Euthanasia, pain killing, murder and manslaughter

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Introduction

Two features of the law of euthanasia sit very uneasily with each other. One is that euthanasia is murder; the other is that only a light punishment (if any) should be imposed in cases of euthanasia. Since the very reason for having a law of murder rather than an undifferentiated law of homicide is to mark off the worst cases of killing from the less serious cases so that the former are murder and the latter manslaughter, the imposition of a light penalty in a case of murder debases the coinage and tends to bring the law into disrepute. That does not mean that heavy sentences should be imposed in euthanasia cases. It means that some way should be found to take such cases out of the law of murder into that of manslaughter or even justifiable homicide.

There is probably much less political resistance to reducing liability from murder to manslaughter than to full legalisation in cases of euthanasia. In many cases there will be resistance to any modification to the law but in others a certain amount of common ground may lie awaiting discovery. Any move towards lessening the law's theoretical grip on euthanasia is likely to be met with slippery slope arguments and these deserve to be treated seriously. They must however be weighed against the agony to which the present law may give rise. What this article seeks to do is to identify a situation where the harm visited by the present law outweighs the risk of a slippery slope and where a reconsideration of the law of murder and manslaughter can lead to an overall improvement in the lives of the more pain ridden members of the community.

The form of euthanasia which most clearly satisfies this test is killing to remove otherwise uncontrollable pain. Even those most opposed to the legalisation of euthanasia are likely to concede the theoretical justification of at least some mitigation in these circumstances. The objection to legalisation is more likely to be on the ground that killing is not necessary because of the availability of palliative care which will control the pain without killing the patient. This may be the potentially common ground on which a more humane and at the same time more effective law can be sown. The problem will be considered under three heads; firstly, the effects of the present law; secondly, the legal principles which lead to the view that euthanasia even in this kind of case is murder; and thirdly, a set of arguments which could lead to manslaughter convictions in most cases and the possibility of justifiable acquittal in some exceptional ones.

The effects of the present law

The notion that killing to end otherwise uncontrollable pain is murder leads to two consequences. The first is that ways will be found to mitigate the effect of that theoretical position. There are several points in the administration of criminal justice at which a discretion exists to drop the charge altogether or to reduce it to a lesser offence (Otlowski, 1993). So, for example, prosecutors may refuse to prosecute at all, or may prosecute on a lesser charge like manslaughter or attempted murder, or they may accept a plea of guilty to a similar lesser charge, or discontinue a prosecution. Juries may acquit either completely or partly by returning a manslaughter verdict where theoretically a murder verdict should have been returned. Even if the verdict is murder the judge may impose a sentence more appropriate to a much less serious offence, where there is a discretion to do so. Where there is no such discretion and a very heavy penalty is imposed, the executive may reduce or eliminate the punishment. All of these devices have been employed in the area of mercy killing. One way of viewing this situation is
to say that the law is kept pure and simple while mercy is dispensed through a sympathetic exercise of the various discretions. Another is to say that the law in practice has demonstrated the unsuitability of the law in the books.

The second consequence is that the educative value of a properly presented manslaughter charge will be lost if the case is seen to be in effect one of a sympathetically lowered murder charge.

The fact that euthanasia is unlawful however has had one very important consequence. Since a humane society will hardly stand by and contemplate that its frailer members will eke out their final hours and days in agony, it will strive for ways to control terminal physical pain. If the euthanasia option is not available some other method will have to be found. In Britain and Australia that method involves palliative care and the hospice movement. Contrast the position in the Netherlands where active euthanasia is available and palliative care poorly developed (Segers 1988 p.409). It seems probable that a law which held euthanasia to be manslaughter rather than murder would have been just as efficient in providing the sanction for developing the palliative care system. The difficulty is in finding a legal basis for treating the case as one of manslaughter. The legal principles which will be examined later in this paper point to murder rather than manslaughter. Is the quest for a manslaughter approach worthwhile?

