

LEGAL DEATH OF BRAIN-DAMAGED PERSONS

FRANCIS BENNION

A House of Lords Select Committee on Medical Ethics is currently sitting with the following terms of reference-

To consider the ethical, legal and clinical implications of a person's right to withhold consent to life-prolonging treatment, and the position of persons who are no longer able to give or withhold consent; and to consider whether and in what circumstances actions that have as their intention or a likely consequence the shortening of another person's life may be justified on the grounds that they accord with that person's wishes or with that person's best interests; and in all the foregoing considerations to pay regard to the likely effects of changes in law or medical practice on society as a whole.

This article is concerned with one aspect only of this remit, namely the position of persons who through brain damage are in a permanent vegetative state. I shall suggest that, the judges having failed to grasp the opportunity to develop the common law in a suitable way, intervention by Parliament is now needed.

Legal treatment of those in a permanent vegetative state

Medical science refers to certain persons who have suffered brain damage as being in a *persistent* vegetative state, whether or not there is any possibility of recovery. If there is no such possibility it is more accurate to refer to it as a *permanent* vegetative state, and that is the term I shall use. It arises where, as in the case of the Hillsborough football disaster victim Anthony Bland in *Airedale NHS Trust v Bland*¹, through irreversible brain damage the patient has no possibility of ever recovering consciousness. Anthony's brain had turned to water, and it was not imaginable that, even if new medical advances as yet unsuspected were in future to be made, there was any possibility of returning the water back into brain cells. It is only where, as in his case, the vegetative state is demonstrably permanent that what I now propose applies.

On the question of the point at which a person who needs life support is to be treated in law as dead, the present law relies solely on medical opinion. In *Airedale* Lord Goff said of Anthony Bland, who was in a permanent vegetative state because his cerebral cortex but not his brain stem had been destroyed-

'I start with the simple fact that, in law, 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, as a result of developments in modern medical technology . . . 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 still alive *and should be so regarded as a matter of law*.'²

The italicised passage is saying that just because the medical profession does not treat a person who is in a permanent vegetative state as dead, the law will not and should not do so either. However the legal considerations applicable to the situation are not the same as the medical considerations, and I submit that in law such a person should be treated as dead. Parliament should now lay down a rule that, where there is no possibility of restoring consciousness, a person who through brain damage is in

¹ [1993] 2 WLR 316.

² *Ibid*, pp 366-367 (emphasis added).

a permanent vegetative state should in law be treated as dead even though it continues to be true that with medical assistance 'his body sustains its own life', as Lord Browne-Wilkinson put it.³ Another judicial essay is to contrast 'biological life' and 'human life', as in the dictum by Thomas J. of the New Zealand High Court that 'it surely was never intended that [medical science and technology] be used to prolong biological life in patients bereft of the prospect of returning to even a limited exercise of human life'.⁴

Because of new technology the death of a person now needs to be distinguished from the death of his or her body. Words like 'alive' or 'living' have become ambiguous in relation to people with permanent brain damage. As the US Supreme Court judge Brennan J said of a person in a permanent vegetative state 'there is a serious question whether the mere persistence of their bodies is "life", as that word is commonly understood'.⁵ In my submission it is not. Lord Browne-Wilkinson contrasted 'medical' and 'legal' death⁶. However, in my opinion mistakenly, he did not dissent from the view that they should be treated as the same. Hoffmann J said of Anthony Bland: 'His body is alive, but he has no life in the sense that even the most pitifully handicapped but conscious human being has a life'.⁷ Later he said-

'There is no question about his life being worth living or not worth living because the stark reality is that Anthony Bland is not living a life at all. None of the things that one says about the way people live their lives - well or ill, with courage or fortitude, happily or sadly - have any meaning in relation to him. This in my view represents a difference in kind from the case of the conscious but severely handicapped person.'⁸

The law should recognise this vital difference. It should not allow itself to be governed by the same test as that applied by the medical profession, since the relevant considerations are not the same. A person who, through brain damage, can be proved to have entered at any time into a state of permanent unconsciousness should be treated in law as having died at that time even though his body remains alive. The law should be changed by legislation to make this clear. As a corollary the legislation would need to impose limited duties relating to the body of a person who is legally dead but whose body sustains its life with assistance. It would not be right for such a living body to be treated as if it were in all respects a corpse, though of course it should be permissible for those in charge of it to terminate life support.

A draft Bill

As a legislative draftsman, I offer the following as the possible wording of a Bill to achieve the result outlined above.

Death of brain-damaged persons

1.-(1) Subject to the provisions of this Act, if a person at any time enters into a state of permanent unconsciousness through brain damage he shall in law be treated as having died at that time even though his body remains alive.

(2) Without prejudice to any other method of proof, a person shall be deemed to have entered at any time into a state of permanent unconsciousness through brain damage if two registered medical practitioners make a written statement to that effect in the prescribed manner.

