



## Recent Developments in Physician-Assisted Suicide

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### LITIGATION

1. Sampson v. Alaska, No. 3AN-98-11288CI (Alaska Super. Ct.), aff'd, 31 P.3d 88 (Alaska 2001). On 12/15/98, Kevin Sampson (a 43-year-old HIV-positive man) and "Jane Doe" (a female physician in her 60's with cancer) filed suit in Alaska Superior Court in Anchorage challenging Alaska's ban on physician-assisted suicide based on state constitutional claims of privacy, liberty, and equal protection. On 9/9/99, Judge Eric T. Sanders issued a written opinion rejecting the plaintiffs' claims and granting summary judgment to the defendant. On 11/14/00, the Alaska Supreme Court heard arguments on the appeal. On 9/21/01, the supreme court issued an opinion affirming the lower court's decision.
2. Cooley v. Granholm, No. 99-CV-75484 (E.D. Mich.), appeal pending, No. 01-1067 (6th Cir.). On 11/12/99, Professor Robert Sedler filed a federal lawsuit against Attorney General Jennifer Granholm and the Michigan Board of Medicine on behalf of two Michigan physicians, Roy Cooley and M.W. El-Nachef. The plaintiffs claimed that Michigan's ban on assisted suicide violates the Fourteenth Amendment right "to be relieved from unbearable pain and suffering." On 12/20/00, Judge Nancy G. Edmunds granted the defendants' motion for summary judgment and dismissed the complaint. On 1/12/01, plaintiffs appealed to the Sixth Circuit Court of Appeals. The final brief on appeal was filed on 6/4/01. Both sides have requested oral argument.

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### LEGISLATION

1. Oregon.
  - a. Pain management legislation. On 8/17/01, Oregon Governor John Kitzhaber signed Senate Bill 885, which establishes the Pain Management Commission within the Department of Human Services. The commission must develop a pain management education program curriculum by 1/1/03, to be updated biennially, develop pain management recommendations, and develop ways to improve pain management services through research, policy analysis, and model projects. Every licensed physician assistant, nurse, psychologist, chiropractic physician, and naturopath and every physician who treats patients in chronic or terminal pain on an ongoing basis will be required to complete one pain management education program within 24 months of 1/2/06 or within 24 months of the first renewal of the person's license after that date.
  - b. Possible federal action. Supporters of the Oregon Death with Dignity Act have speculated that President Bush may take administrative action to overturn Oregon's law. However, the administration has given no recent indication that such action will be forthcoming.

## OTHER NATIONAL DEVELOPMENTS

### 1. Dr. Jack Kevorkian

- a. Appeal of criminal conviction. On 3/26/99, Dr. Jack Kevorkian was convicted by a jury of second-degree murder and illegal delivery of a controlled substance in connection with the death of Thomas Youk by lethal injection. Kevorkian will not be eligible for parole until May 2007. On 11/12/99, Kevorkian's lawyer Mayer Morganroth filed an appeal with the Michigan Court of Appeals to reverse Kevorkian's conviction and dismiss the case or order a new trial. Grounds for appeal include a Fifth Amendment claim that a prosecutor improperly referred to Kevorkian's failure to testify and a claim of ineffective assistance of counsel. A hearing on the appeal was held on 9/11/01 in Detroit before Judges Joel P. Hoekstra, Henry William Saad, and William C. Whitbeck.
- b. Request for release pending appeal. On 12/27/00, Jack Kevorkian's attorney Mayer Morganroth filed a petition for writ of habeas corpus in U.S. District Court contending that Kevorkian should be released from prison while his murder conviction is appealed, because he is at risk of a stroke, he poses no threat to the public, and the issues on appeal have strong merit. On 6/22/01, U.S. District Judge Paul Borman denied Kevorkian's request, finding that delay in hearing the appeal did not of itself require the federal courts to intervene. *Kevorkian v. Ludwick*, No. 00-CV-75557 (E.D. Mich.), appeal pending, No. 01-2010 (6th Cir.).
- c. ABC suit against Department of Corrections. On 7/19/00, Genesee County Circuit Court Judge Robert Ransom ordered Michigan Department of Corrections director Bill Martin and deputy director Dan Bolden to permit ABC's Barbara Walters to conduct a face-to-face interview with Dr. Kevorkian for the television program "20/20." ABC claimed that the defendants had arbitrarily and unconstitutionally applied a new policy barring cameras and recording devices in the state's 39 prisons. On 6/4/01, the Michigan Court of Appeals issued a ruling in favor of the Department of Corrections. After the Court of Appeals rejected ABC's request for reconsideration in August 2001, ABC declined to file an appeal to the Michigan Supreme Court.