That leads to further consideration of the second social consequence of the present law. Treating the case as one of murder the law casts the doctor in the role of a victim of the system rather than a person to be censured. Murder treats as wicked someone who may merely have been negligent. But any question of negligence gets submerged if the case is presented on the basis that the intentional killing to prevent pain is, without more, illegal. The result is that sometimes patients will be killed when it is unnecessary to kill them and sometimes patients will be left to die in agony when they could have had their pain controlled by appropriate palliative care. This situation comes about because, though the vast majority of patients in pain can have that pain controlled, many of them die in pain because of ignorance of the availability of suitable palliative measures (Victorian Social Development Committee 1987 pp. 219-22). The law of manslaughter would be far better able to assist in remedying this defect than is the law of murder. A doctor who kills when palliative care is available but who is unaware of its availability is guilty of negligent rather than intentional wrongdoing. However as the deliberate taking of life is part of the overall picture, the standard of care could be pitched at a higher level than that required in the case of unintentional killing. This could lead to a manslaughter conviction on the basis of simple rather than gross negligence. A conviction on this basis is less likely to lead to the kind of sympathy for the doctor which engulfs the message that the doctor is at fault in killing where killing is not necessary. That message in turn should go a long way in stimulating the interest of doctors in the availability and methods of palliative care.

If these arguments are correct, the question becomes whether the manslaughter approach to the problem can be achieved by a plausible development of existing principles or by a limited statutory amendment of current law, which does not trigger alarm that the slippery slope is about to be engaged.

To assess the possibility of a manslaughter approach using current principles rather than legislative reform, we need first to look at the principles which support the view that euthanasia is murder and then to see whether there are exceptions or qualifications to those principles which would lead to a manslaughter approach.

**Euthanasia as murder**

For present purposes, murder can be defined as the intentional unjustified, inexcused and legally unmitigated killing of another human being. Active euthanasia fits this definition on the basis that it is the, or a cause of, death. That death is caused intentionally and that there is no defence which justifies, excuses or legally mitigates the killer's conduct. This position can be analysed in terms of specific legal principles as follows:-
Euthanasia is the cause of death on the ground that the hastening of death of one who is already dying is treated as killing (Hale 1736 p.429)

Intention can take the form either of a purpose to kill or of knowledge or foresight that one's act will kill (R v Moloney [1985] A.C. 905; R v Hancock [1986] AC 455; R v Nedrick [1986] 1 W.L.R. 1025). This rule as generally understood means that the mercy killer cannot argue that his or her purpose was not to kill but was to relieve the pain. If the only way to relieve the pain is to kill and the killer knows this, the requirement of intention to kill is satisfied.

There is no defence which justifies, excuses or legally mitigates the killing. As there is no specially fashioned defence of euthanasia, the only named defence which has any general application is that of necessity. Though this defence is available in relation to some kinds of offence, it does not appear to be applicable as a defence to murder (R v Dudley and Stephens (1884) 14 QBD 273; R v Howe [1987] A.C. 417; R v Ross (1854) Legge 857).

Even if some case could be found in which necessity provided a defence to murder, it is likely that it would be seen as an all or nothing defence, either allowing a complete acquittal or providing no defence at all where necessity was believed to exist but did not exist in fact. In the analogous case of self-defence Australian and English courts have taken different views on whether a negligent mistake that the facts justify the use of force will destroy the defence. The High Court of Australia has held that the defence is not available where the belief is an unreasonable one (Zecevic v D.P.P. (Vic.) (1987) 162 CLR 6 45), whereas the English courts have held that the defence is available in such cases. (Beckford v R (1988) A.C. 130; R v Gladstone Williams [1987] 3 All E.R. 411). But what both Australian and English courts agree on is that an unreasonable mistake does not provide a qualified defence reducing what would otherwise be murder to manslaughter.

The legal case for a manslaughter approach

If doctors, who kill to relieve pain when other methods of pain relief are (unknown to them) available, are to be guilty of manslaughter rather than murder, some of the principles set out above will have to be qualified. While there may be more than one possible path to a legitimate manslaughter verdict only the ones which seem to have the greatest hope of acceptance will be considered here.

Not all of the principles set out above will have to be qualified. But at least two of them will. The various principles will need confirmation or modification along the following lines:

1. The principle that hastening death of the terminally ill is a cause of death will need to be maintained. If this principle were reversed or unduly qualified neither a murder nor a manslaughter verdict could properly be obtained.

2. Either -
   (a) The rule that foresight of certainty of death is the same as intending to kill must be qualified; or
   (b) The rule that necessity is no defence to the crime of murder must be qualified or another defence found.

