

Further Decision on the Right to Die

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Following the decision of the Ninth Circuit of the United States Court of Appeals in *Compassion in Dying v State of Washington*,¹ the Second Circuit of the same court has handed down a decision ruling that a New York law that prohibits doctors from assisting their patients to die was unconstitutional under the Constitution of the United States. This decision does not create law in Australia, but it does represent an interesting development in international jurisprudence on the issue of the "right to die".

The decision in *Quill v Vacco*² was based on the constitutional requirement of equal protection and due process under law. In this respect, the court's decision differed from that of the Ninth Circuit which found a constitutionally protected liberty interest in determining the time and manner of one's death. The Second Circuit decision is not as far reaching and looked specifically at the terms of the legislation in question. Unlike the Ninth Circuit

¹ Discussed in M Eburn, "United States Recognition of the Right to Die" (1996) 3 (4) JLM 308.

² United States Court of Appeals, Second Circuit, Docket No 95-7028.

decision, the result in this case depended on the practical application of the Constitution to the law in question, rather than the discovery of a fundamental interest that would be protected under the Constitution. It was suggested by Calabresi J that the State could rework its legislation so that it provided "equal protection", in which case the court would again consider the validity of the legislation. Having said that, the reasoning of the court did raise some fundamental questions in the right-to-die issue, and made findings of law, facts and ethics that may represent a further significant step forward in the legal recognition of the rights of competent persons to determine the time and manner of their death.

The law in question said:

"A person is guilty of manslaughter in the second degree when:

...

3. He intentionally ... aids another person to commit suicide."

And:

"A person is guilty of promoting a suicide attempt when he intentionally ... aids another person to attempt suicide."

The application in *Quill v Vacco* was based upon the argument that the State effectively discriminated against terminally ill, competent persons, who were not dependent upon life support, as against persons who were dependent on artificial life-support mechanisms. The plaintiffs (three medical practitioners claiming their own rights and who also claimed to represent the interests of three patients who had originally joined in the application but who had died before the matter was finalised) claimed that terminally ill persons who were dependent on life support had a legally recognised right to terminate their own lives as they could refuse further treatment, and require that any treatment be withdrawn and so allow them to die.

The Attorney General for New York argued that the law should be considered a valid law as it furthered a legitimate State interest in preventing suicide. The court held that the State of New York had, in fact "placed its imprimatur upon the right of competent citizens to hasten death by refusing medical treatment and by directing physicians to

remove life-support systems already in place" and had acknowledged that such a decision did not impinge the State's interest in preventing suicide.

Having made that finding, the majority of Miner, Circuit Court Judge, and Pollack, Senior District Judge, found:

"In view of the foregoing, it seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are *similarly situated*, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs"(emphasis added).

It is this finding that is most significant for the "right to die" movement, for the court found that there is no valid distinction between a person who chooses to end his or her life by refusing treatment and a person who wants to request the prescription of fatal drugs to end his or her own life. This contradicts a traditional ethical claim that holds there is some moral difference between these actions. The traditional view is that to withdraw treatment need not be accompanied by an intent to cause death, and is a valid exercise of respect for patient autonomy, whereas the prescription of fatal drugs must, of necessity, contravene an ethical prohibition upon causing death. The distinction is stated as the difference between withdrawing treatment and "letting nature take its course" or actively killing the patient. The majority's response to that submission is worth quoting in full:

"Indeed, there is nothing 'natural' about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is

the natural result of the progression of the disease or condition from which the patient suffers.

Moreover, the writing of a prescription to hasten death, after consultation with a patient, involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration. Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death. The ending of life by these means is nothing more or less than assisted suicide. It simply cannot be said that those mentally competent, terminally ill persons who seek to hasten death but whose treatment does not include life support are treated equally."

In summary, the court found that the right of mentally competent, terminally ill persons to refuse treatment, or to insist that treatment be withdrawn, is a right to suicide and to, in fact, commit suicide with the assistance of their physicians. That right has been affirmed by the State of New York, yet denied by the same State to persons who are not reliant upon such treatment. That distinction, according to the court, has not been made upon any basis that legitimately advances a State interest, and, as there is no moral or legal difference between committing suicide by refusing treatment or committing suicide by taking a lethal injection, then the prohibition on assisted suicide breaches the constitutional requirement that the States "treat in a similar manner all individuals who are similarly situated". As indicated above, the finding by the

Second Circuit does not prohibit the State from re-enacting the law provided it indicates what State interest it is advancing, and that the distinction between the withdrawal of treatment and the prescription of fatal drugs is a legitimate distinction which legitimately advances that interest. The alternative would be to pass a law that denies the right to commit suicide to all persons. However, that would seem difficult given the decisions that have previously affirmed the rights of persons to refuse treatment.

In conclusion, the decision of the Second Circuit is not as far reaching as the Ninth Circuit decision since it is based, not on the merits of the law, but on the finding that the law did not treat similarly situated persons in a similar fashion. The finding does not find any new or fundamental right, nor does it stop the State from re-enacting similar laws provided it can show a legitimate distinction between refusing treatment and seeking a fatal dose of drugs to hasten one's own death. Notwithstanding the limited scope of the decision, the finding by the judges that there is no significant difference between seeking to hasten one's death by refusing treatment and seeking a fatal dose of medication represents a legal denial of one of the traditional arguments that have been used to defend the status quo, that is, that there is a moral difference between withdrawing treatment and allowing the patient to die naturally, and assisting a patient to die by the prescription, and/or the administration, of a fatal dose of drugs.

Once again, it appears obvious that the time is right for a Supreme Court decision to provide a conclusive decision on the matters raised by the Ninth and Second Circuit decisions.