2. Michigan. The Michigan Commission on End of Life Care, which was appointed by Governor John Engler in 2000, has issued a 66-page report on ways to improve end-of-life care in Michigan. The report is available at <http://www.mdch.state.mi.us/eol/EOLreport.pdf>. The commission's report recommended a public information campaign for families and health care professionals, an improved curriculum on end-of-life care in health and medical schools, replacing the state's Official Prescription Program with a system that will prevent improper drug distribution while providing better pain care, incentives for instruction in palliative care for those who work in long-term care facilities, and adequate reimbursement for respite care services. State Representative Tom George, a hospice physician and member of the commission, plans to promote the panel's findings in the Michigan legislature.

3. Maine. Following defeat of an initiative on physician-assisted suicide in November 2000, several steps are being taken in Maine to improve end-of-life care. The Maine Medical Association will conduct an extensive study to determine why less than 8% of dying patients are referred to hospice by their physicians. In 2001, the Maine legislature created a Medicaid hospice benefit and authorized the Bureau of Health to create the Maine Center for End-of-Life Care.

4. New trial ordered for Utah physician. On 1/9/01, Utah Second District Judge Thomas L. Kay granted a new trial to Dr. Robert Weitzel, a psychiatrist who was convicted by a jury in July 2000 of two counts of second-degree felony manslaughter and three counts of misdemeanor negligent homicide in connection with the deaths of five elderly patients at the geriatric psychiatric unit of the Davis Hospital and Medical Center in Layton, Utah, during a 16-day period from late 1995 to early 1996. Prosecutors had contended that all five patients were admitted for dementia, not for life-threatening diseases, and that Weitzel killed them with lethal doses of morphine, while the defense had contended that Weitzel merely provided comfort care. Weitzel's motion for a new trial was granted on the ground that prosecutors failed to disclose pretrial statements from Dr. Perry Fine, a University of Utah Medical Center physician and expert in pain management and end-of-life care, that could have aided Weitzel's defense. Weitzel was scheduled to appear in state court on 8/9/01 for a pretrial conference on his upcoming second trial. On 4/26/01, Weitzel filed formal complaints with the Utah State Bar's Office of Professional Conduct against four county attorneys for their failure to disclose Dr. Fine's statements. Family members of one of the patients have filed a civil lawsuit against Weitzel, and his Utah medical license has been suspended.

