Physician-assisted dying: legal and ethical issues

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Overview

- Context & background
- Need to revisit ethical & legal issues
- Relevant fundamental rights
- End-of-life scenarios
  - ➢ Preservation of life of a clinically dead patient
  - ➢ Preservation of life of a competent, terminally ill patient
    - Cessation of life-sustaining treatment on request of competent, terminally-ill patient

Overview (cont.)

- Mentally competent, terminally-ill patient requests lethal dose (to administer him/herself or physician administers)
- Terminal pain sedation/management

➢ Preservation of life of incompetent, terminally ill patient

- With/without living will or advanced directive

- Ethical arguments for/against physician-assisted dying
- Conclusion

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Context and background

- Law Commission investigated end of life decisions (Project 86; Report on *Euthanasia and the Artifical Preservation of Life;* Draft Bill: End of Life Decisions Bill/Rights of the Terminally Ill)
- Treatment of assisted dying addressed on *ad hoc* basis
- Decision often left in hands of doctor, not patient
- Doctor rarely charged if assisting patient to die, or if so, receive symbolic sentence

Context and background (cont.)

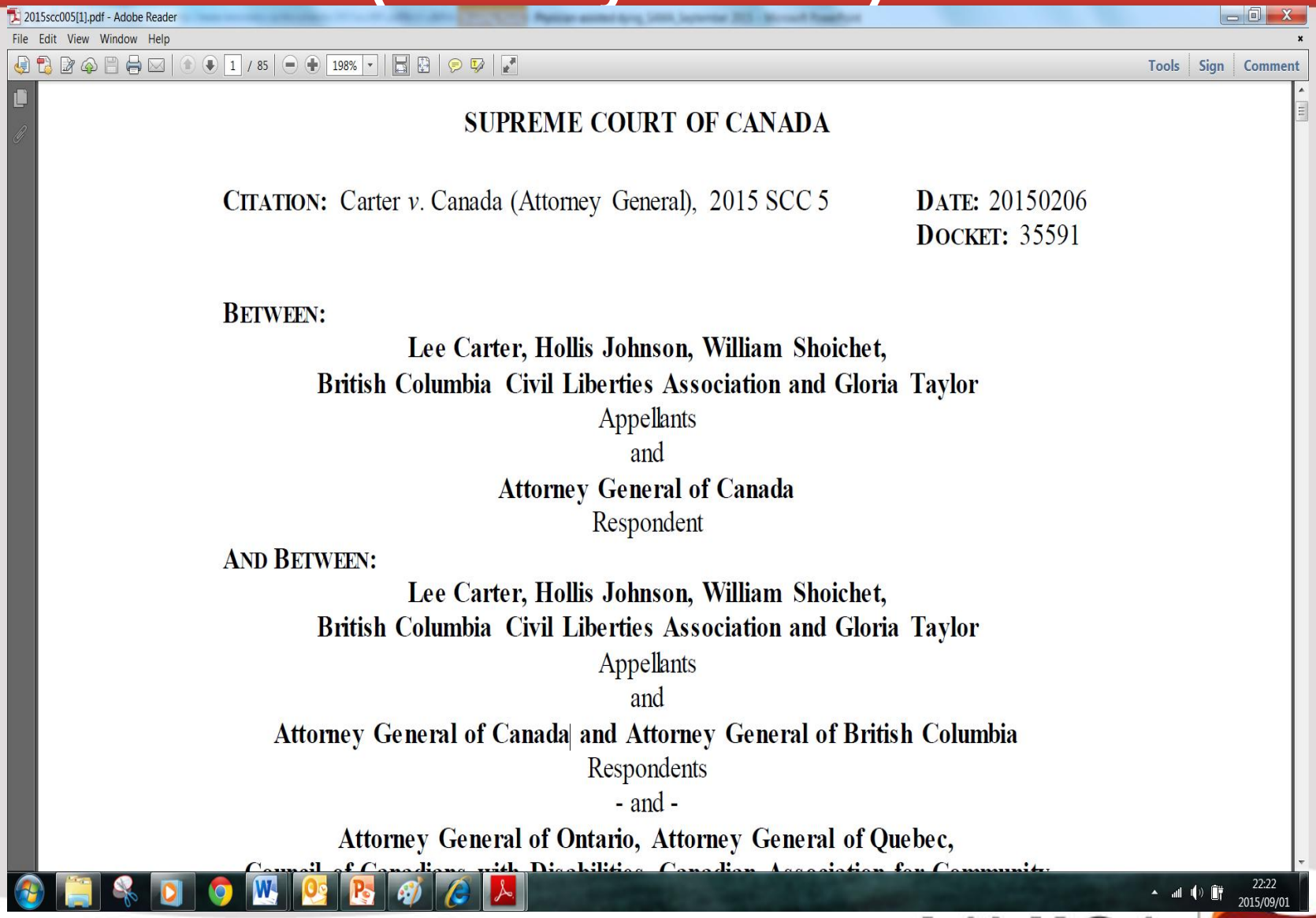
- Legal position: knowingly assisting another to commit suicide = legal and factual cause of his/her death; possibly guilty on charge of murder; culpable homicide
- Criminal office in most Western countries; courts upheld prohibitions in face of human rights challenges
- Uncertainty amongst medical personnel regarding legal position; fear for civil/criminal liability/professional misconduct

