

## MEDICINE AND THE LAW

# Withholding or withdrawing treatment and palliative treatment hastening death: The real reason why doctors are not held legally liable for murder

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Doctors who hasten the termination of the lives of their patients by withholding or withdrawing treatment or prescribing a potentially fatal palliative dose of medication satisfy the elements of intention and causation of a charge of murder against them. However, the courts have held that, for policy reasons based on 'society's legal convictions', such conduct is not unlawful if the patient consented to it or medical treatment would be futile or palliative treatment may hasten death. Doctors are not held liable for murder because society regards their omissions or acts as lawful – not because they did not have the intention in law to kill or did not cause the death of their patients.

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Doctors are generally not liable for murder if they withhold or withdraw treatment or provide palliative treatment that hastens death when the patient has made an advance directive, treatment is futile or the burdens and risks will outweigh the benefits of such treatment.<sup>[1]</sup> The usual view is that doctors are not liable because they do not intend to kill the patients in such circumstances, and the underlying illness, injury or condition causes the death.<sup>[2]</sup>

Such acts and omissions are said to constitute passive euthanasia, which is not regarded as murder, rather than active euthanasia. However, the distinction is artificial because what is sometimes called 'passive' euthanasia involves a positive act, e.g. switching off a ventilator<sup>[3]</sup> or turning down a pacemaker.<sup>[4]</sup>

To understand the real reason why doctors are not held legally liable in such circumstances we must examine the elements that constitute the crime of murder. It then becomes clear that doctors are not held liable for murder when they withhold or withdraw treatment or hasten the death of their patients through potentially fatal doses of medication, not because they do not have the legal intention to kill their patients or do not cause the death of their patients – but rather because society does not regard such conduct as wrongful.<sup>[5]</sup>

This is demonstrated by considering the legal position regarding the elements of murder in the context of the withholding or withdrawal of treatment and using palliative treatment that hastens death.

## Murder

Murder is the intentional and unlawful killing of another human being.<sup>[6]</sup> For a conviction of murder it must be proved beyond reasonable doubt that: the act or omission was intentional; the alleged perpetrator caused the death; the killing was unlawful; and a human being was killed. The fact that a human being was killed is not usually in contention, but difficulties arise concerning the elements of intention, causation and unlawfulness.

## Intention

Intention must be established in murder cases and may be 'actual' or 'eventual'. 'Actual intention' occurs where a person directs their will to

kill a particular person.<sup>[7]</sup> 'Eventual intention' occurs where a person does not mean to kill a person but subjectively foresees the possibility of death because of their conduct and proceeds with such conduct.<sup>[7]</sup> For example, a doctor withholds or withdraws treatment or prescribes palliative treatment that hastens death despite subjectively foreseeing that the patient may die as a consequence.

There is a need to distinguish intention from motive. A person's motive good or bad is irrelevant to criminal intent.<sup>[7]</sup> The intention required for murder is the direction of one's will to kill a person (actual intention) or subjective foresight that a person may be killed (eventual intention). Motive is the reason behind the intention and in law is irrelevant except for the purpose of sentencing in criminal cases or damages in civil cases where it may be an aggravating or mitigating factor. Thus an unlawful act can never become lawful because of a good motive, but may reduce the sentence in murder cases (e.g. active euthanasia).<sup>[8]</sup>

A doctor who withholds or withdraws treatment or prescribes palliative treatment that hastens death may have a good motive – not to engage in futile treatment or to lessen pain for the patient – but legally has the eventual intention to kill the patient. However, the doctor cannot be held liable for murder if any of the other elements of the crime are missing.

## Causation

For a conviction of murder it must be shown that the person caused the death of the deceased. 'Causation' refers to the act or omission that causes or accelerates death.<sup>[9]</sup> An accused person need not be the sole cause of the consequential death.<sup>[10]</sup> If one or more events contribute towards the death of a person, the event that finally hastens the death is regarded as its cause. Both types of causation – factual and legal – must be satisfied before a person will be held legally liable.<sup>[11]</sup>

In homicides, factual causation occurs where a person's death would not have resulted 'but for' the original act or omission that ended in the death of the person.<sup>[10]</sup> For instance, if a person is seriously injured by a car and subsequently the ambulance transporting him to hospital collides with another car, causing his death – 'but for' the negligent driving of the first driver the person would not have died. However,

the first driver will not be liable unless he or she also legally caused the death of the person.

