**Euthanasia and the Law**

**Ursula Smartt** writes on what is the law on Assisted Dying in Britain and Other Countries?

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**Assisted suicide: the Daniel James Case**

Strong evidence suggests that since October 2002 at least 100 UK citizens have travelled abroad for the purpose of lawfully obtaining an assisted suicide. To date, there have not been any prosecutions which have resulted from such active euthanasia, though there have been some recent police investigations.

On December 10, 2008, the Director of Public Prosecutions (DPP), Keir Starmer QC, said that there had not been “sufficient evidence” to prosecute the parents of the 23-year-old Nuneaton Rugby player, Daniel James, who had taken their son to a Swiss euthanasia clinic outside Zürich in September 2008, so that their tetraplegic son could die with dignity. Daniel had been left paralysed from the chest down, with no independent hand or finger movement, as a result of an injury sustained in a scrum while training at Nuneaton Rugby Club on March 12, 2007.

A Worcestershire coroner’s verdict had stated on December 10, that 23-year-old Daniel James had intended to end his own life when he visited an assisted-dying clinic in Switzerland. The father of the young Rugby player, Mark James, had told the inquest at Stourport-on-Severn Coroner’s Court, about the moment his son drank a substance intended to kill him. Coroner Geraint Williams recorded a verdict of suicide stating he had no doubt Daniel wished to kill himself.

The DPP had made a public statement that there would be no charges of aiding and abetting suicide brought against Daniel James’ parents, Mark and Julie James. The parents had been investigated by West Mercia Police since September 2008 after it had become known that they had taken their son Daniel to a Swiss Dignitas clinic where he had died. Following the inquest, DPP Keir Starmer QC stated:

“While there are public interest factors in favour of prosecution, not least of which is the seriousness of this offence, I have determined that these are outweighed by the public interest factors that say that a prosecution is not needed. In particular, but not exclusively, I would point to the fact that Daniel, as a fiercely independent young man, was not influenced by his parents to take his own life and the evidence indicates he did so despite their imploring him not to. I consider it very unlikely that a court would impose a custodial penalty on any of the potential defendants… in all probability the sentence would be either an absolute discharge or, possibly, a small fine.” [Source: BBC News Online, December 9, 2008: http://news.bbc.co.uk/1/hi/]

On the same day as the DPP decided not to charge Daniel James’ parents with assisted suicide, the 10 December 2008, Sky’s digital TV channel 243, screened the documentary “The Suicide Tourist: Right to Die?” Documentary footage was shown of the death of 59 year old Professor Craig Ewert suffering from motor neurone disease.

Following the programme, Prime Minister Gordon Brown was asked in Parliament whether he favoured legislation which would permit euthanasia, the Prime Minister responded:

“These are very difficult issues… I believe it is a matter of conscience and there are different views on each side of the house about what should be done. I believe that it’s necessary to ensure that there is never a case in the country where a sick or elderly person feels under pressure to agree to an assisted death or somehow feels it’s the expected thing to do. That’s why I’ve always opposed legislation for assisted deaths.” [For further reportage, see Audrey Gillan’s article in *The Guardian* on the topic, “Father tells inquest of son’s dying moments”. *The Guardian*, December 11, 2008, p.16.]

**Euthanasia and the Law**

Euthanasia or ‘mercy killing’ is popularly taken to mean the practice of helping severely-ill people to die, either at their request or by taking the decision to withdraw life support. Legally defined within the law of England and Wales, euthanasia means an act or omission as part of his or her medical care (see: Keown, 1997: 1ff), meaning that people who wish to end their lives when they consider that they cannot endure further pain and suffering cannot presently legally obtain help to produce a peaceful death (see: Griffiths, 1999: 107ff).

English law differentiates between acting and refraining to act (omission). “Active” euthanasia occurs when treatment is administered with the intention of ending the patient’s life. As the law stands in the UK, deliberate or “active” euthanasia leaves anyone who assists the suicide or death of a person liable for murder.