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## MEDICAL DEVELOPMENTS

1. Lawsuit for undertreatment of pain. On 6/13/01, a jury in Alameda County Superior Court awarded \$1.5 million in damages to the family of William Bergman, who claimed that Dr. Wing Chin violated California's Elder Abuse and Dependent Adult Civil Protection Act by failing to prescribe adequate pain medication for Bergman as he battled lung cancer. The jury decided by a vote of 9 to 3 that Chin's conduct constituted reckless abuse of a senior citizen but deadlocked 8 to 4 on whether Chin was also liable for punitive damages for malice or oppression or for intentionally causing emotional distress. The complaint also named Eden Medical Center, but the hospital settled with the family out of court in April 2001 for an undisclosed sum of money and a promise to educate the medical staff in a new approach to pain management. In 1998, the Medical Board of California found that pain management for Bergman "was indeed inadequate" but declined to take any disciplinary action against Chin. On 8/20/01, Alameda County Judge David Hunter reduced the jury's award to \$250,000 after finding that the California cap on medical malpractice awards applied to elder abuse cases. The plaintiffs plan to appeal the ruling.
2. National Cancer Policy Board report. On 6/19/01, the National Cancer Policy Board of the Institute of Medicine and the National Research Council issued a 78-page report, *Improving Palliative Care for Cancer* (Kathleen M. Foley & Hellen Gelband eds.), that makes sweeping recommendations aimed at forcing the medical community to focus more on end-of-life care for cancer patients. The report called on the National Cancer Institute (NCI) to fund more research and training on end-of-life care and designate cancer centers to specialize in symptom control and palliative care. In addition, the report recommended that the Health Care Financing Administration focus attention on improving funding for integration of palliative care and other types of medical care. Information on the report is available at <http://national-academies.org>. NCI welcomed the report and indicated it would hold a special meeting to implement many of the recommendations.
3. Physician group opposes assisted suicide. In a position paper published in the *Annals of Internal Medicine* on 8/7/01, the American College of Physicians-American Society of Internal Medicine (ACP-ASIM) declared its opposition to physician-assisted suicide. See Lois Snyder & Daniel P. Sulmasy, *Physician-Assisted Suicide*, 135 *Annals Internal Med.* 209 (2001). ACP-ASIM has 115,000 members and is the largest physician organization in the United States after the American Medical Association.
4. Pain assessment. Professor Ann Horgas of the University of Florida College of Nursing and Institute on Aging has received a \$523,636 grant from the U.S. National Institute of Nursing Research to assist her in researching for a better way to assess pain in nursing home patients, particularly those who are cognitively impaired. The grant will be used to videotape 200 nursing home residents as they participate in various activities, after which Horgas will monitor behaviors and facial expressions to examine whether dementia affects the relationship between pain behaviors observed and the pain that patients report.
5. Michigan Medical Society book. The Michigan Medical Society has produced a book that aims to help physicians treat and comfort dying patients. The book, which was produced in partnership with the Michigan Osteopathic Association, the Michigan Department of Community Health, and American Physicians Assurance, will be sent to 34,000 Michigan physicians and to thousands of medical residents and interns.
6. Recent articles
  - a. Kathryn L. Tucker, *A New Risk Emerges: Provider Accountability for Inadequate Treatment of Pain*, 9 *Annals Long-Term Care* 52 (2001) [author reviews recent developments regarding physician accountability for undertreating pain].
  - b. Elizabeth B. Lamont & Nicholas A. Christakis, *Prognostic Disclosure to Patients with Cancer near the End of Life*, 134 *Annals Internal Med.* 1096 (2001) [1996 telephone survey of physicians for 326 cancer patients in five hospice programs in Chicago showed that, even if patients requested survival estimates, physicians would give frank survival estimates to patients only 37% of the time and would instead give knowingly inaccurate survival estimates for 40.3% of patients and no survival estimate for 22.7% of patients; the median communicated survival estimate was 90 days, but the median true survival estimate was 75 days and the median actual survival was only 26 days].
  - c. Richard Schulz et al., *Involvement in Caregiving and Adjustment to Death of a Spouse*, 285 *JAMA* 3123 (2001) [study of subset of patients age 65 or older participating in Caregiver Health Effects Study in four U.S. communities showed that the impact of losing one's spouse varied as a function of the surviving spouse's caregiving experiences preceding the death; among caregivers who were already strained prior to the spouse's death, the death itself did not increase distress but actually reduced health risk behaviors; among noncaregivers, however, death of the spouse resulted in increased depression and weight loss].