Legal causation occurs where the act or omission that caused the death is either a foreseeable or a direct cause of the person's death. The foreseeability approach holds that if a person in the position of the perpetrator would have reasonably foreseen the likelihood of death and persisted with their act or omission, then the perpetrator legally caused the death of the deceased.<sup>[12]</sup> For instance, in the ambulance example, a person in the position of the first driver would not have reasonably foreseen that their negligent driving might lead to an injured person being taken in an ambulance that crashes and kills the patient.

The direct consequence approach holds that the perpetrator is liable unless some new act intervenes between the original act or omission that resulted in the ultimate death of the deceased. Therefore, in the example involving the ambulance that killed the patient was a new intervening act. However, the courts have held that an abnormal event which would otherwise be a new intervening act is not such an act if it was actually foreseen<sup>[13]</sup> or planned by the accused person.<sup>[14]</sup> Similarly, the victim's pre-existing physical susceptibilities are not regarded as a new intervening act – 'the accused takes his victim as he finds him with all his pre-existing physical susceptibilities such as a weak heart or thin skull'.<sup>[15]</sup>

The courts in the UK 'have been anxious to ensure that the cause of death was attributed to natural disease in all these cases of non-voluntary assistance in dying'.<sup>[2]</sup> However, there is no doubt that doctors who withhold or withdraw treatment or prescribe a potentially fatal dose of palliative medication, subjectively foresee that their omissions or acts may result in the death of the patient. Therefore, the death cannot be attributed to a new intervening cause because the ensuing death is not an abnormal or unexpected event. Likewise, the pre-existing illness or injury of a patient that eventuates when treatment is withheld or withdrawn, or potentially fatal palliative medication is administered is not legally regarded as a new intervening cause.

As a result, in law, doctors who hasten the death of a terminally ill or injured patient by withholding or withdrawing treatment or administering a potentially fatal dose of medicine will have legally caused the death of the patient – although if any of the other elements are not satisfied they cannot be held liable for murder.

### Unlawfulness

Unlawfulness must be established for a person to be convicted of murder. Whether or not a person's act or omission is unlawful will depend upon the legal convictions of the community at the time.<sup>[16]</sup> Although it is not possible for a person to consent to doctor-assisted suicide in the form of active euthanasia,<sup>[8]</sup> it is trite that it is lawful for a mentally competent patient to refuse medical treatment even if such refusal will result in their death.

The courts have also held that it is not unlawful to withdraw treatment from patients where the prognosis is hopeless and medical interventions would amount to 'a fruitless attempt to save the deceased's life'.<sup>[3]</sup> Similarly, in an application to withdraw feeding from a patient in a persistent vegetative state with no hope of recovery who had been artificially fed for over three years, the court held that 'judged by society's legal convictions' it would be reasonable, justifiable and not wrongful for the patient's wife to be appointed as his curatrix and to order the withdrawal of such feeding even though it would lead to the patient's death.<sup>[5]</sup>

In cases where such treatment is withheld or withdrawn because: the patient has made an advance directive (e.g. a living will); the treatment would be futile; or the burdens and risks will outweigh the benefits of such treatment (e.g. the treatment may keep alive a severely brain-damaged patient), the courts and society do not regard the conduct as unlawful<sup>[1]</sup> – despite the doctors knowing that their omissions or acts will result in the death of the patient. The courts have held that where the prognosis for a persistent vegetative patient is hopeless and their treatment 'did not serve the purpose of supporting human life as is commonly known', the legal convictions of the community would not regard the cessation of artificial feeding as unlawful.<sup>[5]</sup>

Therefore, the real reason why doctors are not held liable for murder despite their intention to end the lives of their patients who are terminally ill or suffering unbearable pain, by withholding or withdrawing treatment or prescribing a potentially fatal palliative drug, is that their conduct is regarded as lawful – not because they did not intend their patients to die or did not cause their patients' death. Legally, both these elements are present, but unlawfulness is not.

As has been said in the UK: 'When, however, a treatment is discontinued solely by reason of its futility, there is nothing to be lost – and much to be gained by intellectual honesty – in attributing death, correctly, to "Lawful withdrawal of life support systems which were necessitated by [the disease]"'.<sup>[2]</sup>

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