Can civil disobedience change the law on assisting suicide?

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Does merely being present at a euthanasia suicide count in the eyes of the law as assisting the suicide? The law will remain as it is until altered by Parliament but in relation to assisting suicide there is probably some scope for judges to rule that some acts are crimes and others are not.

The well publicised death of Mrs Nancy Crick in Queensland last year reopened the euthanasia debate. In their efforts to have the law changed, the pro-euthanasia lobby tried the new approach of having some of their members take part in an act of civil disobedience by attending Mrs Crick's home at the time she was planning to commit suicide. The plan was apparently to have people present in such large numbers that it would be unlikely that they would each be prosecuted for the criminal offence of assisting suicide. If these people were not prosecuted, the law would fall into disrepute. If they were prosecuted and acquitted, others would be more confident that they would not be prosecuted if they were present as a mark of support at the suicide of a person who wanted to die because life was no longer tolerable. Each prosecution and acquittal would, the lobby hoped, undermine the law of assisted suicide and the law itself would gradually be changed.

The pro-euthanasia lobby draws comparisons with the law of abortion. It says the law has been changed by judicial interpretation (the way in which the courts interpret the law), so that abortions are now commonplace despite abortion still being a criminal offence in most Australian jurisdictions. The lobby argues that the law on assisting suicide can be changed in the same way (i.e. by judicial interpretation) so that people who may be regarded as assisting suicide are not prosecuted and those prosecuted can have their charges dismissed, such that attending 'euthanasia suicide' will no longer be a criminal offence.

These are interesting arguments and, despite some misunderstanding of the law of abortion, there is some substance in them.

Law on abortion

Changing the interpretation of the law on abortion does not provide a clear precedent for similar changes in the law of assisting suicide. It is true that abortion is now commonplace in Australia, despite the fact that offences relating to abortion remain part of the various Australian Crimes Acts. It is also true that the administration of the law on abortion has been 'softened' by judicial interpretation since the 1970s. However, it is not true that the law on abortion has been changed by judicial interpretation. Judges cannot change the wording of a statute to make lawful an activity that the statute says is unlawful. The legislation is the ultimate law, being the exposition of the will of the people through Parliament. The statutory provisions are still there and unlawful abortion can still be prosecuted.

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The statutes prohibit unlawful abortion, not abortion *per se*. Section 65 of the Crimes Act 1958 (Vic), for example, states: 'Whosoever…unlawfully uses any instrument [to procure a miscarriage]… shall be guilty of an…indictable offence …' (emphasis added). Because the word 'unlawfully' appears in the legislation, judges are able to interpret the legislation as meaning that some abortions are lawful since only 'unlawful' abortion is criminalised. Thus, Victorian Supreme Court judge Justice Menhennitt formulated the principle that an abortion is not unlawful if it is performed by a doctor who honestly believes that the abortion is necessary to avoid a serious risk to the mother's life or her physical or mental health, and the risks associated with the abortion are not disproportionate to the danger to be averted.[1] (This principle is part of the 'Menhennitt rules'.) Since that decision, other judges have said that doctors may consider social and economic factors as well as medical ones in assessing the risks to the mother if the pregnancy continued.[2] This has had the effect that most abortions are now lawful and doctors performing abortions are rarely prosecuted. But the law on unlawful abortion remains the same in most jurisdictions, and doctors can still be – and sometimes are – prosecuted.[3]

Law on assisting suicide

When we compare the law on assisting suicide with the law on abortion, it can be seen that there is less scope for differing interpretations of the legislation prohibiting assisting suicide. The reason is that it is always unlawful to assist suicide. Section 6B(2) of the Crimes Act 1958 (Vic), for example, states: '(2) Any person who (a) incites any other person to commit suicide…; or (b) aids or abets any other person in the commission of suicide…shall be guilty of an indictable offence.' Unlike in the abortion legislation, there is no mention of lawful or unlawful actions in this legislation. Thus, if attending a suicide is regarded as assisting, there is no scope for a judge to rule that it is not unlawful for a person or persons to be present during the death of someone committing suicide. Matters such as not encouraging or aiding the dying person are irrelevant.

However, there may be other arguments available to people attending a 'euthanasia suicide'. They may contend, for example, that it cannot be proved that they have the *mens rea* (criminal intent) that must generally be proved as an element of a criminal offence. They were merely there; their intention was not – or could not be proved beyond reasonable doubt to have been – that the other person should commit suicide. Although the law does not state that a particular intent is an element of the offence, intent should arguably be implied.

