

The 2013 Wilson Moot Problem

Dylan Jacob (by his litigation guardian Stephanie Jacob) v. Canada (Attorney General)

Dylan Jacob is currently a patient in the forensic unit of the Oak Ridges Centre for Mental Health (“Oak Ridges”) in Hamilton, Ontario. He was found not criminally responsible for having murdered his father several years ago, and has been in custody at Oak Ridges since. His older sister, Stephanie Jacob, is Dylan’s guardian for the purposes of the *Substitute Decisions Act*, and is empowered to make medical decisions on his behalf.

Dylan was diagnosed with schizophrenia over a decade ago. Despite the efforts of various psychiatrists (including those at Oak Ridges), his mental illness has been poorly controlled and Dylan spends much of his time in a psychotic state, though he does experience periods of lucidity. During his lucid periods, he is overcome with guilt about having killed his father, and is horrified by the treatments he is subjected to in an attempt to control his illness. He has on many occasions expressed a desire to end his life, but due to the circumstances of his incarceration at Oak Ridges, is unable to do so.

In the summer of 2011, following a significant amount of public attention on the issue, Parliament enacted amendments to section 241 of the *Criminal Code* to permit physician-assisted suicide in certain circumstances. The relevant provisions are now as follows:

SUICIDE

Counselling or aiding suicide

241. Every one who

- (a) counsels a person to commit suicide, or
- (b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Physician-assisted dying

241.1 (1) Despite sections 14 and 241 of this *Code*, a physician commits no offence where the physician provides and/or administers a lethal dose of medication to a patient, for the purposes of assisting the patient to end his or her life, where all of the following conditions are met:

- (a) the patient is competent;
- (b) the patient has repeatedly and explicitly expressed the wish to end his or her life;
- (c) the patient is experiencing severe pain as a result of a terminal illness;

(d) the physician has informed the patient of the treatments available for the patient's condition, and those options have been exhausted or refused by the patient; and

(e) the physician has consulted a second physician, who has provided a written opinion that it is in the patient's best interest for the patient to be able to end his or her life.

(2) Where a physician provides and/or administers a lethal dose of medication to a patient as permitted by subsection (1), the physician must inform the local coroner within 24 hours of having done so.

(3) For the purposes of this section, "physician" means a person who is licensed by the college of physicians and surgeons (or equivalent authority) of a province to practice medicine.

(4) For the purposes of this section, "patient" means a person who is being treated by the physician for a medical condition.

Dylan has been in a state of psychosis since the amendments were passed. Shortly after the amendments came into force, Stephanie approached Dylan's treating psychiatrist, Dr. Grace Lee, about obtaining an assisted suicide for Dylan in accordance with his previously-expressed wishes to end his life. Dr. Lee was sympathetic to the request, and told Stephanie that she would be inclined to help. She was, however, concerned that she could be prosecuted under section 241 of the *Criminal Code* because Dylan was neither competent nor suffering from a terminal illness, and therefore declined to assist him in ending his life.

Stephanie, acting as Dylan's litigation guardian, commenced an application against the Attorney General of Canada in the Ontario Superior Court of Justice, seeking declarations that:

a) section 241.1(1) of the *Criminal Code* infringes section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), because it discriminates against patients with incurable mental illnesses (as opposed to terminal physical illnesses);

b) section 241.1(1) of the *Criminal Code* infringes section 7 of the *Charter* because it deprives patients with incurable mental illnesses of liberty and security of the person in a manner not in accordance with the principles of fundamental justice;

c) the infringements of sections 7 and 15 are not saved by section 1 of the *Charter*; and

d) the requirements in section 241.1(1) that the patient be competent and suffering from a terminal illness are of no force or effect.

The application was allowed by Justice Nicholas Wire. At the hearing, the parties did not dispute that the word "pain" as it appears in section 241.1(1)(c) is broad enough to include physical or

mental pain—the Crown conceded that individuals with some terminal illnesses experience unbearable psychological distress due to their conditions, even if they are not in significant physical pain.

