Recent Developments in Physician-Assisted Suicide

June 2003

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 patients, 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.

    c. Appeal to Ninth Circuit. On 5/24/02, defendants filed a notice of appeal to the Ninth Circuit Court of Appeals. Numerous amicus briefs were filed on both sides of the case. The case was argued on 5/7/03 in Portland, Oregon, before a three-judge panel consisting of Clifford J. Wallace, a San Diego-based senior judge appointed by President Nixon in 1972; Donald P. Lay, a St. Paul, Minnesota-based senior judge from the Eighth Circuit Court of Appeals appointed by President Johnson in 1966; and Richard Tallman, a Seattle-based judge appointed by President Clinton in 2000. Questioning was vigorous and focused on issues of jurisdiction and ripeness as well as on the merits of the case. The panel is likely to issue its decision by the end of summer 2003. The losing side may seek review by an en banc panel of 10 or 11 Ninth Circuit judges and ultimately is expected to seek review by the United States Supreme Court.

LEGISLATION

1. Arizona. H.B. 2454 (the "aid in dying" bill), which is similar to the Oregon Death with Dignity Act, has been introduced in the Arizona legislature. The House Committee on Health held a hearing on the bill on 2/27/03, after which the chairman announced that the bill would be held in committee.

2. Arkansas. On 4/17/03, the Arkansas legislature enacted the Chronic Intractable Pain Treatment Act, 2003 Arkansas Laws Act 1405 (S.B. 265). The Act recognizes that the use of dangerous or controlled drugs to treat chronic intractable pain is a legitimate medical purpose and provides that the Arkansas State Medical Board may not discipline a physician solely for prescribing such drugs for this purpose. The Act also creates the Pain Management Review Committee, consisting of five physicians with pain management experience, and authorizes the medical board to refer a physician to the committee for review and recommendations in lieu of a disciplinary hearing.

3. 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. On 1/17/03, Senator Colleen Hanabusa again introduced the bill in the Senate as S.B. 391. The bill was referred to committee and did not reach a vote.

4. North Carolina. On 2/20/03, Senators Jim Forrester and Bill Purcell, both physicians, filed S.B. 145, which would make assisted suicide by a licensed health care professional a Class D felony. The bill was referred to committee.

5. Oregon

    a. Deaths during 2002. On 3/6/03, the Oregon Department of Human Services issued a report on deaths during 2002 under the Oregon Death with Dignity Act. The complete report is available on-line at www.ohd.hr.state.or.us/chs/pas/ar-index.cfm. A brief version of the report is found in Katrina Hedberg et al., *Five Years of Physician-Assisted Suicide in Oregon*, 348 New Eng. J. Med. 961 (2003). The report included the following information:

    (1) Prescriptions written. In 2002, 58 prescriptions were written for lethal doses of medication, an increase from 24 prescriptions in 1998, 33 in 1999, 39 in 2000, and 44 in 2001.

    (2) Number of patients. In 2002, 38 patients died after taking lethal medication, as compared to 16 patients in 1998, 27 in 1999, 27 in 2000, and 21 in 2001. Of the 58 persons who received prescriptions under the Act during 2002, 36 died after taking lethal medication, 16 died from their underlying illness, and six were alive as of the end of 2002. An additional two persons who received prescriptions during 2001 died after taking their medications in 2002.

    (3) Patient characteristics. Median age of the 38 patients who died was 69, 97% were white, 71% were male, 53% were married, 40% lived in the Portland metropolitan area, and 26% were college graduates. Thirty-two of the 38 patients who died had cancer, 92% were enrolled in a hospice program (the other patients were offered hospice but declined), and all but one patient had health insurance.

    (4) Patient concerns. The most common reasons for choosing assisted suicide expressed by patients to their physicians were loss of autonomy (84%), inability to participate in activities that make life enjoyable (84%), loss of control of bodily functions (47%), and being a burden on family, friends, or caregivers (37%). Ten patients cited concerns about pain control, and one patient voiced concern about the financial implications of treatment.

    (5) Mental health evaluations. Five of the 38 patients received a psychiatric or psychological consultation.

    (6) Medical information. The lethal medications used were pentobarbital (90% of patients), secobarbital (5%), and tuinal (5%). The physician was present when the medication was ingested in 34% of cases, with other health care providers present in 78% of cases. Median time from taking the medication to unconsciousness was five minutes (individual times ranged from 1-30 minutes). Median time from taking the medication to death was 20 minutes (individual times ranged from 5 minutes to 14 hours). No patient regained consciousness after taking the medication. One patient coughed after taking the medication and another vomited.

    (7) Physician characteristics. A total of 33 physicians prescribed lethal medications to 58 persons. The physicians' median years in practice was 18.5.

