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ASSISTING ‘DEATH TOURISM’: POSSIBLE PROSECUTION OR PRAGMATIC IMMUNITY?

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We cannot leave this case without expressing great sympathy for Ms Purdy, her husband and others in a similar position who wish to know in advance whether they will face prosecution for doing what many would regard as something that the law should permit, namely to help a loved one to go abroad to end their suffering when they are unable to do it on their own. This would involve a change in the law. The offence of assisted suicide is very widely drawn to cover all manner of different circumstances; only Parliament can change it.¹

I. Introduction

Ostensibly clear-cut distinctions made at law can lead, in reality, to complex and contestable states-of-affairs for various reasons. A good example – recently highlighted

¹ Per Scott Baker LJ, R (on the application of Purdy) v DPP [2008] EWHC 2565, paragraph 84.
by the case of Debbie Purdy\textsuperscript{2} – relates to the accompanying of a person in so-called ‘death tourism’, an undertaking that sits precariously – at least in practice – on the dividing line between the criminal act of aiding and abetting a suicide\textsuperscript{3} and a sympathetic act of companionship at a moment of the most profound torment. It may be wondered whether helping a loved one to travel to a Swiss ‘suicide clinic’ is a crime to which the law may turn a blind eye at the Director of Public Prosecution (DPP)’s discretion, or a matter of true indifference legally; something that citizens are simply free to do without interference from, or fear of, the state. Debbie Purdy’s successful attempt to gain permission to challenge the DPP to clarify this matter in the High Court was tempered by Nelson J’s warning against “any optimism that her arguments will ultimately succeed”.\textsuperscript{4}

It was hard to do anything but share the judge’s sentiment. Unsurprisingly, now the case has been heard, Ms Purdy remains without the guidance on prosecuting policy that she seeks. Although helping someone to travel to Switzerland to commit suicide can constitute a breach of the criminal law, history suggests that a prosecution will not be brought. There are no guarantees, however. The DPP is given the power to decide whether to seek prosecution by virtue of section 2(4) of the Suicide Act 1964. Specific criteria used to come to a decision on whether to prosecute have not been published. Ms Purdy had hoped, but failed, to force the DPP to make the policy clear.

It is reported that over 100 UK citizens have travelled to the Swiss ‘suicide clinic’ Dignitas, and in none of these cases has a relative been prosecuted.\textsuperscript{5} There is an issue, however, that should be noted against this backdrop that implies immunity from prosecution. Although the prosecutorial practice might suggest that assisting ‘death tourism’ is lawful, legal analysis suggests otherwise. In other words, sympathetic relatives and others who accompany a loved one abroad may escape legal punishment,

\textsuperscript{2} Ibid...
\textsuperscript{3} Suicide Act 1961, section 2(1).
\textsuperscript{5} Joel Joffe, “Debbie Purdy deserves a less terrible choice,” \textit{The Times} (London) 30/10/08, available at http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article5042217.ece (accessed 9/11/08).
but they nevertheless seem to break the law. Indeed, Ms Purdy’s legal case seems to be driven by a recognition that there is a only a *de facto* immunity. Her husband comes from Cuba, and Ms Purdy fears that this might mean he will enjoy less leniency than others before him.\(^6\) This paper considers the law relating to assisting suicide and its relationship with so-called ‘death tourism’. This is followed by a focus on Debbie Purdy’s case. There is then discussion of the resultant position.

