

Fine lines and Dr Syme: Intention, palliation and death causation in regulation and law

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SUMMARY

Dr Rodney Syme

Case - Syme v Medical Board of Australia (Review and Regulation) [2016] VCAT 2150

Submissions and evidence

VCAT analysis of evidence

Responses to the evidence and the analysis

Conclusions

References

Dr Rodney Syme

Retired urologist



Respect for the right to choose EST. 1974

***Current Vice President
(12 years as President)***

***Assisted numerous people with end of life problems
since 1972***

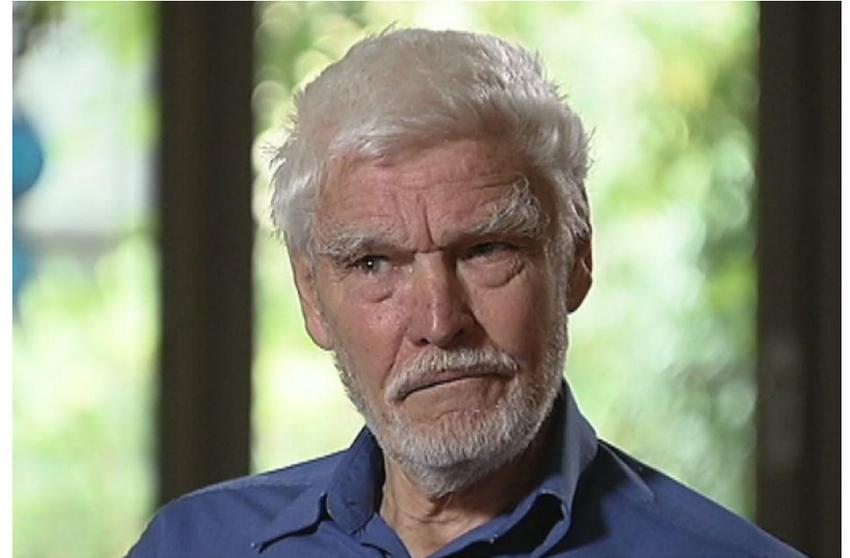
Challenged police to arrest him for assisting people

Speaker and law reform activist

***Supports assisted dying for those suffering from advanced incurable illness,
not just terminally ill***

'A Good Death' 2008 MUP

'Time To Die' 2017 MUP



Syme v Medical Board of Australia (Review and Regulation) [2016] VCAT 2150

1. Mandatory notification by GP that his patient Mr Erica (terminally ill with SQ cell CA tongue) had disclosed that Dr Syme was to assist him to end his life

Practitioners or employers who form a reasonable belief that another practitioner has engaged in notifiable conduct are obliged to notify AHPRA/Health Practitioner Boards.

Notifiable conduct (*Health Practitioner Regulation National Law (Victoria) Act 2009 s140*)

- (a) practising while intoxicated by alcohol or drugs; or*
- (b) engaging in sexual misconduct in practice; or*
- (c) placing the public at risk of substantial harm because practitioner has impairment; or*
- (d) placing the public at risk of harm by significantly departing from accepted professional standards.***

Syme v Medical Board of Australia (Review and Regulation) [2016] VCAT 2150

2. Imposition by MBA of condition on Syme's registration as a medical practitioner

- *Any action by a medical practitioner (anticipated or otherwise) that has the **primary intent and effect of bringing about the end of a person's life** constitutes a significant departure from accepted professional standards and presents a serious risk to that person, such that immediate action is required (under Health Practitioner Regulation National Law (Victoria) Act 2009).*
- Syme is not to engage in the provision of any form of medical care, or any professional conduct in his capacity as a medical practitioner that has the primary purpose of ending a person's life.

Syme v Medical Board of Australia (Review and Regulation) [2016] VCAT 2150

3. Syme's application to VCAT

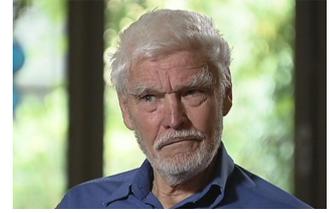
- Decision of MBA to impose the condition was wrong
 - in relation to the facts; and
 - interpretation / construction of s 156 of the *National Law*OR alternatively, condition was ambiguous.