Context & background (cont.)

Recent judgments:

- Carter v Canada (AG): SC of Canada struck down rule prohibiting assisted suicide (February, 2015)
- Stransham-Ford v Minister of Justice and Correctional Services (May 2015)

Canadian Supreme Court: Carter v. Canada (Attorney General)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SUPREME COURT OF CANADA

CITATION: Carter *v.* Canada (Attorney General), 2015 SCC 5

DATE: 20150206
DOCKET: 35591

BETWEEN:

Lee Carter, Hollis Johnson, William Shoichet,
British Columbia Civil Liberties Association and Gloria Taylor
Appellants
and
Attorney General of Canada
Respondent

AND BETWEEN:

Lee Carter, Hollis Johnson, William Shoichet,
British Columbia Civil Liberties Association and Gloria Taylor
Appellants
and
Attorney General of Canada and Attorney General of British Columbia
Respondents
- and -
Attorney General of Ontario, Attorney General of Quebec,

22:22
2015/09/01

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Context and background (cont.)

- SC struck down provisions in Criminal Code criminalising assisted suicide:
  - in so far as these **prohibit physician-assisted dying for competent adults seeking assistance as result of a grievous and irremediable medical condition that causes enduring and intolerable suffering**
  - **on the grounds that these** deprive adults of their right to life, liberty and security of the person
  - Eg by imposing death or an increased risk of death on a person, either directly or indirectly, in that it has the effect of forcing some individuals to take their own lives prematurely

Stransham-Ford v Minister of Justice & Correctional Services

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Stransham-Ford (2015)

- Applicant sought order permitting doctor to assist him to end his life
- Court: common law crimes of murder and culpable homicide **in the context of assisted suicide by medical practitioners, in so far as they provide for an absolute prohibition,** unjustifiably limit the applicant's the rights to human dignity, freedom to bodily and psychological integrity
- Effect: A physician (who would provide lethal agent) may assist him to end his life by providing the lethal agent
- Physician's conduct would not be unlawful and he/she be free from civil, criminal and disciplinary proceedings

Stransham-Ford (2015)

- Applicant argued that there is no distinction between passive voluntary and active voluntary euthanasia from ethical perspective, as both, eg withdrawing life-prolonging treatment or assisting a patient to die by providing the lethal dose or administering it, has the patient' death or hastened death as secondary result
- Acknowledges right to die with dignity and with professional medical assistance
- No order required for cases of passive voluntary euthanasia (unless challenged in court)

Context & background (cont.)

- Common law crimes of murder or culpable homicide context of assisted suicide by medical practitioners, insofar as they provide for an absolute prohibition, unjustifiably limit applicant's constitutional rights to human dignity, freedom to bodily and psychological integrity; to that extent overbroad and in conflict with the Bill of Rights
- Court order required for active voluntary euthanasia (each case considered on own merits)
- Judgment not binding on any High Court in Gauteng or other provinces

Context & background (cont.)

- Although granting of order may permit doctor to administer the “lethal agent” to applicant or to provide him with it “to administer himself”, no doctor “obliged to accede” to such request
- Judgment important legal development in SA
- State has filed notice of leave to appeal High Court ruling (DoH/DoJ & CD; HPCSA & DFL)

Context and background (cont.)

- European Court of Human Rights:
  - Pretty v UK (2002)
  - Haas v Switzerland (2011)
  - Koch v Germany (2012)
  - Gross v Switzerland (2014)
  - Lambert & Others v France (2015)
  - Nicklinson & Lamb v UK (2015)

Context and background (cont.)