The Role of the Director of Public Prosecutions (DPP)

As head of the Crown Prosecution Service in England and Wales, the DPP is governed by existing law that is the *Suicide Act 1961*. In *Purdy* [2008] (see below) the recently appointed Director of Public Prosecutions, Keir Starmer QC, made it clear that it is not acceptable for an individual to seek to use an application for judicial review of the DPP’s decision
to prosecute as a means of challenging in advance some proposition of law upon which the prosecution will rely at the trial. On assisted suicide the DPP has simply no discretion in accordance with the law.

In an open letter to The Guardian, DPP Keir Starmer QC explained his decision not to prosecute Daniel James’ parents with assisting their son’s suicide in that the decision to prosecute or not depends on the specific and unique facts of each case in line with the Code for Prosecutors:

“This decision neither rules in nor rules out the prosecution of relatives who assist the terminally ill to commit suicide. Every case the Crown Prosecution Services considers, whatever the offence, is reviewed individually in the light of all the available evidence and in accordance with the code for crown prosecutors before deciding whether or not a prosecution should be brought.” [“Assisted suicide, the law and television”. Letter to The Guardian by Keir Starmer QC, DPP, December 11, 2008, p.45.]

The same point had already been made clear in Kebilene [2000], [R. v. DPP ex parte Kebilene and others] [P ref XXXX [2000] 2 AC 326] where Lord Hope said:

“As a matter of general principle therefore a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual.” (ex parte Kebilene at 330A).

Withdrawing Life Support or Medical Treatment

This question first arose in the case of Baby B in 1981, a Down’s syndrome baby, whose survival was said to depend upon speedy surgical intervention to remove an intestinal blockage. But the child’s parents did not sanction the operation. Making Baby B a ward of court, the local authority applied to the High Court for a direction so that the operation could be carried out. But a Judge in chambers ruled that the parents’ wishes must be respected.

On appeal, the decision was reversed by the Court of Appeal on August 7, 1981, on the grounds that there was evidence that if the operation took place, the child would live a normal life span of a mongoloid child with the handicaps and defects of such a child.

A similar question arose in Dr Arthur’s case, concerning baby John Pearson, born on June 28, 1980 at Derby City Hospital. Diagnosed immediately with Down’s syndrome baby John remained in the care of Dr Arthur, a very experienced consultant paediatrician, because the mother had rejected her baby at birth.

John Pearson died on July 1, 1980 and Dr Arthur was charged with the baby’s murder. The charge read that Dr Arthur had intended to cause the child’s “death by starvation” in that the paediatrician had been withholding sustenance by not operating on the malformed intestine of the newborn baby. This, it was alleged, was a positive form of “active euthanasia” by failing or omitting to act, as was the duty of a doctor.

At that start of his trial on October 13, 1981 at Leicester Crown Court, Dr Arthur pleaded not guilty to murder before Farquharson J and the jury. During the trial, a controversial article appeared two days later, on October 15, in the Daily Mail by “pro-life” supporter Malcolm Muggeridge. The headline read: “The Mongol Murder Baby Trial” with the sub-heading: “Baby given a hunger drug to kill him” accusing the consultant of “murdering a child that parents did not want.” This article became the subject of a contempt of court action after Dr Arthur’s trial was over, whereby the Daily Mail editor and the journalist were charged with contempt of court but were later acquitted at appeal. On November 3, 1981, Dr. Arthur was acquitted of murder and subsequently of attempted murder by direction of the trial Judge.

Today, doctors and hospitals look to the landmark decision in Bland (Airsdale NHS Trust v. Bland [1993] AC 789). Anthony (Tony) Bland was a 17-year-old left severely brain damaged after the Hillsborough Football Stadium disaster on April 15, 1989, when Nottingham Forest and Liverpool played their FA Cup semi-final match at stadium in Sheffield, and too many supporters were allowed into the old stadium, causing a fatal crush of many supporters.

Tony had been in a permanent vegetative state (PVS) until 1993, when his parents and the NHS hospital trust sought permission from the High Court to withdraw the artificial nutrition and hydration that was keeping him alive. The High Court and the House of Lords agreed.

Following the decision in Bland, Sir Mark Potter, the then President of the High Court’s Family Division, ruled in the case of J. on December 6, 2006, a 53-year-old woman who had been in PVS since 1993, that life support could be discontinued.

