

Judge Noble's Ruling

**Q.B.J. A.D. 1994 No. 37 J.C.B.
IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF BATTLEFORD
BETWEEN:
HER MAJESTY THE QUEEN
- and -
ROBERT W. LATIMER
Eric J. Neufeld, Q.C. and Graeme G. Mitchell for the Crown
Mark Brayford, Q.C. for Robert W. Latimer**

**RULING ON DEFENCE MOTION NOBLE J.
December 1, 1997**

Upon the jury returning a verdict of "guilty" to the charge of second degree murder counsel for the accused brought a motion seeking a declaration of this Court that in the circumstances of this case it would be cruel and unusual punishment to apply the mandatory minimum sentence prescribed by ss. 235 and 745 of the Criminal Code in sentencing Mr. Latimer.

The motion is founded on ss. 7 and 12 of the Charter of Rights and Freedoms which read:

7. Life, Liberty and Security of Person -- 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.

12. Treatment or Punishment -- Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The punishment sections for second degree murder can be found in the Criminal Code at:

235.(1) Punishment for murder -- Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) Minimum punishment -- For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

and:

Section 745(c) formerly 745(b) reads:

745. Sentence of life imprisonment -- Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

. . .

(c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty- five years, as has been substituted therefor pursuant to section 745.4;

Related to the law I have already stated in the context of Mr. Brayford's argument is s. 24(1) of the Charter of Rights and Freedoms. It reads:

24.(1) Enforcement of Guaranteed Rights and Freedoms -- Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court . . . to obtain such remedy as the court considers appropriate and just in the circumstances.

If I might be permitted to summarize the basis of Mr. Latimer's motion at this point it is this:

(a) he acknowledges the jury has found him guilty of second degree murder in the death of his daughter Tracy.

(b) he seeks relief from the mandatory minimum sentence of life imprisonment without parole for ten years on the ground that having regard to the circumstances surrounding Tracy's death and his admitted role in it such a sentence is harsh and more than excessive.

(c) the legal instrument he is asking the Court to invoke to overcome the minimum sentence he faces is the concept of a constitutional exemption from the ten- year requirement before parole is available to him.

(d) for the Court to grant his request it must conclude first, that the minimum sentence breaches his Charter right not to be subjected to cruel and unusual punishment; secondly, that the extent of the breach of this right entitles him to a constitutional exemption from the ten-year minimum thereby allowing the Court to substitute a penalty pursuant to s. 24 of the Charter that it considers "appropriate and just".

Before I begin dealing with the arguments of counsel on the issues which arise from Mr. Latimer's motion there are some matters that I wish to clarify. The first is that as I see the accused's request it can only be properly considered under s. 12 of the Charter. Counsel has in his brief put forward the accused's s. 7 rights i.e. "to life, liberty and security of the person in accordance with fundamental justice" as an alternative ground upon which I could found constitutional relief from the 10-year minimum penalty applicable. However, my reading of the jurisprudence surrounding this area of the law in Canada suggests that it is his s. 12 right which must be breached for him to overcome the mandatory minimum

sentence for murder. I note Mr. Brayford in his oral argument suggested that in the alternative I should simply declare the mandatory minimum punishment for second degree murder is unconstitutional and strike down that section pursuant to s. 52(1) of the Constitution Act thereby rendering it null and void. In my opinion that option is not open to the accused in the circumstances of this case because in my opinion the mandatory minimum sentence laid down in ss. 235 and 745 is not unconstitutional. (See: R. v. Luxton [1990] 2 S.C.R. 711; R. v. Bowen (1990), 59 C.C.C. (3d) 515 (Alta. C.A.)

My second preliminary comment is that my reading of the case law and the jurisprudence related to the use of constitutional exemptions is that while they are available to overcome a breach of an accused's Charter rights they are considered up to this point in time both controversial and rarely used. Mr. Justice Cory of the Supreme Court of Canada in the case of Steele v. Mountain Institution [1990] 2 S.C.R. 1385 at p. 1417 put it this way:

It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the Charter.

I shall come back to the term "grossly disproportionate" as used in that quotation because that is the overarching test for declaring a sentence cruel and unusual.

