A Fearsome Dilemma

Physicians' Role in Suicide in Canada

Peter Bowal

"Be still prepared for death
And death or life shall thereby be the sweeter."
– *William Shakespeare (1564-1616)*

Law and medicine have been interwoven by many issues in the last two decades. Interest in *health span* may have actually overtaken *life span*. No issue demonstrates this more poignantly than the current emotionally-charged and profound debate about choosing the circumstances of one's death in terminal cases. Even then, while suicide is not in any way a recent phenomenon, the issue of getting a physician to assist in the suicide, without fear of criminal prosecution against the physician, is new and contentious.

The law confirms one's right to refuse life-saving treatment or to request that treatment be withdrawn. A line is, however, drawn between active and passive euthanasia. In active euthanasia, the forces of nature are interrupted with the intent that death should shortly follow. In withdrawal of treatment, the forces of nature take over and death eventually ensues. This article deals only with the law of active euthanasia.

Some persons who are in pain and dying would like to control the time and manner of their death. They consider it dying with dignity and believe that the

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law should permit it. In many cases, however, they will be physically too weak to give effect to this deeply-held personal desire. They will seek the intervention of another person, usually a physician. That would normally expose the physician to legal liability for culpable homicide. Nevertheless, these sick persons would say that their physical weakness (and consequential reliance on a physician) should not itself thwart their death with dignity. They would argue that any law which permits able-bodied persons to control their death, but does not grant disabled persons the same opportunity, is discriminatory and unconstitutional. This is precisely the question which the Supreme Court of Canada addressed last year in the case of *Rodriguez.*

The *Rodriguez* Facts

The Supreme Court of Canada decision, *Rodriguez* v. *The Attorney General of Canada and the Attorney General of British Columbia*[1] brings into focus the various competing values of the active euthanasia debate. Sue Rodriguez, a 43 year-old woman suffering from amyotrophic lateral sclerosis (ALS), a disease both irreversible and incurable, saw her condition rapidly deteriorating. Her life expectancy at the time of the appeal in May 1993 was estimated at 2 to 14 months. She wished to live while she had the capacity to enjoy life. She requested that a qualified physician be permitted by law to set up the technological means for her to take her own life when she chose, but no longer had the physical ability, to do so.

Canadian criminal law explicitly prohibits this. Section 241 of the *Criminal Code* states,

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.

Rodriguez applied to the court to have this crime of assisted suicide declared invalid and to give her the legal option of a physician assisted suicide.

The Supreme Court of Canada Decision

Sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* state,

S7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

S15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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Rodriguez claimed that section 241 of the *Criminal Code* violated her constitutional "security of the person" interest without observing "principles of fundamental justice". While it is difficult to know what "security of the person" and "principles of fundamental justice" mean because they are legal constellations of words, court cases provide boundaries and examples for interpretation of these imprecise terms.

"Security of the person" encompasses personal autonomy with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, basic human dignity, and freedom from state-imposed psychological and emotional distress. Canadian courts have developed a trend in recent years to acknowledge individual dignity and autonomy, in the face of state action, as cornerstones of "security to person". By contrast, "fundamental justice" calls for a fair balance between state and private interests, adherence to fair procedure, and freedom from state caprice or arbitrariness.

Rodriguez also claimed that the denial of assisted suicide infringed her equality rights. Because of a physical disability, namely her illness, she should not be denied the right to terminate her life, a right which able-bodied persons enjoy.

Justice Sopinka, writing for the majority, based his decision on the section 7 "security of the person" interest. There was little doubt that section 241 constituted a deprivation of Rodriguez' physical autonomy causing her physical pain and emotional stress. Thus, it was a violation of her security interest. He decided it is, however, a deprivation consistent with fundamental justice.

Justice Sopinka analyzed the history of suicide provisions, medical care at the end of life, and legislation in other democracies. He said the purpose of the blanket prohibition on assisted suicide is to protect the vulnerable. The fear is that people of weak minds and bodies will be induced to consent to physician assisted suicide or that assisted suicide may be used to cloak homicide. He observed that all Western democracies generally prohibit physician assisted suicide and that all jurisdictions draw the line between active and passive intervention. Western democracies prohibit assisted suicide to prevent abuse and to uphold the sanctity of life. The principle of sanctity of life is also expressed in the Canadian legal system which prohibits capital punishment. A general prohibition is warranted by the concerns about abuse and the difficulties in developing effective safeguards.

