Medical law reporter

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JUSTINS v THE QUEEN: ASSISTED SUICIDE, JURIES AND THE DISCRETION TO PROSECUTE

Juries are often a crucial protection for citizens against unjust or highly controversial laws. The decision whether to proceed with a prosecution rests on the discretionary powers of prosecutors. In cases where the community is deeply divided over right and wrong, it appears that there is, at times, a transference from the public of thwarted law reform aspirations which can create difficult tensions and expectations. This case commentary considers an appeal by Shirley Justins following her conviction for manslaughter by gross criminal negligence as a result of her involvement in the mercy killing of her partner, Mr Graeme Wylie. The morally unsettled nature of the charges brought against her, her own initial plea, the directions given to the jury by the trial judge and even the basis of her appeal resulted in a convoluted and complicated legal case. Spigelman CJ and Johnson J ordered a new trial, Spigelman CJ stating that it was open for a new jury to consider (a) if Mr Wylie lacked capacity; and (b) whether there was criminal involvement by one person in another's death. Simpson J found that further prosecution on the count of manslaughter would amount to an abuse of process and that an acquittal should be entered. This case highlights how fundamentally unsettled are the publicly much debated and persistently contentious issues of euthanasia, assisted suicide, the right of a person to die a dignified death and the way their capacity in that respect should be assessed. It perhaps asks us to reconsider the role of juries and the exercise of discretion by Directors of Public Prosecutions in areas of law where the community and law-makers are deeply and intractably divided.

INTRODUCTION

In May 2008 the appellant, Ms Justins, was arraigned with Ms Caren Jenning for the murder (or in the alternative, aiding and abetting the suicide) of Mr Graeme Wylie. The jury found Ms Justins guilty of manslaughter by gross negligence and she was sentenced to a non-parole period of 22 months imprisonment with a balance of term of eight months to be served by periodic detention. Ms Justins appealed against her conviction. The basis for her appeal was the nature of the instructions given to the jury by the trial judge regarding the issue of Mr Wylie's capacity at the time of his death and the nature of the charge – manslaughter by gross criminal negligence: see *Justins v The Queen* [2010] NSWCCA 242 at [1]. The New South Wales Court of Criminal Appeal considered the following grounds of appeal (at [213]):

1: The trial miscarried because the concept of "capacity to commit suicide" was elevated to an element of the offence of manslaughter contrary to law.
2: The trial miscarried because the jury was not instructed that they needed to find beyond reasonable doubt that the act of the accused caused the death of the deceased.
3: The trial miscarried because an expert witness gave evidence about the content of a legal standard, namely causation, outside her area of expertise.
4: The trial miscarried because the jury did not receive proper directions on the assessment of the duty and standard of care.

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5: The trial miscarried because the jury was informed that they should convict the accused if she failed in her duty of case (sic – care) to supervise a suicide.
6: The Crown prosecutor's final address gave rise to a miscarriage of justice by reason of distracting and inappropriate factual analogies, inflammatory and prejudicial comments and the expression of personal opinion.

On the hearing of the appeal, the appellant was granted to [sic] leave to add two further grounds, formulated as follows:

7: The trial miscarried because the law relating to "the capacity to commit suicide" was erroneously formulated and, as a result, the directions in relation to each of the charges of murder, manslaughter and "aid and abet suicide" were erroneously formulated.
8: The trial miscarried because the jury were inadequately and erroneously directed in relation to the elements of manslaughter by gross criminal negligence.

BACKGROUND AND ESTABLISHED FACTS

Ms Justins had been the de facto partner of Mr Graeme Wylie, an ex-Qantas pilot, for around 20 years at the time of his death. In 2003, when he was 68, Mr Wylie had been diagnosed with Alzheimer's disease. His two sisters gave evidence that Mr Wylie was greatly upset at the diagnosis. They claimed he declared that he would end his life rather than regress through the disease's inexorable stages of decline. A Qantas colleague who said he had met Mr Wylie by chance at the local Cammeray shopping centre early in 2006 gave evidence that he had about half an hour's conversation with him during which Wylie had said: "My brain is fucked. I'm going to top myself … while I still know what's going on." The colleague claimed they had also discussed incidents in the past, including an aircraft accident, of which Mr Wylie appeared to have a definite recollection.

