



Assisting another to die

By Terry Casey QC

Euthanasia is again in the news after a doctor in Melbourne, a long-time advocate of a person being lawfully permitted to assist another to die, has disclosed that he provided a sufficient dose of Nembutal to a man slowly and painfully dying of cancer to permit him to take his own life. Geraldine Collins refers to this case in her President's Page.

It is a criminal offence in Victoria to assist a person to suicide and it is the responsibility of the police and prosecutors to charge and bring before the courts any person who has committed a crime. By definition, 'euthanasia' means the act of bringing about a painless death in the case of painful and incurable disease. It is not the act of causing the death of a person who has completely lost all quality of life and independence and simply wants to die.

The medical profession is placed in a particularly vulnerable position when it comes to assisting another to die. When the decision is made by a family that it would be a kindness to let an elderly parent pass away now rather than lingering on for a few more days, the medical profession is often called upon to do the act which hastens the death – perhaps morphine is administered for the dual purpose of pain relief and advancing the death. Most members of the community do not seem to object to that practice. But the next step is where a patient with a painful, terminal illness wants to die but simply cannot perform the act of ending life unaided. Is there a distinction between hastening the death of an elderly parent and that of a patient who is not wanting to commit suicide, but is wanting to avoid the suffering of illness?

The common law cases draw an important distinction between actively assisting a person to die (euthanasia) and permitting a person to die. Each case must currently be determined on its own individual circumstances¹ and, in every instance, the court has specifically stated that it is not making a decision about an act of euthanasia. At present, a patient who wishes but does not have the means to end life must seek a declaration from the courts that it would be lawful if, in accordance with the wishes of the patient, the particular medical treatment which is prolonging life be

terminated. If the patient is so incapacitated as to be unable to communicate the wish to end life, then the courts will investigate whether the patient had previously expressed an intention to end life in the circumstances which have occurred.²

Where a person of sound mind has signed an advance directive stating that in the case of a particular disability he or she would want to die, the law might currently permit the medical profession to withdraw life-saving measures such as medication, or artificial means of maintaining life such as ventilation³ or kidney dialysis.⁴ In some jurisdictions, nutrition and hydration might be withdrawn.⁵ Clearly, to end the means of maintaining life in those ways is to assist another to die. However, these are fairly exceptional cases and it is unrealistic to expect the courts to become involved on a case-by-case basis. Legislation is required if the issue is to advance.

Is Australia ready to permit members of the medical profession to assist patients suffering from painful and incurable diseases and who wish to avoid unnecessary suffering by facilitating a less painful, advanced death? Public debate has at least attained some momentum in the press.

However, the issue may wither away again unless it is explored via a comprehensive public inquiry (by the Australian Law Reform Commission, for example). A criminal trial is surely not the means to bring about reform. ■

Notes: **1** The principles of common law are conveniently set out in *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229; *Hunter and New England Health Service v A* [2009] NSWSC 761; *Re JS* [2014] NSWSC 302 and the cases therein referred to.

2 See *Hunter*. **3** See *Re JS*. **4** See *Hunter*. **5** See *Brightwater*.

Terry Casey QC practises in personal injury litigation in Melbourne, particularly in cases involving catastrophic injury.

PHONE (03) 9225 7292. **EMAIL** terrycasey@barristersgroup.com.au.