Assisted Dying: the case of Diane Pretty

Assisting a person to die or voluntary euthanasia is against the law in the UK as s.2(1) of the Suicide Act 1961 states:–

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction or indictment to imprisonment for a term not exceeding 14 years”.

This provision gives rise to appalling dilemmas for a particular group of individuals: those who are suffering unbearably in the context of terminal illness and who wish to take steps to ensure a dignified death in a manner and at a time of their own choosing (see also: Scorer, 2008)

One such case was that of Mrs Diane Pretty [R (on the application of Pretty) v. DPP [2002] HRLR 10; [2002] 1 AC 806; [2001] UKHL 61] who suffered from motor neurone disease, which made it impossible for her to move or communicate easily even though her mental faculties remained normal. She wanted to end her own life, but needed help to do so. She asked the courts whether her husband would be able to assist her or whether this would amount to assisted suicide or “aiding and abetting” under s.2(1) Suicide Act 1961?
First, Diane Pretty asked the DPP to give an undertaking not to prosecute her husband, should he assist her to commit suicide in accordance with her wishes. The request for the undertaking was a request for the grant of an immunity from prosecution equivalent to the grant of a dispensation from the operation of the criminal law or an anticipatory pardon. But the DPP refused to grant her husband immunity from prosecution, confirmed by the High Court on August 20, 2001. The decision was upheld by the House of Lords on November 29, 2001. [R (on the Application of Pretty) v. Director of Public Prosecutions and Secretary of State for the Home Department (Interested Party) [2001] UKHL 61; [2001] All E] (see also: Pedain, 2003).

Lord Bridge confirmed the decision of A-G of Trinidad and Tobago v. Phillip [1995] which stated even if there was a power to grant a pardon, it could not be exercised in advance:

“However while a pardon can expunge past offences, a power to pardon cannot be used to dispense with criminal responsibility for an offence which has not yet been committed. This is a principle of general application which is of the greatest importance. The state cannot be allowed to use a power to pardon to enable the law to be set aside by permitting it to be contravened with impunity.” (1 AC 396 at 411).

Following the House of Lords’ ruling, Mrs Pretty’s lawyer, Shami Chakrabarti asked the European Court of Human Rights to consider her case under five articles of the European Convention on Human Rights (ECHR), including the right to respect for private and family. Ms Chakrabarti asked the Strasbourg court whether a terminally ill person could refuse life-saving or life-prolonging medical treatment and lawfully choose to commit suicide, arguing, inter alia, that English law on assisted suicide infringed Mrs Pretty’s human rights.

But the Strasbourg Court upheld the House of Lords ruling in Pretty refusing permission for assisted dying. The human rights court stated that art.2 ECHR was there to protect life and that an intentional consensual killing in the context of “voluntary euthanasia” was regarded as murder in English law. Mrs Pretty died on May 12, 2002.

The Purdy Case
In October 2008, 45-year-old Mrs Debbie Purdy sought judicial review in order to establish whether she could go to a Swiss Dignitas clinic in order to seek help with the assistance from her husband to die. She had been suffering from primary progressive multiple sclerosis since 1995. Since 2001, her condition had severely deteriorated and she was in a wheelchair.

Mrs Purdy sought a guarantee from the High Court that the DPP would not prosecute her husband, Omar Puente, were he to assist her dying at a euthanasia clinic.

Debbie Purdy also challenged s.7 of the Human Rights Act 1998, arguing that the DPP had failed to promulgate a specific policy as to the circumstances in which a prosecution would be brought for “aiding and abetting”, counselling or procuring a suicide contrary to s.2(1) of the 1961 Act. She argued specifically that the law on assisted suicide was not clear if euthanasia would take place in another country, namely Switzerland, where such practice is lawful.

On October 29, 2008, Debbie Purdy lost her judicial review at the High Court. Lord Justice Scott Baker ruled that under s.2(1) of the Suicide Act 1961, the DPP could never be in a position to grant an exemption for assisted dying, meaning that Mr. Puente would risk prosecution for “aiding and abetting” his wife’s suicide. [ R (on the application of Debbie Purdy) v Director of Public Prosecutions [2008] EWHC 2565; [2008] WL 4698918. High Court of Justice Queen’s Bench Division Divisional Court. Case No: CO/3449/2008.]