The point I seek to make here is that the accused in order to succeed in his motion, must overcome the stringent requirements of the "grossly disproportionate" criteria which would warrant the granting of a constitutional exemption from the mandatory minimum sentence he is facing. So far as I am aware one has never been granted to escape the sentence prescribed for second degree murder.

I next turn to the criteria which the Supreme Court has decided must be established to find that a sentence is so grossly disproportionate that it violates s. 12 of the Charter. The leading case in this regard is R. v. Smith. It has been followed and discussed in such later cases as: R. v. Luxton; R. v. Goltz [1991] 3 S.C.R. 485 at pp. 505-6; R. v. Lyons [1987] 2 S.C.R. 309. In outlining the purpose of s. 12 of the Charter, Lamer J. in Smith said this at pp. 235-6:

. . . In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J.C. in Miller, supra, where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J.C. in Miller, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under s. 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will be infringed only where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

One must also measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate, then it infringes s. 12. The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. . . .

Also relevant to this discussion is the comment of Gonthier J. in *R. v. Goltz* where he explains that in any analysis of the invalidity of s. 12 of the Charter there are two aspects:

. . . One aspect involves the assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender. If it is concluded that the challenged provision provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of s. 12

He then goes on to say that the other aspect:

. . . namely a Charter challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases. . . .

This statement of the law governs Mr. Latimer's situation and we are specifically concerned with the particularized aspect described by Gonthier J. in Goltz which relates to the individual offender. The first question which the Court must answer is whether or not the mandatory minimum sentence for murder is in relation to Robert Latimer's murder conviction for taking the life of his daughter grossly disproportionate. Mr. Brayford contends it is, given the facts of the case, the motivation of Mr. Latimer in taking her life and that notwithstanding it is clear he made a serious mistake in committing the act his culpability does not warrant the imposition of such a harsh sentence. In the Smith case we are told that in assessing what is a grossly disproportionate sentence the Court must look at four aspects of the crime:

- the personal characteristics of Mr. Latimer - the gravity of the offence - the particular circumstances of this case, and - the effect of or consequences of the sentence actually imposed

the object of the examination being to determine what sentence would be appropriate to punish, rehabilitate or deter him or to protect the public from him.

In reviewing the alleged disproportionality of the mandatory minimum sentence facing this accused I am entitled to consider the evidence presented at trial, the significance of any questions the jury placed before the Court and their reaction to the Court's answers, and the evidence filed by Mr. Brayford in support of this motion.

With respect to the law generated by various appeal courts as it relates to the use of constitutional exemptions it is fair to say that most of the cases decided so far are concerned with the problem of mandatory minimum sentences set out in the Criminal Code of Canada for various offences of which murder is but one. In a number of instances the appeal courts have found that the mandatory minimum sentence prescribed by the Criminal Code amounted on the facts of the case to cruel and unusual punishment. So, for example, the Saskatchewan Court of Appeal held in *R. v. McGillivray* that s. 100 of the Code which provided that anyone who was convicted of an offence involving violence against another person shall be prohibited from having possession of any firearm for a period of at least five years amounted to cruel and unusual punishment and granted a constitutional exemption to rectify the injustice it perceived from the facts of the case. Our Court of Appeal was following a similar decision made by the Yukon Territory Court of Appeal (*R. v. Chief* (1989), 74 C.R. (3d) 57 (Y.T.C.A.)). Other examples, some of which were not decided in the accused's favour but which deal with the same issue are: *R. v. Kumar* (B.C.) (1993), 49 M.V.R. (2d) 20 (B.C.C.A.); *R. v. Westfair Foods Ltd. and Canada Safeway Ltd.* (Sask.) (1989), 80 Sask. R. 33 (Sask. C.A.); *R. v. Wust* (B.C.) (1997), B.C.J. No. 573 (B.C.S.C.). So there are precedents where constitutional exemptions have been adopted by Canadian courts.

