

COMMENTARY

PROSECUTORS MAKING (BAD) LAW?

Decision on prosecution – the death by suicide of Daniel James, 9 December 2008

Introduction

The detailed statement made by the Director of Public Prosecutions (DPP) in December 2008 that the family of Daniel James, who died in the Swiss clinic Dignitas in September 2008, would not face criminal charges marks a milestone in the development of the law as it applies in practice to assisted suicide. The DPP and, more recently, the judiciary¹ are arguably contributing to the tacit acceptance of assisted suicide abroad. The emergence of the phenomenon of ‘suicide tourism’ has presented greater choice in end-of-life options but provoked increased uncertainty regarding the potential application of the Suicide Act 1961 s 2(1).² Since 2002 at least 90 UK citizens have travelled to Dignitas to die,³ yet not a single prosecution has been brought against those assisting friends or relatives to commit suicide in Switzerland.⁴ Daniel James’s death prompted speculation that the first such prosecution was imminent. Thus, the decision provides an interesting analysis of evidential and public interest factors considered relevant when considering whether to prosecute a defendant suspected of ‘aiding, abetting, counselling or procuring the suicide of another’. Setting a prosecutorial precedent by issuing such a public statement⁵ raises the question of the extent to which the DPP has effectively promulgated a ‘Code of Practice’ pertaining to those assisting ‘suicide tourists’. At the very least, the statement is intended to be informative of

¹ *The Queen on the Application of Debbie Purdy v Director of Public Prosecutions* [2008] EWHC 2565; [2009] EWCA Civ 92.

² Section 2(1) provides ‘A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on indictment for a term of imprisonment not exceeding 14 years’.

³ Debbie Purdy (n1) at [6], HC.

⁴ Article 115 of the Swiss Penal Code states: ‘A person who, for selfish motives, aids, or abets another person in suicide will be punished with imprisonment of up to five years’. Thus, in the absence of ‘selfish motives’ it is lawful to assist another in suicide. See J Griffiths, H Weyers and M Adams, *Euthanasia and the Law in Europe* (Hart Publishing, Oxford 2008) for a full examination of Swiss legal provisions regarding euthanasia and assisted suicide.

⁵ Decision on Prosecution – The Death by Suicide of Daniel James, 9 December 2008, at www.cps.gov.uk/news/nationalnews/death_by_suicide_of_daniel_james.html.

prosecution policy in this context. But to what extent does the decision in the James case provide a green light to those assisting suicide in another jurisdiction? Does the tacit acceptance of assisting suicide in the case of a 'suicide tourist' also indicate that the Crown Prosecution Service (CPS) might now be less enthusiastic in prosecuting those who assist suicide where the final act occurs in England or Wales, or is prosecution policy founded purely on a 'not in our back yard' approach?

The Facts

Daniel James, a 22-year-old student, who had on several occasions played rugby for England youth teams, sustained a serious spinal injury during a rugby training session in March 2007. Spinal cord compression and the dislocation of two vertebrae resulted in tetraplegia causing paralysis from the chest down, together with a loss of independent hand or finger movement despite retaining mobility and strength in his shoulders, biceps, and triceps. Immediately following his accident, Daniel was determined to prove the medical diagnosis incorrect. Ultimately, he came to accept the view of his consultant that it was unlikely he would see any significant improvement. He became suicidal. Frequently articulating his wish that he had died of his injuries, Daniel told his psychiatrist that as a 'dynamic, active, sporty young man who loved travel and being independent, he could not envisage a worthwhile future for himself now'.⁶ Following his return home from hospital, Daniel made several suicide attempts and it was after his third failed attempt in February 2008 that he contacted the Swiss clinic, Dignitas, to ask for assistance in dying. Daniel's correspondence with Dignitas serves to further illustrate his wish to die.⁷

By May 2008 Dignitas had accepted Daniel's application and made arrangements for a Swiss doctor to provide the barbiturate prescription for Daniel's suicide. Under Swiss law, a doctor is permitted to prescribe a lethal drug for the purposes of an assisted suicide only after examining the patient in person and assessing the medical condition(s) giving rise to the desire to die.⁸ Accordingly, Daniel arranged to meet the doctor

⁶ *Decision on Prosecution* (n 5) at para 6.

⁷ *Ibid* at para 7.

