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"CUTTING THE THREAD OF LIFE"[1] – THE RIGHT TO CEASE MEDICAL TREATMENT

Airedale NHS Trust v *Bland*[2]

Introduction

THE debate over the legal and ethical rights of a doctor to withdraw or withhold medical treatment (particularly where his actions will precipitate the death of his patient) has finally reached the House of Lords in the case of *Airedale NHS Trust* v *Bland.*

The case arose from the appalling disaster which took place at Hillsborough Football Stadium on 15 April 1989, when the police allowed too many people into the ground to watch an FA (Football Association) cup semi-final. Those at the front of the relevant part of the enclosure were crushed up against the fence. Many died from the injuries which they sustained. Others were critically injured. Among those who suffered severe injuries was Anthony Bland, who was then aged 17. His lungs were crushed and punctured and he had the supply of oxygen to his brain interrupted. As a result, the higher centres of his brain were irreversibly damaged, and he suffered from a condition known as persistent vegetative state (PVS). He was not brain dead, since his brain stem continued to function, which meant that he could breathe unaided and digest food. His eyes were open, and he was capable of reflex movement. However the trial judge, Sir Stephen Brown P, found as a fact that:

> [a]lthough Anthony Bland's body breathes and reacts in a reflex manner to painful stimuli it is quite clear that there is no awareness on his part of anything that is taking place around him. EEG and CT scans reveal no evidence of cortical activity .... There is simply no possibility whatsoever that he has any appreciation of anything that takes place around him. He is fed artificially and mechanically by a nasogastric

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1 *Per* Devlin J in *R* v *Adams* [1957] Crim L R 365 at 366.

2 [1993] 1 All ER 821 (The report contains the decisions of the High Court, the Court of Appeal and the House of Lords).

> tube which has to be inserted through his nose into his stomach. All natural bodily functions have to be operated with nursing intervention.[3]

By August 1989 the consultant who was treating Anthony, having exhausted all attempts to revive him, and having carried out every possible test in the hope of finding some brain activity, decided that there was absolutely no prospect of improvement. With the support of Anthony's parents, he proposed that medical management should cease. This would include the termination of artificial feeding and the withholding of antibiotics should Anthony suffer from infection. The consequence of this would be to bring about his death through starvation within 10 to 14 days. However, the Sheffield coroner (who was in charge of the fatal cases arising from the disaster) warned that such a course of action could lead to the possibility of legal proceedings.

As a result, the Airedale NHS Trust, which administered the hospital caring for Anthony, (again with the full support of his parents) issued an originating summons seeking several declarations. The declarations sought were to the effect that the Trust and their responsible physicians might lawfully discontinue all life-sustaining treatment and medical support measures designed to keep Anthony alive including the termination of ventilation, nutrition and hydration by artificial means and that they might lawfully discontinue and thereafter need not furnish medical treatment to Anthony except for the sole purpose of enabling him to end his life and die peacefully with the greatest possible dignity and the least possible pain, suffering and distress. In addition, the Trust sought declarations that Anthony's death following cessation of treatment should be attributed to his PVS and that the discontinuance of the treatment should not render them or any participant acting in good will liable in either civil or criminal law.

The summons was (for whatever reasons) not issued until September 1992, and came before the Family Division of the High Court in November 1992. Sir Stephen Brown P, after a compassionate and thorough analysis of the case, made the declarations. The Court of Appeal affirmed his decision, and the House of Lords dismissed the Official Solicitor's appeal that the decisions were wrong because the withdrawal of life support was a breach of a doctor's duty to his patient, and also a criminal act.

Life and Death

Patently self-evident in view of the declarations sought, but nevertheless critical to the court's reasoning, was the fact that, as Lord Goff put it:

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[3] ***Ibid,*** **at** 824-825.

