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A matter of life and death

Legal expert Stanley Hartt writes that new legislation on assisted suicide must be drafted with great care to protect the vulnerable. We can't just "muddle through".

Stanley Hartt

She should have died hereafter.
– Macbeth*, Act 5, Scene 5*

Macbeth's seeming indifference to the announcement that his beloved Lady Macbeth had died, reflecting on the eventual inevitability of death and the resulting futility of life, needs to be borne in mind by our legislators as they ponder what to do about the Supreme Court of Canada's recent unanimous decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, striking down the Criminal Code provisions prohibiting physician-assisted suicide.

It matters a great deal whether someone dies sooner rather than later, not the least of all to the person whose death is hastened. The Court sets out clear requirements for any forthcoming legislation, intended to ensure that the consent of the patient is indeed free, informed and rational.

The essential holding in this highly-publicized ruling is that "the prohibition [in the Criminal Code] on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability)

that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition".

Relying on the evidence of truly horrible medical conditions advanced by the Appellants, where the focus was on a hopeless prognosis for progressive deterioration accompanied by severe and unbearable suffering, it is not surprising that much of the judgment emphasizes the need to protect the Section 7 *Charter* rights of patients to life, liberty and the security of the person. The decision essentially makes the obvious point that relief from unremitting and incurable pain is a matter of individual dignity and autonomy, and that preventing physician assistance in end-of-life decisions could actually push vulnerable persons to take, or be persuaded to take, their own lives before they would otherwise choose to, in order to avoid being in a position where they no longer could do so for themselves. The decision refers repeatedly to the need to "protect the vulnerable from being induced to commit suicide at a time of weakness".

> *When an incurably ill person is nearing inevitable death, they are extremely vulnerable to external pressures as to the timing of death.*

Throughout the reasoning, the Court takes the view, upholding the trial judge's decision on the evidence, that "properly qualified and experienced physicians [can] reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence [can] all be reliably assessed as part of that process … Physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity".

They reject Canada's argument that a permissive regime in Canada would result in a slippery slope into euthanasia and condoned murder. "At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient 'decisionally vulnerable' and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment".

Ultimately, the Court concludes that, "We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards."

So that leaves us with a road map for what Parliament must consider in order to amend the Criminal Code in a manner that will be compliant with the *Charter* to protect the rights of those with grievous and irremediable medical conditions (including illness, disease or disability) that causes enduring suffering that is intolerable, while maintaining safeguards against the slippery slope abuses feared by Canada's attorneys.

The difficult part, with all respect to the Court, is assigning to physicians the responsibility to ensure that decisions expressed by vulnerable patients asking for assistance to terminate their lives are really the informed, conscious and thought-out decisions of the patient and not planted in their minds by others.

When an incurably ill person is nearing inevitable death, they are extremely vulnerable to external pressures as to the timing of death. Children and their spouses tired of making endless hospital visits, heirs eager to inherit, and others with agendas not in the interest of the about-to-be deceased may find it easy to conclude, based on the doctor's advice, that the situation is hopeless, and so effectively "persuade" the unfortunate patient to hasten the extinguishing of life. The guilt of the dying about hanging on is a sad but real phenomenon.

Many of our largest financial institutions play on guilt and the fear of becoming a "burden" when selling guaranteed acceptance life insurance to cover "final expenses". Extreme caution should be exercised in the drafting of any legislative response. Care should be directed not merely to the need to provide a mechanism to end excruciating pain and suffering but also to the need to discern situations where undue, insidious, unseen influence is brought to bear on the very vulnerable the Court wrote this judgment to protect "from being induced to commit suicide at a time of weakness". There are many ways to commit suicide; one is to accede

to the spoken or unspoken wishes of those closest to someone to "get on with it".

All the more reason to reject the very silly thesis reported in the *National Post* on February 26, under the headline "No need for Harper government to enact new assisted-suicide legislation: professor". In it, a law professor at the University of Ottawa argues that physicians are experienced at how to withdraw life-saving treatment.

> *Even patient options to refuse certain treatments are recognized in law, as the court is careful to point out, short of actually asking for assistance in dying.*

An expert in professional and applied ethics at the University of Manitoba agrees. According to the *Post*, "Doctors and family members have long made decisions about life support – 'tens of thousands of times every year in Canada' – in the absence of laws or regulations. In palliative care wards, a patient can contract pneumonia and not be given an antibiotic 'because the patient believes that it's time to go.'"

The Manitoba professor states: "It used to be called passive euthanasia, and I'm not aware of any cases of abuse, and no one from the evangelical Christian community or the disability rights community is raising alarms about this situation."

What this argument misses is that we are precisely worried about doctors' impressions of patient consent being influenced by not-disinterested family members. We are not here discussing treatment options for a patient in a coma or otherwise incapable of acting for themselves, which, it is quite true, have long been part of our medical system. Even patient options to refuse certain treatments are recognized in law, as the court is careful to point out, short of actually asking for assistance in dying. Here, rather, we are dealing with the need to protect patients against the exercise of insidious influence on a vulnerable person with a view to making it appear to a misled physician that the decision was actually a free, voluntary and informed one made by a competent individual him or herself.

The *Post* article goes on to be even more outrageous: "Canada 'muddled through' without an abortion law after the Supreme Court decriminalized it, 'and I think we'll do the same on assisted suicide.'

'Abortion proves that, where the medical profession has been left to its own devices it has arrived at a solution that, although not pleasing everybody, clearly pleases the majority of us. For everyone who is hyperventilating that the [assisted suicide] void must be filled by legislation — and, at that, federal legislation — I would say you're ignorant of history'," the law professor is quoted as saying.

To set the record straight, no one determined to "muddle through" when the Supreme Court decision in *Morgentaler* struck down the Criminal Code provisions on abortion as unconstitutional, leaving Canada without any rules whatsoever about when and under what circumstances an abortion could appropriately be performed. Far from muddling through, a significant effort was made by Justice officials to draft a Charter-compliant replacement statutory measure.

The proposed enactment won support from such diverse members of the House of Commons as the governing party's Quebec women's caucus and a group of committed Christians among the BC delegation, all of whom agreed that a replacement law was better than no law at all. The measure passed the House in 1990.

The reason Canada has no law on the subject is that Senator Pat Carney, who had promised to stay home if she couldn't in conscience support the enactment, showed up and voted against the proposal in the Senate, and caused the outcome to be tied. A bill on which the vote is tied is not carried and therefore lost. It would be dreadful if the consequential outcome of the Supreme Court's ground-breaking *Carter* decision were handled in the same manner.

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