I think this argument has some merit. Those attending may say that they did not want the person to commit suicide, but if that were to occur they did not want the person to die alone. And they may draw analogies. Imagine that a person who is unaware of the events that have led to the bedside gathering simply walks into the room and is present at the time of death. Is that person guilty of an offence simply because he or she is in the room? What if an onlooker says 'don't do it', or attempts to stop the suicide? Surely that person is not to be regarded as having committed a crime. The offence requires proof of an intention, and mere presence is not enough.

Clarifying the law

The above discussion does not mean that being present at a 'euthanasia suicide' will never be a crime. It will depend on the circumstances – in particular, whether those present were actively encouraging the suicide or were merely providing support and comfort. There is, therefore, some scope for judges to clarify the law and, to some extent, rule that some acts are crimes and others are not.

If the onlookers at Nancy Crick's bedside are prosecuted, judges will be required to rule for the first time in Australia whether intention must be proved as an element of the offence of assisting suicide. To that extent, the use of civil disobedience will have been successful in clarifying the law. It should be borne in mind, however, that a decision not to prosecute is not a precedent but an exercise of the prosecutor's discretion, and that another prosecutor may take a different view. Also, the law will remain as it is until it is altered by Parliament. The most that might be achieved by judicial interpretation is that the offence of assisting suicide requires proof of intention. In these early assisted suicide cases at least, the judgment will be the decision of a single judge and will be open to being overturned on appeal. For the euthanasia lobby, however, it is a step forward.

Series Editor's comment

In 1995, a young woman ('CES') in New South Wales sued a number of doctors working in a 24-hour clinic for negligent delay in diagnosis of pregnancy.[3] The 'damage' asserted was loss of the chance to have the pregnancy terminated. The plaintiff's claim was dismissed on the grounds that she did not have a lawful reason for a termination and hence damages could not be awarded for the loss of the chance to commit an illegal act.

The Court of Appeal, however, set aside the judgment and found for the plaintiff. Justice Michael Kirby (then President of the NSW Court of Appeal) said: '[T]he central question in the appeal was… whether [CES] could establish, on the balance of probabilities, that, if she had not been deprived of the opportunity, she would successfully have obtained a termination'.[5] He concluded: '[T]he evidence establishes that [CES] would have successfully sought and obtained a termination. Therefore…the causal connection between that negligence (in failing to detect her pregnancy) and depriving her of the opportunity

to terminate has been successfully established'.

In short, whether or not the woman had grounds for a lawful termination was ultimately irrelevant to the judgment as the evidence was that in Sydney in 1995, on the balance of probabilities, she would have been able to obtain a first trimester abortion. Hence, the negligent delay in the diagnosis of pregnancy until after the end of the first trimester caused her to lose the opportunity to terminate the pregnancy.

If the witnesses to Nancy Crick's death were charged with aiding and abetting a suicide, would the judge take a similarly robust view of the balance between practical realities of current community standards and 'black letter' law? It seems we may never know because the Police and the Director of Public Prosecutions appear to have decided not to test the law. Both pro- and anti-euthanasia groups will find that unsatisfactory as they want a case to be tried to test the law.

Abortion and euthanasia are both intensely moral issues, and the community is deeply divided between a utilitarian position (the lesser of two 'evils') and a Kantian one (the end never justifies the means). The difference between the two issues is in the number of individuals directly involved. The anti-abortionists argue that one human being does not have the right to destroy the chance of life of another (potential) human being, and the pro-abortionists argue that the continued existence of an embryo should not be allowed to 'destroy' the life of the mother. By contrast, euthanasia involves – directly – only one human being. Should we have the lawful right, if of sound mind, to end our life? If so, should we have the right to seek assistance and support to do so? Doctors, as citizens, have the same right as any other citizen to enter these debates and to attempt to influence change in the law. However, doctors as doctors have no right to act in any way other than in accord with current law.

If confronted directly with these issues, seek advice, through your medical defence organisation. MT

References

1. *R. v. Davidson* (1969) VR 667 at 672 (Vic SC).
2. *R. v. Wald* (1971) 3 NSWDCR 25.
3. *CES v. Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47.
4. Skene L, Nisselle P. Developments in abortion law. Medicine Today 2002; 3(2): 59-61.
5. *CES v. Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47; para 454.