> Anthony is still alive. It is true that his condition is such that it can be described as a living death; but he is nevertheless still alive. This is because ... it has come to be accepted that death occurs when the brain, and in particular the brain stem, has been destroyed .... The evidence is that Anthony's brain stem is still alive and functioning and it follows that, in the present state of medical science, he is alive and should be so regarded as a matter of law.[4]

Lord Goff saw this fact as significant given the fundamental principle of law (present in almost all modern societies) relating to the sanctity of human life. However, he pointed out that the principle is not absolute and that there are circumstances in which the law permits the taking of life – for example in self-defence or, in some jurisdictions, by lawful execution. Although the circumstances of this case were quite different, Lord Goff (and the rest of their Lordships) recognised that, where the right to withhold medical treatment is concerned, there is no absolute rule that a patient's life must be prolonged artificially regardless of all other considerations. In this case there was more at issue than merely the sanctity of life. As Hoffman LJ had observed in the Court of Appeal:

> On the one hand, Anthony Bland is alive and the principle of the sanctity of life says that we should not deliberately allow him to die. On the other hand, Anthony Bland is an individual human being and the principle of self determination says that he should be allowed to choose for himself and that, if he is unable to express his choice, we should try our honest best to do what we think he would have chosen. We cannot disclaim this choice because to go on is as much a choice as to stop.[5]

In the event, all their Lordships concluded (as had the judges in the courts below) that the correct "choice" was to withdraw treatment, and they ruled that, in the circumstances, this would not amount to a criminal offence (nor would it give rise to civil liability) even though it would result in Anthony's death.

"In His Best Interests"

The starting point for all their Lordships was the fact that, in law, a patient must generally consent to all medical treatment (and, by extension, to the withdrawal of medical treatment) and that such consent cannot be given

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[4] *Ibid,* at 865.
[5] *Ibid,* at 854.

on behalf of an incompetent patient by a third party.[6] However, as the House of Lords decision in *F* v *West Berkshire Health Authority*[7] established, where it is deemed to be necessary in the best interests of a patient who is incapable of giving his consent for a particular course of action to be taken, the patient's doctor may (and, indeed, is under a duty to) treat that patient accordingly. All the judges in this case referred to, and drew an analogy with, *F's* case.

A purist might argue that the analogy is not an exact one. *F's* case concerned the sterilisation of a mentally defective but very much "alive" and sexually active woman, the quality of whose life would clearly have been adversely affected by a pregnancy with which she was totally unequipped to deal. In this case, though, the decision related to whether Anthony Bland's life had so little inherent quality that it was better to allow it to end. Given the fact that he was completely unaware of his circumstances, and that his condition was actually recognised as being a "living death",[8] one could legitimately suggest that the best interests concerned were as much those of his family and doctors as of Anthony himself.

Such an argument is, however, uncharitable to all those involved in making the difficult decision to cease the treatment, whose motives were clearly totally altruistic. Furthermore, reference was also made in the judgments to "life and death" cases from other jurisdictions, with which a closer analogy than that in *F's* case can be drawn. Lord Goff, for example, also placed reliance on the very recent High Court of New Zealand decision in *Auckland Area Health Board* v *A-G,*[9] and, in referring to the dictum of Thomas J in that case, he seemed to suggest that it might indeed be preferable from the patient's point of view to die rather than to live in circumstances where his life has no quality:

> it cannot be right that a doctor, who has under his care a patient suffering painfully from terminal cancer, should be under an absolute obligation to perform upon him major surgery to abate another condition which, if unabated, would or might shorten his life still further .... Common humanity requires otherwise, as do medical ethics and good medical practice accepted in this country and overseas. As I see it, the doctor's

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[6] This is because there is no longer a *parens patriae* jurisdiction (which before its abolition effectively allowed the court to consent to treatment on behalf of mentally incompetent adults). Several of their Lordships expressed concern over the abolition of this jurisdiction. (See, *eg,* Lord Lowry, *ibid,* at 875, and Lord Browne-Wilkinson, *ibid,* at 882). In Singapore, the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) prescribes the law and procedure for managing the affairs of mentally incompetent persons. It makes no provision for situations of this kind, so a parallel can be drawn with the position in England.