However, when one examines the decisions of the Supreme Court of Canada as to the use of the constitutional exemption as an appropriate tool to remedy a breach of s. 12 of the Charter there is arguably some confusion on the direction that the Court is headed. So far as I know the Court has not yet been required to examine the mandatory minimum requirement of no parole for ten years in respect of second degree murder. They have, however, dealt with other mandatory minimum sentences such as in Luxton when they dealt with first degree murder where the parole requirement is 25 years (subject to the so-called faint hope clause). In *R. v. Smith*, as I said earlier, the leading case in this area the Supreme Court dealt with the mandatory seven-year sentence for importing narcotics into Canada. In *R. v. Goltz*, they examined the seven-day minimum imprisonment for someone who drives while prohibited under The British Columbia Motor Vehicles Act. In *R. v. Lyons* the mandatory indeterminate sentence requirement for those who are found to be dangerous offenders. There are a number of other cases but the examples noted are suffice to illustrate the point.

In my opinion the Supreme Court has acknowledged that the use of the constitutional exemption is available in certain cases where it is established from the facts that an accused's Charter right not to be subjected to cruel and unusual punishment has been clearly breached. However, the Crown submits that the Court has narrowed down the circumstances where this remedy can be made available. He relies on the Court's decision in *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519, the well known case of the lady who sought the right to be assisted by a doctor to commit suicide. The five- four majority decision of the Court denied her application on the ground that the relevant section was constitutional. Chief Justice Lamer in a dissenting judgment concluded that the relevant section (s. 241(b)) violated s. 15 of the Charter and under s. 52(1) of the Constitution Act declared the section null and void but suspended the operation of his declaration of invalidity for a period of one year to give Parliament time to replace the section. He then went on to say that a constitutional exemption can only be granted when a challenged law is under such a suspension. So the Crown argues that without a declaration that the ten- year minimum sentence is unconstitutional and unless the impugned section is suspended as was done in *Rodriguez* a constitutional exemption is not available to Mr. Latimer. I do not agree with this argument because in *Rodriguez* the issue was not s.12 of the Charter but s. 15. Here the accused concedes that ss. 235 and 745 are not unconstitutional. When this issue came before our Court of Appeal after Mr. Latimer's first trial the majority of the Court concluded that in the circumstances of the case before them (that is the evidence adduced at the first trial) Mr. Latimer was not entitled to a constitutional exemption. I shall return to that conclusion in a moment. In a minority judgment Bayda C.J. agreed with the majority's disposition of Latimer's conviction appeal but dissented on this issue of whether or not this accused should be granted a constitutional exemption. In his judgment Bayda C.J. conducted a wide-ranging review of the various decisions of the Supreme Court on this subject. I have read his reasons carefully a number of times and his analysis of the jurisprudence pronounced by the Supreme Court on this area of the law is in my opinion both thorough and valid. It both challenges the arguments advanced here by Crown counsel and illustrates that the Supreme Court has not reached a final position on the use of the constitutional exemption to remedy a breach of an accused's Charter right not to be subjected to cruel and unusual

punishment in relation to mandatory minimum sentences prescribed in the Criminal Code.

Before I discuss the four factors relating to the issue of disproportionality, I want to first consider the principal argument of Crown counsel in defence of this motion. It is that the majority decision of our Court of Appeal following the first trial of Mr. Latimer was that he was not entitled in the circumstances of the case before them to the benefit of a constitutional exemption from the prescribed sentences for second degree murder. Counsel contends that applying the doctrine of stare decisis I am bound by that ruling.

I am unable to accept this position for a number of reasons. Strictly speaking it is only an appeal court's pronouncements on rules of law which are binding on a lower court. The conclusion of the majority of our Court of Appeal was arrived at after it drew certain inferences of fact from the evidence in the first trial. I am not bound by their factual findings and indeed I do not necessarily agree with some of the inferences they drew when I weigh them against the evidence presented to the jury in this trial. One example is the inference the Court drew that Mr. Latimer would never have considered taking Tracy's life had she not been handicapped and in extreme pain. This suggests that his decision was at least in part prompted by Tracy's tragic physical debilitation by virtue of her cerebral palsy. That may have been a fair inference for the Court of Appeal to draw from the evidence they were considering but I am bound to say that on the basis of the evidence presented at this trial there is no suggestion, by any witness who testified or for that matter by Crown counsel that he was motivated in any way by her disability. All of the evidence points to his concern for the pain which he saw flowing from her illness. So on the evidence I heard I could not conclude Mr. Latimer ever considered killing his daughter because she was disabled. In addition the history of his 12- year relationship with her completely negates such a conclusion.