- d. James R. Rogers et al., *Rational Suicide: An Empirical Investigation of Counselor Attitudes*, 79 J. Counseling & Development 365372 (2001) [random survey of 241 members of the American Mental Health Counselors Association in 40 states showed that 81% were moderately supportive of the idea that people can make well-reasoned decisions that death is their best option; rational suicide gained in acceptability as the scenario moved from client, to friend, to self; 71% reported having at least one client who made a suicide attempt, 28% reported having at least one client who committed suicide, and 20% indicated that they themselves had seriously considered suicide].
- e. Robert B. Wallace & Robert S. Olick, *Assisted Suicide: A Few Answers—Many Questions*, 41 Gerontologist 437 (2001), and Lori A. Roscoe et al., *A Comparison of Characteristics of Kevorkian Euthanasia Cases and Physician-Assisted Suicides in Oregon*, 41 Gerontologist 439 (2001) [review of data on 69 euthanasia deaths with Dr. Jack Kevorkian's assistance in Oakland County, Michigan, between 1990 and 1998].
- f. Ameda A. Manetta & Janice G. Wells, *Ethical Issues in the Social Worker's Role in Physician-Assisted Suicide*, 26 Health & Social Work 160 (2001) [survey of 66 social workers in South Carolina showed that 50% were in favor of physician-assisted suicide and 50% opposed it; those who favored physician-assisted suicide were more likely to have had special training in ethics and mental health].
- g. James V. Lavery et al., *Origins of the Desire for Euthanasia and Assisted Suicide in People with HIV-1 or AIDS: A Qualitative Study*, 358 The Lancet 362 (2001) [qualitative study of 32 patients with HIV-1 or AIDS in Toronto, Canada, by face-to-face interviews using open-ended questions; 63% of participants reported that they had already decided to pursue euthanasia or assisted suicide; researchers concluded that the desire for euthanasia or assisted suicide were affected by two main factors: (1) disintegration (symptoms and loss of function giving rise to dependency on others and loss of dignity) and (2) loss of community (the progressive diminishment of desire and opportunities for close personal relationships, owing to loss of mobility, exclusion and alienation by others, and self-isolating actions); these two factors combined to give participants a perception of loss of self].
- h. Anthony L. Back & Robert A. Pearlman, *Commentary, Desire for Physician-Assisted Suicide: Requests for a Better Death?*, 358 The Lancet 344 (2001) [authors suggest that the patients in the Lavery study "can be seen as articulating a widespread public fear that the dying process represents a kind of destruction of humanness, a final indignity, and that medical care commonly falters in responding to these existential and spiritual concerns"].
- i. Hua-Hie Yong et al., *Development of a Pain Attitudes Questionnaire to Assess Stoicism and Cautiousness for Possible Age Difference*, 56B J. Gerontology: Psychol. Sci. & Soc. Sci. 279 (2001) [pain attitudes questionnaire administered to 373 healthy community-dwelling Australian adults showed support for the scale's reliability and validity; older adults were more reticent in reporting pain, showed greater self-doubt in their judgment of pain sensations, and were more reluctant to label a sensation as painful when compared with young adults].

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## INTERNATIONAL DEVELOPMENTS

### 1. Australia

- a. Dr. Nitschke. Dr. Philip Nitschke has received a grant of \$58,000 from the Hemlock Society to develop a "suicide pill" using ingredients most people could access on their own. About 300 mostly terminally ill patients have attended Nitschke's free euthanasia clinics, and at least 40 of them have committed suicide.
- b. National voluntary euthanasia conference. In August 2001, 95 of 100 delegates to a national conference hosted by the Voluntary Euthanasia Research Foundation in Broken Hill, New South Wales, voted to support development of a suicide pill. However, the delegates rejected formation of a federal political party by a vote of 75% to 25%.

