

The Supreme Court's Other Mistakes

by Ruth von Fuchs

Robert Latimer has long been pointing out the mistake the Supreme Court made in 2001 when it concluded that he and Laura could have given Tracy more effective pain medication. The misconception seems to have resulted from the judges being less scientific than is required when a case involves technical matters.

The text of the Court's ruling reveals four additional errors made by the judges:

- Not guarding sufficiently against picking up biases;
- Making an unjustified assumption;
- Accepting an ill-considered restriction; and
- Not practicing what they preached, about bearing in mind “the situation and characteristics of the particular accused person” (paragraph 32 of the judgment).

1. Not Being Scientific Enough

The most frequent indicator of this deficiency is a disregard for the element of time. Having a “stationary” mind-set does no harm when one is discussing a poet's imagery or critiquing a historian's assessments, but scientific thinking demands keen awareness of change and temporality.

In paragraph 6 the judges note that Tracy's condition was a permanent one, yet I have found no place where they acknowledge that it was also progressive. And when paragraph 12 states that the surgery proposed for November of 1993 was expected to lessen her pain, it glosses over the temporary nature of that lessening.

Paragraph 9 says “Tracy enjoyed music, bonfires, being with her family and the circus. She liked to play music on a radio, which she could use with a special button.” By the time Tracy died, however, most of the claims in these sentences had been untrue for many years.

Finally, a time problem may have been what led to the judges' belief that Tracy's pain could have been treated by better drugs than the ones which had been used. The text quotes no source for the idea (another lapse from scientific standards, and particularly troubling since the opinion was pivotal in the judges' reasoning about the defence of necessity). All I can do is form a hypothesis, and I have done so:

An anti-Latimer medical witness may have cited the 2000 edition of the *Compendium of Pharmaceuticals and Specialties* (the drug reference book used in Canada), where the discussion of Tracy's anti-seizure drug does suggest that powerful pain drugs can be administered concurrently if careful monitoring and adjusting are done.

Then the judges failed to say “Hold on! Tracy's doctors could not have been advising her parents on the basis of the 2000 CPS. We need to get the 1993 edition out of the stacks and see what it says.” Sure enough, the wording in the older edition is much more cautious. After reading the 1993 article on Rivotril, a doctor would have been quite likely to tell the Latimers what they said they had been told: “No painkillers stronger than regular Tylenol.”

The second manifestation of unscientific thinking is the Court's reaction to the idea of a feeding tube. In two of the places where they mention a tube (paragraphs 7 and 38-39) the judges appear to have a very simplistic view – purely mechanical, not at all pharmacological – of what the medication problems were and how they could be fixed. They seem to think that Tracy's swallowing difficulties were the only obstacle to administering analgesics which could have made her life bearable.

In a third place where medications are mentioned (paragraph 6) there is indeed a reference to undesirable drug interactions, but this reference is prefaced by the words “It was thought ...”. The judges seem to mean “It was thought by the Latimers, erroneously, ...”, because in the next paragraph they go on to state that a feeding tube might have allowed better painkillers to be administered, which suggests that they dismissed the pharmacological

considerations. But these considerations are very serious ones – even recent editions of drug reference books treat them with respect.

2. Absorbing a “Slant”

Among the parties who addressed the court, anti-Latimer groups outnumbered pro-Latimer groups 12 to 2. The judges evidently felt they could remain impartial in the face of such an onslaught, but what they wrote suggests that they did not completely succeed.

“Pro-disabled” groups made up the bulk of the anti-Latimer faction. Indeed, the leaders of these groups considered that being anti-Latimer was an essential part of being pro-disabled.

(Most disabled people are quite hurt by being misunderstood as often as they are. Their feeling is very natural. But hurt has turned into anger, for many of them, and anger seeks an object. Robert was seized upon as the perfect target.)

The bitter disabled-rights leaders are given to speaking about the “value” or the “worth” of a life, rather than the “quality” of a life, because the two inflammatory terms make people think about Nazi Germany and other contexts in which lives have been graded like eggs, with the appraisals being made from the outside rather than from the inside (by the person living the life or by people taking that person’s point of view).

The judges probably heard the prejudicial words far more often than the neutral one, which may be why paragraph 13 of their ruling says “Robert Latimer formed the view that his daughter’s life was not worth living.”

This is bad enough. Far more frightening is the possibility that the judges absorbed not only the vocabulary of the majority witnesses, but also the implicit slur behind the vocabulary, namely that Robert saw Tracy as some kind of lesser being.

More misrepresenting of Robert was done by anti-Latimer witnesses, and apparently credited by the judges to some extent at least: in paragraphs 14 and 39 the ruling mentions the option of putting Tracy in a group home.

Anxious to portray Robert in a bad light, his opponents liked to imply that he had acted from caregiver burnout. But everyone who knew the Latimers attested that both parents willingly and constantly gave Tracy every kind of love and care they possibly could. Robert and Laura had noticed that she did not do well when she was in an institution; this strengthened their determination to look after her at home.

Paragraph 39 may indicate that a second kind of innuendo also occurred when Robert’s critics spoke about institutionalizing Tracy. They may have insinuated that the Latimers’ objections to a feeding tube were foolish (being partly aesthetic in nature) whereas staff at a facility would have been sensible and done the right thing.

But would it have been right? If Tracy had been given a feeding tube she might well have had to be restrained so that she did not disturb the tube with her involuntary limb movements when she had seizures. To thus “keep her in chains” would have been to impose a bewildering additional torment on a little girl who was already terribly afflicted.

And it would have been pharmaceutically futile as well: group-home personnel would have received the same medication warnings that Robert and Laura had received. If the staff had gone ahead and installed a feeding tube, the only drugs they could have administered through it would have been the old ineffective ones that Tracy’s parents had been limited to.