There were other significant differences between the first trial and this one. Take for example the Crown's determination in the first trial to depict the accused as a cold-blooded killer. Counsel in his jury address described Mr. Latimer as "foul, callous, cold, calculating and not motivated by anything other than making his own life easier". I am not aware of the strategy employed by counsel for the Crown on the appeal of the first trial but I can say that Mr. Neufeld, as counsel on this trial took the position throughout that Tracy's pain is what motivated Mr. Latimer but he argued, quite rightly, in my view - that in relation to the issue of his guilt or innocence of the murder charge what compelled him to do it was irrelevant.

Another difference between the two trials relates to the evidence presented to the jury. I am not aware of all the evidence admitted at the first trial although I do know that the accused's statement to the police formed a significant part of the case against him just as it did in this trial. The evidence of Dr. Dzus was the same evidence in this trial as she gave at the first trial. We know that at this trial additional evidence was brought forward. For example, Tracy's doctor, two of her caregivers and two sisters of the accused. There was also the opinion evidence of Dr. Robin Menzies, a forensic psychiatrist, who examined Mr. Latimer, his background and his motives in taking Tracy's life and

confirmed that in his opinion he was compelled to do what he did out of concern for her present and future pain. We cannot judge what affect this new evidence had on the jury's verdict but it is arguable that it raised in the minds of the jurors some sympathy for Mr. Latimer even though they had concluded that in accordance with the law I gave them he was guilty.

This brings me to the fourth incident that differentiates this trial from the first one. That is the significance of the questions the jury sent to the Court after it began its deliberations. Just briefly, the jury had been out for some time when it returned with some questions. The first question read, "Is there any possible way we can have input into a recommendation for sentencing?" My response was the usual one which simply stated is that they were not to concern themselves with penalty. Later after returning a verdict of guilty and I announced that in accordance with s. 745 of the Criminal Code that I must sentence the accused to life imprisonment but that I needed them to consider whether or not his eligibility for parole should exceed the ten years minimum it was apparent that some of the jurors were emotionally upset. A fair inference to be drawn from that fact is that they were unaware of the mandatory minimum sentence for murder or if any of them were aware it had not been raised during their deliberations. The jury retired again and after a few minutes sent the following question to the Court: "Can we recommend less than ten years before parole? We want to be clear on this as there is some confusion." I again explained to them that s. 745 only calls for a recommendation with respect to eligibility for parole over the ten years specified but that they could make any recommendation they chose to. When they returned for the last time they recommended that the accused be eligible for parole after one year. Counsel for the accused contends that the jury was telling the Court they thought the sentence of life imprisonment without parole for ten years was in the circumstances of the evidence they heard harsh and excessive, and did not fit the crime he had committed. Counsel for the Crown argued that the jury's recommendation was not in conformity with s. 745 and should be ignored. Perhaps, but given the manner in which the jury stated their position would it be fair to ignore the implications of it? It is a fair inference to be drawn from the first question that they were considering finding the accused guilty at the time they asked it. The second question indicated their concern for the length of the sentence the law required for second degree murder. To just ignore the message they appeared to be sending the Court would in the eyes of many citizens bring the administration of justice into disrepute. I am not prepared to pretend it did not happen.

I return to consider the four factors which govern the consideration of whether or not the mandatory minimum sentence facing the accused is grossly disproportionate. I shall consider the personal characteristics of Mr. Latimer first; then the gravity of the offence together with the circumstances surrounding it; and finally the effects that imposing the minimum sentence on the accused would have. In discussing each of these factors I do not propose to review the evidence before me at length. That evidence is on the record and need not be repeated here beyond summarizing what I believe the evidence to be.