At the hearing of the application, Justice Wire made the following findings of fact:

1. Dylan was born in 1980; his parents divorced shortly afterwards. His mother passed away when he was seven years old, and he and his older sister Stephanie were sent to live with their father, James, whom they had seen only sporadically since the divorce. Dylan struggled in the wake of his mother's death and was often difficult and aggressive. James had difficulty coping with his son and often disciplined him physically, which led to Dylan being removed from the family home and being placed in a group home when he was fourteen.
2. In the nearly four years he lived in the group home, Dylan's behaviour was erratic. While at times he would excel at school and get along well with the other residents, he experienced increasing episodes of withdrawn and bizarre behaviour. He was referred to Dr. Omar Said, a psychiatrist, and was treated with medication for attention deficit disorder and depression, but there seemed to be little improvement in his behaviour.
3. In 2000, Dr. Said diagnosed Dylan with undifferentiated schizophrenia.
4. Dylan's schizophrenia was not well controlled despite Dr. Said's best efforts to treat him. Dylan was often not compliant in taking his medication, and in any event the medication seemed to be of little help in controlling his psychotic episodes, which became increasingly lengthy. As a result of his mental illness, Dylan was dependent on welfare and was homeless from time to time.
5. Dylan has been tested as being of above-average intelligence.
6. During Dylan's psychotic episodes, he experiences hallucinations, including a recurring delusion that he will be kidnapped and handed over to government doctors who will perform medical experiments on him. He becomes aggressive and sometimes violent whenever he perceives that someone is attempting to control his movement. He is also terrified of doctors and hospitals.

7. Stephanie has always attempted to maintain a relationship with Dylan and has been the only consistently supportive influence throughout his life. Their father James also attempted to reach out to Dylan from time to time, which was much more fraught, given their history.
8. In October 2007, Dylan visited James at James's home, while he was in a psychotic state. During that visit, James threatened to have Dylan committed to a psychiatric hospital where they would "sort him out for good". Dylan reacted by stabbing James nineteen times with a chef's knife from the kitchen counter. A neighbour called 911. James was pronounced dead and Dylan was arrested at the scene and charged with second-degree murder.
9. In April 2008, a judge found Dylan not criminally responsible for murdering James. Following a hearing before the Ontario Review Board, he was remanded to the medium-security unit at Oak Ridges for treatment, where he has remained since.
10. Oak Ridges is a world-renowned mental health facility that performs research as well as treating patients in forensic and non-forensic wards. Dr. Lee is a widely-respected authority on the subject of undifferentiated schizophrenia and has published several papers on ethical issues associated with treating psychotic patients (though none on the subject of assisted suicide). Dr. Lee has been the lead physician on Dylan's case since his arrival at Oak Ridges.
11. Despite the excellent care Dylan has received at Oak Ridges, his condition has worsened and Dylan is now psychotic most of the time. His medication regime is primarily focused on calming his anxieties and controlling his aggression. These medications have a number of side effects including lethargy, dizziness, and loss of motor control. Despite being medicated, Dylan often has to be restrained to his bed.
12. During a period of lucidity, Dylan consented to treatment with electroconvulsive therapy (ECT); Stephanie has twice since consented on his behalf to ECT. As there was no significant improvement in Dylan's condition, Stephanie withdrew her consent to this form of treatment.
13. Over the course of his detention at Oak Ridges, Dylan has experienced only four lucid periods, each lasting between three and five days, the most recent of which was in March 2011. During each of these lucid periods, he has been visited by Stephanie and seen at length by Dr. Lee.

14. In each of his last three lucid periods, Dylan has told both Stephanie and Dr. Lee that he wishes to end his life. He is overcome with guilt for having killed James. Moreover, he is horrified to learn about his psychotic behaviour and that he is frequently placed in restraints, which he considers “barbaric”. Dylan believes that his quality of life is basically non-existent, and is appalled by the idea that he may live forty years or more in these conditions.
15. During two of his lucid periods, Dylan attempted to commit suicide—first, by strangling himself with a bed sheet, and on the second attempt by cutting his wrists with shards of a broken mirror. Since that time, preventive measures have been put in place to prevent Dylan from harming himself.
16. The term “competent” means “having the ability to understand the information relevant to making a decision about a medical treatment, and the ability to appreciate the consequences of that decision”.
17. During his lucid periods, Dylan was competent for the purposes of this definition. At all other times during his detention at Oak Ridges, Dylan has not been competent. In particular, he has not been competent since the end of his last lucid period in March 2011.
18. Stephanie unequivocally supports Dylan’s wish to end his life. In her affidavit filed in support of the application, she stated:

I am very sad at the thought of losing my brother. Despite his difficulties, I love Dylan and my relationship with him is very important to me. The first time Dylan told me he wanted to end his life, I was very upset and tried to talk him out of it. Since then, however, I have come to see his point of view. I visit him at least three days every week for an hour or more, even when he is psychotic and barely seems to recognize that I am there. It breaks my heart to see him tied to his bed, terrified by things that only he can see, drooling on himself, or crying. I understand that there is virtually no chance that his condition will ever improve, and I feel strongly that this is no life for him.

19. In her affidavit, Dr. Lee stated:

I have no hesitation in stating that Dylan’s mental suffering is incredibly severe. I do not believe that Dylan will ever recover to a point where he will be released from Oak Ridges.

