Permission, not entitlement, in physician-assisted suicide

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The court in *Carter* 2015 invited a softening of prohibitions on physicians from participating in assisted death, not to obligate physicians who would object. At the outset Bill C-14 appears to create an entitlement to have death inflicted, that would wrongfully create an oppressive regime rather than the permissive one mandated by the Supreme Court. This error therefore needs correcting.

Where the bill proposes, at *Criminal Code* [CC] section 227(4), to negate s.14 in defined cases, it negates the first phrase that denies the existence of entitlement to have death inflicted. The objection arises - "only *consent* is what s. 14 makes unavailable, now to be undone in narrow circumstances". But in this phrase *consent* is colouration only, particularizing what would be an implicate entitlement. I can hardly consent to being crowned king of England, if I have no such claimable title. Indeed non-en*title*ment to death, an essential to the state, is the fundamental reason for non-entitlement to *consent* to have someone inflict it.

The permissive object of bill C-14 is met by negating the *second* phrase of s. 14, where 'consent' is not superfluous but germane to criminal liabilities. The object is not met by negating the first, a fundamental principle in the logic of statehood. Negating the opening phrase of s. 14 arguably creates entitlement in that circumstance, not just the *permission* that the bill and *Carter* intended.

Access as entitlement

At the joint committee, Justice testified to Hon. Judith Seidman who thought that 'access' had been determined as a right in *Carter*. Their answers wrongly allowed as much ("the decision and the holding in *Carter* [is] that there has to be access": Jeanette Ettel). **The court ruled no such thing**. This made the impression that assistance to die was a *Charter*-based enforceable "right" for persons like the late Kay Carter.

Bill C-14 runs immediately into this error. By having CC s. 227(4) negate more than the s. 14 phrase on the culpability of a practitioner pleading *consent* of the

patient, the result is inadvertent openness to a wrongful interpretation as against what the *Carter* case mandated. Negating that 'no-one is entitled to have death inflicted', implies someone *is* entitled.

It is egregious to read into *Carter* that to have death inflicted was for Kay Carter a right, even one nestled in the s. 7 *Charter* right to life and liberty. Instead, the CC s. 14 and s. 241(b) prohibition of a *physician* willing to help was found overbroad when impeding the result of suicide intended by a person in Kay's situation. It needed relaxing with permission to act in order to meet Kay's right to life as far as possible while still mobile. Escalating *permission* of a practitioner to a *right* of the sufferer, would wrongfully invest power to compel someone to inflict death.

The court treated only whether physicians should always in law be *prevented* from assisting a requested infliction of death. It did not create or expose a right to have death inflicted, for it was necessary and sufficient to relieve the slight over-broadness in scope of the prohibition against a willing physician, where that scope impaired fundamental justice to the extent of this hard case.

Hard cases make bad law

Greater legislative care is needed because relief of prohibition on practitioners who aid death can easily go to laxity on culpability for counseling, or even for abetting - contrary to revised CC s. 241(a). Aside from capital punishment no right - *Charter* or fundamental - affords power to compel anyone to inflict death or to refer someone to the infliction of death, for this too is consent. To such inflictions the term 'universal access' as employed in the *Canada Health Act* does not apply, for *access* is implied only by the right to life-sustaining health-care.

Hard cases make bad law is a common-law principle. Care in responding to *Carter* is required because much good law is vulnerable under a barrage of hard cases that can be contrived *ad infinitum* - to pit one *Charter* right against another in order to construe new entitlements in a jarring dialectic or revolution by judicial activism.

This does not mean that *any* law responding to the voluble ruling over a very narrow case has to be a bad law, but it raises the bar very high for a law to be much less bad. Due care is not met by starting from a premise that an *enforceable* right or entitlement has been recognized even for such as Kay Carter to have death inflicted on them: it's not something that was even sought in her case.

Money Bill

The interpretation of entitlement is far from what *Carter* enjoined or mandated, and it would even give the bill the character of a money bill. Creating a new entitlement not seen before would place the government under new obligation to transfer funds for the unheralded procedures of euthanasia and assisted suicide.

The federal government is under no obligation to procure abortions because no legal entitlement exists, as the reasons in *Carter* reiterate. But in a wrongful entitlement to assisted death the state, starting from the posture of voluntary permissiveness would put itself under interpretation of a fiduciary obligation.

Carter, indeed the plaintiffs, called for a *permissive* regime, not an *obligating* one. Even authorities in Holland assert that it would be unconscionable to treat euthanasia as a right creating enforceable obligations on physicians, and that includes obligations to consent to the euthanasia or suicide by referring to another. In some sense Kay died in a venturesome expression of her belief (whether one agrees with it or not) that physicians should not be prosecuted for agreeing to help her; she did not die for the belief that Canada (or even Switzerland) should obligate any practitioner against *their* own beliefs.

Conclusion

It is misguided for any to take *Carter* as mandating a right or power to have death inflicted by another, or to allow legislation intending a permissive regime to slip into an oppressive one.

Bill C-14 can be relieved of this interpretation and stay closer to *Carter* by presenting CC s. 14 in two natural parts, with s. 227(4) negating the second part that withdrew consent (or implicate request) as a defense from manslaughter:

"s. 14(1) No person is entitled to have death inflicted on them.

(2) Consent or request by a person to have death inflicted on them does not affect the criminal responsibility of any other person who precipitates or inflicts death on the person who requested or consented to have death inflicted on them." and

" s. 227(4) Subsection 14(2) does not apply to persons who precipitate or inflict death on a person in accordance with s. 241."

A law clerk would render this in proper clausal form, but for any interested, a draft amendment is available from the author at gdknight@gmail.com.

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