**II. The Crime of Assisting a Suicide**

The Suicide Act 1961 decriminalised suicide.\(^7\) There is some tension in academic debate on the question of whether or not suicide can, as a result, properly be said to be lawful,\(^8\) but it is clear that it is no longer a criminal offence. The Suicide Act does, however, create an anomalous position by maintaining in section 2(1) the crime of aiding, abetting, counselling, or procuring a suicide (what I refer to in this essay as assisting a suicide). This means that it is a criminal offence to aid or abet the commission of a non-criminal offence.\(^9\) Furthermore, section 2(4) of the Suicide Act provides that “no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.” The pertinent question here is whether helping someone to travel to another jurisdiction to commit suicide is, at law, assisting a suicide. It was reported early in 2003 that Sir David Calvert-Smith QC, the then DPP, was planning to issue guidance that would remove uncertainty on the law in this area.\(^10\) This came at a time when there were calls for a policy statement, based on arguments that the

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\(^6\) *Ibid.*

\(^7\) Suicide Act 1961, section 1.


legal position was not clear. It has also been alleged that the police are unclear as to the legality of this sort of assistance. In spite of this, Lord Goldsmith QC, the then Attorney General, said in January 2005 that it would be “inappropriate” to publish the grounds on which decisions are made to prosecute (or refrain from prosecuting) people who travel abroad with loved ones to help them end their lives. In January of 2003, it was reported that the “Home Office said the Crown Prosecution Service could construe the booking of flights as aiding a suicide.” In other contexts, it is clear that aiding a suicide can include providing a person with lethal drugs, or information about how he might kill himself with the expectation that he will use this to end his life.

Richard Huxtable, in his analysis of the assistance of ‘death tourism’, argues that its lawfulness is unclear. He bases the ambiguity on the fact that the ‘final act’ takes place in another jurisdiction. Although the suicide takes place outside of England and Wales, however, it appears from a legal perspective that a defendant should be viewed as having aided and abetted a suicide by helping someone to go abroad in order to commit suicide (see next section). Judicial statement supports this interpretation: in the case of In Re Z, which concerned an injunction on a husband that stopped him from helping his wife to travel abroad for assisted suicide, Hedley J commented obiter that:

Although it is the case that all that Mr and Mrs Z propose to do is not criminal under the law of Switzerland, it seems to me inevitable that by making arrangements and escorting Mrs Z on the flight, Mr Z will have contravened

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18 In Re Z [2005] 1 WLR 959.
section 2(1) [of the Suicide Act]. It follows that in order for Mrs Z actually to be able to carry out her decision, it will require the criminal conduct of another. That said I remind myself of subsection (4). Although not unique, the provision is rare and is usually found where Parliament recognises that although an act may be criminal, it is not always in the public interest to prosecute in respect of it.\textsuperscript{19}

Reflecting on Hedley J’s statement, Huxtable says “[t]his looks like a clear enough direction: participating in death tourism can involve an offence.”\textsuperscript{20} However, Huxtable’s ambivalence remains, as he goes on to ask:

Is death tourism an offence? Perhaps—but it seems no one who engages in it can know in advance whether the weight of the criminal law will be brought to bear.\textsuperscript{21}

It is thus instructive to consider criminal complicity and ‘death tourism’.

\textbf{III. Is It a Crime to Assist ‘Death Tourism’?}

The criminal law on complicity suggests that assisting ‘death tourism’ is a crime. This remains so even in cases where the potential defendant is unaware of the intricate details of how the suicide will occur. Consider the unanimous House of Lords decision in \textit{DPP for Northern Ireland v. Maxwell}.\textsuperscript{22} This case turned on the question of what degree of knowledge the law required to render criminally liable a person who assists another to commit or attempt to commit a crime. As we have seen, suicide itself is not a crime, but its assistance is, so we may presume that the precedent is relevant here.\textsuperscript{23} Lord Fraser

\textsuperscript{19} Ibid., paragraph 14. See also, \textit{R (on the application of Purdy) v DPP [2008] EWHC 2565}, paragraph 71, where Scott Baker LJ holds that Parliament has “clearly stated that it is an offence to aid, abet, counsel or procure suicide. Any person who contemplates doing so can foresee that they would be breaking the criminal law.” See also the final paragraph of the judgment, quoted at the head of this paper.
\textsuperscript{20} Huxtable, \textit{Euthanasia, Ethics and the Law}, (above, n. 17), p. 66.
\textsuperscript{21} Ibid.
\textsuperscript{22} \textit{Director of Public Prosecutions for Northern Ireland v. Maxwell [1978] 1 WLR 1350.}
provides a useful expression of their Lordships’ decision, stating that the question of criminally aiding or abetting:

depends upon the extent of [the accused’s] knowledge of the common plan when he took part in it. If he had known full details of the plan – the time, place and nature of the crimes intended – he would unquestionably be guilty as a principal because he had aided and abetted their commission. Even if he had not known the intended time and place, but had known the nature of the crimes that were planned, there could be no question of his guilt.  