3. Either
   (a) If 2(a) applies, a head of manslaughter must be found where the doctor has acted negligently in killing where other palliative care was available; or
(b) If 2(b) applies, the law will need to recognise a qualified defence reducing liability from murder to manslaughter where the doctor unreasonably believes that killing is the only way to relieve pain.

These possibilities will be considered in detail a little later but first we need to be aware of a phenomenon which may be called the innominate defence. This is a factor which causes a result at odds with orthodox reasoning without overt recognition. It is as though there is an applicable defence which the courts are willing in some cases to employ but not to admit. This makes an appearance in the context of causation and intention where it arguably does not belong and is visibly absent from the defence part of the story where it would sit more comfortably. In the discussion which follows the innominate defence will play a central role. Now for the details.

1. Hastening and causing death

If hastening death is treated as causing death, it should make no difference, on the question of causation, whether the hastening is in response to good or evil motives. Whether the motive is pecuniary gain or relief of pain the shortening of life should be the cause of death. But the leading English case on the subject does not quite see it that way. In *R v Adams* ([1957] Crim. L.R. 365) Dr Bodkin Adams was charged with murder. He had given his patient a large dose of morphia. The prosecution alleged that he intended to kill her to inherit under her will. His case was that he gave the morphia to control her pain. Devlin J told the jury that there was no special defence of preventing pain but that if the doctor in giving proper medical treatment inadvertently shortened the life of the patient, it would not be murder because the treatment would not be the cause of death. (See also Williams (1958) pp.289-291).

While the recognition that the doctor's act would not be murder in these circumstances has been welcomed, the reasoning has been criticised because the result was based on causation (Williams 1958 pp. 289-291; Smith and Hogan 1992 p. 332 Ashworth 1991 pp. 102-103). There is merit in the criticism. The causative potency of the treatment is the same whether it is given in order to obtain an inheritance, whether it is in accordance with good medical practice or whether it is contrary to such practice. The legal liability in the three cases might be quite different but the difference would turn, not on causation or its absence, but on other aspects of criminal liability.

The principle in *R v Adams* has been expressly approved by members of the House of Lords in *Airedale NHS Trust v Bland* ([1993] 1 All E.R. 821). Lord Goff recognised that when a patient is dying a doctor may lawfully administer painkilling drugs despite the fact that the doctor knows that an incidental effect will be to abbreviate the patient's life (p. 868). He saw the doctor's action as lawful in these circumstances and added that where the doctor’s action is lawful the patient's death is regarded in law as exclusively caused by the pre-existing injury or disease. Lords Keith, Lowry, Browne-Wilkinson and Mustill agreed in general with Lord Goff, but Lord Mustill took a different view of the relevance of causation in the analogous case of a doctor's omission to provide life saving medical treatment. In his view in such a case both the original injury and the failure of the doctors to give life saving treatment would be a cause of the death, though where the doctor's omission was lawful there would be no criminal liability (pp. 892-893). This seems a more realistic assessment of the causal aspects of the conduct.

This discussion reveals the existence of the innominate defence. Though the doctor is free of liability where the painkiller shortens life, on the basis that the doctor has not caused the death, the crucial factor turns out to be not causal potency but the lawfulness of the doctor's action. This lawfulness turns on factors other than causation.

2(a) Foresight and intention

Though the cases cited below appear to hold that one who foresees that his or her conduct will lead with certainty to a given consequence intends that consequence, the matter is not quite so straightforward. Where the motive for the conduct is ignoble it is easy to equate
foresight of certainty and intention. In *Hyam v D.P.P.* [1975] AC 55 Lord Hailsham held that one who blows up an aircraft in flight in order to obtain insurance moneys intends to kill (p.74). But where the motive is a very honourable one there may be room to differentiate intention and foresight of certainty of consequences. The more recent English cases on the subject seem to leave space for this possibility. The House of Lords both in *R v Moloney* ([1985] A.C. 905 at p. 913) and *R v Hancock* ([1986] A.C. 455 at p. 472) held that foresight was merely evidence of intention and not the same thing as intention. In *R v Nedrick* ([1986] I WLR 1025), the Court of Appeal held that this was the case even if foresight was foresight of certainty, (p.1028). If that is so there must be some ingredient which must be added to convert foresight of certainty into intention. The only clue to what that ingredient is, is an indication of what it is not. What it is not is desire to bring about the forbidden result. (*R v Nedrick* [1986] 1 W.L.R. 1025 at p. 1028). So what is left? The most plausible answer is some element of wickedness, an element which would normally be made out simply on the basis that the defendant foresaw death as a certain result of his or her actions. But such an element would not necessarily be established where the killing occurred in order to remove unbearable and otherwise unrelievable pain.

