



Recent Developments in Physician-Assisted Suicide

March 2003

Copyright © 2003 Valerie J. Vollmar, all rights reserved.

LITIGATION

1. Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002), appeal pending, No. 02-35587 (9th Cir.).
 - a. Case Filed. On 11/7/01, in response to Attorney General John Ashcroft's directive that prescribing lethal medication was not a legitimate medical purpose under the Controlled Substances Act, the State of Oregon filed a complaint in the U.S. District Court for the District of Oregon seeking a declaratory judgment and injunctive relief. The court allowed several individual patient plaintiffs, a physician, and a pharmacist to intervene as plaintiffs supporting the position of the state of Oregon. Named defendants included Attorney General John Ashcroft, Asa Hutchinson (Administrator of the Drug Enforcement Administration), Kenneth W. Magee (Director of the Portland DEA office), the United States of America, the U.S. Department of Justice, and the U.S. Drug Enforcement Administration. The court allowed several organizations to file amicus briefs.
 - b. U.S. District Court decision. On 4/17/02, Judge Robert E. Jones issued his written decision in favor of plaintiff and plaintiff-intervenors. Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002). Judge Jones permanently enjoined defendants from "enforcing, applying, or otherwise giving any legal effect to" Ashcroft's directive and ordered that health care providers in Oregon "shall not be subject to criminal prosecution, professional disciplinary action or other administrative proceedings for any actions taken in compliance with the Oregon Death with Dignity Act." Although plaintiff and plaintiff-intervenors had made statutory, administrative, and constitutional arguments, Judge Jones based his decision on statutory grounds exclusively, holding that neither the plain language of the Controlled Substances Act, its legislative history, nor the cases cited supported defendants' argument that Congress intended to delegate to the Attorney General the authority to override a state's determination as to the "legitimacy" of a medical practice. On 6/10/02, Judge Jones granted defendants' unopposed motion to stay plaintiff-intervenors' application for attorney fees and costs until defendants' appeal to the Ninth Circuit is decided.
 - c. Appeal to Ninth Circuit. On 5/24/02, defendants filed a notice of appeal to the Ninth Circuit Court of Appeals. The parties' last reply brief was filed on 12/23/02; numerous amicus briefs have been filed on both sides of the case. Argument has been set for 5/7/03 in Portland, Oregon. The losing side is expected to seek review by the United States Supreme Court.

LEGISLATION

1. Hawaii. On 3/7/02, the Hawaii House passed by a vote of 30-20 the Hawaii Death with Dignity Act, patterned after the Oregon Death with Dignity Act. The Senate initially voted 13-12 in favor of the bill but finally rejected it by a vote of 11-14. The proposed legislation, which was supported by Governor Benjamin J. Cayetano, was consistent with the 1998 recommendations of the governor's Blue Ribbon Panel on Living and Dying with Dignity. In January 2003, the Hawaii Women's Coalition unveiled its legislative package, which includes a similar bill, and Senator Colleen Hanabusa introduced the bill in the Senate. Governor Linda Lingle opposes physician-assisted suicide but has said that she probably would not veto a bill that comes to her with strong legislative support. Prior to opening of the 2003 legislative session, opponents of physician-assisted suicide launched a \$40,000 media campaign over a 12-day period.

2. Ohio. On 12/23/02, Ohio's governor signed into law HB 474, which was passed by the Ohio House on 5/21/02 and by the Senate on 11/20/02 and is effective on 3/24/03. The bill declares that assisting suicide is against the public policy of Ohio and creates the Compassionate Care Task Force to study and make recommendations on pain and symptom control treatment for patients with terminal illness or severe chronic pain. Under the legislation, professional licensing boards can revoke or refuse to grant a license for medical professionals who assist in a suicide.
 3. Oregon.
 - a. Political campaigns. On 10/14/02, Oregon Death with Dignity launched a direct-mail and online campaign to raise voter awareness about opposition to Oregon's physician-assisted suicide law from Republican U.S. Senator Gordon Smith and Kevin Mannix, the Republican candidate for governor. Senator Smith's opponent, Bill Bradbury, charged Smith with defying the will of Oregonians by supporting federal action to overturn the Oregon Death with Dignity Act.
 - b. New initiative filed. In October 2002, Oregon Citizens Alliance leader Lon Mabon filed a new initiative, called the Divine Life Sovereignty Amendment, which would amend the Oregon constitution to ban abortion and physician-assisted suicide. The initiative is a new version of an initiative Mabon unsuccessfully tried to place on the ballot for November 2002.
-