As a person Mr. Latimer is depicted as a responsible and hard-working farmer from the Wilkie area where he has lived his entire life. With his wife Laura they had four children,

the oldest of which was Tracy, born with a very severe form of cerebral palsy which left her permanently incapacitated and in order to sustain her life she required constant ongoing total care. The evidence reveals the enormity of their task in caring for Tracy on a day-to-day basis but establishes that Mr. Latimer shared in providing for her needs. Not only his wife but his sisters described his love and devotion to this child. When asked about the standard of care the Latimers provided Tracy her doctor said "excellent". So the evidence does not suggest that Mr. Latimer did not do his share in caring for Tracy so far as his other responsibilities to his farm and family would allow him. He came across as a devoted family man with a loving and caring nature. Beyond that it is apparent he was well regarded in his community. He has virtually no criminal record (an alcohol-related driving offence some 20 years ago) long before he married Laura. It is also clear from the ongoing history of this whole case that he is not a threat to society nor does he require any rehabilitation. In summary the evidence establishes he is a caring and responsible person and that his relationship with Tracy was that of a loving and protective parent. On the evidence it is difficult to believe that there is anything about Mr. Latimer that could be called sinister or malevolent or even unkind towards other people.

I move on to consider the gravity of the offence and the circumstances which led the accused to taking his daughter's life. The gravity of murder need not be stated. It is recognized in our society as the most serious crime of all and that is reflected in the penalty that has always been attached to its commission. Having said that an act of murder like any other crime is committed in countless ways by people with countless reasons for doing it. There is in the commission of murder as there is in the commission of any crime varying degrees of culpability revealed by the evidence and circumstances surrounding the act. Since murder involves the taking of a human life, Parliament has said that the penalty shall be life imprisonment in all cases but that if it is first degree murder the offender is denied parole for 25 years (subject to the so-called faint hope clause) and ten years if the conviction is second degree. The distinction between first and second degree by itself indicates first degree murder is classified in law as more serious than second degree murder. In that regard s. 745 of the Criminal Code mandates that a trial judge (as I did in this case) ask a jury who convicts an offender of second degree murder if they are of the opinion that the ten-year period should be extended upward. This again suggests that Parliament recognized that some second degree murders might be more sinister or malevolent than others. So we know the law recognizes that the moral culpability or the moral blameworthiness of murder can vary from one convicted offender to another. The degree of variance in acts of murder can range on a scale of one to ten to something akin to manslaughter at the lowest end of the scale in terms of culpability; to the high end which is usually akin to a vengeful, hateful and violent act designed specifically to accomplish the death of the victim. So in all crimes it can be said the gravity of a crime - even murder - is determined by the moral culpability of the person committing it.

Mr. Latimer's moral culpability in killing his daughter can only be placed on that scale of one to ten by briefly reviewing what happened including how and why he did it. From the moment he was arrested he told the police he did it because he wanted to put her out of her pain. The extent of the pain Tracy was suffering in the months leading up to October

12, 1993 is well documented by the evidence of her mother, the outside caregivers who attended on her and Dr. Dzus - the surgeon who had announced to Laura Latimer on October 12, 1993 that to alleviate Tracy's pain radical surgery to her right hip had to be done very soon. The extent of her concern is enhanced by her decision to move the surgery up to November 4. We know Tracy had surgery before this to alleviate her condition. At four years they cut the muscles and tendons in her hips and she was left with a flail limb she could no longer control. While every effort was made to keep her muscles as flexible as possible it must be remembered that Tracy save for her head and one arm was incapable of movement on her own, a fact which illustrates again the constant attention she required. At age nine she required further cutting of her muscles and tendons to ease the pressure on her joints. This time she was placed in a cast from chest to toes for a period of six months.

In 1992 her body had become so twisted out of shape that the surgeon placed steel rods in her back to straighten her body. After this surgery Tracy suffered severe pain because her right hip was dislocating regularly. This was 13 months before she died. By the time Dr. Dzus saw her on October 12, 1993 her pain was pretty well unremitting. All in all the evidence indicates that her health was slowly but steadily deteriorating. In the summer of 1993 she was in a respite home in Battleford and while there lost several pounds by the time she came home.

When Laura Latimer told her husband on October 12 that Tracy needed more surgery to alleviate the right hip problem and that there was no guarantee it would stop the pain and that Tracy faced further surgery as she got older just to alleviate her suffering Robert Latimer took the decision to take the matter of Tracy's pain into his own hands. He considered a number of ways of putting her out of her misery but finally settled on putting her to sleep with carbon monoxide gas as the most gentle way of accomplishing his goal. We know that on Sunday, October 24 he carried out his plan.