    Oregon Health Division statistics for 2002 generally were consistent with statistics for 1998-2001.

    b. Compassion in Dying of Oregon. Compassion in Dying of Oregon reported in spring 2003 that it assisted 47 of the 58 patients who were prescribed lethal medication in 2002 and 30 of the 38

patients who died after taking lethal medication. During 2002, Compassion received 3,509 telephone calls, e-mails, and letters, a 30% increase from 2001. The organization also reported that, because of its work with the terminally ill, at least 17 clients in 2002 chose not to hasten their deaths by violent means.

6. Wisconsin. Senator Fred Risser and Representative Frank Boyle, Democrats who have spent 10 years trying to get the Wisconsin legislature to pass a law similar to Oregon's Death with Dignity Act, vowed in April 2003 that they would introduce the bill again. The bill has never received a vote in the full Assembly or Senate and often has not even been given a public hearing in past legislative sessions.

OTHER NATIONAL DEVELOPMENTS

1. Dr. Jack Kevorkian. 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 in connection with the death of Thomas Youk by lethal injection. *Kevorkian v. Grayson*, No. 02-CV-72927 (E.D. Mich.) Briefs were filed by the parties during January and February 2003.

2. Arizona physician charged with overprescribing pain medication. Dr. Jeri B. Hassman, a Tucson pain management specialist, was arraigned on 4/1/03 on 66 federal charges that she prescribed various painkillers to six patients without a legitimate medical reason. The drugs were Schedule II narcotics including morphine, methadone, Vicodin, and Oxycontin. Hassman's DEA certificate of registration allowing her to prescribe controlled substances was suspended in November 2002, but she has continued to practice medicine. According to Hassman's lawyer, most of her 235 patients on controlled substances switched to other physicians, most of whom continued to prescribe the same or a higher dosage of the controlled substance that Hassman was prescribing. Hassman also was arraigned on 42 counts relating to the manner in which she billed a managed health-care program for chiropractor services not covered by the plan.

MEDICAL DEVELOPMENTS

a. David J. Casarett et al., *Is Satisfaction with Pain Management a Valid and Reliable Quality Indicator for Use in Nursing Homes?*, 50 J. Am. Geriatrics Soc'y 2029 (2002) [survey of 66 nursing home residents with pain in two urban nursing homes suggested that satisfaction with pain management can be measured reliably when residents are able to report their pain].

b. Debra K. Weiner & Thomas E. Rudy, *Attitudinal Barriers to Effective Treatment of Persistent Pain in Nursing Home Residents*, 50 J. Am. Geriatrics Soc'y 2035 (2002) [survey in seven nursing homes of 75 nurses, 75 certified nursing assistants, and 75 residents experiencing pain regularly revealed differing resident and staff attitudes that may serve as barriers to detection and management of persistent pain].

c. Sami A. Hurst & Alex Mauron, *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians*, 326 Brit. Med. J. 271 (2003) [describes the history of the Swiss law allowing assisted suicide, the current debate, and the existing data on euthanasia and assisted suicide in Switzerland].

d. Katrina Hedberg et al., *Five Years of Physician-Assisted Suicide in Oregon*, 348 New Eng. J. Med. 961 (2003) [SEE DISCUSSION ABOVE].

e. Mark P. Pfeifer et al., *The Value of Disease Severity in Predicting Patient Readiness to Address End-of-Life Issues*, 163 Arch. Intern. Med. 609 (2003) [study of 100 outpatients with a diagnosis of chronic lung disease showed that neither disease severity nor recent clinical events could be used to predict a patient's readiness to engage in end-of-life discussion with the patient's physician].

f. Tom Fahey et al., *Quality of Care for Elderly Residents in Nursing Homes and Elderly People Living at Home: Controlled Observational Study*, 326 Brit. Med. J. 580 (2003) [study of elderly patients in three general practices in Bristol, England, including 172 nursing home residents and 526 patients living at home, revealed that the overall standard of care was inadequate regardless of where the patient lived, with problems including overuse of unnecessary or harmful drugs, underuse of beneficial drugs, and poor monitoring of chronic disease].

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. Queensland police have been investigating the case for possible criminal prosecution. On 5/20/03, Queensland Police Commissioner said that the Director of Public Prosecutions was still considering the case. Dr. Philip Nitschke used Crick's gravesite memorial on 5/28/03 to launch a new organization called Nancy's Friends.

b. Distribution of suicide information over Internet. Australian Justice Minister Chris Ellison has indicated that the government wants to introduce new offenses for distributing information that incites or promotes suicide via the Internet. The new offenses would reinforce existing bans on importing and exporting documents related to the use of suicide kits.

c. Suicides in Switzerland. The Swiss group Dignitas legally assists its members to commit suicide and has assisted many of its members (about 80% from other countries) to take their lives. On 2/9/03, Dr. Philip Nitschke said that he was helping two Australians with terminal cancer, one from Sydney and the other from Melbourne, to investigate flying to Switzerland to obtain the assistance of Dignitas in taking their lives. The two Australians did not want to be identified for fear that they would not be allowed to leave the country, or that their families would face legal consequences if they also traveled to Switzerland.

d. Sydney conference. On 5/31/03, Dr. Philip Nitschke introduced his COGen suicide machine at the Killing Me Softly conference in Sydney organized by Exit Australia. The machine can be made for about $100. Nitschke also demonstrated use of the Exit suicide plastic bags.

e. West Australia. In September 2002, Greens MP Robin Chapple introduced a voluntary euthanasia bill in the state parliament. Legislative Council leader Kim Chance hopes that reform of the Upper House sitting hours would allow time to be set aside each week to debate non-Government bills, in which case the voluntary euthanasia bill probably would be among the private member's bills debated. Premier Geoff Gallop has said that the Labor party would allow a debate and conscience vote on euthanasia.