OTHER NATIONAL DEVELOPMENTS

1. Dr. Jack Kevorkian
 - a. Criminal conviction. After Dr. Jack Kevorkian lost the appeal of his murder conviction and the Michigan Supreme Court and the U.S. Supreme Court declined review, Kevorkian's petition for writ of habeas corpus requesting release from prison pending his appeal was voluntarily dismissed. *Kevorkian v. Ludwick*, No. 00-CV-75557 (E.D. Mich.), appeal dismissed, No. 01-2010 (6th Cir. Dec. 9, 2002).
 - b. Petition for writ of habeas corpus. On 7/17/02, Jack Kevorkian's attorney Mayer Morganroth filed a petition for writ of habeas corpus in U.S. District Court, alleging ineffective assistance of counsel and multiple violations of Kevorkian's constitutional rights at his original trial. *Kevorkian v. Grayson*, No. 02-CV-72927 (E.D. Mich.) Briefs were filed by the parties during January 2003.
 2. Utah physician acquitted of criminal charges. 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. On 11/22/02, jurors acquitted Weitzel after a two-week retrial on the same charges on which he was previously convicted. Members of the jury panel indicated that the testimony of expert witnesses in support of Weitzel's treatment was influential in the outcome. Medical malpractice claims against Weitzel are still pending. The Utah Division of Occupational and Professional Licensing is seeking to revoke Weitzel's medical license after he pleaded guilty to prescribing morphine and Demerol to two patients but keeping some of the drugs for his own use, and Weitzel is now serving a one-year sentence in a federal prison.
 3. Hemlock Society newspaper advertisement. After initially refusing to run an advertisement for a lecture by the Hemlock Foundation's senior vice president, Faye Girsch, the Hartford Courant newspaper was inundated by calls from interest groups and readers who disagreed with the rejection. The newspaper then agreed to accept the advertisement.
-

MEDICAL DEVELOPMENTS

1. Nursing homes. In a weeklong series that began on 10/20/02, the St. Louis Post-Dispatch reported that a review of government documents and court records shows that hundreds of elderly patients in nursing homes are dying of neglect. According to the series, most deaths are caused by an inadequate number of nurses and aides on whom the elderly rely for nutrition, hydration, and prevention of bedsores.

2. Thou Shalt Honor Foundation. The producers of "And Thou Shalt Honor," a PBS documentary released in October 2002, have formed a foundation to support family caregivers' efforts through advocacy, public education, and multimedia communications, including a 25-city series of Town Hall meetings on chronic care issues. The Thou Shalt Honor Foundation will publish a weekly newsletter called Caregivers USA News, with an initial circulation of about 40,000.
 3. Hospital palliative care programs. According to a survey of 4,000 hospitals conducted by the American Hospital Association, hospitals are adding palliative care programs by as much as 20% in one year. Five years ago, almost no hospital-based palliative care programs existed. From 2000 to 2001, however, the number of hospital-based palliative care programs increased from 658 to 806 hospitals.
 4. Public opinion poll on end-of-life care. The Last Acts Campaign to Improve Care and Caring Near the End of Life, in conjunction with the release of Means to a Better End: A Report on Dying in America Today, commissioned Lake Snell Perry & Associates to conduct a national survey of 1,002 adults during 8/30-9/1/02 about end-of-life care. Fifty-nine percent gave the current system a rating of only fair or lower, including 26% who rated it poor. Just under half of respondents felt that the system does only a fair (27%) or poor (19%) job of providing emotional support to the dying and their families, while 39% gave the system a fair or poor grade in making sure patients are as comfortable and pain-free as possible at the end of life. Ninety-three percent felt that it is important to improve how the system cares for dying people, and 72% felt that it is very important to do so.
 5. Last Acts report card on care of the dying. On 11/18/02, Last Acts released a state-by-state report card on care of the dying concluding that none of the states is doing a good job. Criteria included the state's advance directive and pain policies, pain among nursing home residents, number of palliative care-certified physicians and nurses, location of death, hospital end-of-life services, and care in intensive care units at end of life. A Last Acts spokesperson said that the problem is one of "too few": too few physicians and nurses trained in pain control, too few nursing homes and hospitals with specialized palliative care, and too few people using hospice, and that significant improvements are possible. If all eight measures were counted equally and combined for a cumulative average, Oregon would come out with a C+, second only to Maine.
 6. Use of pain management standards by home care agencies. A study of home care agencies reported in January 2003 showed that home care agencies that use research-based pain management standards help patients feel better and their family caregivers feel less burdened. The study included 75 patients in an experimental group, which used interventions based on improved standards of care, and 89 patients receiving the usual care. Marlene Dufault, a University of Rhode Island nursing professor, conducted the study in South County, Providence, and Woonsocket. The experimental group reported decreased severity of pain, decreased interference of pain, increased satisfaction with interventions and caregiver responsiveness, and decreased family caregiver burden. Family caregivers for those patients reported fewer problems with sleep disturbances, financial strain, family adjustment, upsetting symptoms, disruption of plans, time demands, and feelings of confinement.
 7. Recent articles
 - a. Wayne Guglielmo, *Assisted Suicide? Pain control? Where's the Line?*, Medical Economics (Oct. 11, 2002), <http://www.memag.com> [in national survey of over 750 physicians in family and general practice, internal medicine, cardiology, ob/gyn, pediatrics, and other specialties, 49% of respondents supported physician-assisted suicide under some circumstances; 6% had helped a patient end his or her life; 24% had changed the way they treat pain because of fear of litigation, disciplinary action, or prosecution; 20% had given more pain-control medication than they considered optimal; 29% felt that the medical profession does an adequate job of dealing with pain, while 43% disagreed and 29% were uncertain].
 - b. Kathleen M. Foley, *Patients in Pain: Casualties of the War on Drugs*, 2 Ideas for an Open Society 1 (Oct. 2002) [author expresses concern that focus on illegal abuse of Oxycontin and drug addiction leads many people with chronic pain to forgo effective treatment with opioid analgesic medication].
 - c. Leslie Curry et al., *Could Adequate Palliative Care Obviate Assisted Suicide?*, 26 Death Studies 757 (2002) [survey of 2,805 Connecticut physicians found them nearly evenly divided on the question of whether there is a role for physician-assisted suicide when adequate palliative care is available, with 42% saying yes, 41% no, and 17% uncertain; respondents who believed that adequate palliative care would obviate the need for assisted suicide were more likely to have a religious affiliation, consider themselves relatively religious, have more terminally ill patients in their practice, and care for older patients].
-

