

Analyse the legal issues raised by the case of *Airedale NHD Trust v Bland* (1993)....

[Life](#), [Emotions](#)



Introduction

The intractable dilemma of euthanasia has been thrown very much into the spotlight in the UK following the bold and final act of the House of Lords as a judicial body in *Purdy v DPP* [2009] UKHL 45 which saw the Department of Public Prosecution's lack of policy on assisted suicide held to be incompatible with article 8 of the European Convention of Human Rights (Heywood, 2010). In 2011 a documentary on the BBC chronicled the journey of many in the UK to the assisted dying clinic in Switzerland, Dignitas, and there would appear to be a turning of the intellectual tide towards personal autonomy. For many these very recent events are but ripples of the decision in *Airedale NHD Trust v Bland*, a case involving the termination of nutrition and hydration of a man in a Persistent Vegetative State (PVS), which was perceived by many commentators at the time to be the first step on the road to euthanasia, akin to Julius Caesar's army in their "crossing of the Rubicon" to use Lord Goff's stark warning (Finnis, 1993, p. 329), despite the House of Lords' frantic attempts to narrow its application (Brazier & Cave, 2007, p. 500). Both Finnis (1993) and Keown (1997) produced scathing criticism of the implications for euthanasia from *Bland*. John Keown memorably concluded with this withering attack:

"Bland rendered the law morally and intellectually misshapen. It is to be hoped that the courts or the legislature will soon restore it to its former, coherent, shape, when it could be commended as Hippocratic rather than criticised as hypocritical." (Keown, 1997, p. 503)

For Keown giving up on patients was unforgivable and the lack of a presumption of care disturbing but perhaps most importantly he felt that the sanctity of life in a legal context had been misrepresented (ibid). This decision, which effectively enabled doctors to withdraw artificial hydration and nutrition from a patient without risking prosecution has paved the way for numerous decisions which have upheld personal autonomy and ended the lives of those in various stages of PVS: FrenchayHealthCare NHS Trust v S [1994] 2 All E. R. 402, Re B [1998] 1 F. L. R. 411 and Re H. (Adult: Incompetent) [1998] 2 F. L. R 36. The legal issues at the heart of Bland have been the subject of debates which have echoed through the centuries and the issues of the sanctity of life, autonomy and the best interests of a patient were argued by Ronald Dworkin to be the three main contentious issues when deliberating euthanasia and will be the structure adopted in this essay to analyse the momentous decision of Bland (1994).

Chapter 1: Sanctity of Life and Personal Autonomy

What is the sanctity of lifeThe argument that euthanasia and suicide are contrary to God's will is a powerful one which time has only begun to erode in our increasingly secular world (Wacks, 2009, p. 47). The decision in Bland could be viewed as an assault on the traditional edifice of life's preservation as overriding all other interests. The opprobrium with which murder is treated is a symbol of how the sanctity of life has held sway over mankind for centuries. Sir Thomas Bingham M. R. recognized very early on in the Bland case that it was common ground between both parties that " a profound respect for the sanctity of life is embedded in our law and our

moral philosophy" (p. 809). No longer does this appear to be the case in the 21st century where self-determination, a corollary of individual rights, slowly squeezes the life out of previously sacrosanct views which held ending life as no less than heresy as epitomized by the views of Aristotle. His views, articulated in his *Nicomachean Ethics*, on assisted suicide reveal a perspective which viewed the taking of one's life as being a violation of the sanctity of life:

" But to seek death in order to escape from poverty, or the pangs of love, or from pain or sorrow, is not the act of a courageous man, but rather of a coward; for it is weakness to fly from troubles, and the suicide does not endure death because it is noble to do so, but to escape evil" (G7, 1116a13-17).

The practical reality now is that, after *Bland*, those in a PVS may be killed legally. The sanctity of life is, in contrast to Aristotlean views, now balanced against personal autonomy. Autonomy was accorded primacy over the right to life in the House of Lords back in 1993 in *Bland* and indeed it could be argued with some justification that this was a " crossing of the Rubicon" (Wacks, 2009, p. 47). Of course the sanctity of life is not just one-dimensional as Dworkin's carefully crafted argument, that to end one's life with dignity is also an extension of the sanctity of life, demonstrate: " to die proudly when it is no longer possible to live proudly" (1994, p. 212). Both Keown (1997) and Finnis (1993), however, criticise the decision in *Bland* (and indeed Dworkin as well) as misunderstanding the sanctity of life. John Keown observes:

“ But why was discontinuance not a breach of the principle of the sanctity of life, a principle which Lord Keith accepted was the concern of the State, and the judiciary as one of the arms of the State, to uphold? What is remarkable is that, while their Lordships agreed with the fundamental importance of the principle, none of them accurately articulated it.” (Keown, 1997, p. 494).