If this ingredient is part of the law of murder a question arises on how best to account for it. It can either be regarded as part of the mental element of the crime of murder, the mens rea, or as a defence which eliminates responsibility for murder even if the mens rea is made out. On the second analysis we have another example of the inominate defence at work.

The first option would leave open the possibility of a manslaughter conviction if a head of manslaughter could be found. The second option would also allow for a manslaughter conviction if in any circumstances the inominate defence could operate as a qualified rather than an absolute defence. As a qualified defence it would release the defendant from liability for murder but leave him or her guilty of manslaughter. Before these alternative bases for a manslaughter verdict are discussed, however, we need to examine the case for treating the missing ingredient as a defence rather than keeping it in the ring as an element of intention.

2(b) Murder, necessity and the inominate defence

The cases below suggest that necessity is not a defence to murder. If that is so how could there be room for another defence which looks like necessity but which differs sufficiently to allow it to stand with the general rule. The answer seems to be that the cases assume that there is no value greater than human life and that that value is unquantifiable. That means that it is impermissible to take one life intentionally even if two or more other lives may be saved. But if there is a value greater than human life then such life can be taken to promote that value. It may be that a principle capturing this idea cannot safely be entrusted to the defence of necessity because that defence may be potentially too open-ended, unless subjected to definite sub-rules. An inominate defence confined to cases where the value which is greater than human life is present could provide a greater safeguard against undue extension.

The value greater than human life will be fairly evident from the discussion so far. It is the interest in being free from agonising pain where there is no hope of other relief. There is some recognition of this position in the approval by the House of Lords of the principle in *R v Adams* though it must be recognised that the House of Lords expressly denied a right to kill in order to relieve pain however intense the suffering (*Airedale NHS Trust v Bland* [1993] 1 All ER 821). The conflict involved in these two positions will have to be resolved if the question arises more directly.

Is there any prospect that the conflict might be resolved in favour of recognising a limited inominate defence? There is some support for such a case. Professor J C Smith, building on the reasoning of a British Medical Association (BMA) working party paper (Nuclear attack: Ethics and Casualty Selection 1988) has suggested that mercy killing might be lawful in the aftermath of a nuclear attack (Smith 1989). Like the working party Professor Smith stresses the wholly exceptional circumstances and the need for certain knowledge that the victim would experience terrible suffering and an incontestable factual condition. In a paper entitled *Euthanasia* (1988 p.29) and the BMA identified other cases where mercy killing might be
ethically justified. These included the case of a person trapped in the path of a fire and beyond rescue. An actual example of a similar situation was the case of a British soldier who shot an Argentinian prisoner of war who was caught without hope of rescue in a burning hut (The Age 13 April 1983). There is some religious and legal support for the inference that such killings would be justifiable. St Alphonsus Liguori, a nineteenth century theologian, held that it was not suicide to leap from a high window to avoid burning to death (Rachels 1988 pp. 104-105; Williams 1958 p 286). Suppose the person jumping had charge of a small child who would also perish in the flames. Would it be the sin of murder to take the child to an earlier painless death? The legal support is a little more remote but is in the same direction. Sir Matthew Hale (1736 p.611), who generally took a narrow view of the defence of necessity, held that a prisoner who escaped from a burning gaol was to be excused from the crime of gaol escape - an offence punishable by death.

While the legal authority of these cases is slim, the social case for regarding the actors as murderers, suicides or suicide attempters is weaker still. The only argument for criminalising such conduct is that the law in doing so is holding to a line, the crossing of which might lead to a remedy worse than the mischief of theoretical liability. In other words, the slippery slope argument. This argument, relied on by opponents of euthanasia for example, Alexander (1949) was given resounding endorsement by Lord Goff in Airedale NHS Trust v Bland ([1993] 1 All E.R. 821 at p. 867). There Lord Goff said that the law did not feel able to authorise euthanasia even in the case of a person dying in pain because once it was held lawful in those circumstances it was difficult to see any logical basis for excluding it in others.