4. Decision of VCAT

- Set aside MBA decision to impose condition
- Evidence did not support reasonable belief that Syme posed serious risk to persons generally or his patient in particular.
- Not necessary to take immediate action to protect public health or safety
- Condition objectionable; not a valid condition to impose upon one practitioner alone, to the extent that its purpose and effect is merely to restate the law
- Condition oppressive, unworkable and uncertain

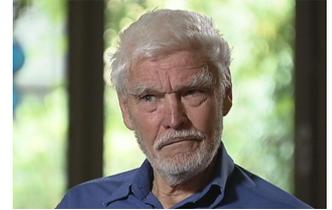
Submissions and evidence

1. Dr Syme (as recorded in the judgment)



- Told Erica if he sought to end his life **he would help him, by giving him Nembutal.**
- Recognised that there are circumstances in which Erica might choose to take nembutal, but that he may choose never to take it, or may never ask for it in the first place.
- **Not Syme's intention he take it,** but to provide relief from psychological distress by providing it.
- Usually does not provide nembutal immediately, but does so in refractory cases, in order to relieve intolerable suffering.

Submissions and evidence



1. Dr Syme (as recorded in the judgment)

- “When I first started doing this, I did feel my intention was to allow a person to end their life. But as time has gone on, I have recognised very, very strongly the palliative value in having the medication without using it”.
- “And ultimately (a female patient) did not use it (nembutal), which **made me realise again that giving a person medication was not done by me because I wanted or intended them to use it**”.
- In both Syme’s provision of nembutal and pall care’s use of terminal sedation, the intention is to relieve suffering. **In both, one can foresee that the provision of that treatment may hasten death**, so there is a very strong parallel between the two.
- “When he gives possession of Nembutal, **he will also give instructions as to its use. He clearly contemplates that there is a possibility they will take it**”.

Submissions and evidence

2. Mr Erica (as recorded in the judgment)

- “I certainly am not at any risk from Dr Syme - in fact, quite the contrary”.
- “My quality of life has plummeted since you have imposed those restrictions upon Dr Syme”.
- “[The symptoms] will not be palliated by the medication provided by [my GP] which is for the management of pain. These symptoms will only be relieved if I take a massive overdose of the pain medication provided by [my GP] and this option is entirely unpredictable”.



Submissions and evidence

3. Professor Maddocks (Em Professor of Palliative Care) (as recorded in the judgment)

- Had **difficulty in relying upon 'double effect principle' to reconcile** two statements –
 - Obtaining Nembutal relieves the patient's intolerable suffering.
 - There is no intention that the patient use nembutal to end his life.

because while some suffering may be relieved simply by the assurance of having nembutal at hand, at the time when it is taken it will surely cause death.



Submissions and evidence

3. Professor Maddocks (Em Professor of Palliative Care) (as recorded in the judgment)

NEVERTHELESS -

- If Dr Syme undertakes to give a patient Nembutal, without actually giving it, then such undertaking alone could be very helpful to the patient.
- Dr Syme could have had the **intention to provide palliation** to the patient by offering or providing the drug Nembutal, **without intending that the patient actually take the drug.**



Submissions and evidence

4. Dr Hunt (Palliative Care physician) (as recorded in the judgment)



- **Syme's statements about nembutal may seem contradictory:**
 1. He would help Erica obtain nembutal if 'his suffering had become intolerable' and if he considered that Erica was at the end of his endurance.
 2. He denied any intention that the patient would use Nembutal to end his life
- **Statements can be reconciled, however, using the 'principle of double effect':**
 - Clinicians' *primary intention* is to palliate suffering
 - *Secondary (unintended)* consequence is hastened death of the patient
 - (making nembutal available doesn't mean he intends him to take it; he may hope he doesn't take it)

VCAT analysis of evidence

1. Law and regulation

- VCAT not concerned with the illegality of Syme's conduct in obtaining and providing Nembutal; only question was whether conduct posed serious risk necessitating immediate action.
- Condition purports to merely prohibit **what is currently prohibited under the law**, so it supplants the burden of proof applicable to criminal conduct with an entirely different burden of proof applicable to professional misconduct. VCAT finds the Condition objectionable and contrary to the power and discretion afforded to MBA.
- **RESPONSE**
 - *This avoids the Tribunal's duty to consider the significance of doctors failing to act in accordance with the law.*
 - *MBA took the potential provision of nembutal as reflecting intention to assist patient to die, which it held to be both unlawful and contrary to current professional standards.*

VCAT analysis of evidence

2. Intention / purpose (1)

- Accepted Syme's evidence that his **purpose/intention, in promising and providing possession of Nembutal, was the palliation** of psychological/existential suffering experienced by his patients.
- MBA wrongly contends that, **since the chemical effect of the drug if ingested is death, that can be the only purpose** for Dr Syme promising/providing it.
- MBA's construction **ignores the reality of the palliative effect** contended by Syme

