would suggest that the issue of physician-assisted suicide or euthanasia is a federal matter or is in any way guaranteed by the Constitution of Australia. The Commonwealth does, however, have a general power to make laws with respect to the Territories.<sup>13</sup> In 1997, the Commonwealth relied upon s 122 to pass the *Euthanasia Laws Act 1997* (Cth). This Act amended the self-government legislation for the Northern Territory, the Australian Capital Territory and Norfolk Island to remove any power that the legislatures in those Territories had to make law that would authorise euthanasia. The effect of the *Euthanasia Laws Act* was to override the *Rights of the Terminally Ill Act 1995* (NT) that had allowed euthanasia to occur in limited circumstances. The consequence of the *Euthanasia Laws Act 1997* (Cth) is that although the States have the power to make law either allowing or disallowing euthanasia and physician-assisted suicide, the Territories may not pass a law that would allow euthanasia (and probably physician-assisted suicide) but may pass a law that would continue to prohibit such conduct. In effect, the position for the Australian States is the same as that set out by the United States Supreme Court, namely that the matter is one for the State legislatures, and not the federal courts, to determine.

One of the most significant ethical aspects of the United States Supreme Court decision was the finding that there is a difference between withholding treatment and actively assisting another to die. This distinction was rejected by the 9th Circuit of the Court of Appeals in its decision in *Compassion in Dying v Washington*,<sup>14</sup> where it was said:

"[W]e see little, if any, difference for constitutional or ethical purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the known effects in each case is to hasten the end of the patient's life. Similarly, we see no ethical or constitutionally cognisable

difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life. In fact, some might argue that pulling the plug is a more culpable and aggressive act on the doctor's part and provides more reason for criminal prosecution. To us, what matters most is that the death of the patient is the intended result as surely in one case as in the other."<sup>15</sup>

The House of Lords, in *Airedale NHS Trust v Bland*,<sup>16</sup> found that, as a matter of law, a distinction between withdrawing treatment and other, more active means of killing could be drawn, but a number of judges found the distinction hard to justify and were uncomfortable in coming to this conclusion. Lord Browne-Wilkinson conceded that the conclusion that it is lawful to allow a patient to die slowly due to a lack of food but not to hasten death by lethal injection would appear "almost irrational" and he found it difficult to "find a moral answer" to that objection.<sup>17</sup> Lord Mustill said, of the alleged distinction:

"[H]owever much the terminologies may differ, the ethical status of the two courses of action is for all relevant purposes indistinguishable. By dismissing this appeal I fear that your Lordship's House may only emphasise the distortions of a legal structure which is already both morally and intellectually misshapen."<sup>18</sup>

Lord Goff said: "It is true that the drawing of this distinction may lead to a charge of hypocrisy." However, he concluded that, in the end, the distinction was supported by "reasons of policy" rather than ethics.<sup>19</sup>

The decisions of the United States 9th Circuit and the difficulties faced in the House of Lords depended upon a consequential viewpoint. Those courts saw the similarity between "passive" and "active" means of hastening death due to the certainty of identical consequences, namely the death of the patient involved. The United States Supreme Court, on the other hand, had little difficulty drawing the distinction based on its view of patient autonomy. The right to be free from unwanted medical treatment

<sup>12</sup> See, eg, *General Practitioners Society of Australia v Commonwealth* (1980) 145 CLR 532.

<sup>13</sup> Constitution, s 122.

<sup>14</sup> 79 F 3d 790 (9th Cir 1996).

<sup>15</sup> *Ibid* at 832.

<sup>16</sup> [1993] AC 789.

<sup>17</sup> *Ibid* at 885.

<sup>18</sup> *Ibid* at 887.

<sup>19</sup> *Ibid* at 865-866.

meant that treatment must be withdrawn when the patient demands; but it does not justify the right to demand that death be provided on prescription. Even if the consequences were the same, the moral justification was sufficiently different to distinguish the actions in question. If the Supreme Court's analysis is adopted in other common law countries, including Australia, it may be that some of the moral difficulties faced by the House of Lords can be resolved.

## **Conclusion**

The American decisions are "fuel" for the debate that continues to surround the issues of euthanasia and physician-assisted suicide, and the analysis by

Rehnquist CJ of the ethical difference between assisting suicide and withdrawing treatment may be of use to courts in other common law countries, including Australia, that are called upon to consider the issue of physician-assisted suicide. On the other hand, the strict legal reasoning applied in the decisions, based as they are on the court's understanding of the United States Constitution, will not resolve the legal issues that arise either in Australia or the United States.

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