The argument is powerful but not unanswerable. First, Lord Goff himself rejected the slippery slope argument in relation to the withdrawal of treatment on the ground that there was a clear distinction between that and active killing (p.874). But the distinction is one of law rather than logic. Lords Browne Wilkinson (p.884) and Mustill (p.895) had difficulty discerning a moral distinction between killing by omission and killing by act but were in no doubt that the law recognised that distinction in the context of medical treatment. If the law can draw a distinction between acts and omissions in defiance of logic it can also draw a distinction between physical pain and other forms of suffering.

Secondly, it seems likely that the law already does draw a distinction along this latter line. Lord Goff recognised that a doctor might lawfully give painkilling drugs even where he knew that to do so would abbreviate the life of the patient (p.868). This principle is itself an exception to two rules that shortening life is causing death and that one is taken to intend what one foresees will happen as a result of one's conduct. Rules of logic do not dictate the scope of the exception. Yet we are not forced to choose between abandoning the principle and allowing it to widen out to a fully fledged legalisation of euthanasia. Where it stops is a matter of policy not logic, and in the absence of parliamentary intervention that policy is in the hands of the courts.

Lord Goff did not discuss what kind of suffering other than physical pain might justify a shortening of life but it seems likely, from his approval of the Cox case (p.867), that he would not wish to extend it beyond physical pain. If that is right it would not be lawful to give life shortening drugs to a dying patient who was suffering from depression rather than physical pain, even if the drugs overcame the depression. If that limitation exists it exists as a matter of legal policy rather than logic and if that limitation can be imposed on the principle in Bodkin Adams it can be imposed on a principle which allowed the immediate implication of death where necessary to overcome terminal physical pain.

3(a) Mercy killing as manslaughter where there is no malice aforethought

If the law were to take the approach in section 2(a), that intention is not established where the primary motive is to kill pain, some basis for holding that the case is one of manslaughter must be found to ensure that the criminal law retains some control over active euthanasia. So far as Australian common law is concerned there is another problem to be overcome before liability for manslaughter is confronted. That is the problem of reckless
murder. Even if we can say that the killing is not intentional because of the merciful motive, a murder conviction will still be possible unless that motive also negates malice aforethought by recklessness. This concept is not fully developed in Australian law but the basic ingredient is that the defendant foresees that his or her conduct will probably lead to death or grievous bodily harm (R v Crabbe (1985) 156 C.L.R. 464. See also Boughey v The Queen (1986) 161 C.L.R. 10 for the meaning of probability). Since these are cases where death is foreseen as certain this condition is amply made out. After that the law becomes a little obscure. In R v Crabbe ((1985) 156 C.L.R. 464) and the High Court of Australia recognised that acts performed with foresight of the probability of death would not be murder if those acts were justified, as in the case of heart transplant operations (p.470). There could, however, be resistance to extending this reasoning to the case of mercy killing if the effect were to legalise the killing rather than remove it from the law of murder. By itself justification is too blunt a concept to cater for the case where the killing is objectively unnecessary, because of alternative palliative care, but is motivated solely by compassion. What is needed is recognition that for reckless murder there is some other ingredient, in addition to foresight and lack of justification which must be satisfied to make the killing a murderous one. There is some judicial authority for this extra ingredient in the judgment of Jacobs J in La Fontaine v The Queen (1985 156 C.L.R. 464) and a certain amount of extrajudicial (Goff 1988) and academic (Lanham 1978) support. In R v Crabbe (1985) 156 C.L.R. 464 at p. 470 the High Court denied that there was any element of indifference in recklessness, but the context came nowhere near to presenting the question as a live issue and the matter was not fully considered. In addition, rejection of indifference as an ingredient does not preclude recognition of other subjective elements in recklessness such as contempt for human life.

The upshot is that though the authority is slim the principles are in reserve for treating genuine mercy killing as something less than murder. This then sets the scene for the question whether there is a basis for holding that the mercy killing amounts to manslaughter.

