Is there a right to die?

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The ethical and legal dilemma

“Modern medicine... Faces us with fundamental and painful decisions about life and death which cannot be answered on the basis of normal everyday assumptions.” (Hoffmann LJ in Tony Bland’s Case)
A Right to Die with Dignity?

The decisionally competent patient

Given that death is inevitable for every human being:

• Does the right to life include an individual’s right to choose how and when that life shall end?

• Does a patient have the legal right to terminate his or her own life?

• If so, does that patient, if physically unable to perform the act personally, have a right to seek the voluntary assistance of another to do so?
What actually happens in the NHS?

In 2007-2008:

- **21.8%** of deaths involved withdrawing or withholding treatment
- In **4.9%** of deaths the decision was made with the 'explicit intention of hastening end of life'

(C Seale, 'End-of-Life Decisions in the UK Involving Medical Practitioners' (2009) 23 Palliative Medicine 198)
‘Martin’

Martin is 50. In August 2008 he suffered a brain stem stroke, leaving him virtually unable to move. He cannot speak. He communicates through small movements of his head and eyes and, very slowly, by using computer technology which can detect where on a screen he is looking. He is totally dependent on others for every aspect of his life. He can swallow, and is fed by carers putting food in his mouth, so could take lethal medication by mouth but would need assistance.

He is unlikely to die of natural causes in the near future. Since at least 2011, Martin has had a strong, settled and reasoned wish to end his life, which he finds undignified, distressing and intolerable. His wife, a nurse and his primary carer, does not wish to assist him personally to die but will support him if he gains his wish.
Question:
Should a physician who is **willing** to do so be **ethically** permitted to assist Martin to die when, where, and in the way, he wishes?
The Suicide Act 1961

s. 1 Suicide is no longer a criminal offence.

s. 2(1) A person (“D”) commits an offence if –
(a) D does an act capable of *encouraging or assisting the suicide or attempted suicide of another person, and
(b) D’s act was intended to encourage or assist suicide or an attempt at suicide.

[*amended 2010 to include providing suicide information, including online]*

s. 2(4) any prosecution must be instituted by the Director of Public Prosecutions.

Maximum sentence: 14 years’ imprisonment

NB: voluntary euthanasia = murder (mandatory life sentence
The legal paradoxes (Nicklinson UKSC 2014)

• It is a criminal offence to assist someone to perform a legal act.
• The ‘victim’ is not merely a willing participant, but the instigator.
• The ‘victim’s human right to self-determination at the end of life (ECHR Art 8) is interfered with unless the crime is committed.
• The person committing the offence will be a reluctant participant, motivated by compassion for the ‘victim’.
Does a **competent** person have a legal right to commit suicide?

With the exception of

- children, or
- adults who are mentally ill, or
- persons in the State’s care and custody e.g. prison,

the State has **no** general obligation at common law or under the guarantee of the right to life in Article 2(1) of the European Convention on Human Rights (ECHR) to place obstacles in the way of persons desirous of taking their own life; the **prevention of suicide is not amongst the allowable proportionate limitations on the right to personal autonomy**.

*Savage v S Essex NHS* (HL, 2008)
*Rabone v Pennine Care NHS* (UKSC 2012)
*Nicklinson v Ministry of Justice* (UKSC 2014)
A. The Law: Martin, having mental capacity:

(1) is entitled to assess for himself the quality of his life, and

(2) having determined that he wishes to die, is entitled to refuse, or to require the cessation of, all life-sustaining medical treatment (if provided – not so for Martin), nutrition or hydration; and

(3) if he were capable of taking the necessary steps to end his life, would be entitled to do so.
B. The law: Martin, having mental capacity:

(4) **BUT** since, due to his disability, he is physically incapable of taking the necessary steps to end his life quickly, he has only one legal recourse within the UK: to refuse nourishment and hydration until death ensues, and to instruct that only palliative care be provided until that point is reached. [Attempted by Martin after he lost his first case at trial, but he had to abandon his attempt to kill himself “in distressing circumstances”, whereas Tony Nicklinson succeeded in dying].

(5) Apparently he is entitled to exercise his human right to travel to another jurisdiction where assisted dying is not criminalised (*Pretty v UK; Purdy v UK*)
Poignant: Businessman Jeffrey Spector (circled) shares a final meal in Switzerland with family and friends - including two of his daughters.

A 54-year-old British father dines with loved ones. Just 16 hours later he took his own life at a Swiss clinic, with the reluctant blessing of his wife and three daughters.
The law: Martin, having mental capacity:

BUT any UK resident who knowingly assists Martin in so doing, in the UK or abroad, is subject to:

- the virtual inevitability of a UK police investigation, and
- the possibility of a prosecution under the Suicide Act 1961.
Debbie Purdy
It's not because I want to die
After Purdy, and Nicklinson, Lamb & ‘Martin’: 

**Policy for prosecutors** (Feb 2010, updated Oct 2014)

Public interest factors **in favour** of prosecuting 
[weighted according to the case](selected from 16):

(1) V under 18 
(2) V did not have capacity under MCA 2005 to make an informed decision 
(5) V did not seek D’s assistance personally or on V’s own initiative 
(6) D not wholly motivated by compassion 
(8) D did not take reasonable steps to ensure no one had pressured V
Public interest factors in favour of prosecuting