- c. Suicide "exit bag." Justice and Customs Minister Chris Ellison said in August 2001 that customs officials would attempt to intercept Canadian mail-order kits that include a guide to suicide and a plastic "exit bag." Dr. Philip Nitschke has promoted use of the suicide kits in Australia, but Ellison said that they may be illegal under Australian law. As a result of the threat of seizure, orders for the kits are no longer being accepted until it becomes clear whether shipments will be confiscated by Australian customs officials.
    - d. New South Wales. On 6/22/01, Greens upper house member Ian Cohen released a draft of the Rights of the Terminally Ill Bill, saying that his party unanimously supported allowing physicians to assist patients in dying. Under the bill, which is patterned after Northern Territory legislation subsequently overridden by the national parliament, the physician would have to be satisfied that the patient will die barring the "application of extraordinary measures," there must be no medical treatment "acceptable to the patient" that could cure the illness, a medical specialist and a psychiatrist must confirm the prognosis and find no treatable depression, there must not be any acceptable palliative care option available, and the patient must have the right to change his or her mind. The leader of the opposition party said that she opposed euthanasia but would allow a conscience vote on the issue.
- 2. Belgium. On 12/22/99, the ruling six-party coalition introduced a draft euthanasia bill in the Belgian Senate. The draft bill would legalize euthanasia for competent adults with an incurable illness causing unbearable and constant suffering, as well as for patients in a persistent vegetative state who had made a request within the prior five years before two witnesses to have their life ended in such circumstances. A national evaluation committee of physicians and lawyers would be set up to ensure that the law is followed. The opinion of a second physician would be required for a terminally ill patient. In the case of a patient who is not terminally ill, the opinion of a third physician (either a psychiatrist or a specialist in the patient's illness) would be required, and at least one month would have to elapse between the patient's request and the act of euthanasia. On 3/20/01, senators from two parliamentary working groups approved the final text of the draft bill. The draft legislation will be presented to both houses of parliament, which is expected to pass it. On 7/2/01, the Belgian Council of State issued a statement saying that it was up to individual legislators to consider the ethical implications of euthanasia.
- 3. Canada
  - a. Robert Latimer. Supporters of Robert Latimer continue to protest his life sentence, without possibility of parole for 10 years, for the mercy killing of his disabled 12-year-old daughter.
  - b. National polls
    - (1) Leger Marketing. A poll of 1,507 Canadians conducted by Leger Marketing and published in the Canadian Press on 7/2/01 showed that 75.5% believed that someone who has helped end the life of a loved one suffering from an incurable extremely painful illness should not be prosecuted, 16.3% said the person should face prosecution, and 8.1% said they did not know or refused to answer. When asked whether they would want help to die in the case of an incurable, extremely painful illness affecting themselves, 57.4% said they would want such help, 34% said they would not, and 8.6% did not know or refused to answer.
    - (2) Enviro-nics Group. Following the Leger Marketing poll, a larger and more detailed poll by the Enviro-nics Group showed that 72% believed that support for euthanasia would fall if people with disabilities or painful illnesses had adequate pain management, 42% believed that euthanasia is necessary only because nursing home and end-of-life care is inadequate, and 58% were opposed to the euthanizing of disabled children by their parents.
  - c. Articles on "self-deliverance." The July 2001 issue of the journal Death Studies (published by Taylor and Francis Ltd.) contains articles by Russel D. Ogden and James L. Werth discussing the new technology for self-deliverance movement.
- 4. Chile. Controversy surrounds a proposal for a patients' rights law submitted to the Chilean Chamber of Deputies in June 2001. Medical College President Juan Luis Castro has objected that Article 18 of the proposed legislation would authorize euthanasia, but Health Minister Michelle Bachelet replied that this article simply would allow a suffering, terminally ill patient to refuse medical treatment if two physicians agree on the patient's diagnosis.
- 5. China. A study of 2,649 patients admitted to the Sha Tin Hospital intensive care unit in Hong Kong between April 1997 and March 1999 revealed that 61.5% of the 524 patients who died at the unit died after having treatment withheld or withdrawn to reduce suffering. In 90% of such cases, the move was first suggested by physicians, rather than by the patient or relatives. Patients or their families agreed in 95% of cases to the suggestion that treatment be limited.