- Albania, Belgium, Canada, Columbia, Luxembourg, The Netherlands, Switzerland
- US: Oregon, Vermont, Washington, New Mexico, Montana & California
- Oregon (1327 deaths since 1997; doctors investigated 22 times for breaches)
- Reasons for ending lives: pain (1/4 of all instances; loss of autonomy & dignity main reason)

Thus far and no further

Source: *The Economist*/Ipsos MORI

The Economist, 27 June 2015

Need to revisit legal & ethical issues

- Stransham-Ford judgment: turning point
- Technology may artificially sustain life
- Changes in socio-political landscape (abortion & death penalty); access to health care services
- Necessary to define parameters, safeguards and protect against possible abuse
- Impact on doctor-patient relationship
- HPCSA 2008 Guidelines/WMA 2015 statement

Fundamental rights

- Right to human dignity
- Individuals as **ends-in-themselves**, capable of **self-governance** (Woolman)
- Rights to life, privacy, freedom and security of the person; **quality of life**
- Right not to be treated in a cruel, inhuman or degrading way
- Right to freedom of religion, belief (conscientious objection)
- Right of access to health care services (distributive/social justice/equity considerations)

(1) Preservation of life of a clinically dead patient

- If patient is clinically dead, but artificially kept alive by heart-lung machine or ventilator, a medical practitioner may disconnect life-sustaining system (disconnection **not** cause of death)
- **No** rule in our law to force person to "bestow certain signs of life" on person already dead (S v Williams)
- Definition of death: **"brain death"** (National Health Act); death of brain stem & absence of respiratory & circulatory functions

Preservation of life of a clinically dead patient (cont.)

- A medical practitioner may cease or authorise the cessation of all further medical treatment of a patient whose life functions are being maintained artificially while the person has no spontaneous respiratory and circulatory functions or where his brainstem does not register any impulse

(2) Preservation of life of competent, terminally ill patient

- Legally and mentally competent patient: one that understands the nature and implications of a legal transaction and is able to provide valid consent (3 aspects: **knowledge, appreciation & acquiescence**)
- Valid consent in law:
  - Voluntary;
  - Full knowledge of extent of rights & nature of injury/medical intervention;
  - Not against legal convictions of society (you cannot consent to be killed)

Preservation of life of competent, terminally ill patient (cont.)

- Three scenarios:
  (a) Where mentally competent, terminally ill patient **requests cessation of life-sustaining treatment**
  (b) Where mentally competent, terminally ill patient **requests that lethal drug be injected to end his/her life** or **to be provided with the drug to inject him- or herself** (voluntary active euthanasia; "active"= "killing"; "passive" = "letting die")

Preservation of life of competent, terminally ill patient (cont.)

(c) Where **medical practitioner prescribes drug with purpose to relieve patient's suffering**, well **knowing that this may hasten patient's death** (slow euthanasia; passive euthanasia; "back-door euthanasia"; terminal sedation or terminal pain management)

(a) Cessation of treatment (cont.)

- Not unlawful to *cease life-sustaining treatment* where terminally-ill patient requests so, with full knowledge of the consequences of the result (eg that death may be hastened)
- Castell v De Greeff : right flows from person's right to self-determination, which includes right to bodily integrity; recognises autonomy of patient

Cessation of treatment (cont.)

- A competent person may refuse any life-sustaining medical treatment (eg hydration & feeding) with regard to any specific illness from which he may be suffering, even though such refusal may cause his/her death/hastens his/her death

(b) Mentally competent, terminally-ill patient requests lethal dose*

*in absence of court order

- Voluntary active euthanasia (voluntary active euthanasia; “active” = “killing)”
- Presently: intentional killing of another person = **unlawful**, except in cases of acknowledged grounds of legal justification; person administering the lethal dose be **guilty of murder**

Mentally competent, terminally-ill patient requests lethal dose (cont.)

- Motive (out of empathy, compassion, etc) not ground of justification; act still regarded as unlawful, but may have **impact on sentencing**
- Effect of symbolic sentences = class of "murderers" who are not punished
  - R v Davidow 1955 WLD (unreported)
  - S v De Bellocq 1975 (3) SA 538 (T)
  - S v Hartmann 1990 (WLD) (unreported)
  - S v Smorenburg 1992 (CPD) (unreported)
  - S v Morengo 1990 (WLD, unreported)

Mentally competent, terminally-ill patient requests lethal dose (cont.)