Following diagnosis with the disease, Mr Wylie had attempted suicide a number of times. Unfortunately. he neglected to prepare and sign an advance directive or power of attorney specifying what should happen at the end of his life in the event that by then he had lost capacity and/or who should then make health care decisions on his behalf. In 2005 he applied to the Swiss-based organisation, Dignitas, to assist him to die. His application to Dignitas was rejected on the basis of their concerns regarding his mental capacity to consent to the program they offered. Dignitas wrote to Mr Wylie to explain their decision, stating (at [15]):

> [I]t cannot be established with certainty to which extend [sic] your current abilities would comply with legal and general requirements to fully carry the responsibility of an accompanied suicide.

As a result of this rejection, in February 2006 Mr Wylie attempted suicide again by asphyxiation secondary to carbon monoxide poisoning after locking himself in his shed with his lawn mower running. Ms Justins was aware of the attempt and absented herself from the house at his request (at [16]). After this attempt failed, a friend of the couple, Ms Jennings, travelled to Mexico to procure the drug Nembutal after reading of its effectiveness for the purpose sought. Upon her return she gave the drug to Ms Justins. During this same month Ms Justins and Mr Wylie visited his solicitor in order to have his will changed. They had obtained a medical certificate that stated Mr Wylie was "quite capable of making his own decisions and understanding the nature of those decisions" (at [18]). The changes to the will resulted in the bulk of Mr Wylie's estate shifting from his daughters' favour to Ms Justins. At her trial Ms Justins admitted that she believed Mr Wylie did not, in fact, have testamentary capacity at the time the will was changed.

By the end of March Mr Wylie had commenced taking Maxolon on a number of consecutive days in order to cope with the anticipated nausea and possible vomiting that might occur as a result of ingesting the Nembutal. On 22 March Ms Justins, according to her testimony, placed the open bottle of Nembutal on the table in front of Mr Wylie and said, "This will relieve your pain Graeme. If you drink this you will die." The deceased said, "Yes" and poured the Nembutal into a glass. Ms Justins said "I want to come too" and he replied "No, I've got to do this alone". He then drank the glass of Nembutal. Ms Justins then left the house. When she returned, Mr Wylie had died (at [7]).

DIRECTIONS TO THE JURY

The original charge against Ms Justins was one of murder. Section 18(1) of the *Crimes Act 1900* (NSW) defines murder and relevantly provides (emphasis added):

(a) Murder shall be taken to have been committed where the act of the accused … causing the death charged, was done … with intent to kill … some person …

(b) Every *other* punishable homicide shall be taken to be manslaughter.

Manslaughter was offered in the alternative. Simpson J (at [248]-[263]) raised questions concerning the availability of involuntary manslaughter where an accused person acts with the intention that the death of another person will result but this argument was not put at trial and it was not presented as a ground of appeal.

There is no formal statutory definition of manslaughter by criminal negligence. It builds under common law upon the civil tort of negligence with the added element that the negligence must be so grave as to warrant criminal punishment (at [224]). The elements of the offence are (at [223]):

(i) that the accused owed a duty of care to the deceased;

(ii) that the accused acted in breach of that duty (whether by act or omission);

(iii) that the act or omission amounting to breach of duty caused (or accelerated) the death of the deceased;

(iv) that that act merited criminal punishment because:

  (a) it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and

  (b) it involved such a high risk that death or really serious bodily harm would follow; and

  (c) that the degree of negligence involved in the conduct is so serious that it should be treated as criminal conduct.

Manslaughter was not raised as an alternative verdict to murder at the outset of the trial but at a later time (at [137]). It was put to the jury, without contest from the appellant's counsel, that Ms Justins did owe Mr Wylie a duty of care. It was then necessary for the Crown to prove that the act or omission that constituted the breach of duty was the act or omission that caused Mr Wylie's death.

