

WHEN IS IT LEGAL TO DIE IN CANADA?

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WHEN IS IT LEGAL TO DIE IN CANADA?

- Withdrawing, withholding or not offering a life-sustaining treatment
- *Cuthbertson v. Rasouli*
 - October 2013
- Assisting death, euthanasia, suicide
- *Carter*
 - February 2015

Rasouli:

- Hassan Rasouli admitted to Sunnybrook Hospital October 2010 for “routine” surgery to remove a benign tumor from his brain;
- Operation successful but Mr. Rasouli contracted meningitis, leaving him mentally compromised;
- Initial diagnosis was persistent vegetative state, subsequently “upgraded” to minimally conscious state.

Rasouli ...

- Treatment team decided continuing treatment would be no medical benefit to Mr. Rasouli, asked family for consent to withdraw treatment;
- Family refused, citing his religious beliefs;
- Physicians said they did not need consent, would withdraw the next day;
- Litigation ensued.

Rasouli – in the Supreme Court

- The test is not “medical benefit;”
- Ontario’s *Health Care Consent Act* defines “Treatment:”

“anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose ...”

Rasouli – in the Supreme Court

- Withdrawing/withholding life support is a “treatment,” requires consent;
 - NOTE: physicians cannot be compelled to “propose” a treatment;
- It should be physicians who commence litigation, not the family -- Mr. Rasouli’s physicians are free to apply to the Consent and Capacity Board;
- “On the facts of this case;”
- The Court, in one case, cannot answer all the ethical concerns of physicians;
- What is needed are “practical solutions”

Rasouli – in the Supreme Court

RESULT:

Physicians' appeal dismissed – They remain free to apply to Ontario's Consent and Capacity Board.

Ontario's Consent and Capacity Board

- Has authority to review the refusal of Substitute Decision-Makers [SDMs] to consent to withdrawal/withholding of treatment;
- Hearing convenes within 7 days of receipt of Application -- usually in the hospital;
- Decision the day after Hearing ends, 'Reasons for Decision' within 4 business days;
- The CCB has heard more end of life cases than all Canadian Courts combined!

Rasouli – in the Supreme Court

What has happened since?

- CPSO is working on revising its guidelines;
- Almost NO “end of life/futility” cases since Supreme Court decision;
- Mr. Rasouli remains alive and well in a minimally conscious state in Sunnybrook ICU.

Carter – in the Supreme Court

Criminal Code: section 241(b)

Everyone who

(a) counsels a person to commit suicide,
or

(b) aids or abets a person to commit
suicide,

Whether suicide ensues or not, is guilty
of an indictable offence and liable to
imprisonment for a term not exceeding
fourteen years.

Carter – in the Supreme Court

Criminal Code: section 14

- No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

Carter – in the Supreme Court

Rodriguez 1993

Social and Legislative Facts:

- There is a moral (or ethical) distinction between passive and active euthanasia
- There is no sufficient means with which to protect the vulnerable, so breach of section 15 is saved by section 1 of the CHARTER

Carter – in the Supreme Court

- No ethical distinction between physician-assisted death and other end-of-life practices whose outcome is likely death;
- Evidence regarding regulatory structures in other jurisdictions; current practices re assessment of informed consent in medical decision-making.

Remedy:

Sections 241 (b) and 14 of the Criminal Code unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who:

(1) clearly consents to the termination of life and

(2) 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.

The Court suspended the declaration of invalidity for 12 months – to give Parliament and the legislatures time to amend existing legislation.

(until February 6, 2016)

Criminal law is federal jurisdiction, health law is provincial

Freedom of Conscience and Religion

...a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief ... the *Charter* rights of patients and physicians will need to be reconciled.

Assisted Death:

WHAT CAN GO WRONG?

(1) clearly consents to the termination of life and

(2) 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.

Competent adult

Clearly consents

Grievous and irremediable medical
condition

Enduring suffering that is
intolerable ... in the circumstances

“Competent:”

- “Capable:” Able to understand information relevant to the decision, able to appreciate the reasonably foreseeable consequences of the decision. [HCCA s. 4(1)]
- 80% of physicians DO NOT understand “capacity,” what it means or how to assess it...
- While I am capable, can I direct my life be ended at some point *after* I lose capacity?

Adult:

- Ontario law of treatment decisions [*The Health Care Consent Act*] contains no age distinctions or limitations – regardless of your age, you are entitled to make your own treatment decisions if you are “capable.”
- Is the Court discriminating against “non-adults” – age discrimination is prohibited by the *Charter* unless the discrimination is “*demonstrably justifiable in a free and democratic society.*”

“Clearly consents:”

“CONSENT” REQUIRES:

- An informed decision
- Given voluntarily
- Without misrepresentation or fraud

Is consent voluntary if given because Dad doesn't think his family should suffer through his illness any longer?

What do these phrases mean?

- Grievous and irremediable medical condition
- Enduring suffering
- That is intolerable ... in the circumstances

JUDICIAL INTERPRETATION IS SLOW!

And profitable for lawyers!

Other Issues:

- How will the “right to die” achieve consistency across Canada?
 - You still cannot get an abortion in Prince Edward Island!
- Can we trust health practitioners to get it right?

Quebec Study:

Health care professionals' comprehension
of the legal status of end-of-life practices
in Quebec;

Study of clinical scenarios

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-- research conducted in 2012

45.8% of physicians and nurses
wrongly thought that it was not
permitted to withdraw a
potentially life prolonging
treatment at the patient's
request;

Only 39.5% believed that, in the event that medical aid in dying were legalized, the use of lethal medication would be permitted at the patient's request, and 34.6% believed they would be able to give such medication to an incompetent patient upon a relative's request.

a Belgian study found that, 7 years after Belgium legislated euthanasia, many physicians still had difficulty identifying which medical practices constituted euthanasia and must be declared to monitoring authorities...

What will happen?

- If no legislation, impugned provisions of Criminal Code cease to be of effect if a physician assists in the death of a competent adult who clearly consents ...
- What physician will take that chance?
- Will the Government opt for a CCB type panel to authorize physician assisted death?



Does it hurt when my lawyer touches you there?