⁸ Swiss doctors must act according to Article 11 of the Narcotics Law that requires that the drug be prescribed according to the rules of medical practice, which are not incompatible with assisting suicide provided the patient is competent. Further to this, an administrative court ruling in Zurich in 1999 (Verwaltungsgericht des Kantons Zurich, *Entscheid der 3 Kammer VB Nr 99.00145*, 1999) added the requirement that there be 'a condition indisputedly leading to death'; however, the court failed to specify which conditions should be covered by this term and even raised the question of whether mental conditions might be included. In 2006 the Swiss Federal Supreme Court (Schweizerisches Bundesgericht, *Entscheid 2A.4812006*, 2006) ruled that a

on two occasions prior to his assisted suicide, which was arranged for Friday 12 September. His parents, however, attempted to persuade him to reconsider. In a report dated July 2 2008, Daniel's psychiatrist wrote that Daniel 'clearly understood that no other parties, be they professionals or family members wished him to pursue this course of action and was clearly aware that he could reverse his decision at any point. He remained firmly of the opinion that support from any agency would not be helpful for him or change his decision'.⁹ With respect to Daniel's mental capacity, ongoing assessments confirmed that he had full capacity. In a report dated March 11 2008, his Consultant Psychiatrist concluded that '...he (Daniel) has full capacity... He is fully aware of the reality and potential finality of his decision, displays clear, coherent, logical thinking processes in order to arrive at his decision and had clearly weighed alternatives in the balance'.¹⁰ Once the arrangements were in place, Daniel's state of mind was further reviewed and it was accepted by his doctors that Daniel retained mental capacity and that his decision to end his life was not driven by mental illness.

For their part, his parents were apparently 'relentless' in their efforts to persuade Daniel to carry on living. During his interview, Daniel's father said '[w]e pleaded with him not to do it and change his mind and live... There would be nobody happier to hear him say he'd changed his mind and he didn't want to do it'.¹¹ Eventually, they accepted their son's resolution and began to assist him in arranging his suicide. It was on the matter of organising flights that a family friend also became engaged in the enterprise of assisting Daniel. The friend, who remains nameless throughout, had initially offered assistance to arrange for Daniel to travel in order to consult specialists who might aid his recovery. At this point, Mark and Julie James took up their friend's offer of help, albeit help with a rather different purpose than that which was originally envisaged. Thus, flights to Zurich were arranged by their friend, including a return flight for Daniel in case he changed his mind.

With all necessary arrangements in place, Daniel signed a declaration dated August 27 2008, witnessed by his doctor, stating that he wished to travel to Switzerland for an assisted suicide and for his body subsequently to be returned to England. Daniel travelled to Zurich with

incurable, permanent, serious mental disorder can be comparable to a serious physical condition, thus a doctor who prescribes lethal drugs for a mentally ill patient does not necessarily violate the rules of medical practice in this regard. See Griffiths, Weyers and Adams (n 4).

⁹ *Decision on Prosecution* (n 5) at para 10.

¹⁰ *Ibid* at para 17.

¹¹ *Ibid* at para 11.

his parents and on September 12 2008 they attended the clinic where a doctor assisted in Daniel's suicide. Mark and Julie James were with Daniel when he died. Post-mortem blood samples confirmed that the cause of death was a fatal dose of a barbiturate typically used for assisted suicide at Dignitas.

The DPP's Decision

The DPP's decision considered whether the defendants' behaviour satisfied the *evidential* element of the law, and if so, whether it was in the *public interest* to pursue a prosecution. Crucial to this decision is the *Code for Crown Prosecutors* (the Code) which details a range of factors that may be considered when weighing up the arguments for and against prosecution in any given case.¹²

The Evidential Test

The Code provides that the evidential stage of the test determining whether a prosecution should go ahead will be satisfied when there is a realistic prospect of conviction.¹³ Having concluded beyond reasonable doubt that Daniel James died as a result of suicide, the DPP stated that the defendants' actions indicated that they 'intended' to assist Daniel, thereby satisfying the mental element of the offence. The question of whether the defendants' actions satisfied the *actus reus* of the offence unfortunately did not encourage the DPP to provide any analysis as to what the words 'aid, abet, counsel or procure' should mean. Treating Daniel's parents' activities as a joint enterprise, the DPP stated that in the absence of absolute clarity regarding who did what, there was sufficient evidence to show that both effectively aided and abetted their son's suicide by assisting with correspondence, making payments to Dignitas, making travel arrangements and finally, accompanying Daniel to the clinic in Zurich.