The High Court affirmed the House of Lords’ and European Court of Human Rights’ decisions in Pretty by stating that the DPP had not acted unlawfully in failing to publish detailed guidance as to the circumstances in which individuals would or would not be prosecuted for assisting another person to commit suicide. Lord Justice Scott Baker said:

“We cannot leave this case without expressing great sympathy for Ms Purdy, her husband and others in a similar position who wish to know in advance whether they will face prosecution for doing what many would regard as something that the law should permit, namely to help a loved one go abroad to end their suffering when they are unable to do it on their own. This would involve a change in the law. The offence of assisted suicide is very widely drawn to cover all manner of different circumstances - only Parliament can change it.”

This means that aiding or abetting a suicide in the UK remains a crime punishable by up to 14 years imprisonment.

Euthanasia Laws in Other Countries
Euthanasia has been decriminalized in a number of European countries, such as The Netherlands, Belgium and Switzerland. As early as 1984, the Dutch Supreme Court...
declared that “voluntary euthanasia” was “acceptable”, and in 2002, the Netherlands became the first EU country to legalize adult euthanasia under the Dutch “Termination of Life on Request and Assisted Suicide (Review of Procedures) Act 2001”. That said, the Dutch scheme includes an elaborate medically supervised and executed procedure; but it can be said that “physician-assisted suicide” is now practiced widely in the Netherlands and with increasing openness.

Following the Belgian Parliament’s approval of the euthanasia legislation on May 28, 2002 with subsequent legislation in December 2005, Belgian pharmacists can supply doctors with a fatal dose of medicine, making assisted suicide more easily available.

In December 2008, the Luxembourg Parliament even stripped their monarch, the Grand Duke Henri of Luxembourg, of his political powers, after he tried to veto a euthanasia bill that allows for the legislation of assisted suicide. The Grand Duke had indicated that he would not give assent and ratify the bill into law even though the Chamber of Deputies of the Luxembourg Parliament had voted to legalize euthanasia on February 19, 2008.

« Assisted suicide » and relevant legislation exists in Switzerland (assistance au suicide et euthanasie active - le droit de mourir dans la dignité) with an additional clause which states:

“Whoever lures someone into suicide or provides assistance to commit suicide out of a self-interested motivation will, on completion of the suicide, be punished with up to five years’ imprisonment.”

Recently, the Swiss charity Dignitas has gained worldwide reputation for helping people with chronic diseases to end their lives. Since it was founded in 1998, it has helped hundreds of people from across Europe to commit “assisted suicide”. The organization was founded by Swiss lawyer, Ludwig Minelli, who runs Dignitas as a non-profit organization with the motto: “Live with dignity, die with dignity”. [Source: Dignitas: Menschenwürdig sterben (transl. Dying with dignity): http://www.dignitas.ch]

Since Swiss law decriminalized assisted suicide without the involvement of a doctor Dignitas interprets Swiss legislation as meaning that anyone who assists suicide altruistically cannot be punished as long as assisted dying or voluntary euthanasia is performed by non-doctors – as the case of Daniel James proved.

Dignitas provides detailed contractual terms for patients which state their express wish for assisted suicide. The clinic’s specialist volunteer staff ensure there can be no conflict of interest. Once the decision has been made, the patient travels to a Dignitas flat outside Zürich; he is then given an anti-sickness drug 30 minutes before the lethal dose of barbiturate. The whole procedure is video taped to evidence that the patient takes the drug himself and that the barbiturate solution is not administered by clinic staff. The dose is three times the normal lethal amount required, based on the patient’s weight. Within five minutes the patient lapses into a coma; the heart stops soon afterwards, apparently leading to a peaceful and painless death. The police are then called, a coroner comes, they question the witnesses and look at the video. [Ludwig A. Minelli, “The function of Assisted Suicide in the system of Human Rights”, Secretary General DIGNITAS, Attorney-at-law, Forch-Zurich]

Sue Rodriguez, a woman suffering from amyotrophic lateral sclerosis or Lou Gehrig’s disease, sought to have s.241 struck down on the grounds that it prohibits a terminally ill person from committing physician-assisted suicide. She argued that her right to “life, liberty and security of the person” – which, in her view, included the right to control the method, timing, and circumstances of death – were denied by s.241. Ms Rodriguez argued before the Supreme Court of British Columbia that s.241(b) Criminal Code, which makes it an offence to aid or abet suicide, violated ss.7, 12 and 15 of the Canadian Charter.

