

Toronto Star, January, 2001

TOP JUDGES GOT IT WRONG IN THIS CASE

Despite all the media hoopla, this case is not about disability rights; this was not a hate crime against a vulnerable person

by Arthur Schafer

It's sad, but also curious, that a jury of ordinary citizens in Wilkie, Sask., should have more wisdom and common sense than the Supreme Court of Canada. Surprising, but also worrying, that trial Judge Ted Noble should have a deeper understanding of the Charter of Rights and the role of the judiciary than his brothers and sisters on Canada's highest court.

The Supreme Court got this case terribly wrong and, in consequence, a decent man will spend the next decade of his life locked behind bars.

A thousand media headlines have described Robert Latimer as a man "who killed his disabled daughter," but it is no more appropriate to describe him in this way than it would be to say that he killed his 12-year-old or his brown-eyed daughter. The Latimer jury unanimously recommended a mercifully reduced sentence because, based on all the evidence, they reached the conclusion that Latimer did not kill his daughter because of her disability. They concluded that he killed her because of his belief that she was in continual, acute and unrelievable pain and they empathized with the tragic situation in which the family found itself.

After reviewing all the evidence, Noble reached the same conclusion. This was a case of mercy killing, in which compassion was owed both to Tracy for her terrible pain and suffering and to the Latimer family for the dreadful options with which they were faced.

In other words, trial judge and jury both agreed that the killing of Tracy Latimer was not a hate crime committed against a vulnerable person by some cruel monster, as suggested by many disability rights advocates. Despite all the media hoopla, the Latimer case is not a case of disability rights.

The jury heard testimony that, despite her severe disabilities and the countless hours of care and attention she required, the Latimer family chose to look after Tracy at home. The family rejected the easy option of institutionalizing her. Latimer, himself, spent hours every day, painstakingly feeding Tracy one spoonful at a time. He and his family gave her loving care for 12 years, shared her moments of happiness and shared also the terrible suffering at the end of her life. This was a key part of the evidence that persuaded

the jury that Latimer did not deserve to serve the mandatory minimum sentence for murder.

The powerful painkillers which could, perhaps, have given relief to Tracy might also, because of her anti-seizure medication, have resulted in her death. If the Latimers had been more sophisticated, they might simply have insisted that doctors provide adequate pain relief, regardless of the consequences. If, as a result, Tracy had died, well, this happens frequently as part of palliative care. It would have been regarded as a reasonable choice for loving parents to have made on behalf of their daughter. Instead, Latimer put Tracy into the cab of his truck and then vented the exhaust fumes so that she would die by asphyxiation. He killed her. His act was an act of killing, but his motive was mercy.

Interestingly, however, in the half-dozen or so other mercy killing cases in recent Canadian history, some involving doctors who hastened the death of their painfully dying patients with a fatal dose of potassium chloride, not one person has served even a single day in prison. Charges have been dropped, or a guilty plea accepted to a lesser charge.

Notwithstanding Tracy's acute and unrelievable pain and her bleak future of repeated painful surgeries, many people worry that it is simply too dangerous for society to give to parents, or to anyone else, the discretionary right to kill their suffering children or loved ones. The dangers of mistake and abuse require that society prohibit such mercy killings.

In 1995, a special committee of the Senate on Euthanasia and Assisted Suicide unanimously recommend that the punishment for murder be reduced in cases of compassionate homicide. Several nations, including Sweden and Switzerland, have already done this. There has been no decrease in respect for life in these countries, no slippery slope, no attitude of "open season on the disabled." Quite the reverse.

Noble ruled that in the special circumstances of the Latimer case, the mandatory minimum sentence for second-degree murder would violate the Charter prohibition against "cruel and unusual punishment." The Supreme Court has given a narrowly legalistic interpretation of this section of the Charter. Latimer and his family are the direct victims of this ruling, but in the long run we are all the losers because justice is the loser.

Professor Arthur Schafer is director of the Centre for Professional and Applied Ethics at the University of Manitoba.