MEDICINE AND THE LAW

Doctor-assisted suicide: What is the present legal position in South Africa?

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In the recent case of Stransham-Ford v. the Minister of Justice and Correctional Services, the North Gauteng High Court held that a terminally ill patient who was experiencing intractable suffering was entitled to commit suicide with the assistance of his doctor and that the doctor's conduct would not be unlawful. The court was careful to state that it was not making a general rule about doctor-assisted suicide. The latter should be left to the Parliament, the Constitutional Court and 'future courts'. The judge dealt specifically with the facts of the case at hand. In order to understand the basis of the decision it is necessary to consider: (*i*) the facts of the case; (*ii*) the question of causation; (*iii*) the paradox of 'passive' and 'active' euthanasia; (*iv*) the test for unlawfulness in euthanasia cases; and (*v*) the meaning of doctor-assisted suicide. It is also necessary to clarify the present legal position regarding doctor-assisted suicide.

S Afr Med J 2015;105(7):526-527. DOI:10.7196/SAMJnew.7895

The facts of the case

In the case of Stransham-Ford v. the Minister of Justice and Correctional Services,[1] the applicant was a highly qualified lawyer who had terminal cancer that had spread to his lower spine, kidneys and lymph nodes. He had tried a number of traditional and other forms of medication as well as palliative care, but none of these had alleviated his suffering. He had only a few weeks left to live, and died of natural causes just before the judge made his order.

After a hasty but well-reasoned judgment, the judge issued an order stating that if Mr Stransham-Ford was assisted to die by a doctor who provided or administered a lethal medication to him, the doctor would 'not be acting unlawfully, and hence, shall not be subject to prosecution by the [National Prosecuting Authority] or subject to disciplinary proceedings by the [Health Professions Council of South Africa]'. Such an order is not unusual, as a similar order in respect of immunity from prosecution was made more than a decade ago, in a 'passive' euthanasia case where a wife was allowed to order the withdrawal of treatment from her husband who was in a persistent vegetative state.[2]

In terms of the South African (SA) Constitution, where the common law is in conflict with the Constitution the common law must be developed by the courts to bring it into line with the Constitution.[3] Thus the court stated that 'the common law crimes of murder or culpable homicide as they affected liability for assisted suicide by medical practitioners, unjustifiably limited the patient's constitutional rights to human dignity (s. 10) and bodily and psychological integrity (s. 12 (2) (b) read with s. 1 and 7)' were

'overbroad' and unconstitutional.[1] However, apart from the situation in the Stransham-Ford case which dealt with 'active voluntary euthanasia', the common law crimes of murder and culpable homicide were not affected by the judgment.[1]

Causation

In law 'causation' refers to an act or omission that causes or accelerates death.[4] In cases of murder or culpable homicide, the accused person need not be the sole cause of the death of the deceased – others may also be held liable for contributing to it.[5] 'Causation' is clear where a doctor's act is the sole cause of death by administering a fatal dose of medication that does not enable the underlying illness or injury to kill the patient.[6] However, in situations where one or more events contribute towards the death of a person, the event that finally hastens the death is regarded as its cause.[6] Therefore, in situations of 'double effect', where the administration of increasing doses of medication with the motive of lessening pain and suffering hastens the patient's death, the increased dose will have 'caused' the death of the patient. This is so, even though without the increased dosage the patient would have died from the underlying illness or condition – because by increasing the dosages the patient's death is hastened.[6]

The paradox of 'passive' and 'active' euthanasia

Previously the courts have observed that the distinction between an act and omission causing death was artificial and the withdrawal of treatment from a persistent vegetative state patient whose prognosis was hopeless would be lawful.[2] In the Stransham-Ford case, the court indicated that there was no logical distinction between 'passive voluntary' and 'active voluntary' euthanasia and that 'active voluntary euthanasia' should be regarded as lawful under the conditions that prevailed in the case.[1] This is because in both situations the act or omission by the doctors in withdrawing or denying medical treatment, or prescribing medical treatment that may hasten the patient's death, causes the patient to die sooner rather than later. In any event, switching off a ventilator, or prescribing increasing doses of medication until they hasten death, is of itself a positive act that triggers the death of the patient.

In 'passive' euthanasia cases, doctors have the 'eventual' intention to hasten the death of the patient – i.e. they subjectively foresee that their withholding or withdrawing treatment or increased use of certain medication(s) will hasten the patient's death.[7] In 'active' euthanasia cases, doctors who administer or prescribe lethal medication have the 'actual' intention to hasten the death of the patient (i.e. they direct their minds to hasten the death of the patient).[7]

In terms of the Constitution, terminally ill patients who suffer unbearably are entitled to have their physical and psychological integrity, privacy and right to die in dignity respected.[1] They are also entitled not to be 'treated or punished in a cruel, inhuman or degrading way'.[8] Whether these rights are protected through 'passive' voluntary euthanasia or 'active' voluntary euthanasia makes no difference. In both instances the death of the patient is hastened. The court in the Stransham-Ford case followed a recent Canadian Supreme Court decsion[9] that granted a similar application for doctor-assisted suicide.