[7] [1989] 2 All ER 545.

[8] See, *supra,* note 4.

[9] [1993] 1 NZLR 235.

> decision whether or not to take any such step must (subject to his patient's ability to give or withhold his consent) be made in the best interests of the patient.[10]

Of the others of their Lordships who considered the best interests test, Lord Browne-Wilkinson differentiated the question of whether it was in the best interests of Anthony Bland to continue the invasive medical care involved in artificial feeding from the question of whether it was in his best interests to die. While the former question could legitimately be examined by the court the latter (presumably for policy reasons) could not.[11] Similarly, Lord Mustill concluded that the best interests test was "logically defensible and consistent with existing law" as long as one directed "the inquiry to the interests of the patient, not in the termination of life but in the continuation of his treatment."[12] Thus while one could never legally conclude that it would be in the best interests of a patient actively to end his life, one could reach such a conclusion with regard to the termination of treatment which kept him alive artificially.[13] Lord Mustill did, however, express some reservations about applying the standard test for civil liability in medical negligence laid down in *Bolam* v *Friern Hospital Management Committee*[14] "to decisions on "best interests" in a field dominated by the criminal law."[15]

Substituted Judgment Test

Lord Goff also referred to the American approach in cases of this kind, the "substituted judgment" test, which calls for a detailed inquiry into the patient's views and preferences to determine how he would have responded had he been competent to make the decision.[16] This approach endeavours to ascertain, through the patient's family, what decision the patient would himself have made had he been competent to do so. The courts and the medical profession must then defer to the family's assessment. While deriving assistance from the various decisions in which this test had been used to recognise the lawfulness of terminating life-prolonging treatment, Lord Goff

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[10] *Supra,* note 2, at 868.

[11] *Ibid,* at 883.

[12] *Ibid,* at 894.

[13] This point is also relevant to the distinction between euthanasia and the cessation of medical treatment. See *infra,* note 20.

[14] [1957] 1 WLR 582. According to *Bolam's* case, in order to decide whether a doctor has discharged his general duty of care, one asks whether he has acted in accordance with a responsible and competent body of relevant professional opinion.

[15] *Supra,* note 2, at 895.

[16] Lord Goff referred in this respect to the cases of *Re Quinlan* (1976) 70 NJ 10 and *Belchertown State School Superintendent* v *Saikewicz* (1977) 373 Mass 728.

ultimately rejected its applicability in this case on the ground that it did not form part of English law[17] and applied the best interests test instead.

In theory, the best interests test will preclude consideration of the patient's own views unless they have been stated overtly prior to his incapacity[18] so as to constitute a withholding of consent to treatment. However, in practice, the approach taken at all levels in this case seems to have been more flexible, with Anthony's father's statement that his son "wouldn't want to be left like this"[19] clearly influencing the decision as to what was in Anthony's best interests. At the end of the day, therefore, the difference between the two tests may be more apparent than real.

Cessation of Treatment and Euthanasia

The House of Lords had to draw a distinction between the withdrawal of medical treatment and euthanasia because counsel for the Official Solicitor had argued that the effect of withdrawing the nasogastric tubes leading inevitably to death by starvation would be a wilful act of homicide.

Lord Goff, referring to the recently reported case of *R* v *Cox,*[20] distinguished the positive act of giving a patient a lethal injection to terminate his life from the "omission" in discontinuing life support (even where that omission might actually involve the taking of action to switch the machine off). For policy reasons, Lord Goff concluded that, while the former was outside the law, the latter was within it. The same conclusion was reached on similar grounds by the rest of the Law Lords, with the possible exception of Lord Mustill, who deliberately abstained from debating whether the proposed conduct amounted to euthanasia, on the ground that "[t]he word is not a term of art, and what matters is not whether the declarations authorise euthanasia, but whether they authorise what would otherwise be murder."[21] Even he, however, based his decision that the declarations would not authorise murder on the criminal distinction between acts and omissions.[22]

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[17] This reason perhaps lacks force given the level of court involved. Had the House so chosen, it could have made the test part of English law.

