



Recent Developments in Physician-Assisted Suicide

June 2002

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LITIGATION

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

case on a constitutional level and would issue his decision between 4/17 and 4/19/02. On 4/17/02, Judge Jones issued his written decision in favor of plaintiff and plaintiff-intervenors. 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.

(1) Jurisdiction. Defendants argued that the district court lacked jurisdiction because Ashcroft's directive constituted final determinations, findings, and conclusions of the Attorney General within the meaning of 21 U.S.C. § 877, giving exclusive jurisdiction to the courts of appeals. As a result, defendants argued, Judge Jones' earlier orders in the case were void. Although Judge Jones said that the correct answer to this question is by no means clear, he rejected this argument on the ground that the statute seems to apply only to a quasi-judicial determination that resolves disputed facts in a specific case after some level of administrative proceedings that has produced an administrative record that can be considered by the court. However, because the Ninth Circuit Court of Appeals could decide otherwise on appeal, Judge Jones also noted that defendants had agreed at the hearing that plaintiff's suit was timely filed and that, if the district court lacked jurisdiction, transfer to the Ninth Circuit would be appropriate under 28 U.S.C. § 1631.

(2) Standing. Defendants earlier had argued that the state of Oregon lacked standing to bring the suit. Although defendants did not pursue this argument at the hearing, Judge Jones (in order to put this matter firmly to rest) found that the state of Oregon met the statutory and constitutional requirements for standing. Judge Jones also noted that the defendants had not challenged the standing of the patient plaintiff-intervenors and had agreed at the hearing to permit patients to join as parties if necessary due to additional deaths. Thus, in lieu of class certification, he enjoined defendants from objecting to future addition or substitution of patient plaintiff-intervenors.

(3) Statutory arguments. Judge Jones based his decision on statutory grounds exclusively. Defendants argued that the Attorney General was authorized to issue his directive by the federal Controlled Substances Act and its implementing regulations. Judge Jones, however, ruled that neither the plain language of the 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.

(4) Administrative arguments. Plaintiff and plaintiff-intervenors argued that Ashcroft's directive was not an interpretive rule, but a substantive rule, and therefore was invalid for failure to follow the formal rule-making procedures required by the Administrative Procedures Act. Although Judge Jones said that I tend to agree with this argument, he found the argument to be moot in light of his ruling on the statutory issues.

(5) Constitutional arguments. Plaintiff and plaintiff-intervenors argued that Congress has no constitutional authority under the Commerce Clause to regulate the medical practices of Oregon physicians and pharmacists, that any attempt by Congress to invalidate medical practices authorized by Oregon law would be unconstitutional under the Tenth Amendment, and that Ashcroft's directive violated the Fifth Amendment due process right of patients to adequate palliative care, including terminal sedation. Judge Jones found these arguments to be moot in light of his ruling on the statutory issues.

- e. Request for attorney fees. On 5/1/02, patient plaintiff-intervenors filed a motion requesting that they be awarded attorney fees and costs in the amount of \$1,036,272.01. In an order issued on 5/3/02, Judge Jones sua sponte struck the request to the extent it sought fees at market rates, because the record did not support a finding of bad faith on the part of the defendants, and gave counsel 20 days to submit a revised request using the hourly rates set forth in 28 U.S.C. § 2412(d). The order also said, Counsel should reconsider whether the services of 49 attorneys and legal assistants during less than five months of litigation can be justified as reasonably necessary to address the key issues in this case. On 5/23/02, patient plaintiff-intervenors filed a revised application for attorneys' fees and costs in the amount of \$741,835.97.
- f. Appeal. On 5/28/02, defendants filed a notice of appeal to the Ninth Circuit Court of Appeals (a process which is likely to take at least 18 months). The losing side is expected to seek review by the United States Supreme Court.

LEGISLATION

Hawaii. On 3/7/02, the Hawaii House passed by a vote of 30-20 two bills relating to physician-assisted suicide. HB 2487 would adopt the Hawaii Death with Dignity Act, patterned after the Oregon Death with Dignity Act. HB



Briefing on the appeal was completed on 2/8/02, and the parties have requested oral argument.

Illinois physician's license ordered reinstated. In November 1999, the Illinois medical board suspended indefinitely the medical license of Chicago cardiologist Dr. Lance Wilson. Wilson was charged with causing the death of Henry Taylor on 9/28/98 at Olympia Fields Osteopathic Hospital and Medical Center by an injection of potassium chloride, which Wilson claimed was intended merely to slow Taylor's heart so he would fall unconscious and not suffer through his own painful suffocation after his trachea collapsed. In April 2002, Cook

going public with their planned suicides to keep up pressure over euthanasia reform. On 5/24/02, the niece of 85-year-old Arthur Schilperoord announced that he took his life by maneuvering his wheelchair off a Perth jetty on 4/29/02 because he suffered from throat cancer but could not get physicians to help him die.