On appeal, Spigelman CJ, Simpson and Johnson JJ agreed that the trial judge was correct to instruct the jury to consider whether the act causing death was the act of Ms Justins framed in relation to the mental capacity of Mr Wylie. However, they found that the trial judge was in error in directing the jury to consider that a person "must be able to" meet five criteria drawn from expert evidence presented at the trial in order for that person to "make an informed decision" about their actions. The disapproved capacity checklist (at [25]) required that Mr Wylie

1. know the extent of his illness and its prognosis;
2. understand the nature of the act of suicide and its consequences;
3. comprehend the benefits and advantages of the alternatives (life and death);
4. be able to weigh the benefits and advantages and decide between them;
5. be able to communicate that decision.

This checklist is consistent with that reported in the case of in *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290; [1994] 1 FLR 31 at 33. In that case, Thorpe J established the functional three-stage common law test for capacity which requires a health professional to assess the ability of a patient to consent to the specific treatment being offered. These three stages are that a patient with capacity will *understand and retain*, in a broad sense, the nature, purpose and effect of the proposed procedure long enough to be able to consent or refuse consent for the treatment; they will *believe* the information they are given; and they will be able to *weigh up* the benefits and risks well enough to make a choice to proceed or not. The significant issue was whether it was for the jury to determine if any component of the "checklist" was essential for assessing capacity to commit suicide.

The Court of Criminal Appeal found that the trial judge erred in making the decision to not simply pose a general test to the jury such as "did the deceased have the capacity to make an independent and informed decision to take his own life" (at [86]) but instead asking them to consider a five-point capacity "checklist", which resulted in a transformation of "factual propositions into legal requirements" (at [2]) and went beyond asking the jury to consider whether the pouring and ingestion of the Nembutal were the acts of the deceased or the appellant (at [98]-[99] (Spigelman CJ), at [268] (Simpson J), at [343] (Johnson J)).

On appeal, Johnson J (at [365]) and Simpson J (at [269]) expressed the view that it was not useful to think of the reasons that would allow Mr Wylie to make a "rational decision" to end his own life as an appropriate assessment of his capacity to decide to suicide.

This position is supported in other cases to which Johnson J made reference in his judgment. He found that an examination of those cases revealed some criticisms of terms such as "informed decision" and "rational decision". For example, he found that in *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; [2009] NSWSC 761 McDougall J effectively rejected the contention that a refusal of treatment must be in any sense "informed". McDougall J said (at [28]):

> It is not necessary, for there to be a valid advance care directive, that the person giving it should have been informed of the consequences of deciding, in advance, to refuse specified kinds of medical treatment. Nor does it matter that the person's decision is based on religious, social or moral grounds rather than upon (for example) some balancing of risk and benefit. Indeed, it does not matter if the decision seems to be unsupported by any discernible reason, as long as it was made voluntarily, and in the absence of any vitiating factor such as misrepresentation, by a capable adult.

Johnson J (at [364]) also made reference to French CJ's comment in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [46] where he referred to the "complexity and variety of factors which may lead to suicidal behaviour". Johnson J stated (at [365]):

> [A] person possessing capacity may decide to commit suicide on a basis which is ill-informed or not supported by a reason, but it may be the reasoned choice of the person, which the law accepts will render the act of suicide the act of the person and not another person who provides the means of death. In my view, the last proposition reflects the appropriate test to be applied in a case such as this.

The issue of capacity in this case appeared also to have a temporal aspect. Indeed, the Crown Prosecutor stated in his opening address to the court (at [142], emphasis added):

> *[A]t the time of his death* Graeme Wylie did not have the mental capacity to exercise independent judgment to decide whether or not to commit suicide.

Yet Graeme Wylie had determined long before that he wanted to commit suicide. There were years of his actions and the evidence of witnesses who could verify his attempts and desire to commit suicide since his diagnosis with Alzheimers. But despite this and despite his membership of Exit International, an organisation that supported voluntary euthanasia and assisted suicide, if he was unable to comprehend the benefits and advantages of the alternatives of life and death *at the time* of ingestion of a lethal poison, as a matter of law he lacked the legal mental capacity necessary to suicide.

The fact that the jury acquitted Ms Justins of murder suggests that it was not satisfied that the appellant knew of Mr Wylie's lack of capacity. The Court of Criminal Appeal found that the directions given to the jury by the trial judge regarding Mr Wylie's capacity to commit suicide were confusing. The trial judge had said (at [42]):

> The Crown does not, for example, suggest that he did not understand the nature of death, or he did not understand that if he drank the Nembutal that he would die; the real question here is whether he had the capacity to make an informed, independent judgment about it, and chiefly the Crown is saying that the problem with capacity was in 3 and 4.