Supplemental

2.(1) The following provisions apply in relation to the body of a person who is to be treated by virtue of section 1 as having died.

³ *Ibid*, at p 381. On the same page his Lordship referred to this limited form of existence as life 'in the purely physical sense'

⁴ *In re J.H.L.* (unreported), 13 August 1992 (High Court of New Zealand), cited *Airedale NHS Trust v Bland* at 336.

⁵ *Cruzan v Director, Missouri Department of Health* (1990) 110 S. Ct. 2841 at 2886.

⁶ [1993] 2 WLR 316, 381.

⁷ *Ibid* p 350 (High Court).

⁸ *Ibid*, p 355.

(2) Any person other than the person lawfully in possession of the body who, without the consent of that person, terminates or obstructs any process by which the body's life is sustained, or otherwise interferes with the body while it is still living, is guilty of an offence.

(3) For the purposes of any enactment or rule of law relating to the treatment of bodies of deceased persons, the body shall not be treated as such a body while still living.⁹

In the remainder of this article I give further arguments in favour of these suggested provisions.

The importance of death in law

Death is important in law for many reasons, some of which are mentioned below. Its civil importance is shown by the requirement to register every death, now set out in the Births and Deaths Registration Act 1953.¹⁰ The registration system would work under my proposed Bill, though minor consequential amendments to the 1953 Act might be required.

The need to be able for legal purposes to establish the death of a person, even when they may not have actually died, is shown by the presumption of death after seven years absence. At common law a person who has not been heard of for seven years by those who, if he had been alive, would be likely to have heard of him, is presumed to be dead¹¹. There is no presumption as to the time during the seven years at which he died¹². The Offences against the Person Act 1861 s 57 excepts from the offence of bigamy a person marrying a second time whose spouse is subject to the presumption of death following seven years' absence.

A class of cases where death is important concerns succession to property. This was recognised by the passing of the *Cestui que Vie* Acts 1666 and 1707¹³, which are still in force. They apply the seven year period to beneficiaries under settlements.

Another important category concerns the law of homicide. Murder carries a mandatory sentence of life imprisonment. It is obviously wrong that this should apply to the 'killing' of a person who, through brain damage, is permanently unconscious. Other offences, such as manslaughter, require corresponding adjustment. (Here I am referring to killing otherwise than by or with the authority of the person lawfully in possession of the body.)¹⁴

The actual time of a person's death may have important legal consequences, and should not be capable of being juggled to meet particular interests. Lord Browne-Wilkinson said-

'... the timing of the patient's death may have a direct impact on the rights of other parties. In the case of a patient suffering from P.V.S. [persistent vegetative state] as a result of a road accident, the amount of damages recoverable will depend on whether the patient is kept alive or allowed to die. We were told by the Official Receiver that there have already been cases in which this factor has been taken into account by relatives of the patient, though there is no question of that in the present case. Again, rights of succession to the estate of the patient may well depend on the timing of his death.'¹⁵

⁹ The above Bill would require supplemental provisions laying down the amount of the penalty, defining 'prescribed' as meaning prescribed by regulations, etc. As to the reference in clause 1(2) to registered medical practitioners, compare Mental Health Act 1983 s 3(3). The reference in clause 2(2) to 'the person lawfully in possession of the body' derives from the Human Tissue Act 1961. Consequential amendments might well be required to enactments concerning death, e.g. the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 61.

¹⁰ For Northern Ireland see the similar provisions in the Births and Deaths Registration (NI) Order 1976.

¹¹ *Prudential Co v Edmonds* (1877) 2 App Cas 487 at 509.

¹² *Nepean v Doe d. Knight* (1837) 2 M & W 894; *Re Phene's Trusts* (1869) LR 5 Ch App 139

¹³ The Life Estates Act (Ir) 1695 followed the 1666 Act, and is still in force in Northern Ireland; there appears to be no Irish equivalent of the 1707 Act,

¹⁴ Murder is further discussed towards the end of this article.

¹⁵ [1993] 2 WLR 316 at 381.

My draft Bill would deal with this problem by specifying the time of legal death as the time when the permanent vegetative state was entered into. The time of switching off life support would be irrelevant except for the purposes of clause 2.

The legal concept of civil death

The primitive legal concept of civil death shows that, for the sort of reasons discussed above, the law once felt it should treat as 'dead' any person who, although still living in the physiological sense, was unable to perform the ordinary functions of a living person. Blackstone expressed the principle thus-

'These rights, of life and member [limb], can only be determined [ended] by the death of a person; which is either a civil or natural death. The civil death commences if any man be banished the realm by the process of the common law, or enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which cases he is absolutely dead in law, and his next heir shall have his estate. For, such banished man is entirely cut off from society; and such a monk, upon his profession, renounces solemnly all secular concerns . . . the genius of the English law would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk is therefore accounted *civilliter mortuus* [civilly dead] . . . the ordinary [diocesan bishop] may grant administration [of his estate] to his next of kin, as if he were actually dead intestate, and such executors and administrators shall have the same power, and may bring the same action for debts due to the religious, and are liable to the same actions for those due from him, as if he were naturally deceased . . . In short, a monk or religious is so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards becomes a monk, determines [ends] by his entry into religion: for which reason leases, and other conveyances, for life, are usually made to have and to hold for the term of one's *natural* life.'¹⁶

