following *Target* to hold that, whatever might be required of the defaulting trustees of a "traditional" trust, in this commercial setting, the trustees were not liable to reconstitute a trust emptied of its one asset – a money sum – by paying equitable compensation of the sum wrongly disbursed. Nevertheless, the Supreme Court did evaluate the distinction between commercial and traditional trusts and found it to have limited significance. Facts of a "commercial" character may affect the application of general equitable principles, the court saw. For example, facts showing the purpose of a commercial contract may help a court determine whether a trustee's breach has caused a compensable loss by showing what the position would have been had the trustee committed no breach. As Lord Toulson observed, that is because general principles apply variably to different facts. It is not because commercial and non-commercial trusts have different rules of relief.

The court's denial that the distinction between commercial and traditional trusts has larger significance will avoid some strange outcomes. It had sometimes been thought that *Target* established a rule that breach of a "commercial" trust cannot be remedied by ordering the trustee to reconstitute it. Such a rule would be absurd: it would preclude the reconstitution of a trust even where reconstitution is necessary before the trust can be performed, and performance of the trust is necessary to complete a larger executory transaction: *Wiggins v Lord* (1841) 4 Beav. 30, 32, 49 E.R. 248, 249.

The decision in *AIB Group* removes such doubts. *Target* neither established different rules for recovering losses suffered by commercial and traditional trusts, nor allowed the quantum of relief to differ according to whether an accounting or equitable compensation is claimed. *Target* instead established a new basic norm of relief for breach of trust: any loss that would have been suffered had the trustees correctly performed is an unrecoverable loss.

P.G. Turner*

*Address for correspondence: St. Catharine's College, Cambridge, CB2 1RL, UK. Email: pgt22@cam.ac.uk

"THE CHOICE IS CRUEL": ASSISTED SUICIDE AND CHARTER RIGHTS IN CANADA

IN a groundbreaking decision, the Supreme Court of Canada in *Carter v Canada (Attorney General)* 2015 SCC 5 has declared the criminal law measures prohibiting the provision of assistance in dying unconstitutional. In doing so, the Supreme Court unanimously overruled its previous decision (*Rodriguez v British Columbia (Attorney-General)* [1993] 3 S.C.R. 519) upholding the blanket prohibition on assisted suicide.

The facts were uncomplicated. Gloria Taylor was diagnosed with a neurodegenerative disease and did "not want to die slowly, piece by piece" or

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"wracked with pain" (at [11]). The claim was joined by Lee Carter, who, despite having taken her mother to the Swiss assisted suicide clinic, Dignitas, believed that her mother should have been able to choose to die at home. Ms. Taylor, lacking the resources to travel to Switzerland and given the criminal prohibition on physician-assisted death, described her choice as "cruel": either to kill herself while still physically capable of doing so or being denied any control over the manner and timing of her death (at [13]).

The Supreme Court decision relied heavily upon the findings of the trial judge in *Carter v Canada* 2012 BCSC 886. She had carried out an exhaustive review of "evidence from Canada and from other permissive jurisdictions on medical ethics and current end-of-life practices, the risks associated with assisted suicide, and the feasibility of safeguards" (at [22]).

The focus of this note is the issue of whether the Canadian Criminal Code which provides that "everyone who aids and abets a person in committing suicide commits an indictable offence" (s. 241(b)) and "no person may consent to suicide" (s. 14), violates a claimants' rights pursuant to s. 7 of the Canadian Charter of Rights and Freedoms. Section 7 states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". While acknowledging that the sanctity of life is a fundamental value in society, the court concluded that the right to life does not require an absolute prohibition on assistance in dying. According to the court, "this would create a 'duty to live', rather than a 'right to life', and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment" (at [63]).

Underlying both the liberty and security rights in s. 7 of the Charter stand the autonomy and dignity of the individual. The court considered that the prohibition on assisted dying denies individuals the opportunity to make decisions concerning their bodily integrity and medical care. It also impinges on the security of the person by leaving individuals, such as Ms. Taylor, to endure intolerable physical and psychological suffering. Thus the law was at odds with the strong legal protection of patient autonomy in medical decision-making and the right to "decide one's own fate" even if serious consequences, including death, flowed from a patient's decision (at [67]). The court concluded that the criminal code violated the rights *to liberty and security of* "competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering" (at [68]).