Why did he do it? He consistently said his only concern was Tracy's ongoing pain and that he could not see any possible way she could ever be freed of the pain by the surgery which was scheduled to be done November 4 or that any future surgery designed to reduce her ongoing pain was anything more than pain management - certainly not a cure or anything close to it. In support of his explanation the defence called Dr. Robin Menzies who testified that he examined Mr. Latimer against a background of information he gathered from several sources including the evidence of some of the witnesses the jury heard from. He found him to be a candid, responsible perhaps a somewhat stubborn and single-minded person who had no symptoms of mental disorder. He said Mr. Latimer expressed to him a growing dissatisfaction of the medical care Tracy had received as she went from one surgery to another with no end in sight. He told Dr. Menzies he believed her pending surgery on November 4 would be torture and that is why he took the decision he did. In his opinion Latimer was motivated entirely by Tracy's pain because he saw no other way to alleviate her from it.

As I indicated earlier it is my opinion that the evidence establishes Mr. Latimer was motivated solely by his love and compassion for Tracy and the need - at least in his mind

- that she should not suffer any more pain. The decision he made was in clear conflict with the law and he knew it but he did not seem to care so long as he accomplished his goal. There are different ways of characterizing his decision to take Tracy's life. The Court of Appeal saw him as "assuming the role of a surrogate decision maker" who then decided to terminate her life. I would characterize it by saying that he (and his wife) became the surrogates of Tracy at her birth and that twelve years later he decided when faced with the despairing news that her pain would continue unremitting that he must do his duty as her father to relieve her of that prospect. It is significant in my opinion that the jurors indicated through the questions submitted to the Court that they too felt he should not have killed Tracy but they sympathized to a significant degree with why he had done it. I repeat again that in my opinion the evidence does not in any way suggest he killed his daughter because she was so severely disabled. It is admittedly a difficult task to prove what motivates a person to carry out such a grave act as murder that was not somehow related to self interest, malevolence, hate or violence. But in my view of the evidence presented in this case which is for the most part clear and uncontradicted we have that rare act of homicide that was committed for caring and altruistic reasons. That is why for want of a better term this is called compassionate homicide.

It is therefore my conclusion that Mr. Latimer's place on the scale of culpability I spoke of is very near the low end. By way of comparison I would refer briefly to the four cases that Chief Justice Bayda describes in his dissenting judgment on the accused's appeal from his earlier conviction. These are examples of compassionate homicides committed elsewhere in Canada (See: Dissenting judgment in *R. v. Latimer* (supra) at pp. 662 to 669). The first - *R. v. Mataya* concerned a nurse who administered a lethal dose of potassium chloride to a comatose patient to shorten his agony. While he was originally charged with first degree murder he eventually was allowed to plead guilty to administering a noxious substance with intent to endanger life. This offence calls for a maximum sentence of 14 years. Mataya was placed on probation and forced to give up the practice of nursing.

In *R. v. de la Roche* the accused, a doctor injected potassium chloride into a dying patient to end her life and faced a charge of second degree murder and a separate charge of administering a noxious substance with intent to end her life. He pleaded guilty to the second charge and was discharged with a three-year term of probation.

In *R. v. Myers* - a Nova Scotia case where the two accused, who were married, smothered the wife's father who was dying of cancer with a pillow. They were charged with second degree murder but in the circumstances were permitted to plead to the lesser offence of manslaughter. They were placed on three years probation and ordered to perform 150 hours community service.

In *R. v. Brush* (reported on Quicklaw (1995) OJ No. 656), Mrs. Brush, an 81-year-old woman had been happily married to Mr. Brush for 58 years. Her husband's health was failing (Alzheimer's disease) and it increased the difficulties she had in trying to care for him. They first attempted joint suicide but did not succeed. So later Mrs. Brush stabbed her husband causing his death but her attempts to take her own life failed. She was

charged with murder which was later reduced to manslaughter. The trial judge saw no purpose in incarcerating her and suspended sentence.

I note also that just recently a doctor in Halifax, Nova Scotia was charged with first degree murder of a patient in the hospital where she works. Ironically, while this trial was in progress the Crown agents in that province reduced the charges against the doctor to manslaughter. Her trial is yet to come.