- d. Australian Medical Association. In a secret ballot at the national conference of the Australian Medical Association on 5/27/02, members rejected 34-79 a proposal that the organization adopt a neutral position on the issue of voluntary euthanasia. However, the conference passed by a vote of 65-48 a resolution that the AMA support physicians whose primary intent is to relieve the suffering and distress of terminally ill patients in accordance with patients' wishes and interests, even though a foreseen secondary consequence is the hastening of death. The wording of the draft resolutions could still be changed before being adopted by the federal council.
- e. National parliament. Greens Senator Bob Brown has announced that he will introduce a private member's bill to allow voluntary euthanasia sometime after the Senate begins meeting on 8/19/02.
- f. New South Wales. In March 2002, the upper house of the New South Wales parliament rejected by a vote of 26-9 the Rights of the Terminally Ill Bill, which would have permitted voluntary euthanasia.
- g. South Australia. On 5/8/02, Sandra Kanck, deputy leader of the South Australian Democrats, introduced voluntary euthanasia legislation in the South Australian parliament. The Dignity in Dying Bill, which is essentially the same as a bill Kanck introduced without success the prior year, would allow the terminally ill to choose to end their lives but only under the strict guidance of a monitoring committee.
- h. West Australia. Following Nancy Crick's suicide, Greens MP Robin Chapple announced that the West Australian Greens will introduce a voluntary euthanasia bill in the state parliament before the end of 2002. Chapple said that any bill probably would not be debated for up to two years because of the already-packed legislative agenda.

2. Belgium

- a. Euthanasia bill passes. On 5/16/02, the Belgian House of Representatives approved by a vote of 86-51, with 10 abstentions, a bill legalizing 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 will be set up to ensure that the law is followed. The opinion of a second physician will 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) will be required, and at least one month will have to elapse between the patient's request and the act of euthanasia. The Belgian Senate had approved the bill on 10/25/01 by a vote of 44-23, with two abstentions. The Christian Democrats have announced that they will fight the new law in court.
- b. Newspaper poll. Despite Belgium's strong Catholic culture, the newspaper La Libre Belgique found that 72% of Belgians were in favor of adopting the new euthanasia law.

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. In March 2002, the Supreme Court of Canada announced that it would treat the letters and other documents received from Latimer as a motion for rehearing.
- b. Jim Wakeford. On 2/7/01, provincial Justice Katherine Swinton dismissed a constitutional lawsuit filed by AIDS activist Jim Wakeford, who had sought the right to die with the help of a physician. Justice Swinton found that it was plain and obvious that the suit could not succeed in light of the Supreme Court's decision in the Sue Rodriguez case. In April 2002, the Supreme Court refused to consider Wakeford's appeal.

New technology. John Hofsess, research coordinator for NuTech, has reported on development of a device known as the "blue box" that can be used by patients wishing to end their lives. Like the

the French parliament to debate euthanasia in the hope that France will become the third European country to legalize it.

6. Great Britain

- a. Diane Pretty. 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 Diane die 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 European Convention on Human Rights. After a hearing, the High Court ruled on 10/18/01 that the law did not allow a family member to help a loved one to die. On 11/29/01, the five law lords of the House of Lords affirmed the High Court's decision. On 3/19/02, Mrs. Pretty's appeal was argued before the European Court of Human Rights, which had given expedited consideration to the case. On 4/29/02, a seven-judge panel of the court unanimously ruled against Mrs. Pretty. The decision is reported at <http://www.echr.coe.int/Eng/Judgments.htm>. With the backing of the Voluntary Euthanasia Society, the couple asked the public to sign an Internet petition (<http://www.Justice4Diane.org.uk>) to encourage a change in the law. Mrs. Pretty died of her disease on 5/11/02.
 - b. Phil Such. In February 2002, Phil Such, a 37-year-old man from Somerset who suffers from motor neurone disease, began a hunger strike in an effort to change the law banning voluntary euthanasia.
 - c. Court grants woman's request to have ventilator withdrawn. On 3/22/02, Dame Elizabeth Butler-Sloss, judge of the High Court, held that a 43-year-old quadriplegic woman (identified only as "Miss B") was competent to direct that her ventilator be withdrawn so that she could be allowed to die. In addition, the judge awarded her 100 pounds nominal damages and 55,000 pounds in agreed costs. The woman's lawyers argued that the woman had the right to refuse life-prolonging treatment under the European Convention on Human Rights, but her treating physicians said it would be against their professional ethics to turn off the ventilator. The hospital involved said that it would not appeal the decision, and the woman died on 4/24/02 after the ventilator was withdrawn.
 - d. Possible parliamentary debate. A cross-party parliamentary group, Compassion in Dying, is pressing for a debate in parliament on the issues raised by the Diane Pretty case.
 - e. 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. On 4/30/02, the council's working group issued draft guidance stating that physicians are legally bound to accept the decisions of a competent patient. The council said that the case of "Miss B" was one where the guidelines would be particularly applicable.
 - f. Public opinion poll. A survey of 1,000 British adults conducted for Channel 4's Powerhouse and released on 3/19/02 showed that 65% believed that family physicians should be able to assist in ending the life of terminally ill patients who wish to die, while 29% disagreed. In addition, 55% approved of a close relative being given the same right, while 37% disagreed.
7. Japan. On 4/19/02, officials at Kawasaki Kyodo Hospital, south of Tokyo, said that a female physician killed a man in his 50's in 1998 by 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. An in-house hospital committee later concluded that a nurse, acting under the physician's orders, had administered the injection.
 8. Thailand. A draft National Health Bill includes the following language: "A person has the right to decide on treatment methods or reject treatment in the last period of his or her life, in order to die in peace and with dignity as a human being." Amphon Jindawatthana, director of the Health Systems Reform Office responsible for drafting the bill, has said that the bill would not allow euthanasia but merely permit end-stage patients to choose whether to accept or reject treatment. The proposal is raising controversy in the legal and medical communities in Thailand.

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