Of course, points 3 and 4 are the components relating to a person's ability to comprehend the benefits and risks of an action, weigh them up and then make a decision about which action to take. If the Crown contended that Mr Wylie understood the nature of death and that if he drank the Nembutal he would die, then clearly he had met the elements of points 3 and 4. If that were the case, then he committed suicide and there would be no case against Ms Justins except, perhaps, a charge of aiding and abetting a suicide. It was ultimately agreed that if Mr Wylie voluntarily consumed the Nembutal and that the issue in dispute was the determination of whether he knew and intended that by doing so he would end his life, it would be suicide and Ms Justins' acts in assisting him would meet the elements of the crime of aiding and abetting a suicide and the act causing his death was his own.

With respect to aiding and abetting a suicide, s 31C of the *Crimes Act 1900* (NSW) provides:

> (1) A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.

(2) Where:
(a) a person incites or counsels another person to commit suicide, and
(b) that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel,

the firstmentioned person shall be liable to imprisonment for 5 years.

In relation to the charges, Spigelman CJ said (at [31], emphasis added):

> Persons in the community, who choose to disobey the law, do so at the peril of being treated as a criminal and punished accordingly. As the evidence finally emerged, and as the offender's plea to the charge of aiding suicide indicated, both the offender and Ms Jennings had been engaged in serious criminal activity leading to the death of the deceased but *was this activity manslaughter or simply aiding and abetting a suicide? The distinction is important for the euthanasia debate*.

Simpson J, in her dissenting judgment, suggested that if the jurors had received written directions on the issue of causation in addition to their oral directions on duty of care and the assessment of capacity, it would have become apparent to them that the critical act by Ms Justins was not the failure to make inquiries about Mr Wylie's capacity but the provision to him of the Nembutal (at [247]). As that act, on the Crown's case, was unequivocally done with the intention of causing death, the Crown's allegation, Simpson J reasoned, should not have been manslaughter but murder. Simpson J made reference (at [252]) to *Pemble v The Queen* (1971) 124 CLR 107; [1971] HCA 20 in which Menzies J stated (at [216]): "The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done."

MANSLAUGHTER BY FACILITATING SELF-ADMINISTRATION OF A DRUG

In his decision, Spigelman CJ made reference to a United Kingdom manslaughter case, *R v Kennedy (No 2)* [2008] 1 AC 269; [2007] UKHL 38 at [15], where the House of Lords was asked to consider whether manslaughter was available where the appellant had prepared a dose of heroin and given the readied syringe to another, who had then injected himself with the heroin and died as a result. The question certified by the Court of Appeal for the opinion of the House of Lords was (at [2]):

> When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?

The House of Lords answered (at [25]): "In the case of a fully-informed and responsible adult, never."

This view is supported by the much-quoted statement of Hughes J of the New Jersey Supreme Court in the famous case of *Re Quinlan* 355 A 2d 647 (1976) where he said (at 664):

> We think that the State's interest [in the preservation of life] weakens and the individual's right to privacy grows as the degree of invasion increases and the prognosis dims.

The trial judge gave the following oral direction to the jury on this issue at ([32]-[33]):

> [T]he real issue here is whether it is Ms Justins' act that killed the deceased …
>
> [I]f the Crown has not satisfied you beyond reasonable doubt that he lacked that capacity, then, in law, the drinking of the Nembutal is his act, and not Ms Justins' act, and, if it is his act, then she did not murder him.
>
> So that is why it is fundamental, both to the offence of murder and the offence of manslaughter, that the Crown prove beyond reasonable doubt that the deceased, Mr Wylie, lacked the capacity to make a judgment as to whether or not to drink the Nembutal and cause his death.

Spigelman CJ concluded (at [128]-[130]) that the charge of manslaughter was available because Ms Justins did not know that her act was "likely to cause death". Simpson J, however, found that manslaughter was not an alternative verdict because the element of intent in Ms Justins' act of providing Mr Wylie with the Nembutal with the intention of him consuming it to end his life, amounted to an allegation of murder and therefore manslaughter should not have been available as an alternative for the jury (at [248], [250]-[251], [267]).