Test for unlawfulness in euthanasia cases

In cases decided before the Constitution came into effect, the courts held that the test for unlawfulness was the 'legal convictions of the community'.[2] However, since then the Constitutional Court has held that the courts should not be influenced by public opinion but by the values of the Constitution – the most important of which is the right to dignity.[10] It also held that the right to life is inextricably linked to the right to dignity and means something more than 'existence'.[10] Thus, in determining the patient's quality of life, the court in the Stransham-Ford case applied the values of the Constitution and concluded that the right to life 'cannot mean that an individual is obliged to live, no matter what the quality of his life is'.[1]

This approach is similar to that of the court in Clarke v. Hurst NO,[2] which found that continued artificial feeding would 'not serve the purpose of supporting human life as it is commonly known', and allowed the patient's wife to order its withdrawal without being exposed to legal sanctions.

Doctor-assisted suicide

Although it has been suggested that the phrase 'doctor-assisted suicide' should be replaced with 'death with dignity', 'aid-in-dying'[11] or 'doctor-assisted death', the term is still used widely and is applied where doctors administer or supply lethal drugs or mechanisms to patients who are terminally ill to assist them to hasten their death so that they might die with dignity. Whether the doctors actually administer the drugs or mechanisms or provide them, knowing that their patients will use them to take their own lives, makes no difference.[12] In both instances doctors are regarded in law as having 'caused' or contributed to the death of their patients.

The question of whether or not a doctor is guilty of murder or culpable homicide will depend on whether the courts regard such conduct as unlawful.[7] The Stransham-Ford case now suggests that, in certain cases, the courts may hold that 'active' voluntary euthanasia by a doctor is not unlawful because its prohibition is a violation of the Constitution. The court, however, was careful not to elevate this to a general rule because it recognised that the terms and conditions for a general rule need to be considered and determined by Parliament, the Constitutional Court or an appeal court.[1]

The present legal position

In the Stransham-Ford case, the court clearly stated that each application for doctor-assisted suicide by terminally ill patients who wish to die in dignity must be considered on its merits.[1] The judgment implies that, unlike in cases of 'passive' euthanasia, where no court order is required unless the decision is challenged in court,[2] in cases of 'active' euthanasia it will be necessary to obtain a court order. The requirement of a court order provides a safeguard against abuse,[1] and will be mandatory unless Parliament, the Constitutional Court or an appeal court outlaws the practice or provides other guidelines for how it should be conducted. Until then, the decision in the Stransham-Ford case (which is a judgment by a single judge) is not binding on any of the high courts in Gauteng or the other provinces of SA, but may be of persuasive value to them. The case recognises that people in the position of Mr Stransham-Ford may approach the courts for an order allowing their doctors to assist them in terminating their lives. Such an application may or may not be granted in future, depending on how Parliament, the Constitutional Court or other appeal courts develop the law.

1. Stransham-Ford v the Minister of Justice and Correctional Services and Others 30 April 2015, Case no. 27401/15 (NGHC) (unreported).
2. Clarke v. Hurst NO and Others 1992 (4) SA 630 (D).
3. Section 8 of the Constitution of the Republic of South Africa, 1996.
4. Burchell J. Principles of Criminal Law. 3rd ed. Lansdowne: Juta & Co. Ltd, 2006:209.
5. S v. Daniels and Others 1983 (3) SA 275 (A).
6. S v. Hartmann 1975 (3) SA 532 (C).
7. McQuoid-Mason DJ. Withholding or withdrawal of treatment and palliative treatment hastening death: The real reason why doctors are not held legally liable for murder. S Afr Med J 2014;104(2):102-103. [http://dx.doi.org/10.7196/SAMJ.7405]
8. Section 12(1)(e) of the Constitution of the Republic of South Africa.
9. Carter v Canada (Attorney-General) 2015 SCC 5.
10. S v Makwanyane 1995(3) SA 391 (CC).
11. Zaremski MJ. Legal Rx: Suicide and hastening death are different – death with dignity should be seen as just that. http//www.medpagetoday.com/PublicHealthPolicy/Ethics/49429 (accessed 5 June 2015).
12. Cf S v Grotjohn 1970 (2) SA 355 (A).

Accepted 4 June 2015.