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No Charter for Assisted Suicide
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any way it chose. It chose to do so by awarding such monies as would compensate the plaintiff for loss of rent free accommodation for life and remitted the case for assessment of the actual sum.

The decision in *Baker* v. *Baker* is perfectly justifiable on well known principles. Estoppel is a remedy for informal bargains, unfairly denied. Its inherently flexible nature does allow the court to achieve practical justice for all parties. However, a successful claim of undue influence means that a person has entered into a transaction that he would have otherwise avoided. In such cases, the equity is on one side only and as the House of Lords makes clear in *O'Brien*, this has powerful consequences for all those tainted by it. In *Cheese v. Thomas* the plaintiff was treated as if he had succeeded by estoppel, rather than the doctrine of undue influence.

MARTIN DIXON

NO CHARTER FOR ASSISTED SUICIDE

SUE RODRIGUEZ was a 42-year-old resident of British Columbia suffering from Lou Gehrig's disease, a terminal condition which causes progressive paralysis but which does not impair the mental faculties. She wanted to be connected by a doctor to a device by which she could, at a time of her choosing, self-administer a lethal drug. An obstacle was section 241(*b*) of the Criminal Code prohibiting aiding and abetting suicide.

She sought a declaration that this section violated sections 7, 12 and 15 of the Canadian Charter of Rights and Freedoms. Her application was dismissed by Melvin J., whose decision was affirmed by the B.C. Court of Appeal (McEachern C.J.B.C., dissenting). Rodriguez appealed to the Supreme Court of Canada.

By a 5–4 majority, her appeal was dismissed: *Rodriguez* v. *British Columbia (Attorney-General)* (1994) 107 D.L.R. (4th) 342. Sopinka J., who delivered the leading judgment with which La Forest, Gonthier, Iacobucci and Major JJ. concurred, identified the main issue as being whether section 241 infringed section 7.

Section 7 provides that everyone 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". Rodriguez argued that section 241 infringed both her "liberty" and "security of the person". Sopinka J. agreed that it deprived her of autonomy over her person and caused her physical pain and psychological stress in a manner which infringed the security of her person. However, noting that security of the person and liberty could not be divorced from the third value protected by section 7, the sanctity of life, he held that the

infringement was not contrary to the principles of fundamental justice.

He observed that the active assistance of a third party in carrying out a patient's desire to die had been rejected by the Canadian Law Reform Commission in its report on euthanasia and by the Law Lords in *Airedale N.H.S. Trust* v. *Bland* [1993] 2 W.L.R. 359, and that there were two reasons for this: the intrinsic wrongness of active participation by one individual in the death of another and the risk of "abuse". Moreover, after a review of the laws of some western countries, he noted that an absolute prohibition seemed the norm and had never been held unconstitutional or a breach of human rights. In sum, section 241 did not infringe section 7.

Also unsuccessful was Rodriguez's submission of an infringement of section 12 of the Charter, which states that everyone has the right not to be subjected to "cruel and unusual treatment or punishment". She was not, held Sopinka J., being subjected by the state to any form of treatment: a mere prohibition could not constitute "treatment".

More successful was her submission that section 241 infringed section 15 of the Charter, which provides that everyone has the right to "equal protection and equal benefit of the law without discrimination" and, in particular, without discrimination based on, *inter alia,* physical disability. Sopinka J. assumed a breach of section 15 but held, however, that section 241 was saved by section 1 of the Charter as being a reasonable limit which could be demonstrably justified in a free and democratic society.

Of the four dissentients, McLachlin J. (with whom L'Heureux-Dubé J. concurred) held that section 241 infringed section 7; Cory J. that it infringed both sections 7 and 15, and Lamer C.J.C. that it infringed section 15. All four held that the Charter permitted physician-assisted suicide, at least with prior court approval granted in the light of certain "guidelines".

This landmark case will interest not only medical lawyers but also students of constitutional law and human rights. The importance of the majority judgment lies in its analysis and reaffirmation of the principle of the sanctity of life, which is remarkably similar to that in the recent *Report of the House of Lords Select Committee on Medical Ethics* (HL 21–I of 1993–94), both in its accurate recognition that the principle precludes euthanasia and assisted suicide on the ground of the intrinsic wrongness of intentional killing, quite independently of the risk of its leading to involuntary euthanasia (which, as Sopinka J. aptly observed, is a "worrisome trend" in The Netherlands) and in its inaccurate view that it does not preclude intentional killing by omission.

The majority's reasoning that section 241 violates the security of the person and the remarkable *assumption* that it infringes section 15

are open to criticism, for the they are grounded in an articulation of "dignity", "autonomy" and "equal protection and equal benefit" which seems both superficial and inconsistent with a comprehensive understanding of the sanctity of life. This criticism applies *a fortiori* to the minority judgments, which wholeheartedly endorse the egregious argument that section 241 violates the Charter because it inequitably prevents those physically incapable of killing themselves, but not those so capable, from committing suicide.

Leaving aside the (apparently overlooked) fact that even Rodriguez could have committed suicide (either by suicidally refusing food, or, in due course, artificial ventilation) the argument misapprehends the rationale of the decriminalisation of suicide, which was *not* respect for a right to self-determination (let alone self-destruction) but, as Sopinka J. points out, a judgment that attempted suicides are better dealt with by non-criminal measures. Indeed, the maintenance of the very offence of assisted suicide should have alerted the minority to the fact that, far from being lawful and an individual right, suicide remains unlawful and contrary to public policy. The policy informing the law is to discourage, not encourage, suicide. If, one wonders, a legislature were to repeal a law against drug-taking on the ground that addicts need help not punishment, but were to retain a law against aiding drug-taking, would the minority hold that those too disabled to inject themselves were entitled to a judicially-approved physician-assisted fix?

With respect, the minority's reasoning is misconceived, their assessment of the risks of abuse complacent and their "guidelines" vague. Yet they almost established a constitutional right to physician-assisted suicide; a right arguably going beyond, in the words of Sopinka J., "any serious proposal for reform in the western world", and a right whose extension to the able-bodied and to euthanasia consistency would inexorably have required.

The minority judgments in *Rodriguez* raise, as did those of the majority in *Morgentaler* (1988) 44 D.L.R. (4th) 385 (see [1989] C.L.J. 165), which held that anti-abortion laws contravened section 7 of the Charter, profound questions about the role of the judiciary in a democratic society.

JOHN KEOWN.

EQUALITY IN PENSIONS LAW—THE LIMITS OF *BARBER*

IN *Barber* v. *Guardian Royal Exchange Assurance Group* C-262/88 [1991] 1 Q.B. 344 the European Court of Justice held that benefits under occupational pension schemes are covered by the principle of