Johnson J observed ([340]):

> It is difficult to see a proper conceptual basis upon which manslaughter by criminal negligence could arise on the facts of this case.

COULD FAILING TO ASSESS CAPACITY CONSTITUTE MANSLAUGHTER?

With respect to whether the jury should have been directed to convict Ms Jennings of manslaughter on the basis that a reasonable person would have made inquiries as to the deceased's capacity before leaving him with the supply of a potentially deadly drug, Spigelman CJ stated that this was not a direction that should have been given and that additional assistance should have been provided to the jury to ensure clarity on the issue of causation. The stated basis for their position was that it was (at [109]-[110]):

> [d]ifficult to see how the failure to make enquiries could have constituted an alternative basis for a finding of criminal negligence … there was no clear articulation to the jury of how the failure to make enquiries about capacity could constitute the conduct which resulted in the provision of Nembutal.

In *R v Lavender* (2005) 222 CLR 67 at 87-88; [2005] HCA 37 it was determined that a consideration of negligence involves the application of an objective test based on the standard of a reasonable hypothetical person and therefore the standard of care required to be applied is that of the "reasonable" person. This allows for the conduct of the appellant to be compared to the conduct of the reasonable person who finds themselves in the circumstances of the appellant. The appellant's own knowledge of the circumstances is relevant when considering the circumstances in which the reasonable person is placed[1] and determining Ms Justins' duty with respect to Mr Wylie was also an important consideration in order to establish the *normative behaviour* expected of a "reasonable person" in a similar position so that the jury could better assess whether Ms Justins had failed in her duty and thus provide a salient reason why Mr Wylie had died and thus meet the test of causation for a finding of criminal negligence.

The Dignitas letter rejecting Mr Wylie's application for assistance to die outlined clearly their concerns over his capacity to consent to suicide. This, in and of itself, supported the Crown's case that Ms Justins knew, or a least had been made aware, that experts in this area suspected that he lacked capacity. This position was really only countered by the certificate written by Dr Gupta and presented to Mr Wylie's solicitor in March 2006 for the purposes of proving his testamentary capacity in order to change his will which said that he was "suffering from early patchy dementia. He is still capable of making his own decisions and understanding the nature of the decisions" (at [305]). Dr Gupta later admitted to the court that his assessment of Mr Wylie had not been thorough and that he had not been told the purpose of the certificate.[2]

Despite the majority having reservations about the availability of the charge and ultimate verdict against Ms Justins, Johnson J agreed with Spigelman CJ that this must therefore warrant a new trial being ordered, with Spigelman CJ stating ([13]-[14]) that it was open for a new jury to consider (a) if Mr Wylie lacked capacity; and (b) whether there was criminal involvement of one person in another's death.

Simpson J in dissent, however, said (at [15]):

> On the basis of the finding that manslaughter was not available in this case, further prosecution on the count of manslaughter would amount to an abuse of process. The Court should order that an acquittal be entered.

On the basis of the majority decision, a new trial was ordered with Spigelman CJ deeming it appropriate even though Shirley Justins had already served her sentence of 22 months weekend detention by the time the Court of Criminal Appeal delivered judgment and that, despite the new trial being ordered, "no additional penalty is likely to be imposed" (at [118], [120]).

[1] *R v Lavender* (2005) 222 CLR 67 at 88; *R v Sam (No 17)* [2009] NSWSC 803 at [9]-[14].

[2] The issue of Dr Gupta's duty of care and professional responsibilities with respect to this was not raised.

DISCUSSION: ROLE OF JURIES AND PROSECUTORIAL DISCRETION

This case highlights the difficulties public officials – juries and prosecutors – face when trying to apply the law in an area where the community is intractably divided. As but one example of the deep divisions that apply in this area, in the Australian Capital Territory legislation has been passed to legalise assisted suicide for the terminally ill, but it has been repealed by request from a Commonwealth Minister to the Governor-General under the colonial governance strictures of s 35 of the *ACT Self Government Act 1988* (Cth). If a Parliament of an Australian State had passed the same legislation, no such Commonwealth veto would have been available. In some ways the policy debate about assisted suicide and euthanasia resembles equally controversial and unsettled debates on the legalisation of gay marriage or abortion.