[18] The dictum by the House of Lords on this point gives approval to the concept of the "living will" advocated by proponents of voluntary euthanasia, although its effect is limited to the withholding of medical treatment and does not extend to invasive pratices designed to hasten death. See discussion at note 20, *infra.*

[19] *Supra,* note 2, at 826.

[20] 18 September 1992, unreported. This much-publicised case, in which a doctor was convicted of homicide for administering a lethal drug to a patient who was dying in agony, has fuelled the debate in the United Kingdom over voluntary euthanasia in recent months.

[21] *Supra,* note 2, at 885.

[22] *Ibid.*

One possible complication in this case related to the argument that, having undertaken the obligation to provide Anthony with medical care and food for an indefinite period, the doctors would be breaching their duty in withdrawing the artificial feeding. Counsel for the Official Solicitor even sought to argue that the duty to feed existed independently of the duty to provide medical treatment and that it was a duty which, once assumed, could not be terminated. However, this argument was also rejected.[23] All their Lordships (basing their views on informed medical opinion throughout the world) saw artificial feeding as an aspect of overall medical treatment, and concluded that, as such, it could be discontinued. Lord Browne-Wilkinson, for example, stated that: "[t]he doctor cannot owe the patient any duty to maintain his life where that life can only be sustained by intrusive medical care to which the patient will not consent."[24]

The distinction between actively taking life and passively allowing it to end can be a very fine one, and the House of Lords clearly recognised the moral and ethical dilemmas to which the distinction gives rise. As a result, the discussion of their Lordships on this point is not entirely comfortable. Lord Lowry observed that there may be many who are "unconvinced that someone who can be kept alive should be allowed to die",[25] Lord Mustill admitted to having "profound misgivings about almost every aspect of this case,"[26] and these concerns are echoed to one extent or another in all the judgments.

The Implications of the Decision

This concern about the ethical questions involved and the implications of the decision led their Lordships to decide the case on very narrow grounds. Lord Browne-Wilkinson, referring to the views expressed by Hoffman LJ in the Court of Appeal, stated that "the law regulating the termination of artificial life support being given to patients must, to be acceptable, reflect a moral attitude which society accepts."[27] His Lordship took the view that it was "for Parliament, not the courts, to decide the broader issues which the case raises."[28] He saw this as essential because of the substantial division of views in the area, and referred in particular to the strong opposition to the withdrawal of life support by Roman Catholics, orthodox Jews and other religious groups. Lord Browne-Wilkinson was also concerned about the extent to which individual doctors' views on the sanctity of life might

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[23] See, *eg,* Lord Goff, *ibid,* at 876.
[24] *Ibid,* at 882.
[25] *Ibid,* at 877.
[26] *Ibid,* at 896.
[27] *Ibid,* at 877.
[28] *Ibid,* at 878.

complicate matters. He was thus "very conscious" that his conclusions in this case were reached on "narrow, legalistic, grounds which provide no satisfactory basis for the decision of cases which will arise in the future where the facts are not identical,"[29] and he considered that "for the foreseeable future, doctors would be well advised in each case to apply to the court for a declaration as to the legality of any proposed discontinuance of life support where there has been no valid consent by or on behalf of[30] the patient to such discontinuance."[31]

Lord Mustill voiced a similar opinion:

> whilst the members of the House have all picked a way through the minefields of the existing law to the conclusion that the proposed conduct is lawful, it would in my opinion be too optimistic to suppose that this is the end of the matter, and that in the future the doctors (or perhaps the judges of the High Court) will be able without difficulty to solve all future cases by ascertaining the facts and applying them to the precepts established in the speeches delivered today.[32]

Like Lord Browne-Wilkinson, he considered that "the whole matter cries out for exploration in depth by Parliament."[33]

Lord Keith, although prepared to make the declarations sought in this case, shared the opinion of Lord Browne-Wilkinson (and Sir Stephen Brown P in the High Court and Sir Thomas Bingham MR in the Court of Appeal) that future cases involving the proposed discontinuance of medical treatment should be brought before the Family Division at least "until a body of experience and practice has been built up which might obviate the need for application in every case."[34]

Lord Goff alone took a more philosophical view. He considered that the President of the Family Division could keep the matter under review, and hoped that he would "soon feel able to relax the present requirement so as to limit applications for declarations to those cases in which there is a special need for the procedure to be invoked."[35] Nor did he see the dilemma of individual doctors as particularly worrying. The problem was,

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[29] *Ibid,* at 884.