6. France. In an article published on 7/25/01 in the Dutch magazine Vrij Nederland, Health Minister Bernard Kouchner said that he had engaged in active euthanasia while he was a practicing physician. Kouchner favors relaxing the prohibition against euthanasia in France.

7. Great Britain

a. Diane Pretty

(1) Request for aid in dying. In June 2001, Brian Pretty wrote a letter to Prime Minister Tony Blair asking that a physician be allowed to help his 42-year-old wife Dianedie because of her motor neurone disease. When Blair declined to help and Mrs. Pretty's condition deteriorated further, she appealed to Director of Public Prosecutions David Calvert-Smith to guarantee that her husband would not be prosecuted if he assisted her to take her own life. In August 2001, after Calvert-Smith refused to give any guarantee, Mrs. Pretty appealed to the High Court in London arguing that his refusal violated her rights under the Human Rights Act.

(2) High Court. On 8/31/01, Mr. Justice Silber granted permission for a full judicial review before the High Court and said that he wanted a hearing to be held as soon as possible. Mrs. Pretty will be represented by the British legal aid organization, the Legal Services Commission. On 9/11/01, Mr. Justice Baker ruled that the case should be heard between 10/10/01 and 10/12/01 and allowed the organizations Alert, Medical Ethics Alliance, and Society for the Protection of Unborn Children to join the case as interested parties, but not to file medical evidence. The High Court will hear arguments from them, as well as from the Prettys, the Director of Public Prosecutions, and the Home Office (Interior Ministry).

(3) National poll. In a poll reported in The Independent on 8/26/01, 85% of Britons said that people should have the right to die when they choose.

b. General Medical Council guidelines. Britain's General Medical Council is considering a draft code of practice that would clarify the ethics of withdrawing and withholding treatment from patients with little chance of recovery. A final decision on the guidelines is expected during 2002. The British Medical Association issued similar ethical guidelines in 1999.

c. Book by Dr. Dave Moor. A book written by Dr. Dave Moor and published a year after his death, *Allowing Dignity in Death*, discusses the controversial euthanasia case involving him and its traumatic effect on him and his family. He was acquitted in May 1999 of charges that he murdered 85-year-old George Liddell by administering a lethal injection, but died in October 2000 of a suspected heart attack at age 53.

8. India. The Kolkata Society for the Right to Die, which was formed in April 2001 and has over 50 members, is seeking the legalization of euthanasia in India.

9. Netherlands

a. Legislation legalizes physician-assisted suicide and euthanasia. On 4/10/01, the Dutch Parliament passed the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, legalizing physician-assisted suicide and euthanasia. The law goes into effect on 1/1/02.

b. Study of euthanasia practices. A new study will be launched in 2001 to evaluate the operation and procedures of the regional euthanasia review committees, examine factors influencing the willingness of physicians to report euthanasia, and gather data allowing comparison with data from prior studies in 1991 and 1996.

c. United Nations Human Rights Committee. On 7/31/01, the United Nations Human Rights Committee issued its final conclusions and recommendations on a report submitted to it by the Netherlands regarding the new law on euthanasia and assisted suicide. The committee welcomed the creation of an independent National Ombudsman and Equal Treatment Commission but expressed concern about safeguards against abuse or misuse, including undue influence by third parties and application of the law to minors and newborn disabled infants.

10. Philippines. A survey by the Pain Society of the Philippines among hospitals showed that about 70% of patients in pain are treated inadequately. According to Dr. Lilybeth Reyes-Tanchoco, an anesthesiologist and coordinator

of the Pain Control Center of the MCU-FDTMF Hospital, causes include insufficient knowledge about pain management among caregivers, patient fear of developing an addiction to painkillers, patient failure to report pain, and inadequacies of the health delivery system itself.

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\* Some information obtained from media reports has not been independently verified.