Ultimately, this case addressed an issue which is not going to go away, particularly as our population ages. How do we go about offering terminally ill individuals a way of ending their lives with dignity and certainty? To what extent should it be the role of juries and prosecutors to seek to make the law here operate in a just way? As Australia's population ages and people live longer with more chronic and protracted conditions, it would be naïve to fail to acknowledge that the law is in these cases, as was so clearly in evidence in this particular case, a blunt instrument indeed. The solution probably lies in an "integrated" approach, where the patient, patient's family, treating health care team and even local area health care ethics committee work together to plan the best care available, being guided by the relevant bioethical, legal and human rights principles.[3]

Baroness Mary Warnock, one of Britain's leading moral philosophers, created controversy in Britain when she suggested that those with dementia have a "duty to die",[4] thus suggesting that there should be a shift in our moral and cultural understanding of the time for death. Juries, interposed between the state and the individual, perhaps offer the opportunity to reflect the community's moral and cultural understanding of death in cases dealing with contentious issues like "mercy killing". The practice of not discharging the duties of the office on the basis of conscience is known as *rule departure* or *jury nullification*. A decision by prosecutors not to proceed to trial, or a decision by a jury to acquit an obviously guilty person are examples of these rule departures. Rule departures are similar in nature to, and may be considered a form of, civil disobedience. There are some distinctions between the two. One difference is in the position of the participants. For example, in the *Justins* case, Shirley Justins would be considered to have engaged in civil disobedience by assisting her partner to die on the basis of a moral duty to relieve his suffering which required her to breach a law. If the prosecutor had chosen not to prosecute the case, he would have been acting as an agent of the state in an official role and thus engaged in rule departure. These two positions also differ in their legality. Civil disobedience involves a breach of the law and exposes its participants to legal sanction, whereas it is unlikely that rule departure would amount to an illegal act and thus does not expose its players to sanction or punishment.

In Britain, *Bushell's Case* (1670) 124 ER 1006 recognised that juries may deliver merciful verdicts. Certainly in the United States of America, the right of jurors to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences is a recognised right. In addition, the defendant has the right to have the jury instructed of this power. This form of "legitimated disobedience" is even mentioned by John Mortimer's character, Horace Rumpole, when he defends a government whistleblower saying, "If Miss Tuttle's broken the law, the Jury are entitled to acquit her! It's their ancient and inalienable privilege, I shall tell them. It's the light that shows the lamp of freedom burns."[5]

Juries in Australia have exercised this power to acquit defendants charged with violating unpopular laws. For example, this rule departure could be said to have been in evidence during the

[3] Faunce T, *Who Owns Our Health?* (UNSW Press, Sydney, 2007).

[4] Beckford M, "Baroness Warnock: Dementia Sufferers May Have a 'Duty to Die'", *Daily Telegraph* (London) (8 September 2008), http://www.telegraph.co.uk/news/uknews/2983652/Baroness-Warnock-Dementia-sufferers-may-have-a-duty-to-die.html viewed March 2011.

[5] Mortimer J, "Rumpole and the Official Secret", *The Second Rumpole Omnibus* (Penguin Books, 1988) pp 517-518.

first case brought against a women and her partner for procuring an abortion in Queensland in 110 years in 2010. Abortion is unlawful in Queensland under the *Criminal Code 1899* (Qld) in a chapter entitled "Offences against morality". Tegan Leach, 21, and her partner, Sergie Brennan, 22, faced trial after being charged for using the abortion drug RU486. The Crown Prosecutor told the jury that if they disagreed with Queensland's abortion law, then their chance to express their view was at the ballot box, not in the courtroom. However, it took the jury less than an hour to find the pair not guilty.[6] A decade ago a jury acquitted Joseph Moh, aged 74, of murder and manslaughter charges for the "mercy killing" of his wife Ingrid, aged 71, who had repeatedly asked her husband to help her to die following a debilitating stroke.[7] In 2000 a Western Australian doctor was found not guilty of murder following his lethal injection of a woman suffering from terminal cancer of the kidney. The jury took just 10 minutes to acquit him.[8]

The *Justins* case also raises the issue of the role of the Director of Public Prosecutions (DPP) and the discretion he or she has as to the way in which these matters are prosecuted. The Crown Prosecutor presented the original charge as murder, did not accept Ms Justins' plea to aiding and abetting and then presented the alternative of manslaughter by gross criminal negligence to the jury despite that charge being inappropriate for the reasons best outlined by Simpson J.