In Maxwell, the defendant was found to have assisted in the commission of the crime of placing a bomb in a public house, and to have had it in his possession or under his control. The part he played in the crime involved no physical contact with the bomb, or indeed specific knowledge of its existence. In his car, he led three men in another car who were to place the bomb in its target position.

The House of Lords’ judgment suggests guilt on the part of a person who helps somebody to die by providing a means for that person to get to a ‘suicide clinic’, even where he does not know the intricate details of the particular process by which the assisted-suicide will occur; he knows the ‘common plan,” he most likely knows the time and place, but even if not, he knows full well the nature of what is to happen. That the people who provide the instruments necessary for suicide are not in England and Wales is, it might be said, neither here nor there. The relevance has no legal bearing on the potential defendant.  

It is fair to assume that giving help to a loved one to travel, for example, to the Dignitas clinic is the criminal act of aiding and abetting a suicide. Thus, to understand the likelihood of prosecution, we need to consider not the question of whether the criminal law has been breached, but whether the DPP will consent to a prosecution being brought. In the next section, there is an overview and analysis of the

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25 It might be thought that it is relevant that an assisted suicide will be lawful in Switzerland if it does not breach the Swiss penal code. This lawfulness has no bearing on the present discussion, however: a crime under English law is being committed by the person helping another to get to Switzerland, an act which begins in this jurisdiction.
Purdy case, where it was argued that there was a duty on the DPP to publish the criteria used to make a decision under section 2(4).

III. The Purdy Decision

The Purdy case has been of wide interest to the public, and reported across the media. Perhaps afraid that the central issue of the case would be misunderstood, Scott Baker LJ, delivering the Court’s judgment, began by summarising both what the case was and was not about:

The issue in the case is whether the Director of Public Prosecutions (“DPP”) has acted unlawfully in failing to publish detailed guidance as to the circumstances in which individuals will or will not be prosecuted for assisting another person to commit suicide. This case is not about whether it should continue to be a criminal offence in this country to help another person, whatever the circumstances, to take their own life. That is a matter for Parliament and not the courts. Nor is this case about whether someone can obtain in advance immunity from prosecution for helping another person to travel to another country where assisted suicide is lawful, for the purpose of an assisted suicide; that question has already been decided in the negative by the House of Lords.

It was accepted by all sides that Mr Puente, Ms Purdy’s husband, would expose himself to the risk of prosecution under the Suicide Act 1961, s. 2(1), if he were to help his wife to travel abroad to commit suicide. The question was how great this risk was.

The case is thus crucially distinct in its approach from the Dianne Pretty case.

Pretty involved a criminal law question: could the DPP be compelled (or did he even have the power) to grant a proleptic immunity from prosecution under section 2 of the Suicide Act to Mrs Pretty’s husband? Purdy, by contrast, was a civil law matter: whilst her case

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26 R (on the application of Purdy) v. DPP [2008] EWHC 2565, paragraph 1.
27 Ibid., paragraph 4.
29 R (on the application of Purdy) v DPP [2008] EWHC 2565, paragraph 9.
also concerned the criminal law matter of aiding and abetting a suicide, her claim was that her rights were breached by the DPP’s failure to publish the prosecuting policy concerning assisted suicide.\(^{30}\) She was not, in contrast with Mrs Pretty, seeking an immunity for her husband in advance of the assisted suicide.