The Supreme Court ruled that s.241 did not deprive Ms Rodriguez of her right to life, liberty and security of the person, nor did it restrict her freedom of choice or affect her ability to make fundamental decisions about her life. In the court’s view, it was the nature of her illness, not the legal system or the state, that deprived Ms Rodriguez of the ability to carry out her wishes. The court also concluded that s.241 does not discriminate against persons on the grounds of physical disability. Ms Rodriguez appealed to the Supreme Court of Canada, which, in a five-to-four decision, dismissed the appeal.

In deciding whether s.241 violated s.7 of the Charter, Hollinrake J held that, although s.241 of the Criminal Code might have deprived Ms Rodriguez of her right of security of the person under s.7 of the Charter, the prohibition against physician-assisted suicide was not contrary to the principles of fundamental justice. The Canadian court held that, to allow physician-assisted suicide would erode the belief in the sanctity of human life and suggest that the state condones suicide. Furthermore, the court expressed concerns about euthanasia abuse and the difficulty in establishing safeguards to prevent abuse in assisted suicides (see: Tiedemann and Vallyquet, 2008).

Discussion

The law on assisted suicide or voluntary euthanasia remains unclear and confusing within the realms of s.2(1) of the Suicide Act of 1961. Both Diane Pretty and Debbie Purdy could not avail themselves of the ruling in Bland, because both women were held mentally competent despite the fact that they were suffering from terminal and incurable illnesses. And yet, their physical disabilities prevented them both from ending their own lives. Existing law prevented them from asking a relative to assist their suicide.

Both Pretty and Purdy had challenged the 1961 Suicide Act, arguing that the law infringed their human rights, namely art.3 ECHR “freedom from torture, inhuman and degrading treatment” and 8 ECHR, the individual’s “right to privacy”. The ruling in Purdy confirmed the ruling in Pretty in that the DPP has no power to give an undertaking not to prosecute in respect of a crime to be committed in the future. This includes voluntary euthanasia at a Swiss clinic.

The DPP has stood firm in relation to euthanasia and assisted dying. People risk prosecution if they assist another person to die. This law appears to cover the UK as well as British nationals who travel abroad to assist their loved ones to die. As the ruling in Purdy demonstrates, the courts believe that the proposed safeguards regarding mercy killing remain inadequate and impractical.

Conclusion

Presently the law remains such that assisted suicide is illegal in the UK. The courts have made it clear in both Pretty and Purdy that they cannot allow the DPP to interfere in applications of relatives who want to assist a loved one to die; furthermore that the DPP cannot and must not turn a blind eye to persons who want to assist their terminally ill or severely disabled loved ones to die.

The DPP remains governed by existing law on murder where he cannot give an undertaking that he will not prosecute anyone who is going to assist in someone’s suicide. No matter how much their loved one is suffering an incurable illness. Indeed, it is not the DPP’s function to decide arguable questions of law. The courts ruled in Pretty that it was not acceptable for anyone to seek judicial review of the DPP’s decision to prosecute as a means of challenging in advance some proposition of law upon which the prosecution will rely at the trial.

If assisted suicide is to be permitted, it is essential that Parliament decides on legislation which, apart form the permission to assist dying, includes suitable safeguards of an appropriate rigour and specificity. The Assisted Dying for the Terminally Ill bill was last debated before the House of Lords in 2005 suggesting to reform the present murder laws. For the time being, Parliament has ruled that assisted suicide is unlawful under s.2 Suicide Act 1961.

If assisted suicide or mercy killing is to be permitted by law, it is essential that the permission includes suitable safeguards of an appropriate rigour and specificity.

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