INTERNATIONAL DEVELOPMENTS

1. Australia

- a. Nancy Crick. Nancy Crick, a 69-year-old resident of Queensland, ended her life on 5/22/02 in the presence of 21 family, friends, and supporters of voluntary euthanasia with the intent of challenging laws against assisting a suicide. Police investigating the case for possible criminal prosecution raided the home of John Edge, Crick's media adviser and a witness to her suicide, as well as property belonging to Dr. Philip Nitschke, and seized computers, e-mails, files, and other evidence. On 9/3/02, Nitschke announced that he had filed suit in the Darwin Supreme Court, seeking to recover seized items including the medical records of about 200 of his own patients and information on the members of the pro-euthanasia group Exit Australia. On 10/31/02, Justice Trevor Riley agreed that most of the records had nothing to do with the death of Crick and ordered Queensland police to return or destroy the vast majority of the records and pay Nitschke's costs in the court action. According to newspapers, a police report recommended Nitschke not be charged in connection with Crick's death.
- b. Recent deaths. Dr. Philip Nitschke's activities in conducting euthanasia workshops continue to stir controversy, with over 1,200 people having attended so far. Most recently, police are investigating the deaths of four people: an 80-year-old woman in Melbourne, Lisette Nigot in Perth, and Sydney and Marjorie Croft in Bundaberg—who ended their lives after consulting with Nitschke, although none of them was terminally ill.
- c. Exit Australia. In October 2002, Dr. Philip Nitschke reported that the membership of Exit Australia had increased from 2,500 to 3,200 since Nancy Crick's death.
- d. COGen machine. With financial assistance from the American Hemlock Society, Dr. Philip Nitschke has developed a debreather machine (called the "COGen" machine) that pumps carbon monoxide through a nasal tube and is used in conjunction with sedatives to assist a person to die. Nitschke was scheduled to unveil the machine at a national Hemlock Society conference in San Diego in January 2003. Australian authorities seized the machine at the Sydney airport under the Prohibited Export Act, which was amended three months earlier to prohibit the exportation of devices that could be used to commit suicide or assist another to do so. However, authorities allowed Nitschke to return to Australia with the parts of a rebuilt machine, and Exit Australia plans to begin producing the machines and distributing them to members by the end of 2003.