3. Accepting an Assumption

In several places (paragraphs 2, 5, 31, 41 and 81) the judges reveal their failure to see through the common but unjustified assumption that death is the worst possible fate. They are like the shallow-minded journalists who consider that a story has ended on an upbeat note if a person’s injuries are said to be “not life-threatening”. There is

no awareness that some conditions are life-ruining. Blank stares would likely be the response to a suggestion that people can get into situations where they need protection by death, not from death, because what they need protection from is the rest of their lives.

If you believe that death is the only serious peril, and you also believe that ending a life is only justified in situations of impending calamity, you may wind up thinking this Alice-in-Wonderland thought: “X is only justified in ending Y’s life if Y is in immediate danger of dying.” Paragraph 38 seems to show the judges presenting this idea and managing to keep a straight face while they do it. That paragraph is part of their attempt to show that the defence of necessity fails in Robert’s case – in other words, that he was not justified in ending Tracy’s life – and among their arguments is the statement “Tracy’s proposed surgery did not pose an imminent threat to her life.”

4. Accepting a Restriction

In English-speaking countries it is currently fashionable to use the terminal-illness criterion when assessing someone’s right to die. The SCC judges follow this fashion; in paragraph 8 they note that Tracy “was not terminally ill” and “her life was not in its final stages”.

However, the policy of denying release to people whose anguish may last more than six months does not stand up well when it is closely examined.

If we look at things from the insiders’ point of view, we see that people who will suffer for a long time have a greater need for release, not a lesser need, than people who will suffer for a short time. Support for the terminal-illness criterion is thus unlikely to be coming from the sufferers.

So where is it coming from?

From the spectators. Among those who stand on the outside and watch (people like doctors, politicians, and voters), the criterion has great appeal. It fits comfortably with two powerful instincts: the instinct to regard life as a duty, and the instinct to recoil from the act of ending a life.

Viewing life as an obligation leads to thinking that people must hang on until they are utterly beaten or at least until defeat is imminent.

Revulsion from accepting responsibility for ending a life leads to preferring situations in which one can say “I didn’t really do anything – the person was dying anyway.”

5. Not Grasping a Personal Situation

Although the ruling contains passages in which the judges discuss Robert’s situation and ideas, there is an overall lack of comprehension.

The judges’ thinking is very “inside the box”. Two instances have just been mentioned and there are others. Paragraph 85 gives the impression that the judges possess thoroughly conventional understandings of concepts such as vulnerability and premeditation. Being vulnerable likely means being vulnerable to death, period; being vulnerable to torture or to exploitation would be off the screen. Premeditation is assumed to be bad; even if the judges understand that intentionality merely reinforces the already-existing moral character of an act, rather than automatically making the act more wicked, they would not apply this insight to acts of killing, because they cannot see any such act as a good act.

Robert and Laura, in contrast, had been driven “outside the box” by their increasing alarm over what Tracy would be put through if they continued to act as the system expected. They were questioning many things which the judges still found unquestionable.

Paragraph 38 shows the judges’ total captivity to the assumption that there is no fate worse than death. Fierce

ongoing pain is declared to be unimportant if it will not lead to death in the immediate future. The judges become exasperated: “Tracy’s situation was not an emergency. The appellant can be reasonably expected to have understood that reality.” Finally they stoop to sneering: “There was no evidence of a legitimate psychological condition that rendered him unable to perceive that there was no imminent peril.” I suspect that in the mind of its writer that sentence had an insert: “... no evidence of a legitimate psychological condition [*other than congenital stupidity, beh beh beh*] ...”

Paragraph 39 contains more instances of minds failing to meet. The judges say that Robert had the alternative of struggling on and minimizing Tracy’s pain “as much as possible”. But the whole problem was the huge gap between what was possible and what was necessary. When we do all that we can, we comfort ourselves, but we may not adequately comfort the person we are trying to help. Robert was not focusing on his comfort, he was focusing on Tracy’s comfort. Yet the judges keep talking about his feelings – how he may have found things “sad” and “demanding” and “unappealing”. They cannot grasp that his concern was entirely for his daughter.

Their ultimate failure of comprehension is their mistaken view of the information setting in which Robert was operating. They reason as if the “facts” conveyed to them by an extremely lopsided panel of witnesses (a) were non-fiction and (b) had been part of Robert’s knowledge base.

But Robert had lived in a much different world, one that was dominated by just two considerations:

1. Any improvements in Tracy’s condition would be getting progressively smaller in scope, shorter in duration, and costlier in terms of post-operative suffering;
2. If she lived at home, the only place where she might have occasional moments of joy because she was with her parents and siblings, she would not be able to receive adequate pain control. As long as her anti-seizure drug was continued, narcotic analgesics would be forbidden because they might cause her death, an undesirable outcome in the view of the system. Stopping her anti-seizure drug would probably decrease her quality of life in ways that would not be compensated for by opioids. And providing intravenous anaesthesia on an “as-needed” basis would require the government to pay for three skilled workers (each doing an 8-hour shift) to live on the farm or nearby, something that would be deemed unaffordable.

Note #1: If you want to see the Court’s ruling, you can find a version with paragraph numbers at this address :
<http://csc.lexum.umontreal.ca/en/2001/2001scc1/2001scc1.html>

Note #2: If you want to see a somewhat extended discussion of the assumption that death is the worst evil (and other assumptions), follow this path:

www.righttodie.ca

Researchers’ Buffet

Pro and Con

Ion Effects

Assumptions

Note #3: A PDF version of this document (for making extra printed copies easily) is available at this address:
<http://www.righttodie.ca/scc-mistakes.pdf>

Here is a link to a recent version of Adobe Reader, in case the version you have is too old to work:
<http://www.adobe.com/products/acrobat/readstep2.html>