[30] Whilst consent cannot be given in England on behalf of any adult patient, even one who is mentally incompetent (see *supra,* note 6, for discussion), a parent or guardian (or the court exercising *parens patriae* rights under its wardship jursidiction) may consent to treatment on behalf of a minor.

[31] *Supra,* note 2, at 884.

[32] *Ibid,* at 887.

[33] *Ibid,* at 889.

[34] *Ibid,* at 862.

[35] *Ibid,* at 874.

in his view, "more theoretical than real ... if only because the solution could be found in a change of medical practitioner."[36] As he pointed out, similar theoretical problems arise with matters such as abortion, but are overcome in practice. This is undoubtedly true, but at the same time it highlights the deep ethical divide at the heart of this area of the law.

Final Thoughts

This is a landmark decision by the House of Lords. However, it is one which leaves unanswered far more questions than it resolves, and it represents only the beginning of what is bound to be a long and agonised debate. The termination of life, however passive the conduct, however compassionate the motive, will always be a matter of controversy. This is an area of law in which there can be no clear-cut answers, and one in which ethical and moral issues feature at least as strongly as do purely legal considerations. Indeed, it might be argued (and this is tacitly suggested in some of the judgments in *Bland's* case) that the law is an inadequate and inappropriate vehicle for dealing with such sensitive matters. On the other hand, only through the law can society ensure that the rights of those who cannot speak for themselves are protected. The potential for abuse in a system without stringent rules is obvious.

The case has actually decided very little. We now know that in a subsequent case involving identical (or virtually identical) facts doctors will be able to cease medical treatment and thus precipitate the death of an irreversibly brain-damaged patient without fearing criminal or civil liability. Given the narrowness of this decision, however, it would appear that, in any other situation, doctors will be ill-advised to make life-and-death decisions about the cessation of treatment without first seeking confirmation by the courts that the proposed action is legal. No doubt, Lord Goff is correct in thinking that in a relatively short while there will be a sufficient body of cases to offer broad guidelines to the medical profession. But what of the other parties inevitably concerned in such a decision? What of the families who, at least in theory (though the matter will probably be different in practice), have no say in the matter? And what are the wider implications for a society which is already divided over the question of euthanasia? Whilst this decision clearly decides that the action taken in relation to Anthony Bland is on one side (the acceptable one) of the euthanasia line, it does not decide exactly where that line falls. As far as the criminal law, in particular, is concerned, the implications of this decision are potentially enormous but at present unclear.

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[36] *Ibid,* at 875.

It would be unfair to criticise their Lordships for the narrowness of their decision. Indeed, it would have been far more blameworthy, and, indeed, dangerous, for them to have decided the case in broad terms which might have led to the decision being applied in very different situations, possibly involving far less justification for terminating medical treatment. The last thing which one would have wanted to see would have been a plethora of dubious cases leading to the need for parliamentary intervention to tighten the law. However, as things now stand, Lords Browne-Wilkinson and Mustill are almost certainly correct when they say that parliament may have to become involved anyway. The task of formulating the parameters of when it is, and when it is not, acceptable to allow a patient to die may simply be too enormous a burden for the courts to bear. Of course, the legislature will find the task no easier, but the process of drafting and debating any bill will inevitably allow for extensive public discussion and will encourage an open examination of the moral and ethical dilemma which is at the heart of the matter. It will be impossible to find a solution acceptable to all members of society, but only the legislature really has the mandate even to try.

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