Ms Purdy’s case was based on Article 8 of the European Convention on Human Rights (ECHR),\(^{31}\) her argument was that the prohibition of assisted suicide in English law engages her right to respect for private life under this Article, and the State’s interference with the right could only be justified in accordance with the qualifications found in Article 8(2) if the DPP complied with her request.\(^{32}\) Part 5 of the Crown Prosecutors’ Code sets out a two stage test to be applied when a decision to prosecute is being considered: first, is there sufficient evidence that a prosecution is likely?; and if so, is it in the public interest to bring a prosecution?\(^{33}\) Although the DPP has the power to publish a detailed policy about particular cases – as he has done for domestic violence, bad driving, and football related offences – he has not generally been considered to be under a duty to do so.\(^{34}\) Ultimately, the Court was not convinced that Article 8 was even engaged in Purdy.\(^{35}\) This (perhaps surprising) conclusion was met because the House of Lords in Pretty had found that in that case the Article was not engaged, and the European Court of Human Rights, which had found that Article 8 was engaged, had expressed its opinions in “such tentative terms”.\(^{36}\)

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\(^{30}\) Ibid., paragraphs 5 and 8.

\(^{31}\) Article 8 ECHR reads as follows: “8(1) Everyone has the right to respect for his private and family life, his home and his correspondence. 8(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

\(^{32}\) R (on the application of Purdy) v DPP [2008] EWHC 2565, paragraph 11.


\(^{34}\) See the obiter dicta in the speeches of Bingham L, paragraph 39; Steyn L, paragraph 66; Hope L, paragraphs 80-82; and Hobhouse L, paragraph 114, in the House of Lords judgment in Pretty [2002] 1 AC 800.

\(^{35}\) R (on the application of Purdy) v DPP [2008] EWHC 2565, paragraph 58.

\(^{36}\) Per Scott Baker LJ, ibid., paragraph 41.
However, the Court decided that it would consider Article 8(2) anyway. Article 8(2) allows for interferences with Article 8 rights if such is in accordance with the law, and necessary in a democratic society in furthering various specified interests. It was accepted that it was legitimate for the state to criminalise assistance in suicide. However, counsel for Ms Purdy argued that the Suicide Act’s provision concerning the DPP’s discretion would not be in accordance with the law unless it were made more precise through his issuing of guidance outlining the criteria on which a decision to prosecute under section 2(1) of the Suicide Act would be based. The Court stated that there were two logical consequences of the legitimate prohibition of assisting a suicide. First, as the act of aiding, abetting, counselling, or procuring a suicide could take an “almost infinite variety” of forms, the definition in the Suicide Act had to be phrased as loosely as it is. Second, for public policy reasons some flexibility in the law is desirable. Certainty in the Act’s definition means this flexibility for good reason came through the DPP’s discretion. The Court was thus able to hold the following at paragraph 75:

[T]he combination of the Code of Practice that has been promulgated by the DPP under s.10 of the [Prosecution of Offences Act 1985] and the administrative law principles and remedies as have been developed in the common law of England and Wales satisfy the required Convention standards of clarity and foreseeability. Thus if the guidance in the Code of Practice is followed reasonably and rationally by the DPP and his delegates and only relevant factors are taken into account in making a decision on whether to prosecute an offence under s.2(1) of the Act, it cannot be said that the exercise of the discretion on whether to prosecute constitutes an arbitrary or unfettered power of the executive. Any failure by the DPP and his delegates to act in this way can be dealt with either by the legal remedy of judicial review of the decision of the DPP or his delegate or within the context of the criminal proceedings themselves[.]