With respect to the involvement of the family friend, it was concluded that while his actions were less significant than those of Daniel's parents, in arranging and paying for the flights—while having knowledge of the purpose of the visit to Switzerland—his actions also constituted aiding and abetting Daniel's suicide. Although the DPP did not define what 'aid, abet, counsel or procure' should mean in more precise terms, it seems that he regards *any* assistance with arrangements in connection to a proposed suicide to be aiding and abetting a suicide. But is this correct? In *A-G v Able*,¹⁴ Woolf J stated that an offence would have

¹² Available at <http://www.cps.gov.uk/Publications/docs/code2004english.pdf>.

¹³ *Ibid* at para 5.2.

¹⁴ [1984] QB 795 (QB).

been committed in the event that a recipient of one of the booklets detailing advice on how to commit suicide took, or attempted to take his/her own life; that the Society intended the booklet to facilitate suicide and had distributed the booklet to the recipient with this aim in mind. In *R v Chard*,¹⁵ the defendant was found not guilty of assisting a suicide despite having supplied the deceased with a large quantity of paracetamol. In alleging that the family friend had breached the Suicide Act merely by arranging flights in circumstances where it was clear that Daniel would have gone to Dignitas irrespective of this assistance, is the DPP is being overzealous in his interpretation of the Suicide Act?

The Public Interest Test

The DPP had to consider further whether it was in the public interest to bring such a prosecution against the defendants. The DPP noted that the nature of the offence in question is unique among other aiding and abetting offences in the fact that the ‘critical act—suicide—is not in itself unlawful’.¹⁶ For that reason a significant number of the factors identified in the Code were simply not relevant.¹⁷ Of relevance was the question of whether a conviction would be likely ‘to result in a significant sentence’.¹⁸ The DPP concluded that it would be ‘very unlikely’ that a court would be minded to impose a custodial sentence on Mr and Mrs James and their friend.

The DPP cited two cases by way of comparison. *R v Wallis*¹⁹ concerned an unsuccessful appeal against a 12-month sentence for assisted suicide. Keith Wallis had shared a flat with the deceased, 17-year-old Deborah Johnson. A troubled young woman with a history of drug abuse, Deborah had apparently attempted suicide in the past. The defendant bought large quantities of aspirin and codeine for Deborah, together with a bottle of cough medicine and a bottle of vodka. He then sat with her while she consumed the deadly cocktail and initially declined to call an ambulance when another flatmate requested him to do so. Police who investigated Deborah’s death reported that the defendant, who they described as ‘an unsettling young man’, treated the tragedy as a joke. Evidence suggested that the defendant had at no time attempted to dissuade Deborah from committing suicide and had claimed that he had wanted to help her achieve ‘peace of mind’.

¹⁵ (1993) *The Times*, 23 September 1993.

¹⁶ *Decision on Prosecution* (n 5) para 28.

¹⁷ Factors regarded as not relevant to the case in hand were identified as 5.9 (b), (c), (d), (e), (j), (k), (m), (n), (p) and 5.10(b), (c), (d), (e), (f), (g), (h), and (i) of the Code.

¹⁸ 5.9(a) of the Code.

¹⁹ (1983) 5 Cr App R(S) 342.

*R v Hough*²⁰ involved more active assistance in suicide and resulted in a conviction for attempted murder. The defendant had agreed to help an 84-year-old woman, Miss Harding, to commit suicide as a consequence of her great unhappiness, loneliness, and suffering. Miss Harding, who was prone to describing herself as a 'non-person', was partially blind, partially deaf, and suffering from arthritis. After failing over a year to dissuade her from her desire to commit suicide, the defendant agreed to supply a quantity of sodium amytal tablets to Miss Harding and to sit with her while she took them. Miss Harding prepared the drugs herself, together with some whisky with which to take them, while also obtaining plastic bags for the purpose of suffocation and apparently begging her friend to use them should the drugs prove insufficient. When the old lady fell unconscious, the defendant stayed with her and after several hours of observing Miss Harding's continued breathing, the defendant placed a bag over her head and removed it when breathing ceased. The defendant's appeal against her 9-month sentence was unsuccessful.

These two cases provided the DPP with a useful comparison by which to judge the moral culpability of those assisting Daniel. Mr Wallis's behaviour amounted to encouraging rather than discouraging the victim, and then actively assisting her by procuring the means of suicide. Although Charlotte Hough was not emotionally supportive of Miss Harding's suicide bid—on the contrary, she tried in vain to discourage it—her actions nevertheless went far beyond merely assisting a suicide. Charlotte Hough's actions may be viewed as less morally reprehensible than those of Mr Wallis, but her actions in placing the bag over the old lady's head were—notwithstanding the fact that causation was inconclusive—perceived as causative in a way that merely providing the means of suicide is not. Accordingly, in comparing the facts of Daniel's assisted suicide to those in the cases of Wallis and Hough, the DPP drew a distinction between these cases and the behaviour of Mr and Mrs James and their friend.