I believe that Dylan’s request to end his life, as it has been expressed in his periods of lucidity, has been well-informed and enduring. During his lucid periods, we have discussed the limited options available to treat his illness and the low likelihood that his condition will improve. We have

attempted every form of treatment I know of for this illness, but sadly without success. I have given this issue countless hours of thought and study and have come to the conclusion that, in these particular circumstances, it is my medical duty to help Dylan bring his suffering to an end. If this application is allowed, I would be prepared to assist Dylan in ending his life.

20. Dr. Lee also stated in her affidavit that she had consulted Dr. Steven Grimshaw, a fellow psychiatrist at the Centre for Addiction and Mental Health in Toronto, about Dylan's case. Dr. Grimshaw affirmed an affidavit in which he concurred with Dr. Lee regarding Dylan's poor prognosis, and stated that if Dylan's application to the court were allowed, that he would be willing to provide the opinion required under section 241.1(1)(e) of the *Criminal Code*.
21. Dr. Grimshaw further affirmed that over the course of his career, he has encountered "numerous" cases of incurable psychiatric illness that he believes left those patients in intolerable mental suffering and subject to conditions that Dr. Grimshaw considered "an assault on their independence and dignity as human beings". Prior to the amendments to the *Criminal Code*, two such patients approached Dr. Grimshaw for assistance in ending their lives, but he refused on the basis that providing any such assistance would be illegal.
22. In cross-examination on their affidavits, both Dr. Lee and Dr. Grimshaw admitted that, as a general proposition, it can be more difficult to give a certain prognosis in cases of mental illness than in cases of terminal physical illness. One reason for this is that the field of psychiatric medicine is evolving, and new treatments may have promise in difficult cases.
23. The Court admitted expert affidavit evidence from both the applicant and the respondent. The Crown adduced the following expert evidence from Dr. Roy Illario, a professor from Dalhousie University who holds an M.D. and a Ph.D., and who is an expert in the sociology of mental health:
 - a. Taken together, the federal and provincial governments have spent approximately \$180 million on mental health awareness and suicide prevention programs over the past three years. The key objectives of these programs have been to destigmatize mental illness and to urge people with mental health issues to seek medical attention.

- b. In the past 15 years, an annual average of 3600 people have committed suicide in Canada. Approximately 60% of these people suffered from depression, with another 30% having some other type of mental illness or addictive disorder.
 - c. Patients with serious psychiatric illnesses are generally at a higher risk of neglect or abuse than patients with many other types of disabilities. Dr. Illario is concerned about the risk that such patients may be vulnerable to involuntary or non-voluntary euthanasia.
 - d. As a medical doctor, Dr. Illario feels strongly that physician-assisted suicide is unethical in any circumstances; in his view it is contrary to the Hippocratic Oath, and sends a message that the lives of severely disabled people are not socially valuable. Dr. Illario is aware of several medical associations and advocacy groups that share this view.
24. In cross-examination, Dr. Illario agreed that the care provided to Dylan by Dr. Lee was the “gold standard”, and that he could not think of any additional treatment that was likely to be successful in treating Dylan’s schizophrenia that Dr. Lee had not attempted.
25. The applicant adduced the following expert evidence from Dr. Petra Wolinski, a psychiatrist who is affiliated with an advocacy group called Physicians for Death with Dignity:
- a. There remains a diversity of opinions in the medical profession about the ethics of physician-assisted dying. A significant minority of physicians are of the view that physician-assisted suicide is medically defensible in cases of incurable psychiatric illness, in certain circumstances.
 - b. Suicidal ideation is a feature of many psychiatric illnesses; however an expressed wish to die is not the manifestation of a mental illness in each and every case.
 - c. Studies performed in jurisdictions where physician-assisted suicide has been legal for at least 10 years show that the primary motivators for patients’ requests for an assisted suicide are: loss of independence (86% of cases), loss of dignity (82% of cases), and desire not to be a burden on loved ones (73% of cases). Physical pain was cited as a factor in slightly less than half (46%) of cases.

- d. There are a handful of jurisdictions where physician-assisted suicide is permitted both in cases of physical and psychiatric illness. A survey of the experience of those jurisdictions found that approximately 10% of the total number of requests made by patients for physician-assisted suicide involved cases of psychiatric illness. In 80% of those cases, the physician declined to assist the patient to end his or her life. The most commonly cited reason for the refusal was that the patient was suffering from depression, which the physician felt could be appropriately managed by other means.