37 See note 31, above.
38 R (on the application of Purdy) v DPP [2008] EWHC 2565, paragraph 62.
39 Ibid., paragraph 71.
40 Ibid., paragraph 72.
It is worth noting finally with regard to the decision itself, the reasoning the Court offered for giving specific guidance for other offences, but not for assisting a suicide. It should be remembered that the Court had already found that the DPP had a power, but no duty, to issue specific guidance. Therefore, it seems unnecessary even to have given reasons for the DPP’s not providing guidance as Ms Purdy demanded. Nevertheless, the Court held at paragraph 80 that:

In our view, there are special reasons why the DPP has promulgated specific Codes of Practice in relation to crimes of domestic violence, bad driving and football related offences. First, in each case those types of offence constitute a particularly prevalent social problem. Secondly, however, the circumstances in which those types of offence might arise they are, in our view, likely to be more easily identifiable than in the case of possible s.2(1) offences. Thirdly, in the case of domestic violence in particular, there had been a perception for many years that the authorities would not prosecute “domestics”. Fourthly, in all cases, because those types of offence are widespread and constitute a prevalent social problem, it was clearly imperative that the public should understand the specific criteria that the DPP and Crown Prosecutors would employ in deciding whether to prosecute them.

I would question whether providing guidance on prosecuting policy concerning section 2 of the Suicide Act can not also be rationalised according to these criteria. At least in terms of the continued public interest and debate that they provoke, ‘end-of-life issues’ do constitute a particularly prevalent social problem. The difficulty with identifying “possible s. 2(1) offences” seems to belie the claims the Court previously made regarding certainty in the Act’s definition, referred to above. Furthermore, there is a perception with regard to ‘death-tourism’ cases that there will not be a prosecution. Finally, although there is not a widespread practice of ‘death-tourism’, it is, as I have suggested, a prevalent social problem, and it is not clear why it should be any less imperative that the public understand the prosecutors’ criteria. The Court might have
been better leaving this line of reasoning out of its judgment: it adds nothing to the strength of the decision, and arguably undermines aspects of the DPP’s policy.

IV. Towards Better Understandings?

Does the Purdy case teach us anything? Without cynicism, I would suggest that it teaches us very little. The High Court acted as expected. Although there is a chance it will go otherwise, one imagines too that if Ms Purdy’s husband does assist her in going abroad to end her life, he will not face prosecution. There is a clear and (rather to understate matters) difficult position for those who would choose to end their lives. The existing law under the Suicide Act adds an extra dimension to the decision-making process. What is interesting is that it arguably adds to the de facto content of what William Grey has called a ‘duty to live’.41 Contrast this with John Hardwig’s ‘duty to die’ arguments:42 rather than base his theory in a strong normative framework,43 Hardwig discusses the factors that might bear on a person’s decision to end his life, including a concern for members of his family. The Purdy case suggests that people might choose life so as not to be a burden, rather than choose death to avoid imposing too much on others.

Academic commentators and others interested in these types of decisions do well to consider the legal relationships between family members, those committing suicide, and the State. One way may be to adopt a specific rights taxonomy44 when discussing the cases, or at the very least unpacking as explicitly as necessary the content and effect of the rights under discussion. So-called ‘right to die cases’, such as Pretty, in reality engage with the question of a power (and possibly a duty) of the State and the potential

43 For criticism of this aspect of Hardwig’s duty to die arguments, see G. Seay, “Can There Be a ‘Duty to Die’ without a Normative Theory?” (2002) Cambridge Quarterly of Healthcare Ethics 11, 266-272.
44 Such as the Hohfeldian scheme: see Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, (eds D. Campbell and P. Thomas), (Ashgate, 2001).
for an immunity for Mrs Pretty’s husband. Accurate articulation of the legal relations engaged exposes potential fallacies in comparisons with ostensibly (and perhaps, at a micro-level, morally) similar cases, such as the case of Ms B, whose right to non-interference meant that she was permitted to make a life-ending decision at law.\footnote{Ms B v An NHS Hospital Trust [2002] 2 All ER 449.} The nature and scope of Mrs Pretty’s alleged ‘right to die’ is very different to that of Ms B. The former’s involves a right to an immunity for a third party from criminal prosecution, the latter’s involves the right not to be touched. And Ms Purdy’s more modest alleged right is that for her sake her husband should have a right to see the factors that would bear on the DPP’s decision to prosecute.