The five judges found it paradoxical that the right to die could be recognized in a society founded on the sanctity of life principle. Fundamental justice calls for human life to be respected and the

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vulnerable to be protected from the unscrupulous. To summarize, Rodriguez' security rights had indeed been denied, but such a denial was in accordance with the principles of fundamental justice.

Four judges disagreed with Mr. Justice Sopinka. They wrote three separate judgments. Two of them reasoned that if suicide and attempted suicide are not specifically prohibited, so also should assisted suicide be lawful. To draw the distinction is to deny the physically unable the choice to end their lives. Those who are physically capable can commit suicide while those who are physically incapable cannot. Such a denial was considered arbitrary and hence a violation of one's security of the person that does not accord with fundamental justice.

Chief Justice Lamer built his entire decision on equality. He was of the opinion that an absolute prohibition was unnecessary in order to protect the vulnerable. He would grant Rodriguez and others the right to assisted suicide after the fulfillment of a list of specific conditions. These include application to a superior court, written certification by at least two physicians of the applicant's competence, proof that the application was made voluntarily, present or future physical incapacity to commit suicide, and notification that one has a continuing right to change one's mind.

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Conclusion

This issue is improperly named when it is described in the popular media as "the right to die". All human beings already have the right (indeed, duty) to die. What is germanely raised by the Rodriguez case is the right to control that death. Medical advances have helped to both ease suffering and postpone death. The physician is uniquely positioned to counsel and administer the treatment desired. Without legal sanction, assisting physicians will not be simply and compassionately "helping someone die". It will in law be killing another person. This is a liability and stigma which physicians are obviously not prepared to accept.

While all judges affirmed the importance of human life as a value in democratic society, the Supreme Court of Canada had serious splits on the fundamental legal questions of the issue. One can readily see the difficulties with which society struggles along with them. Like most issues steeped in individual belief at the expense of legal principle, it is easy to regard the judgments as little more than the individual philosophical preference of each judge.

While our society is capable of dealing with life and life enhancement issues in medicine and law, it is less able to deal confidently with terminal illness and issues such as physical deterioration and dependence upon others. Ultimately issues about death are intractable. Assisted suicide is a veritable life and death matter that neither law nor medicine alone is competent to decide.

The case is not closed after the Supreme Court of Canada decision in *Rodriguez*. The 5-4 margin in the Court and the publicity which attended Rodriguez' cause, make future re-visiting of the issue a practical certainty. The federal government has indicated that Parliament will get free vote on it.

Assisted suicide seems to have considerable, likely majority, support in Canada (Bozinoff)[2]. An aging population spoiled by constitutionally-protected choice and personal autonomy will continue to press for change. Physicians, although they recently resolved as a professional body not to assist in suicide, will play a critical role throughout the legislative debate and perhaps after. They are not only the practitioners of medical science that promotes the well-being of the body. They also care for the dying and would be expected to participate in legal assisted suicides. On the other hand, the moral dilemma lies in that they are sworn to do no harm. The notion that they would be practitioners of death is repulsive to many of them.

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Rodriguez, the woman who had earlier appealed to Parliament by asking "whose body is this?", died on February 12, 1994. Her suicide was indeed assisted by an anonymous physician. She died, ironically, in the arms of a Member of Parliament. Other physicians who had cared for her during the last few months indicated that they believed Rodriguez was not near death, nor in pain. In the end, after fighting for society's sanction to choose the circumstances of her own death, it was not law but Rodriguez herself who, faced with its inevitability, made the final determination about her own death.

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References

1. *Rodriguez* v. *The Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 S.C.R. 519.
2. Bozinoff L. and A. Turcotte, "A Majority of Canadians Continue to Support Legalized Euthanasia", *Gallup Rep* Toronto, November 23, 1992; Wood, C, *Macleans* 107:9, 1994.