

HEALY'S COURT: SHOULD WE HAVE A RIGHT TO ASSISTED SUICIDE?

Presented at Bouchercon, Chicago, September 1, 2005

After the "Healy's Court" presentation at Bouchercon, Chicago, a number of audience members asked if I would post my "teaching notes" for it on my website. I'm happy to do so, and I hope they prove educational on this difficult subject.

Jerry:

Intro:

- Trial Professor for 18 at NESL, first in country...
- RIGHT TO DIE in May, 1991
- In the novel, I explore the various viewpoints on whether or not we should have a right to assisted suicide.
- Month later, Dr. Kevorkian indicted for first time.
- I did a lot of radio and TV talk shows:
- Derek Humphrey's FINAL EXIT, a how-to-manual, The Hemlock Society

14 YEARS later, Terry Schiavo case in Florida, resulting in a governor intervening, a legislature intervening, and appeals to the Supreme Court of the United States.

We haven't made much progress in resolving things.

I'd like to explore today the issues surrounding the issue of a right to die as though I was teaching a law school class about it. There are some "ground rules," though. I'll be pretty imperious, asking you to stand if you want to say something, and perhaps not calling on you, or perhaps coming BACK to you after you've taken a position. And only if we have time at the end of the session will I take questions that I'm not posing to you. Finally, this is just a DEBATE: I am NOT providing legal advice to ANY of you.

All agree to this ground rules?

Okay. Let's start with some, if not universal ground, at least perhaps common ground.

An 80-year-old man, fine mentally, but in tremendous pain from prostate cancer that migrated to his bones. Every time he rolls over in bed, he breaks another one. The cancer is incurable, and he asks the hospital to stop doing anything further medically.

Do we agree the patient has THAT right? If so, why?:
age, mentally fine, incurable, pain, declination of medicine

Hypo B:

Same facts, but that patient also asks the hospital to stop bringing him meals?

THIS right as well? Yes: He could always just refuse to eat any food actually brought to his room, correct?

Hypo C:

Same facts, but he's too weak to eat, and the hospital is feeding him intravenously.

Do we agree the patient has the right to demand the tubes be detached?

Hypo D:

Same facts, including intravenous, but he seems confused about his situation.

Do we let HIM still decide? Risks to DOCTOR?: Professional, Civil, even Criminal?

Hypo E:

Same facts, but while he's confused, he seems to trust his daughter to decide things for him.

Can SHE decide?

Advanced Directives, like Living Will, Medical Proxy, etc.

Hypo F:

Same facts, but the man's son DISAGREES with decision to withdraw feeding tubes.

Who decides? Doctor? Majority of Family? A Court? A lawyer appointed to represent the patient/father?

Hypo G:

Same facts, but the patient/father is now not just confused, but in a coma, and there is no advanced directive executed by him when he WAS mentally competent. D says F wouldn't want to live this way; S says F would want to let nature take its course.

Who decides?

Hypo H:

Same facts, but no apparent pain for comatose F, and D claims comatose F orally told her in past when he WAS mentally competent that he wouldn't want to live that way; S says his F told HIM nothing like that?

Who decides?: Terry Schiavo case. Comatose, brain dead, hopeless, on feeding/hydration tubes, H says W told him she didn't want to be kept alive like that; Parents of W say she wouldn't want to "starve to death/die of thirst": Cruelty beyond punishment we couldn't even impose on a convicted mass-murderer, right?

ARE WE CONCERNED ABOUT SOME OTHER FACTORS HERE?

New Hypo I:

5-year-old, physically and mentally disabled child, in coma. Both parents and doctors say can't get better, and obviously the child was always too young to execute an advanced directive on what he or she would want done.

Who decides?

Hypo J:

Same facts as I, but all Medical Insurance has run out on child, though parents able to afford to pay from current income.

Who decides?

Hypo K:

Same facts as I and J, but parents have two other, healthy kids, and the medical expense of the disabled child will force the family to sell its house in order to keep paying.

Who decides? Financial suicide for the family, right, unless we starve the disabled boy?

STAGGERING FACT: New England Journal of Medicine estimates that in the USA, 90% of health-care dollars are spent on the last 30 DAYS of a patient's life.

Make a difference in who should decide? In what should be DECIDED?:

Oregon's rationing of health care law: Struck down by US Supreme Court on Americans with Disabilities Act violation grounds. Hearing in October by same court on the Oregon Right to Die statute.

New Hypo M:

An 80-year-old, mentally competent woman is in significant pain, but has no terminal disease. She asks her doctor to increase her pain medication so as to let her simply pass away in her sleep, free of pain.

Different issue? This is ASSISTED SUICIDE, right? Why Dr. Kevorkian is doing 20 years in prison: For helping someone to kill themselves.

THE NETHERLANDS EXPERIENCE: Not prosecuted, up to doctor to confer with patients and doctor to be convinced that his or her patient wants, truly, to die. A PROBLEM with that?

Hypo N:

Same as M, but our elderly female patient is in a coma, and ALL five of her children say she would like to have the pain-killer hot shot.

Who decides?

CURRENTLY IN HOSPITALS: From a confidential survey about four years ago, the American Medical Association determined that approximately 75% of all HOSPITAL deaths are now "doctor-assisted": Family/doctors informally confer, and so long as nobody DISagrees, the pain-killer is

given to the comatose patient until the patient dies from it.

Why did SURVEY have to be confidential?: Professional, civil, even criminal action against doctor.

Any problem with nobody "disagreeing?"

Hypo O:

Same facts, but our elderly, comatose patient is worth \$5 million, and her five children aren't getting any younger themselves?

How about a procedure, established by legislative enactment and court rules, where a mentally competent person who wanted to die would have to appear before a panel of 3 professionals (say a judge, a lawyer, and a doctor) in a courtroom setting. During this RTD hearing the person or his or her attorney, offers arguments why the person wants to die, and the panel decides if such a wish should be granted, thereby absolving the doctor who gives the hotshot of any liability professionally, civilly or criminally?

NOTE: In Massachusetts, we do this every week on medical malpractice cases, where a patient claiming to have been injured is required to make an upfront showing of at least SOME evidence of malpractice by their doctor during a hearing presided over by a judge, a malpractice lawyer, and a doctor in that specialty. If the patient can't make that upfront case, he or she can still sue, but they have to post a bond that would pay the doctor some substantial money if the plaintiff/patient loses.

What if a similar RTD panel turns DOWN the person's request?

There's always suicide yourself, or, if you're unable (completely paralyzed), a spouse, lover, friend to help? Back to Kevorkian, right? Assisted suicide, just without benefit of doctor?

Final HYPO:

What if the "person" in our RTD-hearing situation is comatose, though, and no advanced directive, and we have the 5 greedy children looking to have mom put out of their misery? Should there be an attorney appointed for HER toward arguing the opposite during the hearing?

WOULDN'T THIS RTD HEARING, WITH ADVOCATES ON BOTH SIDES AND A RIGHT TO AN EXPEDITED APPEAL, BE PREFERABLE TO WHAT HAPPENED IN THE SCHIAVO CASE IN FLORIDA TO ALL MEMBERS OF THAT POOR PATIENT'S FAMILY?

Questions and Answers?

Thanks for your attention, and enjoy the balance of the conference.