A call for pedantry – especially pedantry relating to rights – may not be welcome to many, but its utility is in fact reflected by the Court’s own statement at paragraph 59 of the Purdy judgment:

Before leaving art 8(1) we should point out that even if its ambit is broadened to cover the personal autonomy of the claimant, in this case the court is ultimately concerned not with the claimant, but with a third party, (her husband), and the circumstances in which that third party may or may not be prosecuted We accept, of course, the claimant has a close interest in this question but it is he, not she, against whom any criminal sanction would lie.

Strictly, then, Pretty and Purdy are not really ‘medical law’ cases at all, although they are of perennial interest to those working in health law and ethics. By properly expounding and analysing the legal matters in these cases, it is possible to overcome many misperceptions that seem to pervade academic and public literature. Whether or not the Purdy decision is defensible in its own right, it can not be justly accused of some count of hypocrisy or legal incoherence when Ms Purdy’s supposed ‘right to die’ is placed beside Ms B’s.
The important question to ask, though, is whether the Purdy decision is defensible in its own right. It is, in some senses, perfectly reasonable for the Court to have reached the decision that it did: the scope and demands of Article 8, particularly in cases such as this, are manifestly uncertain. Even so, the Court’s reasoning is not strikingly convincing. Its reading of Pretty is surprisingly precautionary. A much bolder interpretation would seem a much more natural understandings of the case. Equally, there does seem to be a strong public interest in the prosecuting policy being made explicit. ‘Death tourism’ does not affect us all, but it affects a significant number of people, and their cases attract great public and State interest. It is eminently reasonable to hope that prosecutors’ decisions under section 2(4) of the Suicide Act are not arbitrarily made. Given this, a call for publication of guidance also seems reasonable. It can hardly be said to contravene the public interest; no ‘slippery slope’ type fears could realistically be said to flow from the publication of such guidance.

This view – driven by the prospect of a light onus on the DPP, and great sympathy for the suffering of families – is reinforced when one considers that the Purdy decision was in some ways shadowed by another ‘death tourism’ case; that of 23 year old Daniel James. 46 In James’ case, there was no terminal illness. Rather, he found it intolerable to live a life paralysed, having previously been a successful sportsman. And one thing of which we can be certain is that there will be further cases challenging our perceptions of the law, and even challenging the law itself. Each assisted-suicide case that appears in the media strengthens the need to discuss the scope of assisted-dying law, and to question what its acceptable scope should be. Difficult questions relating to safeguards, protection of the vulnerable, ‘good’ and ‘bad’ reasons for allowing a person the choice to die, and the questions of who can be complicit all raise themselves. Each needs careful consideration. In the meantime, individuals will make tragic choices. Sometimes these will be criminal choices. It is not clear why the criminality, and the motivations for prosecution, should not be spelled out on the basis of existing policy.

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This would add no new dimension to any sort of ‘right to die’ in English law; it would merely make the law accessible to people who are already in the midst of great tragedy.

\textit{V. Conclusion}

Debbie Purdy’s case has not given her the modest but crucial result that she sought. In contrast with some ‘right to die’ cases, it is hard to be very sympathetic with the Court’s choice of a conservative approach in this instance. We may acknowledge that it would be a big step to impose a \textit{duty} on the DPP to publish guidance. Beyond this, however, rather than push the boundaries of the law, let alone seek to redraw them, Ms Purdy simply wanted to see an articulation of the way in which the law will be applied. Assistance with ‘death tourism’ was accepted as unlawful. The basis for the decision on whether to prosecute remains obscure. For Parliament to make radical change to the law, there is need for time, debate, and, in light of its potential effect, considerable political bravery. For the DPP to fulfil the wish of Ms Purdy – a wish doubtless shared by others, and one whose fulfilment would not be harmful – would not take such bravery.