VCAT analysis of evidence

2. Intention / purpose (2)

- MBA fails to acknowledge **critical distinction between possessing and ingesting Nembutal.**
- The purpose/intention of both Syme and patients is that patients have it in their possession, **not that it be used.**
- If ingested, nembutal will cause death, **but time between provision of drug and when, or if, patient uses it, further confirms that ingestion is not the purpose/intention of provision.**
- ingestion requires **independent decision/action of patient.** Syme's provision of drug does not inevitably lead to ingestion **nor of itself cause death.**

VCAT analysis of evidence

3. Relevance of double effect (1)

- **Describing death as an ‘unintended consequence’ is somewhat strained where terminal sedation is initiated for the primary purpose of relieving pain, but where death is inevitable - it is only a matter of timing.**
- Promise or provision of Nembutal does not cause the patient’s death. Syme’s treatment has no immediate secondary effect; patients do not ingest nembutal **as soon as it is provided and they may never ingest it. Principle of double effect has no direct application for such patients.**

VCAT analysis of evidence

3. Relevance of double effect (2)

- **BUT, VCAT states - process by which some patients choose to die by ingesting nembutal is analogous to process of terminal sedation.**
- In both, intended and established purpose of treatment is palliation of suffering. That treatment also has effect of **providing opportunity** for patient to **later** ingest nembutal is not intended by Syme and can be seen as a secondary but unintended consequence.
- There is a logical analogy between principle of double effect used in palliative care and prospect that a patient may elect to ingest Nembutal, the latter effectively representing the same kind of secondary effect as the hastening of death which Dr Hunt said occurs when terminal sedation is used. The **only real difference is one of timing.**

VCAT analysis of evidence

4. Serious risk (1)

- Risk of harm identified by MBA is potential subsequent and secondary effect of ingestion.
- MBA's position is simplistic and mechanistic because –
 - Some patients never choose to ingest nembutal being reassured by sense of control that promise of possession and actual possession provide. **No serious risk can arise in such cases.**
 - That some patients **choose to ingest nembutal**, often long after being provided the drug, does not invalidate **Syme's original intention**.
 - **MBA dismisses**
 - (a) right of competent individuals to seek reassurance that they will be able to control the manner of their dying;
 - (b) palliative effect upon such patients.

VCAT analysis of evidence

4. Serious risk (2)

- Dr Hunt preferred the word “opportunity” to “risk” – **access to nembutal cannot necessarily be said to be placing these patients at risk.**
- Whether nembutal is ingested is ultimately a matter for patient. The **intention to end their life is their own, it is not the intention of Syme.**
- That a medical treatment is not lawfully able to be provided in Australia does not of itself indicate that it is a treatment that places patients at serious risk.

VCAT analysis of evidence

5. Concluding statements (1)

- VCAT satisfied that **Syme does not intend that any patient will actually use the Nembutal to end their life.**
- VCAT considers, consistent with opinions of both experts, that choice of a rational patient who elects to end their life rather than endure further intolerable suffering is **not a death which can be described as harmful for that patient.**
- Syme consults with only those who seek him out. There is no impact on public safety **beyond those patients.**
- **Other than giving instructions as to requisite dose and likely effect of ingesting nembutal, Syme does not advise patients that they should take it.**

VCAT analysis of evidence

5. Concluding statements (2)

- Condition is unworkable to the extent that it relies upon an assessment of the **subjective intention of the medical practitioner, which is inherently difficult to assess and monitor.**
- VCAT satisfied that holistic approach adopted by Syme is **entirely focused** on supporting patient in life rather than pre-empting patient's death.

Responses to the evidence and VCAT's analysis

Logical errors

- **MBA does NOT contend that, since the chemical effect of the drug if ingested is death, that can be the ONLY purpose for Syme promising/providing it.**
- **To accuse the MBA of IGNORING the reality of the palliative effect contended by Syme is a straw argument; it begs the question of intentions where the focus of the MBA was on intention to assist patients to die.**
- **Ditto re accusing the MBA for failing to acknowledge critical distinction between possessing and ingesting Nembutal.**