The longstanding former Director of Public Prosecutions in New South Wales, Nick Cowdrey QC, has publicly supported a comment by Michael Kirby regarding the criminal law:

> No other branch of the law is so important. It is where our commitment to fair trial and the rule of law are tested every day, in courts throughout the nation. It is where fear of wrongdoers intersects with respect for basic human rights.[9]

However, this statement raises the issues of prosecutorial discretion, law and human rights and most particularly the discretion that prosecutors have in deciding to prosecute an assisted suicide case. Assisted suicide cases are of a sensitive nature and may present a significant challenge for prosecutors. In August 2010, for instance, David Scott Mathers, aged 66, was charged with murder after he allegedly placed a plastic bag over the face of his partner. The latter had attempted suicide but failed twice in 24 hours. The prosecutor, David Vautin, told the Downing Centre Local Court that, in cases involving assisted suicide, the Crown was "regrettably … left in a situation where there is only one charge that we see as appropriate".[10] It has been argued[11] that, since the decision in *Airedale NHS Trust v Bland* [1993] AC 789 where the role of doctors in the withdrawal or withholding of life-sustaining treatment was considered, as well as whether that act or omission constituted a criminal offence, moral issues surrounding the topic of euthanasia have not been clearly discussed and this has "left the law in disarray";[12] that the distinction between an act or omission to act is "used as a cloak for avoiding the moral issues"; and that "our current legal regime relies on sophistry" to distinguish lawful refusal (an omission) from assisted suicide (an act) and that "the 'omission' classification is chosen … [to] engineer the (morally) right result".[13]

[6] Nancarrow K and Howells M, "Couple Not Guilty in Abortion Trial", *ABC News* (14 October 2010), http://www.abc.net.au/news/stories/2010/10/14/3038330.htm viewed March 2011.

[7] Kerridge I, Lowe M and Stewart C, *Ethics and Law for the Health Professions* (Federation Press, 2009).

[8] "Doctors, Death and the Criminal Law", *ABC Radio National* (2001) http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s403647.htm viewed March 2011.

[9] Cowdrey N, *Human Rights and the Prosecutor*, Faculty of Advocates, Edinburgh, 3 May 2001. http://www.odpp.nsw.gov.au/speeches/Faculty%20of%20Advocates%20-%20May%2020011.htm viewed March 2011.

[10] Kontominas B, "Man Charged for Killing Painridden Partner Whose Drug Overdose Failed", *Sydney Morning Herald* (21 June 2010), http://www.smh.com.au/nsw/man-charged-for-killing-painridden-partner-whose-drug-overdose-failed-20100620-ypc0.html viewed March 2011.

[11] McGee A, "Ending the Life of the Act/Omission Dispute: Causation in Withholding and Withdrawing Life-sustaining Measures" (2011) 31 *Legal Studies* (forthcoming).

[12] Moore M, *Act and Crime: The Philosophy of Action and its Implication for Criminal Law* (Oxford University Press, Oxford, 1993) p 27.

[13] Huxtable R, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge-Cavendish, Abingdon, 2007) p 125.

An English case that highlights the complexity of the issues surrounding the area of euthanasia and, more specifically, who can do what and when is the case of Debbie Purdy. In England and Wales[14] it is also unlawful to assist a person to die. In 2009 Debbie Purdy, a women with multiple sclerosis, sought advice from the Director of Public Prosecutions on whether her husband would be charged with an offence if he assisted her to die by taking her to Dignitas in Switzerland. Ms Purdy's case revolved around s 2(4) of the *Suicide Act 1961* (UK) which provides that "no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions". After failing in the lower courts, Ms Purdy's case was heard by a five-member panel of the House of Lords which determined that it would be a breach of Ms Purdy's human rights not to allow her to end her life with respect and dignity.[15] The judgment also criticised the DPP's lack of guidelines as to how they arrived at decisions on which case to prosecute. This led the Director, Keir Starmer, to draft advice listing a range of factors that will be taken into account when deciding if a prosecution is appropriate. The aim of the document is to give people asking their loved ones to help them die an indication of whether they would then face charges.