On this approach to the problem there should be no difficulty in presenting a case for manslaughter. The arguments both in relation to intention and recklessness are concerned to eliminate malice aforethought, not to demonstrate legality. The strength of this approach is that there is no need to recognise that active euthanasia is ever legal. Even where there is no other way to prevent the most agonising physical pain, killing to do so will be illegal if a head of manslaughter can be found. There would be little danger of descent down the slippery slope.

The case for manslaughter can easily be made out. If the case is put up as one of manslaughter by unlawful and dangerous act, the facts fit even the most pro-defence version of this kind of manslaughter. In Wilson v The Queen (1992 66 A.L.R. 517), the High Court of Australia required a criminal act and an appreciable risk of serious injury. The act of injecting a death dealing substance would be a battery to which consent would be no defence and the other element is amply made out where there is foresight that death will occur. Since English law frames this head of manslaughter in terms of harm which need not be serious (R v Church [1966] 1 Q.B. 59), liability would be no more difficult to establish. Were it necessary to rely upon them, manslaughter by recklessness (R v Seymour [1983] 2 A.C. 493) or gross negligence would also be easy to make out (Nydam v The Queen [1977] V.R. 430).

3(b) Manslaughter by qualified defence

While the case for manslaughter is easy enough where the case is one of descent from murder, the route described in 3(a), the case for the lesser crime is much more of a challenge if the path is upwards from lawful homicide. Our starting point on this route is that in some, very exceptional cases, killing to relieve pain is lawful. The cases are exceptional in that there will normally be methods other than killing to relieve the pain. Where the motive is to remove the pain, and the circumstances make the killing unnecessary but the defendant believes that killing is necessary, the scene is set for the operation of a qualified defence reducing the crime from murder to manslaughter, or in terms of the route described above, converting lawful homicide into manslaughter. The difficulty is not one of policy but of authority. In terms of policy the case for manslaughter is strong. The overall picture is one of negligent rather than deliberate or
innocent wrongdoing; so that the appropriate description of the defendant's conduct is manslaughter rather than murder or lawful homicide respectively. But, at least in Anglo-Australian terms it is the search for authority which proves frustrating.

The analogous case is self-defence. This is a situation where, if all the conditions of the defence are made out, conduct which would otherwise be murder will be lawful. If any of the conditions for the defence is not satisfied but is believed by the defendant to be satisfied there is a good case for holding the conduct to be manslaughter rather than murder. There is a difference between Australian common law and English law on what conditions do have to be satisfied but both systems of law agree on ruling out a qualified defence. In both legal regimes self-defence is an all or nothing defence (Palmer v The Queen [1971] A.C. 814; R v McInnes [1971] 3 All. E.R. 295; Zecevic v DPP 1987 162 C.L.R. 645) leaving no room for legitimate manslaughter conviction if the conditions are imperfectly satisfied. This has been staunch orthodoxy in England for over twenty years but until recently the High Court of Australia was prepared to recognise the possibility of a qualified defence reducing what would otherwise be murder to manslaughter (R v Howe (1958) 100 C.L.R. 448; Viro v The Queen (1978) 141 C.L.R. 141.). This possibility was abandoned in Zecevic v DPP (1987) 162 C.L.R. 645 on the ground that the qualified defence was too complex rather than that it was unjust. This reasoning may justify a flicker of hope that the qualified defence might be reintroduced into Australian law if it could be formulated in a context and in terms where both justice and lack of complexity called it into being.

There is reason to believe that mercy killing provides that context. The justice of holding genuine mercy killers who kill, when there is no objective necessity to do so, guilty of manslaughter rather than murder has already been discussed. On the other point there is no need for the qualified defence to be too complex to be workable. The law could and should stand firm on limiting legal killing to cases of pain rather than distress. That would leave the possibility of mistakes going to the existence of pain the consent of the patient (express or implied) or the availability of palliative care. Where in relation to any or all of these questions the mistake is reasonable there should be no liability at all. Where it is unreasonable, liability should be for manslaughter rather than murder.

Conclusion

Current orthodoxy regards mercy killing legally as murder but morally as something else. In exceptional circumstances that something else could be lawful homicide. The sanctity of human life should however dictate that normally it should be regarded as manslaughter. Two routes to that objective have been identified in this paper. Both involve a steep climb. The destination is distant, but perhaps not unattainable.

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