Some legal reflections on the death of Nancy Crick

CAMERON STEWART

Senior Lecturer, Dept of Law
Division of Law, Macquarie University

Margaret Otlowski’s and Michael Ashby’s comments on Nancy Crick’s death highlight both the turgid nature of the current euthanasia debate and the difficulties with trying to reach an ethical consensus, especially when all the debate seems to do is go from one disaster to the next. Crick’s death is another example of how the euthanasia debate is run by a media machine, fuelled by sound bites and video clips, rather than by rational and sensible debate. That is not necessarily a criticism of Crick or her helpers. Rather it’s a sad reflection on how our society makes decisions about life and death matters.

What’s the alternative? For any chance to create a sound and ethical policy on dying we need the interested parties to share a common language and to be able to present their arguments in an appropriate forum. These factors are distinctly lacking not only when arguments flare about euthanasia, but in nearly all areas where the sanctity of life comes into play. Sooner or later, the lack of a consensus means that the argument spills into the only forum left which still pretends it can provide answers: the courts. It may not be long before Crick’s decision to die is debated there as well.

Suicide and legality

If the debate about Crick’s death ends up in the courts there are some important things to remember. The first is that suicide is not illegal. The decriminalisation of suicide, has led some judges to find that there is now a right to commit suicide. 1 Australian courts might not go so far but the autonomy-based principles of the common law certainly create the possibility.

The second point to remember is that assisting suicide is illegal. 2 While Crick could have found a number of ways to kill herself, if she received any aid in achieving her death the person or persons providing that assistance may be punished very severely. In older cases assistance has been found when a person has supplied the means of death (drugs, poisons, knives, guns etc) with the intention that those means will be used by the person to commit suicide. 3 It might be possible to assist a suicide by omission (that is, by failing to act). Aiding and abetting can be established via omission in other crimes. There is no reason why the offence of assisted suicide could not also be committed by omission. 4

One might suspect that these very principles are the ones that Crick’s ‘helpers’ are wanting to see tested.
Other options for dying well

A further issue is raised in the context of palliative care. Could Crick's aim of dying well be achieved legally via palliative treatments? As Michael Ashby clearly points out we will never know if palliative care could have made a difference to Crick. However it might be argued in any prosecution that her death was totally unnecessary and that her pain could have been treated freely and effectively by appropriate palliation.

In other common law jurisdictions palliative care has been given legal protection via the doctrine of double effect. In the management of intractable pain doctors have been given a wide reign to do what is necessary to reduce it, even with the effect of shortening life. The practice of terminal sedation has also been accepted as coming within the doctrine.

Crick's 'cancer-free' status does complicate matters. It is arguable that the doctrine of double effect would still apply to any doctor treating her pain, even if she no longer had cancer. In the English case involving Dr David Moor, Moor was found not guilty of murdering a patient, when he terminally sedated a non-terminally ill patient to treat his pain.

Can the euthanasia debate be really be resolved by the courts?

The courts are increasingly becoming a de facto way for the euthanasia movement to try for legalisation. Diane Pretty's recently failed attempt to create a right to assisted suicide in the United Kingdom is a prime example, as are the United State's Supreme Court cases and the Sue Rodriguez litigation in Canada. Any litigation surrounding Crick's death may serve a similar purpose to these cases, in highlighting the arguments for and against legalisation of euthanasia.

Of course some fundamental issues remain. Firstly, we should ask ourselves whether a court is the proper place for dealing with these issues given the undemocratic nature of our judiciary. Practically speaking, none of the cases mentioned above was successful for the pro-euthanasia movement. All they really did was highlight how inadequate the litigation process is in this area, and how reluctant the judges are to become involved.

Secondly, it is clear that the debate about death and dying can't go forward until we work out what the current legal position is in Australia. There has been no appellate level consideration of any of the underlying issues of law in Australia, such as the right to refuse treatment, the double effect or the right to withdraw treatment. Lawyers and doctors working in this area, do so in an atmosphere of great uncertainty.

Finally, if litigation is only way these issues to be resolved, what does that say about the way our society deals with difficult and pressing social issues? Courts are ultimately blunt instruments for the creation