2. Canada. On 6/26/02, Vancouver Island police arrested 71-year-old Evelyn Martens of Langford, British Columbia, on charges of counseling suicide and aiding and abetting suicide in the deaths of Monique Charest on 1/7/02 in Duncan and Leyanne Burchell on 6/26/02 in Vancouver. On 6/27/02, police seized from Martens' home a computer and publications, videos, "exit bags," and other supplies belonging to the Right to Die Network of Canada and Last Rights Publications. Her bail conditions include a prohibition against possessing helium or plastic tubing and using the Internet. The maximum penalty on each charge is 14 years imprisonment, and Martens has requested a jury trial. Her preliminary hearing, which will determine whether enough evidence exists to warrant a trial, is expected to conclude on 6/12/03. Evidence at the hearing is under a publication ban. Martens has drawn money and support from international euthanasia groups.

3. Great Britain

    a. Proposed legislation in House of Lords. On 2/20/03, Lord Joffe, a retired human rights lawyer, introduced the Patient (Assisted Dying) Bill in the House of Lords. The bill would allow a terminally ill adult to receive medical help to die if two physicians had confirmed the diagnosis and were satisfied that the patient had considered alternatives such as hospice care. The bill does not have Government support and will not pass, but Lord Joffe said that parliament had to debate it.

    b. Proposed legislation in Isle of Man. On 5/13/03, the House of Keys, which is the parliament for the Isle of Man, voted 15 to 4 in favor of a bill to legalize voluntary euthanasia. An amendment was then passed to make the legislation subject to a select five-member committee taking evidence on the subject and reporting back to the House before the bill's introduction.

4. Ireland. Irish authorities have been investigating the involvement of Rev. George Exoo and Thomas McGurrin of Beckley, West Virginia, in 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. The men could be charged with assisting a suicide, a felony that can lead to a sentence of up to 14 years in prison. In April 2003, the Dublin Coroner's Court heard that a file on the case had been prepared and would be sent to the Director of Public Prosecutions shortly. The case has been adjourned and will come before the Dublin Coroner's Court again on 7/31/03.

5. 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. During her first hearing on 3/27/03, Suda pleaded not guilty to the charges. Her lawyer told the Yokohama District Court that the muscle relaxant could not have caused the patient's death and that Suda's intent was to help the patient die from natural causes. Prosecutors claimed that Suda's motive for the murder was to remove the financial burden on the patient's family.

6. New Zealand

    a. Pending legislation. In 2000, New Zealand First MP Peter Brown introduced a private member's bill (the "Death with Dignity Bill") that would legalize voluntary euthanasia. On 3/6/03, the bill was introduced for debate in parliament, and debate began in April 2003. The last time parliament debated the issue was in 1995, when a similar bill failed to pass. Prime Minister Helen Clark voiced conditional support for the bill, which is opposed by the New Zealand Medical Association and Hospice New Zealand.

    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. On 3/6/03, Wanganui police arrested Lesley Martin on attempted murder charges. She was released the same day on bail. Under the court's gag order, Martin may not talk to the media about her case but can continue campaigning for legalization of voluntary euthanasia. She has used donations from the public to set up a trust fund called My Life My Choice, which will be used for promoting legislative change and paying legal costs incurred by herself and others.

    c. Survey of physicians about prior participation in aid-in-dying. On 3/20/03, Auckland University psychology lecturer Dr. Kay Mitchell reported the results of an anonymous mail survey of 2,600

general practitioners. The survey asked the physicians about the last patient death they were involved with in the preceding 12 months. Thirty-nine of the physicians who responded indicated that they had participated in physician-assisted suicide or voluntary euthanasia by answering "yes" to the question "Was death caused by a drug prescribed, supplied or administered with the explicit purpose of hastening the end of life or enabling the patient to end their own life?"

Survey of physicians, Grey Power members, and students about acceptability of physician participation in aid-in-dying. On 3/26/03, Auckland University psychology lecturer Dr. Kay Mitchell reported the results of a survey conducted during 2000, in which 120 Auckland general practitioners, 595 Grey Power members, and 205 psychology students were asked to respond to a hypothetical scenario involving a patient with terminal illness and constant pain not alleviated by drugs. As the patient's condition deteriorates, the patient's doctor provides information on how to end life and prescribes drugs to do it, holds the drinking cup containing the drugs, and administers a lethal injection. Almost all of the physicians knew that physician-assisted suicide and voluntary