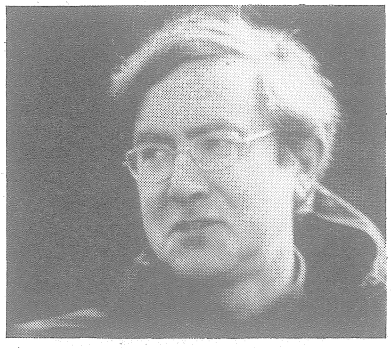
PAIN-KILLING DRUGS AND THE LAW OF HOMICIDE



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During the recent debate in New Zealand about the proposed 'Death with Dignity' Bill, there were occasional references to the 'doctrine of double effect'. In the context of the care of terminally ill patients, this doctrine is said to sometimes permit the administration of drugs for the purpose of relieving pain, even though it is known that the drugs are likely to have the incidental effect of hastening death.

The 'doctrine of double effect' is not a legal doctrine, and has no direct application in law. However, if the issue were to come before New Zealand courts, it is overwhelmingly likely that judges would hold that doctors and nurses will not be liable in consequence of the administration of drugs to relieve the pain of terminally ill patients - even if, when administering the drugs, the doctors and nurses believed that their patient's lives could well be shortened in consequence. (It is assumed here, and in all that follows, that any necessary consent of competent patients has been obtained.)

It is not surprising that a New Zealand court has not been asked to rule on these matters: it is so widely accepted that the administration of pain-relieving drugs is legitimate in these circumstances that a prosecution is most unlikely. Nevertheless, it is as well to clarify the legal position: it would be unsatisfactory if doctors and nurses were left with the impression that it is only because of an unwillingness to prosecute, or because of the virtual certainty that no jury would convict, that they cannot be found guilty of murder or manslaughter when they act, in accordance with good medical and nursing practice, to seek to relieve the pain of terminally ill patients.

The New Zealand law of homicide is by no means identical to that of England. Nevertheless, New Zealand courts often place considerable reliance on English cases. If the New Zealand courts had to rule on the legality of the administration of pain-relieving drugs to terminally ill patients, when it was known that the drugs could well hasten death, they would almost certainly be influenced by the English case law. It is therefore proposed to start by reviewing the leading English cases, before going on to examine some of the details of the New Zealand law of homicide. (Except where indicated, emphasis in quotations has been added for the purpose of this article.)

English case law

In 1957, in the trial for murder of *Dr Bodkin Adams*, Devlin J instructed the jury on the approach to be adopted when it is claimed that death was caused by the administration of pain-killing drugs. He told them that cause 'means what you twelve men and women sitting as a jury in the jury box would regard in a common-sense way as the cause'. He gave the example of a doctor who did or omitted to do something, because of which death occurred 'at eleven o'clock instead of twelve o'clock, or even on Monday instead of Tuesday'. He said:

> [N]o person of common sense would say 'Oh, the doctor caused her death.' They would say that the cause of death was the illness or the injury, or whatever it was, which brought her into hospital, and that the **proper medical treatment** that is administered and **that has the *incidental* effect of determining the exact moment of death**, or may have, **is not the cause of death in any sensible use of the term.**

He also said:

> **If the first purpose of medicine, the restoration of health, can no longer be achieved** there is still much for a doctor to do, and **he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life.**

The flexibility which Devlin J's approach provided was widely welcomed. Although there was dispute about whether the matter was best dealt with as one of causation, there was little doubt that at least the broad outlines of Devlin J's approach would be followed in later cases.

In recent years there have been several cases in which English judges have reaffirmed that it is sometimes lawful to administer drugs to patients, even if the drugs will incidentally hasten death. In *Re J (Wardship: Medical Treatment)* [1991] Fam 33, 46 the English Court of Appeal was dealing with an issue about the treatment of a child who had been born a few months earlier. In the course of his judgment, Lord Donaldson MR said:

> What the doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely. This is not a mere matter of semantics. It is fundamental. **At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death.** What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so. (His italics)

> ...it is sometimes lawful to administer drugs to patients, even if the drugs will incidentally hasten death.