Also of relevance to the determination of whether the prosecution would be in the public interest was the question of whether the defendants were ringleaders or organisers of Daniel's suicide.²¹ Despite evidence that all three defendants played a role in the organisation in the arrangements, the DPP's interpretation of the Code led him to conclude this question in the negative. Daniel was the ringleader in the orchestration of his own demise, but the DPP's treatment of this issue arguably has implications for future cases. The interpretation of the word

²⁰ (1984) 6 Cr App R(S) 406.

²¹ At para 5. 9(f).

'organiser' is particularly significant, in that it indicates that a person would have to play the primary or decisive role in organising the suicide, not merely taking part in some aspects of organising the suicide, in order to be seen as culpable in this respect. May it be assumed, for example, that any assistance in organising arrangements for a person with physical limitations in this context is acceptable, provided, of course, that such assistance does not amount to a person being seen as the driving force or 'ringleader' of the suicide?

On the issue of premeditation,²² the DPP found no evidence that the defendants premeditated Daniel's suicide, or that their actions comprised elements of a 'group' offence.²³ The possibility that the offence might be repeated²⁴ was similarly disregarded. The DPP considered whether the defendants were in a position of authority or trust, and whether there was a marked difference between the actual or mental ages of the defendant and the victim, or, if there was any element of corruption. On this point, the DPP found that despite the existence of a relationship of trust together with a considerable age gap between Daniel and the defendants, he was satisfied that Daniel was by no means manipulated. Describing Daniel as a 'mature, intelligent and fiercely independent young man',²⁵ it seems that the DPP was in no doubt as to the determination of Daniel to end his life with or without his parent's assistance. The DPP stressed his conclusion that rather than his parents influencing Daniel to travel to Dignitas, he proceeded 'in the teeth of them imploring him not to do so'.²⁶ For the same reasons, the DPP rejected the question of vulnerability raised by 5.9(i) of the Code, stating that although Daniel was in some respects vulnerable, he was not vulnerable to manipulation or corruption by those under consideration. The next factor to be considered under 5.9(q) of the Code was whether a prosecution would have a positive impact on maintaining community confidence, with the DPP concluding that given all the circumstances of the case, a significant positive impact would be unlikely.

Having dismissed all factors in favour of prosecution, with the important exception of the offence itself being of a serious nature, the DPP considered that section of the Code identifying factors against prosecution. Paragraph 5.10(a) was seen as supportive of the argument against prosecution, as any penalty imposed following conviction is likely to be nominal. The DPP also viewed 5.10(c); whether the offence was

²² Para 5.9(g).

²³ Para 5.9(h).

²⁴ Para 5.9(o).

²⁵ *Decision on Prosecution* (n 5) para 32.

²⁶ *Ibid.*

committed as a result of a genuine mistake or misunderstanding, as being a factor, albeit one with little weight attached to it, against prosecution with respect to the family friend, as he was unaware that in booking the flights he was potentially legally culpable for assisting in Daniel's suicide.

After providing a reminder that the factors in the Code, both in favour or against a prosecution, are not exhaustive of the public interest issues that may be relevant in any given case, the DPP highlighted Parliament's decision to retain the assisting suicide offence in the Suicide Act 1961. Evidently keen to limit the significance of his decision, the DPP sought to emphasize that in spite of the decision *not* to prosecute in this particular case, even powerful mitigating circumstances in a case of assisted suicide should not automatically lead to a decision not to prosecute. In summing up the crucial determining factors in this case, the DPP cited as pivotal to his decision Daniel's previous suicide attempts together with his fiercely independent spirit which would have undoubtedly led to further attempts to take his own life should his parents have refused to assist him. Also relevant, were the relentless efforts of Daniel's parents to dissuade him from his chosen path. By comparing the actions of Mr and Mrs James and their friend to the actions of the defendants in *Wallis* and *Hough*, the DPP described them as being 'towards the less culpable end of the spectrum'.²⁷ And finally, the fact that none of the defendants stood to gain any advantage, financial or otherwise, was cited as being important to the decision not to prosecute.

When Might It Be in the Public Interest to Prosecute?