The Court then turned to consider "whether this deprivation was in accordance with the principles of fundamental justice" as required by s. 7. Three principles have emerged through the Charter jurisprudence as central to this determination: "laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that

are grossly disproportionate to their object" (at [72]). The court agreed that a blanket ban on assisted suicide clearly achieves the objective of protecting vulnerable individuals from being persuaded to commit suicide. It then considered the "overbreadth" requirement. This inquiry asks whether "a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object" (at [85]). The court pointed out that the legal limitation on individuals, such as Ms. Taylor, was not concerned with the objective of protecting vulnerable individuals. As this law catches individuals who are competent, fully informed, and not subject to coercion and duress, it was indeed overbroad.

As a consequence of the finding that the appellants' rights to life, liberty, and security had been breached, s. 1 of the Charter required Canada to "show that the law had a pressing and substantial object and that the means chosen are proportional to that object" (at [94]). Given the controversial and competing societal values at stake and the issues of social policy raised requiring a regulatory response, it was considered appropriate to give some deference to the legislature at this stage of the analysis. The central issue was whether or not the absolute prohibition "is the least drastic means of achieving the legislative objective" (at [103]). In assessing this concept of minimal impairment, the trial judge had concluded that the evidence did not show that a blanket ban was the sole way to achieve the Government's objectives. The Supreme Court agreed stating that justification under s. 1 requires "a process of demonstration, not intuition or automatic deference to the government's assertion of risk".

Relying on the assessment of the trial judge, the court dismissed Canada's arguments, for the following reasons. First, using the procedures developed for physicians to assess informed consent and decisional capacity in the medical decision-making context, it is possible to assess vulnerability on an individual basis. Circumstances already existed in Canada for advance directives or substitute decision-making for life-and-death decisions. Second, the risks can be mediated "through a carefully designed and monitored system of safeguards" (at [117]). Finally, the court did not accept that the absence of a blanket ban on assisted suicide would "descend the slippery slope into euthanasia and condoned murder" (at [120]). The evidence did not suggest that safeguards would function defectively. For these reasons, the court found that s. 1 of the Charter did not save the criminal law provisions on physician-assisted suicide.

Given the court's finding that the existing prohibition was not consistent with the rights guaranteed in s. 7 of the Charter, the criminal law was declared void where "a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his

or her condition" seeks medical assistance to end life (at [127]). The Court suspended its declaration of invalidity for 12 months, acknowledging the need for the Parliament to formulate a comprehensive regime.

The UK Supreme Court has also recently addressed the blanket ban on assisted suicide in *R. (Nicklinson) v Ministry of Justice* [2014] UKSC 38 and, in line with the Canadian court decision, was sensitive to the consequences flowing from the flawed nature of the existing criminal law. The Canadian judgment, however, goes much further, offering some genuine assistance to the applicants by declaring the law void and providing strong guidance to the legislature. The reasoning and the breadth of the decision, which includes disabled individuals not suffering from a terminal illness, is perhaps the most sympathetic judgment towards the legalisation of assisted dying by individuals who wish to choose a peaceful and dignified death. In contrast, *Nicklinson* has revealed a deeply divided court over the respective roles of Parliament and the courts and the circumstances in which it is appropriate to use the declaration of incompatibility.

Any relaxation of the law on assisted suicide raises difficult and complex ethical and practical questions. In principle, it is difficult to disagree with the court's conclusion in *Carter* that the law is too broad, but that it is for Parliament to change the law. In the UK, the existing law also contains similar unsatisfactory features and artificial distinctions. Competent individuals, who are not vulnerable but are unable to end their life without assistance, are caught by the blanket ban in s. 2 of the Suicide Act but it is not a criminal offence to refuse or withdraw medical treatment from competent adults (see *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429). The prospect of being able to retain some autonomy and control over the end-of-life process is of value to more individuals than would ever choose the option of an assisted death. At the heart of the issue remains the question of whether a law can be designed that effectively protects against the pressure that may be placed upon vulnerable individuals or those who may feel that their lives are a worthless burden. The Canadian experience and any future legislation are likely to prove a valuable precedent for the UK and may help smooth the path for a change to UK domestic law. Some reform is likely given that five of the seven judges in the UK Supreme Court have implied that the existing criminal law is unsatisfactory and that, if the UK Parliament fails to consider the issue, a future application for a declaration is highly likely to be granted.

STEPHANIE PALMER*

*Address for correspondence: Girton College, Cambridge, CB3 0JG, UK. Email: sp10002@cam.ac.uk