A similar approach was adopted by Ognall J in his summing-up to the jury in the trial for attempted murder of *Dr Cox* (1992) 12 BMLR 38. He said:

> It was plainly Dr Cox's duty to do all that was medically possible to alleviate her pain and suffering even if the course adopted carried with it an obvious risk that as a side-effect - note my emphasis, and I will repeat it - even if the course adopted carried with it an obvious risk that as a side effect of that treatment, her death would be rendered likely or even certain.

He went on to say:

> There can be no doubt that **the use of drugs to reduce pain and suffering will often be fully justified notwithstanding that it will, in fact, hasten the moment of death**, but . . . what can never be lawful is the use of drugs with the primary purpose of hastening the moment of death.

The distinction drawn by Ognall J was reaffirmed in the House of Lords in the leading case of *Airedale NHS Trust v Bland* [1993] AC 789, 865, 867. Lord Goff said that it is not lawful for a doctor to administer a drug to bring about the death of a patient, even though the doctor is prompted by a humanitarian desire to end great suffering. But he also referred to:

> **the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an *incidental* effect of that application will be to abbreviate the patient's life.**

Lord Goff said that:

> Such a decision may properly be made as part of the care of a living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, **where the doctor's treatment of his patient is lawful, the patient's death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable.**

The Crimes Act 1961

The Crimes Act 1961 provides the statutory basis for the New Zealand law of homicide. Under New Zealand law, the question whether conduct amounts to murder or manslaughter does not arise unless affirmative answers have been given to the two preliminary questions: whether it is homicide, and, if so, whether it is culpable homicide.

It is overwhelmingly unlikely that a health professional will be prosecuted for following the established practice of administering a pain-relieving drug to a terminally ill patient, when it is known that the drug may well hasten death. However, if a prosecution were to occur, a New Zealand judge would have more than one way of avoiding the conclusion that the doctor or nurse was guilty of manslaughter, much less murder, if death was in fact hastened. One would be to deny that the administration of the drug was in law a cause of death; another would be to say that the administration of the drug was lawful. The English cases provide some support for both of these approaches, which will be examined here with specific reference to the New Zealand statutory provisions.

> . . . a doctor is sometimes legally justified in administering a pain-killing drug, even though the drug may hasten death.

Is it homicide?

Section 158 of the Crimes Act 1961 provides that

> Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

When determining whether the defendant can be said to have caused the death of another human being, the New Zealand courts have relied more on the English case law than on a detailed exegesis of section 158 and the related provisions in the Crimes Act 1961.

It is well-established that the defendant's conduct does not have to be the sole cause of death for the defendant to be found to have killed the deceased person. It is enough that the defendant's conduct was a substantial - or, it is sometimes said, a significant - cause of death occurring when it did.

The case law provides two grounds on which it could be concluded that the administration of pain-killing drugs would not, in the circumstances under discussion here, amount to homicide. One is that the drug which hastens death is not a substantial or significant cause of death, so it can be disregarded. The other is that the lawful conduct of a health professional, in seeking to relieve the pain of a dying patient, should not be regarded in law as a cause of death. Objections can and have been raised to both of these ways of dealing with the matter. For later judges, these objections may be less significant than the fact that the causation approach has been supported by such highly regarded judges as Lord Devlin (as he became) and Lord Goff.

There is one statutory provision which might be thought to preclude the possibility a New Zealand judge adopting one of the approaches outlined above. This is section 164 of the Crimes Act 1961, which provides that:

> Everyone who by any act or omission causes the death of another person kills that person, although the effect of the *bodily injury* caused to that person was merely to hasten his death while labouring under some disorder or disease arising from some other cause.

However, in *Auckland Area Health Board* v *Attorney-General* [1993] 1 NZLR 235, 254-255, Thomas J held that withdrawal of artificial ventilation, from a patient who would die almost immediately without it, did not amount to the causing of 'bodily injury' for the purpose of section 164. In the same way, it could be argued that administration of a pain-relieving drug to a terminally ill patient should not be taken to cause 'bodily injury' in this context - even if it has the incidental effect of suppressing respiration and hastening death.

Is it culpable homicide?