Looking at the key factors which, for the DPP, tipped the scales against pursuing a prosecution, what factors may, in the future, tip those same scales in favour of pursuing a prosecution? What if, for example, Daniel's parents had not been 'relentless' in their efforts to dissuade Daniel? Imagine they had accepted his decision more readily, perhaps even stating that they would feel the same in his situation, although stopping short of actually encouraging him. Alternatively, what if they had reaped a financial benefit as a result of their son's death? Many of those who have assisted a 'suicide tourist' must have subsequently received a legacy, yet none have faced prosecution. It seems that despite the DPP's rigorous appraisal of the defendants' conduct in light of the issues pertaining to the public interest test, the DPP's decision is essentially supportive of a regime that allows people to provide organisational assistance to those seeking suicide abroad.

²⁷ *Ibid* at para 35c.

By combining a strict interpretation of the Suicide Act for the evidential test, with a liberal interpretation of public interest, the DPP's decision has two primary implications for future cases. Firstly, with respect to his conclusion over the evidential test pertaining to the family friend, he has effectively retained the potential to pursue a prosecution for even quite inconsequential acts in assistance of a suicide where the motives of the defendant are perceived as less honourable than in the James case. And, secondly, the DPP has, through his analysis of the public interest factors, effectively promulgated a code of sorts for those who assist in a 'suicide tourism' case.

The Impact of Purdy on Prosecution Policy

Contemporaneously to the investigation of the events surrounding the suicide of Daniel James, Debbie Purdy unsuccessfully sought judicial review of the DPP's refusal to promulgate a code defining the circumstances in which consent will or will not be given for a prosecution under the Suicide Act s 2(1). The Court of Appeal expressed sympathy for Ms Purdy's predicament but dismissed the appeal on the basis that her rights under Article 8(1) are not engaged²⁸ and the DPP's failure to promulgate a code did not render him in breach of any duty to act compatibly with Convention rights. But note what the Court said about the decision of the DPP in the James case:

Although it is, like all such decisions, fact-specific, we believe that it is illustrative not only of the care with which the issues in these cases would be approached, but also an extremely helpful example of the kind of broad circumstances in which, notwithstanding that the evidential test has been passed, the ultimate decision would be that a prosecution should not be mounted.²⁹

...with the example of the decision in the case of Daniel James available for analysis, there was ample material to enable Ms Purdy's legal advisers to address the likelihood of a prosecution if her husband assisted her suicide.³⁰

By endorsing the DPP's decision in the James case as an exemplar of good practice, while also providing reassurances regarding the court's role in preventing or extinguishing the effect of any arbitrary or unprincipled exercise of the DPP's powers, the Court of Appeal provided some comfort to Ms Purdy, who is reported to have said:

²⁸ Debbie Purdy v DPP (n1), CA.

²⁹ Ibid at [19].

³⁰ Ibid at [78].

I feel that I have won my argument, despite having lost the appeal. I am very grateful for, and respect the ruling of the appeal court. They have done everything they can do to clarify that, given the Dan James judgment, Omar would be unlikely to be prosecuted if he were to accompany me abroad for an assisted death, and we are therefore one step closer to the clarification I need.³¹

Consequently, may we now assume that provided a person's motives for assisting suicide abroad are selfless, and any assistance appears to be provided reluctantly, the CPS will refrain from prosecution? Is the DPP partially condoning 'suicide tourism' because the final act takes place in another jurisdiction, with the most crucial assistance being performed by the Swiss doctor who prescribes the fatal dose and the Swiss volunteer nurse who assists in the actual suicide (both of whom are not subject to English law)? But if acts which assist a suicide are tacitly permitted—despite the fact that such acts are viewed by both the judiciary³² and the DPP as illegal—on the condition that those assisting have done so reluctantly and the final act occurs abroad, the validity of the Suicide Act is increasingly precarious. By covertly allowing the phenomenon of 'suicide tourism' to develop yet potentially punishing the self same conduct in England, English law is arguably surrendering control over a potentially dangerous practice. In Switzerland, there is a very limited framework of control over assisted suicide, and minimal assessment of the person seeking suicide. There is no requirement for intractable, unbearable suffering and people with psychiatric problems or non-terminal illnesses may be assisted in suicide. While this is not necessarily ethically unsound, it is certainly ethically questionable. With this in mind, perhaps the primary significance of the decision in the James case lies in highlighting the inadequacy of our current law in a climate where calls for greater autonomy in end-of-life options will not be abated.

Alexandra Mullock
The University of Manchester

³¹ The Guardian 19 February 2009.

³² See also *A local Authority v Z (An Adult: Capacity)* [2005] 1 WLR 959.