2. Belgium. On 10/25/01, the national parliament approved a bill legalizing euthanasia for competent adults with an incurable illness causing unbearable and constant suffering. The final step in implementing the new law occurred in September 2002, when the government set up a national evaluation committee of physicians and lawyers that will ensure that the law is followed.

3. France. In January 2003, nurse Christine Malevre was convicted and sentenced to 10 years in prison on six counts of murder for administering lethal medication to elderly, terminally ill cancer patients who died in 1997 and 1998 at a hospital in Mantes-la-Jolie west of Paris. Although Malevre claimed she was acting out of compassion, prosecutors argued that Malevre had a morbid fascination with death, and right-to-die groups withdrew their initial support of her cause.

4. Great Britain

- a. Guernsey. On 9/26/02, the States of Deliberation, the governing body for the Channel Island of Guernsey, voted 38 to 17 in favor of an investigation into the desirability of legislation legalizing voluntary euthanasia. The vote followed introduction of a private member's bill by Deputy Pat Mellor. The States of Deliberation is responsible for making Guernsey's laws in areas other than defense, foreign policy, and broadcasting, but the British Privy Council must approve any such legislation.
- b. Support for euthanasia legislation. In November 2002, Dee Banks, who suffers from a crippling illness, called on the government to adopt the recently published Compassion in Dying bill that would legalize euthanasia. Her proposal was rejected by the Department of Health, but an on-line poll showed that 81% of 100,000 people were in favor of such a bill.
- c. Assisted suicides in Switzerland. Dignitas, a Swiss charity, was founded in 1998 to enable its members to participate in assisted suicide in Switzerland, which does not criminalize assisted suicide if drugs are self-administered and the person involved is making a rational decision to die. Applicants for assisted suicide must provide a letter giving their reasons and medical records proving that they are suffering from a terminal illness, great pain, severe disability, or a long

- history of mental illness that makes their lives unbearable. In October 2002, the first British citizen used the services of Dignitas to die in Zurich. On 1/20/03, a second British man, 74-year-old Reginald Crew, who had motor neurone disease, also died. Euthanasia opponents and the British Voluntary Euthanasia Society have criticized such "death tourism," and the Director of Public Prosecutions is investigating whether a television broadcasting company that paid for broadcasting rights could be prosecuted for aiding and abetting a suicide that occurred in another country.
- d. Physician participation in assisted suicides. On 1/26/03, the Sunday Times of London reported that a practicing general physician from southeast Scotland had admitted to deliberately helping eight terminally ill patients to commit suicide by overdoses of sleeping pills or fatal morphine injections. The physician said six family physician colleagues had discussed with him their role in similar assisted suicides. A survey released the week before claimed that half of all physicians in the United Kingdom think that patients who suffer from a terminal illness should be allowed assisted suicide.
 - e. Poll of nurses. In an on-line poll of 1,173 nurses by Nursing Times released on 2/5/03, one in 20 nurses said that colleagues help patients to die. One-half believed that laws banning assisted suicide should be reviewed so that health professionals and relatives can help terminally ill patients die with dignity, while one-third said that existing laws should stand.
5. India. Two residents of Kerala have sought legal sanction to die on their own volition rather than waiting for natural death. In the first case, the Kerala High Court dismissed a petition filed in 1996 by retired teacher C.A. Thomas, who relied on Hindu scriptures and ancient Indian systems. The second petition was filed in 1998 in the Ernakulam sub-court by wealthy industrialist Kochauseph Chittilappilly; although the court has asked the state to respond, the state has not yet filed its reply.
 6. Ireland
 - a. Rosemary Toole Gilhooley. In October 2002, Rev. George Exoo and Thomas McGurrin of Beckley, West Virginia, appeared at a hearing in Beckley regarding the suicide of Rosemary Toole Gilhooley, a 49-year-old woman who died in Dublin in January 2002 after swallowing crushed sleeping pills, covering her head with a plastic bag, and breathing helium. Exoo is a minister at New River Unitarian-Universalist Fellowship and runs Compassionate Chaplaincy, a tax-exempt organization that counsels people seeking to commit suicide. Irish police, who attended the hearing, seek the men's extradition to Ireland. The men could be charged with assisting a suicide, a felony that can lead to a sentence of up to 14 years in prison. A lawyer representing Exoo and McGurrin instructed them to plead the Fifth Amendment and refuse to answer questions about Toole's death.
 - b. Bishops' Conference. The Irish Bishops' Conference marked Sunday, 10/13/02, as a "Day for Life," focusing on the issue of euthanasia. The bishops issued a new booklet and a pastoral letter, "Living with Dying," which condemn euthanasia as morally unacceptable.
 7. Japan. On 4/19/02, officials at Kawasaki Kyodo Hospital, south of Tokyo, said that a female physician killed a 58-year-old man on 11/16/98 by removing a tracheal tube and injecting a muscle relaxant after the patient suffered a cardiac arrest and lapsed into a coma following an asthma attack. The hospital reported the case to the Kanagawa prefectural police after concluding that the physician had not complied with the requirements set out in a 1995 ruling of the Yokohama District Court involving a hospital affiliated with the School of Medicine at Tokai University. In particular, the patient had not expressed his clear approval of the euthanasia. A panel of physicians at the hospital later concluded that the physician did not provide sufficient information about the patient's condition to family members. In December 2002, Dr. Setsuko Suda was arrested in connection with the charges and indicted for murder.
 8. The Netherlands. On 10/30/00, a court in Haarlem acquitted Dr. Philip Sutorius of charges in connection with the April 1998 assisted suicide of Edward Brongersma, an 86-year-old former politician who had no serious physical or psychiatric illness but was obsessed with his "physical decline" and "hopeless existence." Public prosecutors had called for Sutorius to be given a three-month suspended prison sentence, but the court found that Brongersma was suffering "hopelessly and unbearably," one of four criteria protecting Dutch physicians against prosecution. The public prosecutions office appealed, seeking a finding of guilt but no prison sentence. On 12/6/01, an appeals court in Amsterdam found that Sutorius was guilty of the criminal charges because he did not act for a medical reason, but rather because his patient was tired of life. However, the court imposed no prison sentence because Sutorius acted out of compassion and because the court viewed the case as a test case by the prosecutor. On 12/24/02, in the first test of new laws legalizing euthanasia in the Netherlands, the Dutch Supreme Court ruled that Sutorius was guilty of assisting a suicide because euthanasia is not permitted in the absence of "medically classified physical or mental diseases and afflictions."