26. Section 241.1 of the *Criminal Code* was enacted following a series of high-profile cases in which patients suffering from Lou Gehrig's disease or terminal cancers travelled abroad to obtain physician-assisted suicides in countries where it was legal. There was also media attention and public debate around several other cases in which patients suffering from such illnesses passed away in deplorable conditions in Canada because they were unable to travel abroad to obtain this treatment.

27. In early 2011, a survey undertaken by the Canadian Association of Physicians (CAP) found that a slim majority (52%) of Canadian physicians agreed with the following statement: "Physician-assisted suicide is medically and ethically permissible to alleviate cases of unbearable suffering with no realistic prospect of relief, where the patient will likely otherwise die within two years, and if the patient has made an informed decision to end his or her own life and clearly communicated that wish to his or her treating physician."

Justice Wire allowed the application, finding that the requirements of "competence" and that the patient be suffering from a terminal illness in section 241.1(1) of the *Criminal Code* discriminated against individuals with mental illnesses. In his judgment, he wrote:

The effect of these conditions is that individuals in unbearable suffering, who would otherwise satisfy all of the requirements of section 241.1 of the *Criminal Code*, are denied access to a physician-assisted suicide, simply because their illness is mental rather than physical. Section 241.1 was drafted with numerous safeguards to ensure that physician-assisted suicide would be permitted only as a last resort, in cases of intolerable suffering, and where it is the patient's unequivocal desire to end his or her life, which protects mentally ill patients as much as they protect the physically ill. However, the amendments fail to take into account that severely mentally ill patients may find themselves in equally unbearable pain, and prevents them from ending their lives with dignity. [...]

I accept that protecting mentally ill individuals from abuse, specifically from being subjected to involuntary euthanasia, is a pressing and substantial objective, and that this infringement is rationally connected to that objective. Nevertheless, I am unable to conclude that a regime that totally excludes mentally ill individuals from being able to access physician-assisted suicide is minimally impairing of Mr. Jacob's rights. As such, sections 241.1(1)(a) and (c) cannot be saved under section 1 of the *Charter*.

Given his conclusions on sections 15(1) and 1, Justice Wire did not address section 7 of the *Charter*. He held that the appropriate remedy was to read in the words "at the time of the patient's request that the physician assist the patient to end his or her life" to the end of section 241.1(1)(a) and to strike the words "as a result of a terminal illness" from the end of section 241.1(1)(c).

The Crown immediately appealed this decision to the Ontario Court of Appeal (the Court granted an interim stay of Justice Wire's judgment pending the disposition of the appeal). A majority of the Court of Appeal overturned the decision below. Writing for herself and Justice Robert Tembala, Justice Ryanne Rainfoot wrote:

In my view, it may be unnecessary to engage in the section 15(1) inquiry at all. The amendments to the *Criminal Code* should be viewed as an ameliorative program within the meaning of section 15(2), aimed at improving the situation of severely disabled individuals who are unable, by reason of their physical disabilities, to end their lives when they choose. However, it is not necessary to decide this issue since, in any event, I find that any distinction made by section 241.1 is not discriminatory within the meaning of section 15 of the *Charter*.

The very nature of serious psychiatric illness is that patients have diminished capacity to make rational decisions, and there cannot be a treatment decision with greater consequence than that to request a physician-assisted suicide. Thus, any distinction in this case corresponds to the actual needs and circumstances of mentally ill individuals. Moreover, to permit physician-assisted suicide in these circumstances sends a message that a life with psychiatric illness is a "life not worth living", which would diminish rather than promote the dignity of individuals living with such illnesses.

For similar reasons, I also find that there is no violation of section 7 of the *Charter*. Assuming that a deprivation of liberty or security of the person is made out, the restriction is anything but arbitrary. In my view any restriction is entirely consistent with the government's objective of protecting vulnerable patients from undue pressure or coercion to end their own lives, or from being euthanized against their will.

In dissent, Justice Iris Singh largely adopted the reasoning of Justice Wire.

Dylan has since been granted leave to appeal the Ontario Court of Appeal's judgment to the High Court of the Dominion of Canada,¹ which has stated the following constitutional questions:

- 1) Does section 241.1 of the *Criminal Code* constitute an ameliorative law or program within the meaning of section 15(2) of the *Charter*?
- 2) Does section 241.1 of the *Criminal Code* infringe section 15(1) of the *Charter*?
- 3) Does section 241.1 of the *Criminal Code* infringe section 7 of the *Charter*?
- 4) If the answer to questions 2 and/or 3 is "yes", is the infringement demonstrably justified in a free and democratic society, under section 1 of the *Charter*?

The High Court has not asked the parties to address the issue of the appropriate remedy in the event that the appeal is allowed.

¹ Note that the High Court of the Dominion of Canada will not consider any facts other than those found by the application judge.