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(Geddis, A., 2015)

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Aid in Dying in the High Court *Seales v Attorney General*

As her inevitable death from brain cancer approached, a 42-year-old lawyer named Lecretia Seales wanted the option of receiving aid in dying from her (unnamed) general practitioner, who in turn was willing to provide that aid.¹ Seales' own actions would not breach the law; it has not been an offence in New Zealand for anyone to attempt to end her or his own life since 1961. However, should a doctor aid Seales to do so, she or he ran the risk of arrest and prosecution for breaching the Crimes Act 1961. A doctor who directly administers a lethal dose of medication at Seales' request for the purpose of ending her life might be prosecuted for murder or manslaughter under section 160 of the Crimes Act. Providing Seales with a lethal dose of medication in the knowledge she may self-administer it to end her life some time in the future might lead to a prosecution for aiding or abetting suicide under section 179.

In order to provide her doctor with legal certainty, Seales sought declarations in the High Court regarding the current law's application to her situation. In essence, she wanted the court to find that a doctor who provides aid in dying at the request of a terminally ill, competent individual falls outside the above provisions of the Crimes Act. Alternatively, if the court could not make such a declaration, Seales wanted it to find that the law's effect in preventing her from gaining access to aid in dying is inconsistent with the New Zealand Bill of Rights Act 1990. The resultant judgment by Justice Collins in *Seales v Attorney General*² thereby provides us with a somewhat definitive statement of the present law, as well as important findings about that law's justifiability.

The reach of the Crimes Act

In regards to the first issue – whether the Crimes Act's prohibitions cover the actions of a doctor who supplies aid in dying directly to a patient, or who gives it to a patient to self-administer at a later date – Justice Collins answered in the affirmative. His honour found that a doctor who directly admini

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fatal drug to Seales with the intention of terminating her life breaches section 160 by killing another person through an 'unlawful act' (Seales, at [112]). Somewhat strangely, the exact nature of that unlawful act was not specified; his honour suggested that the doctor 'probably' would commit an assault on Seales, or 'in all likelihood' would administer a poison with the intent to cause grievous bodily harm (Seales, at [113]-[114]). Nevertheless, his honour was satisfied that, under section 160, a doctor's direct administration of aid in dying would amount to murder or manslaughter.

By the same token, Justice Collins also ruled that the section 179 prohibition on

dispositive of the question whether any form of aid in dying currently is permitted under the Crimes Act 1961. It is not.

Consistency with the New Zealand Bill of Rights Act

Having found that the Crimes Act could not be interpreted in a manner that permitted aid in dying, Justice Collins then turned to examine whether this outcome is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act. Two rights were at issue: the section 8 right not to be deprived of life; and the section 9 right not to be subjected to cruel, degrading or disproportionately severe treatment.

has the same potential consequence in New Zealand regarding individuals ending their lives prematurely (Seales, at [166]). However, his honour then found that this consequence did not breach Seales' section 8 right to life, as, in distinction to Canada, any deprivation of life was 'on such grounds as ... are consistent with the principles of fundamental justice' (Seales, at [186], [191]).

With respect, this conclusion is hard to sustain. Justice Collins based his contrasting treatment of the right on an alleged difference in intent behind Canada's and New Zealand's criminal law prohibition on assisting suicide. Canada's legislature was concerned only to protect the lives of *vulnerable* individuals, while New Zealand's wanted to protect the lives of *all* persons. Therefore, his honour concluded, it is not inconsistent with the principles of fundamental justice for New Zealand's prohibition to apply more broadly and capture individuals in Lecretia Seales' position.

I think this is wrong (Geddis, 2015). His Honour's basis for distinguishing between the Canadian and New Zealand parliamentary intent is somewhat flimsy. Furthermore, by accepting a broad, generic legislative purpose such as 'protecting the sanctity of life', the analysis of whether the effect of the law in question is consistent with the principles of fundamental justice is hopelessly short-circuited.⁴ At no point, therefore, does Justice Collins confront the important question: why *should* the state have in place a law that causes competent, rational, terminally ill individuals to take their own lives early? What justification can there be for producing such an outcome?

Consequently, I think Justice Collins was mistaken to conclude that the Crimes Act prohibition on aid in dying is consistent with the section 8 right not to be deprived of life. That error may not have changed his honour's conclusion as to how the Crimes Act can be interpreted. But his honour should have considered whether to issue a declaration that the current law is inconsistent with the rights and freedoms guaranteed in the New Zealand Bill of Rights Act.

In regards to Seales' section 9 right, Justice Collins' reasoning was more

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aiding or abetting suicide covers providing the means to self-administer aid in dying. His honour found that the legislative provision's intent was to preserve 'the sanctity of human life', not simply to protect the vulnerable in society (Seales, at [132]). As such, Seales' decision to take a fatal drug with the intention of ending her own life would constitute a 'suicide' under the Crimes Act as her death would be intentional, voluntary and caused by the drug taken (Seales, at [144]). A doctor who provided her with a fatal drug knowing she was contemplating using it to end her own life would thus fall foul of section 179 (Seales, at [145]).

