

# The Law at the End of Life

## *R (Nicklinson & Ors) v*

## SSJ

by

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# A Timeless Debate or a Debate of Its Times?

- "It makes a great deal of difference whether a man is lengthening his life or only his death. If the body is useless for service, then why should he not free the struggling soul? Perhaps he should even do it a little before he needs to, lest when the time comes he may be unable to perform the act. Since the danger of living in wretchedness is so much greater than the danger of dying soon, he is a fool who refuses to sacrifice a little time to win so much. Few men have lasted through extreme old age to death without impairment, and many have lain inert and useless. How much more cruel, then, do you suppose it really is to have lost a portion of your life, than to have lost your right to end it?": Seneca *Ep.* LVIII. (1<sup>st</sup> Century CE)
- "This I choose to do. If there is a price, this I choose to pay. If it is my death, then I choose to die. Where this takes me, there I choose to go. I choose. This I choose to do." Wintersmith, *Discworld 35*, Sir Terry Pratchett (21<sup>st</sup> Century CE)
- "Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made": *Nicklinson*, Lord Neuberger, at para. 118

# A Basic Anatomy of the Law

## Homicide

- Murder is a common law offence in England and Wales. It carries a mandatory life sentence. It is committed if a person kills another intending to kill or to inflict grievous bodily harm.
- Manslaughter is also a common law offence which carries a maximum sentence of life imprisonment. Voluntary manslaughter has the same ingredients as murder, but will arise where a person is able to rely on specified mitigation such as diminished responsibility and loss of control.
- “The doing of a positive act with the intention of ending life is and remains murder” – *Airedale v NHS Trust v Bland* [1993] AC 789,885 per Lord Browne-Wilkinson.
- Terms such as voluntary euthanasia or mercy killings therefore describe either murder or manslaughter. The fact that an individual may act for what appear to be well-intentioned motives, such as acting out of compassion or love, for the benefit of the person, even at their request or direction, does not alter the position.
- But a doctor will not commit an offence when withdrawing life-sustaining treatment

# A Basic Anatomy of the Law Suicide

- Until 1961 it was a criminal offence to commit suicide: “self-murder”.
- A person who aided or encouraged another to commit that offence was also guilty of an offence: see *R v Croft* [1944] 1 KB 295
- The offence of suicide was abolished by s.1 of Suicide Act 1961.
- S.2 & 2A now deal with encouraging or assisting suicide.

# S.2 and 2A of Suicide Act 1961

"(1) A person ("D") commits an offence if –

(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) D's act was intended to encourage or assist suicide or an attempt at suicide.

...

(1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.

...

(2) If on the trial of an indictment for murder or manslaughter of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1).

(4) ...no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

Section 2A:

"(1) If D arranges for a person ("D2") to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it."

# Historical case overview

- *Airedale NHS Trust v Bland* [1993] AC 789
- *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147
- *In re B (Consent to Treatment – Capacity)* [2002] 1 FLR 1090
- *R(Pretty) v DPP* [2002] 1 AC 800
- *Pretty v United Kingdom* (2002) 35 EHRR 1
- *R(Purdy) v DPP* [2010] 1 AC 345
- *R(Nicklinson and Lamb) v SSJ* and *R(AM) v DPP* [2014] UKSC 38
- *Nicklinson and Lamb v UK* [2015] ECHR 709
- *R(AM) v GMC* (2015)

# Parliamentary Scrutiny

Assisted Dying for the Terminally Ill Bill 2005 introduced by Lord Joffe

Proposed amendment to the Coroners and Justice Act 2009 by Lord Falconer of Thoroton moved an amendment to permit assisting the "terminally ill" to commit suicide

Approval of 2009 Act by the House of Commons with brief debate explaining purpose of section 59: Hansard (HC Debates), 26 January 2009, col 35.

Adjournment debate on assisted dying in the House of Commons in November 2008 - Hansard (HC Debates), 11 November 2008, cols 221WHff.

Debate on the DPP's 2010 Policy in House of Commons March 2012: Hansard (HC Debates), 27 March 2012, cols 1363ff.

Assisted Dying Bill 2014 by Lord Falconer

Assisted Dying (No.2) Bill 2015: rejected by House of Commons at 2<sup>nd</sup> Reading (330:118)

# Nicklinson and Lamb and AM

- Prohibition of assisted suicide within the wide margin of appreciation afforded to member states of Convention. Interference with right to private life balanced against interests of protecting vulnerable people from being pressured into suicide but not possible for court to make its own assessment on the evidence available (Baroness Hale and Lord Kerr dissenting).
- Courts had power to declare legislation of this kind incompatible with the Convention even where within margin of appreciation and not outside court's institutional powers to do so (Lords Clarke, Sumption Reed and Hughes dissenting).
- Inappropriate for the courts to declare section 2(1) of 1961 Act incompatible with article 8 (Baroness Hale and Lord Kerr dissenting).
- DPP's policy lawful.

# Nicklinson and Lamb v UK

- Procedural protection in Article 8 did not extend to intervention in the margin of appreciation exercised through primary legislation. Contracting States generally free to determine which of the three branches of government responsible for taking policy and legislative decisions. Assessment made by UK through s2(1) of the 1961 Act. If domestic courts required to give a judgment on the merits of such a complaint this could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order. Odd to deny domestic courts charged with examining the compatibility of primary legislation with the Convention the possibility of concluding, like ECtHR, that Parliament best placed to take a decision on the issue in question in light of the sensitive issues, notably ethical, philosophical and social, which arise.
- Majority of Supreme Court judges did deal with the substance of the first applicant's claim anyway (see Lords Neuberger, Mance Wilson and Lord Reed). Attaching "very considerable weight" to views of Parliament did not mean that they failed to carry out any balancing exercise.
- Complaint re voluntary euthanasia inadmissible as applicants had not exhausted domestic remedies.

# Some Issues

- Change for Parliament or for the Courts? Majority 5:4 on institutional competence. But see Lord Sumption's 3 reasons.
- Voluntary euthanasia v assisted suicide: acts different from omissions?

“To my mind, the difference between administering the fatal drug to a person and setting up a machine so that the person can administer the drug to himself is not merely a legal distinction. Founded as it is on personal autonomy, I consider that the distinction also sounds in morality.

...If the act which immediately causes the death is that of a third party that may be the wrong side of the line, whereas if the final act is that of the person himself, who carries it out pursuant to a voluntary, clear, settled and informed decision, that is the permissible side of the line. In the latter case, the person concerned has not been "killed" by anyone, but has autonomously exercised his right to end his life.” - Lord Neuberger

- Eligibility: terminally ill or some other category?
- Authorisation for doctors or the courts?
- Evidence for assessment: what process to follow?
- Comparative approach: significance of other countries (Canada etc)