The criteria included whether the victim reached a "voluntary, clear, settled and informed" decision. There is also particular emphasis on the motivation of the suspect. They would be expected to have acted "wholly compassionately" and not for financial reasons. The case of a loved one killing another who is unable to do it for themselves is still considered murder or manslaughter. Another British case centred around Ms Diane Pretty who suffered from motor neurone disease, a progressive degenerative illness.[16] She wished to control the time and manner of her death but her physical disabilities made this impossible for her to do so unaided. She also sought assurances from the DPP that, if her husband assisted her to die, he would not be prosecuted. The DPP was unable to give such assurances and so she sought relief for the protection of her rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the Convention). She contended that her rights protected under Arts 2, 3, 8, 9 and 14 were infringed. Her claim was dismissed and the dismissal was upheld by the House of Lords in 2001: see *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800; [2001] UKHL 61. She then appealed to the European Court of Human Rights which unanimously held in *Pretty v United Kingdom* (2002) 35 EHRR 1 that there had been no violation of her human rights, including no violation of Art 8 which provides that there be no public interference in the right to respect for private and family life.

The court held (at [65]):

> The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.

Because there have been no cases tested in Australia for what constitutes "aiding and abetting" in voluntary euthanasia cases, there is little certainty or comfort for those who wish to remain with their loved ones at the end of their life that they won't be charged. Clearer guidelines around prosecutorial discretion with respect to these matters may help all parties.

While there was no statutory reference to the discretion of the prosecutor in the *Justins* case as there was in the *Purdy* matter in England, there is nevertheless a prosecutorial discretion that is noted in the *Prosecution Guidelines of the Director of Public Prosecutions*.[17] Better use of such discretion in matters such as these may be appropriate. The new guidelines for the prosecution of assisted suicide cases in England outline six public interest factors against prosecution which may be used to assist

[14] *Suicide Act 1961* (UK), http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60 viewed March 2011

[15] *R (on application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345; [2009] UKHL 45, http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090730/rvpurd-6.htm viewed March 2011.

[16] *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800; [2001] UKHL 61.

[17] http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf viewed March 2011.

this decision-making:[18]

1. The victim had reached a voluntary, clear, settled and informed decision to commit suicide.
2. The suspect was wholly motivated by compassion.
3. The actions of the suspect, although sufficient to come within the definition of the crime, were of only minor encouragement or assistance.
4. The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide.
5. The actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide.
6. The suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

It may be that the policies in New South Wales and elsewhere in Australia should mimic more closely the United Kingdom model, which was formulated after extensive consultation with the community, including academics, health workers, politicians and religious groups. If, in lieu of legislation legalising assisted suicide we rely on the discretion of the prosecutor to determine the grounds for a decision not to prosecute a "mercy killing", then those grounds should be explicitly articulated and not concealed behind concepts of duty, knowledge and causation as they were in the *Justins* case. The United Kingdom policy focuses on the motivation of the suspect rather than the characteristics of the victim and provides a clearer framework for prosecutors to decide which cases to prosecute. This, in turn, provides a clear and more consistent understanding to members of the community who may have some interest in assisted suicide.

CONCLUSION

It could be argued that what Shirley Justins did was substantially more than misguided compassion toward her suffering partner. Few could doubt her dedication to ensuring her partner of close to 20 years did not have to endure the undignified end he had already tried to avoid at his own hand several times. Unfortunately, the fact that Ms Justins neglected to encourage her partner to prepare a written advance directive or power of attorney and her involvement in having his will changed to her advantage just before his death created a perception of conflict of interest that was not to her advantage or the cause of those seeking to create a more just legal framework for end-of-life decisions in Australia.

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The authors wish to acknowledge the assistance of Mr Darryl Killen in the preparation of this commentary. However, the views expressed in the commentary are those of the authors.

[18] Crown Prosecution Service, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (February 2010), http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html viewed March 2011.