(14) “the suspect was acting in his or her capacity as a medical doctor, nurse, or other healthcare professional, a professional carer [whether for payment or not] or as a person in authority ... and the victim was in his or her care”

• “care” clarified in fn1 as meaning “a relationship of care between the suspect and the victim such that it will be necessary to consider whether the suspect may have exerted some influence on the victim” –

• to give effect to Lord Judge CJ in Nicklinson & ‘Martin’ (CA) that it does not apply to a non-treating health professional brought in from outside to assist an already determined patient to end his life]
Public interest factors tending *against* prosecution

(1) V had reached a **voluntary, clear, settled and informed** decision

(2) D was wholly motivated by compassion

(3) D’s actions only minor assistance

(4) D had sought to dissuade V

(5) D acted reluctantantly, in face of V’s determined wish; or

(6) D reported V’s suicide to the police and cooperated with the investigation.
European Court of Human Rights: mixed signals?

(1) “An individual’s right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question, and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of article 8 of the Convention.”

Haas v Switzerland (2011) 53 EHRR 33 [51]

Q posed by Lady Hale & Lord Kerr in Nicklinson: Is this right dependent on being physically capable of carrying out that choice without any assistance?

(2) “It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.”

Pretty v UK [2002] ECHR 2346/02 [76]
Nicklinson, Lamb and ‘Martin’ v Ministry of Justice (UKSC 2014)

• Ruled 7:2 that it would be inappropriate for the SC to rule that the assisted suicide offence was incompatible with the ECHR article 8 (right to privacy, self-fulfilment) *at that time* given that Lord Falconer’s Bill was before Parliament

• BUT majority (5:4): the interference with article 8 rights was “particularly grave” and that legislative judgment [if the Bill was defeated] would not be determinative of the issue

• Minority would have made a declaration of incompatibility to guide Parliament

• Assisted Dying (No 2) Bill defeated in HC in Sept 2015
What would you do?

• An elderly woman with a mild-moderate degree of dementia tells you that her husband, to whom she has been married for 62 happy years, has cancer and is expected to die within 3 months. She cannot face life without him, and she wishes to go with him to Dignitas in Switzerland so that they can end their lives, as they have lived, together. They have discussed it with their children, who understand and support the decision.

• Dignitas requires a medical assessment of capacity before they will accept her.

• Will you provide the assessment she asks for?
GMC Guidance

‘When a patient seeks advice or information about assistance to die’

• Listen and discuss
• Limit advice or information to:
  – Explanation that it is a criminal offence to encourage or assist a person to commit or attempt suicide
  – Advice about lawful options such as sedation and palliative care
• Be respectful and compassionate
• Assess any unmet needs
Compare: *Guidance for the Investigation Committee and case examiners when considering allegations about a doctor’s involvement in encouraging or assisting suicide*

- respect competent patients’ right to make decisions about their care, including their right to refuse treatment, even if this will lead to their death
- When considering any allegation of encouraging or assisting suicide, the Investigation Committee or case examiner must decide whether there is a realistic prospect of establishing that a doctor’s fitness to practise is impaired to a degree justifying action on their registration.* In making this decision they must have in mind the GMC’s duty to act in the public interest. The public interest comprises:
  - a protecting patients
  - b maintaining public confidence in the profession, and
  - c declaring and upholding proper standards of conduct and behaviour.
What does the GMC consider is “assisting suicide”? 

• Examples of where such encouragement or assistance might arise include, although are not limited to, where a doctor has prescribed medication that was not clinically indicated:
  – a after a patient had expressed or implied a wish or intention to commit suicide, or their intention was clear from the circumstances
  – b and the medicine would cause death if taken at the prescribed dose or according to the doctor’s instructions.
Doctors’ conduct may also raise a question of impaired fitness to practise by (this list is not exhaustive):

- a encouraging a person to commit suicide, for example by suggesting it (whether prompted or unprompted) as a ‘treatment’ option in dealing with the person’s disease or condition
- b providing practical assistance, for example by helping a person who wishes to commit suicide to travel to the place where they will be assisted to do so
- c writing reports knowing, or having reasonable suspicion, that the reports will be used to enable the person to obtain encouragement or assistance in committing suicide
- d providing information or advice about other sources of information about assisted suicide
- e providing information or advice about methods of committing suicide, and what each method involves from a medical perspective.
Now what would you do?

• An elderly woman with a mild-moderate degree of dementia tells you that her husband, to whom she has been married for 62 happy years, has cancer and is expected to die with 3 months. She cannot face life without him, and she wishes to go with him to Dignitas so that they can end their lives together. They have discussed it with their children, who understand and support the decision.

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Held:

• GMC Guidance is valid and binding on physicians even though it is more stringent than the DPP’s Prosecution Guidelines and prevents patients from accessing medical advice and information.

• Application to Court of Appeal for leave to appeal pending

AM v General Medical Council [2015] EWHC 2096
Canada takes the bold course: 
*Carter v Canada* (SCC 2 Feb 2015)

- Struck down the assisted suicide offence in the Criminal Code of Canada as unconstitutional to the extent that it criminalises physician-assisted suicide for
  
  (1) A competent adult person
  
  (2) Who clearly consents to the termination of life
  
  (3) And has a *grievous* and *irremediable* medical condition
  
  (4) Causing *enduring* suffering that is *intolerable* to that individual

- For Parliament of Canada to devise system of safeguards – given 12 months to do so