9. New Zealand

- a. Pending legislation. New Zealand First MP Peter Brown introduced a private member's bill in parliament in 2000 that would legalize voluntary euthanasia.
 - b. Lesley Martin. In September 2002, Lesley Martin, a euthanasia campaigner, published the book To Die Like a Dog. The book describes how Martin, an intensive care nurse, gave her mother a morphine injection in May 1999 as Joy Martin was dying of cancer. Wanganui police are considering reopening their earlier inquiry into Joy Martin's death, which they had closed after finding insufficient evidence to charge anyone.
 - c. Recent deaths. Several recent deaths in New Zealand have raised controversy over assisted suicide. In August 2003, Rex Law, 77, was sentenced to 18 months in prison after pleading guilty to murdering his wife of 54 years, who suffered from Alzheimer's disease. In September 2002, former Voluntary Euthanasia Society member Victoria Vincent, 83, was found dead with a bag over her head. An 89-year-old man has been charged with murder in the death of his wife of 60 years in December 2002; she was found with a plastic rubbish bag over her head, while the husband was unconscious but recovered.
 - d. Massey University survey. In an annual survey of 1,000 people on political and social issues conducted in August and September 2002 by Massey University, more than 70% of those polled said they supported physician-assisted suicide for someone with a painful incurable disease, while 17% were opposed and the rest undecided. Support dropped to just under 50% for suicide assisted by nonphysicians, such as a relative, while 38% were opposed. Respondents under age 50 were more in favor of physician-assisted suicide (77%) than were those age 50 and over (67%).
 - e. Grey Power survey. Nearly 78,000 members of Grey Power will be surveyed on the ethics of assisted suicide through the group's Lifestyle Quarterly magazine due out in March 2003. The Voluntary Euthanasia Society applauded Grey Power's initiative in running the survey, but also called for a national referendum on the question.
10. Switzerland. The group Dignitas, which legally assists its members to commit suicide, now has 2,340 members and has assisted 147 of its members (about 80% from other countries) to take their lives. Critics have claimed that too much authority is vested in Dignitas' general secretary, Ludwig Minelli, that groups like Dignitas should be licensed, that mentally ill individuals are being assisted in suicide, that too many foreigners are traveling to Switzerland as "suicide tourists," and that each case should be assessed by a second physician. A group of legislators, physicians, and lawyers is calling on the Swiss government to pass legislation regulating assisted suicide, and Zurich prosecutors are investigating Dignitas for assisting in the suicide of mentally ill individuals.
-

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