These are all examples of euthanasia-type mercy killings and while there are differences one can discern in comparing them to the facts of this case there are also many similarities, the most important of which is the compassionate motivation of each accused. All of these accused were seen by the Crown authorities to have a degree of culpability at the minimal end of the scale used to determine the gravity of their offences. It can be argued, as Chief Justice Bayda so forcefully does that Robert Latimer's compassionate homicide of his daughter falls into much the same degree of culpability.

The fourth and final aspect of this assessment to be measured is the effect of imposing the mandatory minimum sentence on Mr. Latimer. Since the sentence was imposed upon him after his first trial we can look at the public reaction which occurred at that time and to some degree since his conviction in this Court. There is no doubt that the sentence provoked an unprecedented public reaction against the severity of the punishment which the law prescribed. In the material filed by the accused's counsel there are hundreds of letters from all over Canada and beyond protesting the harshness of the mandatory sentence. Those letters were to the Latimers, to members of Parliament, to the Ministers of Justice, the Prime Minister and even the Governor General. Many of the letters of support came from people who were themselves handicapped. Some came from church groups. Many of these people enclosed money to help Mr. Latimer's fight what the writers seemed to consider the injustice of his conviction but more particularly the harshness of the sentence required by law. If as the Supreme Court said in defining the phrase "cruel and unusual" in the context of punishment it depends on "whether the punishment prescribed is so excessive as to outrage standards of decency" - then it seems to me there is considerable evidence that this case and the life sentence without parole for ten years imposed (or to be imposed) on Mr. Latimer is seen by the public who responded in this manner as an outrage. In my opinion the jury saw the prescribed punishment in the same light. This is important because that jury also represented the public and it heard all of the evidence.

Another effect of the ten-year minimum sentence is the one pointed out by Bayda C.J. with respect to the wide discrepancy between the punishment Mr. Latimer faces for committing compassionate homicide and the manner in which the Crown and the courts in other provinces handled the four compassionate homicides he describes as noted above. As he points out the inequality of the penalty imposed in the handling of those cases and that which Mr. Latimer is facing is stark to say the least.

Does this analysis of the factors to be weighed and considered in determining whether or not the ten-year mandatory minimum sentence without parole for ten years which the

accused is facing is so grossly disproportionate to what is appropriate in all of the circumstances of this case as to constitute cruel and unusual punishment? After much reflection I have concluded that the answer to that question is "yes". It is my judgment that even though the offence of murder is the gravest of all crimes in our law that the circumstances established by the evidence as to why and how he committed this compassionate act of homicide when taken together with his personal characteristics, the caring role he played as Tracy's father and as an otherwise law-abiding citizen who is respected within his home community despite what he did, his conviction does not warrant the imposition of the ten-year minimum sentence because it would be unjust, unfair and far too excessive.

In the Smith decision Lamer J. says (see above) that "If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1" (of the Charter of Rights and Freedoms). In other words is such a sentence demonstrably justifiable in a free and democratic society. The onus of establishing that it is rests with the Crown. I have concluded that the mandatory minimum sentence for second degree in the circumstances of this case is grossly disproportionate but the Crown has not attempted to justify its purpose under s. 1 so it is not an issue in this instance.

I want to emphasize that I have reached this conclusion based on the facts which in my opinion have been clearly established by the evidence at this trial; and on the law respecting the use of constitutional exemptions as I understand it; and the circumstances under which Mr. Latimer killed his tragically debilitated daughter. It is important that it be understood that this decision only relates to this accused in respect of this crime. In my opinion this is the unique set of facts that Mr. Justice Cory alluded to in the Steele decision which warrants the use of a constitutional exemption to avoid the imposition of the mandatory minimum sentence. It is also my opinion that if Mr. Latimer's situation does not warrant the granting of a constitutional exemption then it is unlikely that any set of facts will ever arise where this rarely granted legal remedy can be made available to one who commits an act of compassionate homicide.

Accordingly, I find that Mr. Latimer's s. 12 Charter right has been violated and that he be granted a constitutional exemption from the sentence prescribed by ss. 235 and 745 of the Criminal Code and that pursuant to s. 24 of the Charter I must substitute a sentence which is appropriate and just in the circumstances.

I shall next hear counsels' submissions on an appropriate sentence.

J.