Of course we would not now think it right to treat a monk as civilly dead. I quote the passage to show that it is inherent in legal doctrine, for sound reasons connected with the social purpose of law, that the needs and expectations of the living should not be blocked by one who has in social reality, if not in physiological fact, departed this life. This is applicable nowadays to one who has permanently lost the power of consciousness yet remains 'alive' by the power of medical science. His entry into that state of permanent loss should be immediately recognised by the law. If he is married, his spouse should at once be freed to grieve, and then to carry on her life as if he had died in the fullest sense. His property should be dealt with, and his debts discharged. If he has left a will, that should be executed. His living body should be treated with respect, but not to the extent given to an ordinary living body. (Of course all this supposes that there is no scintilla of doubt about possible recovery of consciousness at some time.)

Supplemental matters

In accordance with ordinary legal doctrine, the establishing that through brain damage a person has entered a state of permanent unconsciousness should be treated as a simple question of fact. It is desirable that an easy procedure should be laid down, such as certification by two registered medical practitioners, by which that can be evidenced to the law's satisfaction (though other forms of proof should not be ruled out).

It is most undesirable that the system of recourse to the court envisaged by the House of Lords in *Airedale*, following *In re F. (Mental patient: Sterilisation)*¹⁷ should be regarded as a permanent feature. To have to go to court imposes on those responsible for a person in a permanent vegetative state costs and procedures which may be found onerous. Apart from the inherent undesirability of this, it may well discourage relatives and others from taking the step. This would have the result that a person who ought, for the reasons I have given, to be treated as legally dead would not be so treated,

¹⁶ Sir W Blackstone, 1 *Commentaries* (1765) pp 128-9 (emphasis in original).

¹⁷ [1990] 2 AC 1.

or that there would be delay in according this treatment. As I have said, whether such a person is to be treated as legally dead should not depend on the views or actions of relatives or others interested.¹⁸

If the person in charge of a patient in a permanent vegetative state discontinues treatment so that the living body becomes a dead body are they under the present law guilty of murder? In *Airedale* Lord Browne-Wilkinson said: 'Murder consists of causing the death of another with intent to do so'¹⁹. Later (on the same page) he said regarding a possible charge of murder in that case: 'As to the element of intention or mens rea, in my judgment there can be no real doubt that it is present in this case: the whole purpose of stopping artificial feeding is to bring about the death of Anthony Bland'. Both these statements are incorrect. The mental element in murder is malice aforethought. This goes further than mere intent to cause death. It requires an unlawful motive. When the death penalty for murder existed the hangman had an intention to kill the convict, but this did not make him a murderer. The same applies to the soldier who kills in battle, or the police officer who kills a dangerous armed robber.

Murder was defined by Coke as being committed 'when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied'.²⁰ The element in this definition which is especially relevant to a person who is in a permanent vegetative state is the phrase 'any reasonable creature in being'. Here 'reasonable' must mean 'capable of reasoning', though a temporary incapacity would not disqualify. Where the incapacity is permanent it seems that Coke's definition is not complied with.

I conclude by discussing the ways in which my suggested Bill differs from the law as laid down by the House of Lords in *Airedale*. While the House of Lords' opinions leave the matter far from clear, I suggest that their decision could be codified in the following words-

If a person at any time enters into a state of permanent unconsciousness through brain damage, even though his body remains alive, it is lawful for those entitled to possession of the body to terminate its life by ceasing to feed or otherwise sustain it, though not by directly killing it.

Their Lordships appeared to think that such a termination should be carried out only with the approval of the court. However it seems that this is merely advisory, and not part of the law. Their Lordships placed stress on the fact that in the case of Anthony Bland over three years had passed since he entered a persistent vegetative state, but it seems that on usual principles the question must simply be whether as a matter of provable fact a current vegetative state is irreversible and therefore permanent.

Accordingly I would say that if my proposed Bill were enacted all but clause 1(1) would be wholly new law. Clause 1(1) differs from the existing law as codified above in stating expressly that the person is legally dead, rather than saying that it is lawful to terminate the body's life otherwise than by positive action. The difference is advantageous, because the law ought not to sanction the killing of a patient (or even merely of his body) if he is not *in law* already dead.

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¹⁸ In *Airedale* Lord Goff quoted with apparent approval the view of the Medical Ethics Committee of the British Medical Association that 'the committee is firmly of opinion that the relatives' views cannot be determinative of the treatment': [1993] 2 WLR 316 at 373-374.

¹⁹ *Ibid*, p 383.

²⁰ 3 Inst. 47.