Responses to the evidence and VCAT's analysis

Intention / purpose

1. Changing intentions – plausible? contradictory?

- Syme claims that his intention in providing nembutal changed, such that he no longer intends patients to use it – plausible??
- VCAT also satisfied that Syme does not intend that *any* patient will use Nembutal to end their life -
 - Inconsistent with part of Syme's evidence
 - Inconsistent with its own statement that, when Syme gives possession of nembutal, he also gives instructions as to its use
 - Inconsistent with VCAT's view that Condition unworkable as it relies on assessment of subjective intention of the doctor which is inherently difficult to assess/monitor

Responses to the evidence and VCAT's analysis

Intention / purpose

2. Timing and agency

- Gap between provision of nembutal and when/if patient uses it – irrelevant in relation to intention of providing it; does NOT demonstrate that ingestion is not one purpose/intention of provision.
- Similarly, VCAT -
 - ingestion requires independent decision/action *of patient*
 - provision of drug does not *inevitably* lead to ingestion
 - provision of drug does not *of itself* cause death.

All 3 points irrelevant to intention of Syme

Responses to the evidence and VCAT's analysis

Intention / purpose

3. Analogy

- **Oregon Death With Dignity Act 1997 -**
 - **218 prescriptions for lethal medications in 2015**
 - **132 people reported having died during 2015 (60%; at 27.1.16)**
- **If Syme's claim re intention is accepted, why wouldn't we say that Oregon's legislative PAS regime is primarily about providing palliative care/relief of psychological suffering, given that not all people there take the medication?**
- **Otherwise, intention is determined by numbers/proportion.**

Responses to the evidence and VCAT's analysis

Relevance of double effect

(1) Syme would help Erica if suffering became intolerable but

(2) Syme denied any intention that Erica would use nembutal to end his life (Hunt) -

These are not reconciled by assertion of primary/secondary intentions that are not empirically verifiable, and where Syme did not know whether or not Erica would use nembutal.

- VCAT concedes that

1. process by which some patients choose to die by ingesting nembutal is analogous to process of terminal sedation, and

2. describing death as an 'unintended consequence' is somewhat strained, where terminal sedation is initiated for the primary purpose of relieving pain, but where death is inevitable - it is only a matter of timing.

SO - if timing is irrelevant in an analogous process, then calling death an unintended consequence in the Syme case is equally strained, or incorrect.

Responses to the evidence and VCAT's analysis

Serious risk

- That no serious harm – meaning death - can arise in cases where patients do not choose to ingest nembutal is irrelevant to the issues in question.
- Also *tends to* contradict VCAT's view that death of a patient who elects to end their life rather than endure further intolerable suffering cannot be described as harmful for that patient.
- VCAT view that there is no impact on public safety beyond patients who seek Syme out, could imply that there IS an impact on public safety for those who do – precisely the position of the MBA.

Responses to the evidence and VCAT's analysis

Dependence of palliation on a lethal drug

- Syme's palliation is only made possible by the provision of a lethal drug, provided outside the boundaries of accepted practice.
- Even if no one *in fact* used nembutal to end their life, that would not change problems concerning intention.
- By (1) conceding that some people may use nembutal, and (2) given that some do so, Syme is committed to intending that some people will use nembutal (contra Hunt).
- To intend that some people - even if not identifiable at the time - will use nembutal, knowing that some do, is to intend to actively assist in bringing about the death of some people.

Responses to the evidence and VCAT's analysis

Conclusions

- 1. Many of VCAT's arguments concerning MBA's positions and other matters are straw arguments, inconsistent, make false inferences or are irrelevant to the core issue of intention.*
- 2. MBA's position focused on accepted professional standards, which include adherence to current law. Condition imposed on Syme was restricted to ensuring that these standards were maintained, by preventing Syme from actively assisting in ending patients' lives.*
- 3. Given (a) the concessions by Syme and VCAT, (b) the inherent subjectivity and uncertainty about intentions, and (c) that Syme is committed to intending that some people will take nembutal provided by him to end their lives, MBA was justified in its position, which ought to have been upheld by VCAT.*
- 4. The intention that some people will take nembutal must be accepted as the primary intention in those cases, contra the Tribunal.*

References

1. *Syme v Medical Board of Australia (Review and Regulation)* [2016] VCAT 2150

<http://www.austlii.edu.au/au/cases/vic/VCAT/2016/2150.html>

2. *Health Practitioner Regulation National Law (Victoria) Act 2009*

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3. R Syme. 'Time To Die'. Melbourne University Press. 2016

4. Oregon Health Authority. Oregon Death With Dignity Act : 2015 Data Summary

<https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year18.pdf>