Even if the administration of the drug did hasten death, and was held to be homicide, it would not necessarily follow that it was culpable homicide.

Killings of human beings are not all culpable. For a killing to amount to culpable homicide it must come within

the scope of section 160(2) of the Act. The relevant part provides:

Homicide is culpable when it consists of the killing of any person –
(a) By an *unlawful* act; or
(b) By an omission without lawful excuse to perform any legal duty; or
(c) By both combined; or
. . . .

Paragraph (b) could well apply if the health professional administered a quantity of the drug which no reasonably careful health professional would administer in the same circumstances. However, such cases will be rare. Much more important, in this context, is paragraph (a).

In consequence of paragraph (a), it is not every act which causes death which amounts to culpable homicide: the death must be caused by 'an *unlawful* act'. There is now a good deal of authority for the view that a doctor is sometimes legally justified in administering a pain-killing drug, even though the drug may hasten death. Where the practice is legally justified the health professional will not have killed the patient by 'an unlawful act'.

The passage from Devlin J's summing up in the trial of Dr Bodkin Adams, in which he said that if the first purpose of medicine, the restoration of health, can no longer be achieved a doctor 'is *entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life*', was quoted with apparent approval by Thomas J (who added the emphasis) in the case of *Auckland Area Health Board* v *Attorney-General* [1993] 1 NZLR 235, 252. A little later in his judgment, Thomas J used the example of a man 'riddled with cancer, in constant agony, and facing imminent death'. He asked 'Is he to be placed upon a respirator?', and responded to his own question: 'On the contrary, it has been generally accepted that doctors may seek to alleviate a patient's terminal pain and suffering even though the treatment may at the same time possibly accelerate the patient's death.'

Thomas J touched upon the matter only in passing, but there is not the least reason to believe that he disagreed with the generally accepted view to which he referred. Another New Zealand judge, Williamson J, discussed the matter in a paper which he delivered to a New Zealand Law Society Conference in 1987 (and which was printed in *Humanity*, December 1987, p8) He said:

> The prescribing of pain-killing drugs to terminally ill patients even if they hasten death is widely accepted as morally justifiable. Since **the doctor has a lawful excuse** for his act and no murderous intent he is not guilty of an offence.

The express reference to 'an unlawful act' in section 160(2)(a) would often make it easy for a New Zealand court to hold - in the light of the cases quoted earlier, and some others to the same effect - that the administration of a pain-killing drug was not, in the circumstances, unlawful. If the act of administering the drug was not unlawful, the health professional would not have committed culpable homicide - even though death was hastened by that act.

Conclusion

Any health professional who administered a drug for the purpose of hastening death would invariably be guilty of murder in New Zealand law. But health professionals who act, in accordance with good medical or nursing practice, to relieve the pain of terminally ill patients, do not risk criminal liability if death is hastened. In the highly unlikely event of their practice being challenged, a New Zealand court would hold either that the administration of the drug was not a legally significant cause of death or that the administration of the drug was not unlawful. Either way, the doctor or nurse would not be liable.

1996 Summer Seminar: Call for Papers

The Bioethics Research Centre in conjunction with the Health Research Council invite participants in the 1996 Ethics Summer Seminar. The seminar will be organised into three streams:

1 Research Ethics (held from 9-11 February) This stream is funded by the Health Research Council of New Zealand
2 The Moral Management of Health Care (held from 12-14 February)
3 Teaching and Learning in Bioethics (held from 12-14 February)

Overseas contributors include Hermann van der Kloot-Meijberg from the Netherlands who will be a keynote speaker in the Moral Management Stream and Bernadette Tobin from Australia who will be a speaker in the Teaching and Learning Stream. Tom Murray from the USA and Paul McNeill from Australia will be keynote speakers in the Research Ethics stream. In addition to the overseas visitors the Seminar will draw extensively on local expertise.

There will be an opportunity for formal presentation of papers and (in the case of the Teaching and Learning in Bioethics Stream) an opportunity to hold workshops and demonstrations on teaching ethics. One of the Centre's aims is to create sessions in which all present can be participants. All three streams will also feature workshops.

See the centre pages for the provisional programme and registration form.