Unlawful to provide assistance to a terminally ill patient (assisted suicide cases = murder, attempted murder or culpable homicide):

- R v Peverett 1940 AD 213
- S v Gordon 1964 (4) SA 727 (N)
- Ex parte Minister of Justisie: In re S v Grotjohn 1970 (2) SA 355 (A) (Appeal court questioned S v Gordon decision)
- S v Hibbert 1979 (4) SA 717 (D)

(c) Relieving pain as part of palliative care that hastens death of patient

- Purpose to relieve patient's suffering, well knowing that the dose may hasten patient's death; "double-effect" result
- "Slow" euthanasia; passive euthanasia; "back-door euthanasia"; terminal sedation
- Administering increased dosages of pain-killing drugs to terminally-ill patient is lawful, provided doctor acted in good faith; prescribe pain-relieving drugs in reasonable quantities with intention to **relieve pain, not cause death of patient (contra: Stransham-Ford)**
- Part of palliative care that fosters respect for human life

(3) Preservation of life of incompetent, terminally-ill or PVS patient

Two scenarios:

(1) In cases of living will/advanced directive/power of attorney

(2) In cases of no living will/advanced directive/power of attorney

"Living will"/advanced directive:

– Drafted by competent patient who foresees possibility that he/she in future, as result of physical/mental condition, be unable to make decisions regarding his/her future medical care

Preservation of life of incompetent, terminally-ill or PVS patient (cont.)

- Principle of patient autonomy: patient may refuse life-sustaining treatment (not be artificially kept alive) if mentally competent; understands consequences
- Advanced directive = legitimate refusal of consent to treatment at future point; should be honoured by doctors; lawful if doctor acts in good faith
- National Health Act: patient may appoint proxy to act on his/her behalf (section 7)
- HPCSA: Guidelines in support of living will

Preservation of life of incompetent, terminally-ill or PVS patient (cont.)

Where there is a living will/advanced directive (Clarke v Hurst)

- No justification for distinction between omission to institute life-sustaining treatment and discontinuation of treatment instituted
- Liability for discontinuance of life-sustaining treatment will depend on whether there is a duty to continue with such treatment
- Mere maintenance of biological functions (eg heartbeat, respiration, digestion and blood circulation) without functioning of the brain not be equated with life
- Therefore not unlawful to discontinue the artificial maintenance of that level of life

Preservation of life of incompetent, terminally-ill or PVS patient (cont.)

Where there is no advanced directive/living will:

Position same as above; doctor may cease life-sustaining treatment in case of terminally-ill incompetent patient, if this treatment is futile

Law Reform Commission (Report, 1998):

- If treating physician's decision to cease treatment be confirmed in writing by at least one other doctor, he/she may, in the absence of any directive or a court order, grant written authorisation for the cessation of all further life-sustaining medical treatment and the administering of palliative care only
- Treatment not ceased if against wishes of the interested family members of the patient
- Not be unlawful merely because it contributes to causing the patient's death

Ethical arguments against physician assisted dying

- Sanctity of human life/respect for life
- Endurance of suffering confers dignity (religious purpose)
- Playing God
- Irreconcilable with duty to alleviate suffering)/weaken doctor-patient relationship
- Declaring some lives worth ending, devalues lives of similar sufferers

Ethical arguments against physician assisted dying

- Slippery slope (safeguards?)
- Inherently criminal act/illegal act co-opting doctor to participate in unlawful & morally objectionable act
- Inequitable if only available to small segment of society
- Mental suffering as ground for request?
- Children's choices be acknowledged?

Ethical arguments in support of physician assisted dying

- Respect for patient autonomy (self-determination)
- Quality of life
- Right to die with dignity
- Act of compassion, kindness, mercy
- Others' suffering (eg family)
- Personal conscience and the limits of the law

10 statements on end-of-life care (Landman)

1. Life is finite, inevitably reaching a point where death is a good (benefit) rather than a bad (loss).
2. We exercise control over our bodies and medical care throughout our lives, and it should be no different at the end of life.
3. We have a moral and legal right to life, but no duty to live.
4. We also have a moral right to a dignified and peaceful death, which can be undermined by overbearing end-of-life “care” and promoted by assistance with dying.

10 statements on end-of-life care (Landman)

5. We have several constitutional rights consistent with this moral right to a dignified and peaceful death.
6. Any forced treatment (including artificial nutrition and hydration) is unjustified, even if it might temporarily prolong life, since we have a right to decline life-prolonging/saving treatment.
7. Since resources are limited, they should not be used to prolong life when it is futile to do so, especially if it deprives others in the same risk pool of medical care.

10 statements on end-of-life care (Landman)

6. Technology can be utilised to prolong life in a futile manner to the point of denying all dignity in the dying process.
9. Not even close family members are morally justified to extend a dying person's life if it is futile to do so, or if it would override the patient's previous (competent) wishes.
10. The death bed is not the place for the family to extend life simply to be afforded an opportunity to make amends for earlier neglect or indiscretions if prolonging life is futile, or against the dying person's previous (competent) wishes.

Conclusion

- Legal position in flux
- Progressive SA Constitution seems supportive of a regulated regime of euthanasia (Carstens)
- SA ready for progressive legal reform?