Justice Collins' interpretation of the Crimes Act provisions is an orthodox, albeit conservative, one. It certainly was not the only way the legislation *could* have been read (Tucker and Geddis, 2015). Nevertheless, his honour's judgment is

Regarding section 8, a unanimous Canadian Supreme Court recently held that a total prohibition on aid in dying breached the equivalent guarantee in the Canadian Charter of Rights and Freedoms (which is, in turn, the model for our Bill of Rights Act).³ It found that the prohibition's effect was to cause some terminally ill people to end their lives sooner than they otherwise would choose to and it was not necessary to impose this outcome on competent, consenting, terminally ill individuals in order to protect generally the lives of vulnerable members of society.

Although this Canadian precedent is not binding in New Zealand, the links between our New Zealand Bill of Rights Act and the Canadian Charter imbue it with very strong persuasive authority. Unsurprisingly, therefore, Justice Collins accepted that a prohibition on aid in dying

robust. In line with overseas authority,⁵ his honour found that the state's prohibition on receiving aid in dying did not subject Seales to 'treatment' at all (*Seales*, at [205]-[207]). Consequently, while the effect of the prohibition may be cruel, degrading and disproportionately severe, this did not trigger the relevant right under the Bill of Rights Act.

Other findings in the judgment

While the practical effect of Justice Collins' judgment is that, for the moment, a doctor cannot lawfully provide aid in dying even to a competent, terminally ill patient, there are additional aspects of his Honour's judgment worth highlighting as we consider the next steps to take. As his Honour notes: 'Although Ms Seales [did] not obtain[] the outcomes she sought, she has selflessly provided a forum to clarify important aspects of New Zealand law' (*Seales*, at [211]). In the course of the trial a great deal of evidence was proffered on some contested matters relating to aid in dying. This enabled Justice Collins to draw some important factual conclusions.

The first conclusion relates to arguments that aid in dying is unnecessary as it is possible to manage a dying person's symptoms and concerns so that they do not suffer in the process. Justice Collins concluded from the evidence presented that existing palliative care could not guarantee Seales would not suffer pain during the dying process (*Seales*, at [37]-[43]), while 'many of the experts, including those relied upon by the Attorney-General accept that palliative care may not be able to address Ms Seales' psychological and emotional suffering' (*Seales*, at [44]). Consequently, while aid in dying is by no means a replacement for good palliative care, neither can good palliative care provide a guarantee of a peaceful, painless, dignified ending. Just as importantly, the availability of aid in dying can provide a sense of control and reassurance to a patient facing the end of her life which complements the goals of palliative medicine (*Seales*, at [59]-[61]).

The second important conclusion is in respect of claims that if aid in dying is permitted, vulnerable groups inevitably will be victimised by the process. In particular, the Crown argued that *no*

person could possibly properly consent to aid in dying, as *all* terminally ill people are in such a vulnerable state. Once again, Justice Collins rejected this assertion on the evidence before him. His Honour stressed that it is 'important to ensure that medical judgements are not based upon assumptions as to vulnerability. To do otherwise would devalue respect for the principle of individual autonomy' (*Seales*, at [81]). In respect of Seales' own position, Collins J found that the 'statement of her belief that she is not vulnerable must be respected. Ms Seales' application for the declarations she seeks is a rational and intellectually rigorous response to her circumstances' (*Seales*, at [81]).

So after considering all the evidence given by experts on each side of the debate, Collins J found as a factual matter that there was no guarantee that medical science could give Seales a painless, dignified death. He also found that she was not in a vulnerable state when she asked to have control over the circumstances of her own death so as to avoid the possibility of a painful, undignified death; indeed, her decision to seek this was one worthy of our full respect.

These factual findings then underpinned this important conclusion later in Justice Collins' judgment:

By focusing upon the law it may appear that I am indifferent to Ms Seales' plight. Nothing could be further from the truth. I fully acknowledge that the consequences of the law against assisting suicide as it currently stands are extremely distressing for Ms Seales and that *she is suffering because that law does not accommodate her right to dignity and personal autonomy.* (*Seales*, at [192] (emphasis added))

Therefore, while Justice Collins may have found that current law cannot provide Seales with access to aid in dying and that this outcome is consistent with the comparatively narrow range of rights protected by the New Zealand Bill of Rights Act, his Honour's judgment by *no means* says that the law we have is

desirable. To the contrary, preventing those in Lecretia Seales' position from gaining access to aid in dying denies individuals very important individual rights. It forces them to die in undignified ways and so denies them recognition of their status as rational, competent individuals able to choose in their own best interests.

A law that has this effect on individual citizens is a bad one for us as a society. So when Justice Collins notes in his judgment that it is for Parliament to change the law, we should understand what lies behind his lament that this institution 'has shown little desire to engage in these issues' (*Seales*, at [211]). It ought to do so, because while current law on this issue may be clear, it also is wrong.

Postscript

Lecretia Seales passed away from natural causes the day before Justice Collins' decision was publicly released.

1 One of the marks of disagreement in this field is that those on opposing sides cannot even agree on a common terminology for the matters at stake. I will use the term 'aid in dying' to refer to a fatal dose of medication provided at the request of a terminally ill, competent individual who is suffering intolerably for the purpose of ending his or her life at a time of his or her own choosing. If that marks me out as a proponent of legal change in this area, that is because I am.

2 [2015] NZHC 1239.

3 *Carter v Canada (Attorney General)* [2015] SCC 5.

4 See *Carter v Canada (Attorney General)* [2015] SCC 5, at [77]-[78].

5 In particular, *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519; *R (Pretty) v Department of Public Prosecutions* [2001] UKHL 61; [2002] 1 AC 800.

References

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