Keown argues persuasively that the Court adjudged Bland’s life to be worthless and not the actual treatment itself. This is, as Lord Mustill acknowledged but refused to follow, the beginning of a “ very dangerous road indeed” which involves the courts in holding that certain lives are not worth living (Bland, p. 894). Keown and Finnis are accurate in their criticism of their Lordships in Bland although it must be said that articulating the sanctity of life might have been a step too far even for the House of Lords. Ultimately personal autonomy was balanced against the sanctity of life and personal dignity. Hazel Biggs asserts that it was John Stuart Mill’s influential speech on individual autonomy which first ignited the flames of self-determination: “ the only power which can be exercised over any member of a civilised community, against his will, is to prevent harm to others” (Biggs, 2001, p. 96). The ability to end one’s life at an appropriate time and in an appropriate manner is but one aspect of the many important decisions which an individual has a right to make except when they are unable to make such a decision as will be discussed below. Where a patient has expressed a firm resolution to die, what Dworkin refers to as a “ living will”, then the patient’s personal autonomy must and surely will be respected (1994). Hoffman L. J observes, at p. 827, that a “ painful compromise” must sometimes be made:

“ In the case of the person who refuses an operation without which he will certainly die, one or other principle must be sacrificed. We may adopt a paternalist view, deny that his autonomy can be allowed to prevail in so extreme a case, and uphold the sanctity of life. Sometimes this looks an attractive solution, but it can have disturbing implications. Do we insist upon patients accepting life-saving treatment which is contrary to their strongly held religious beliefs? Should one force-feed prisoners on hunger strike? English law is, as one would expect, paternalist towards minors. But it upholds the autonomy of adults. A person of full age may refuse treatment for any reason or no reason at all, even if it appears certain that the result will be his death.” (Per Hoffman L. J at p. 827)

Chapter 2: Best interests of the patient

Where a patient lacks the capacity to make a firm expression of how they wish to die how can this be reconciled with personal autonomy? As we have seen the right to self-determination was accorded primacy over the sanctity of life but the PVS of Anthony Bland would appear to preclude any such notion. As Brazier & Cave observe, there are but two approaches accepted in legal systems where a patient is not in a position to consent to treatment on their own behalf and are respectively objective and subjective: ‘ best interests’ test and a ‘ substituted judgement’ test (2007, p. 129). The latter was squarely rejected by their Lordships in Bland with Lord Hoffman emphasizing at p. 851 that: “ It does not advance the analysis to attempt to guess at the patient’s wishes, when none have been expressed”. Thus the English courts have adopted a ‘ best interests’ test which requires decision-

makers to consider what the overall welfare of the patient demands (Wacks, 2009, p. 47). An insensate patient's best interest is difficult to articulate but Lord Goff argued that Anthony Bland's interest in being kept alive had evaporated in light of the futile situation. Lords Keith and Mustill were highly sceptical of this approach with Lord Mustill observing powerfully:

"...it seems to me to be stretching the concept of personal rights beyond breaking point to say that Anthony Bland has an interest in ending these sources of others' distress. Unlike the conscious patient he does not know what is happening to his body, and cannot be affronted by it; he does not know of his family's continuing sorrow. By ending his life the doctors will not relieve him of a burden become intolerable, for others carry the burden and he has none. What other considerations could make it better for him to die now rather than later? None that we can measure, for of death we know nothing. The distressing truth which must not be shirked is that is that the proposed conduct is not in the best interests of Anthony Bland, for he has no best interests of any kind." (Bland, p. 859).

The use of the Bolam test led Lords Goff, Keith and Lowry to conclude that since an overwhelming body of medical opinion supported the termination of the artificial feed, cessation of the naso-gastric feeding was in his best interests and lawful (Brazier & Cave, 2007, p. 500). Keown pours scorn upon this aspect of Bland and observes that Mustill's comments above are "surely false" (1997, p. 494). He goes on to point out that it is possible to benefit someone without their knowledge and condemns the use of Bolam as being

misleading as doctors, even a responsible body of them, are not qualified to make such assertions.

Conclusion

In conclusion Airedale v Bland was indeed the “ crossing of the Rubicon” and has paved the way for the current struggles between voluntary and involuntary euthanasia. The reasoning which led to the decision is built on shaky foundations but the outcome is surely correct in allowing those who are incapacitated a chance to end their lives. The blanket rejection of substituted judgement, the refusal to articulate what the sanctity of life is, the dubious assertions that Anthony Bland’s life itself was futile and the use of the now discredited Bolam test are all produced by Finnis and Keown as examples of the “ morally and intellectually misshapen law”, to borrow Keown’s phrase, which has prevailed to this day when dealing with those in various stages of PVS (1997, p. 503). Although there is force in their arguments there is also force to be found in arguing that the correct result was achieved albeit by somewhat suspect means. Dworkin’s arguments that the sanctity of life should incorporate how to end that life with pride touch a chord within society today and Finnis and Keown are wrong to dismiss him as misunderstanding the sanctity of life: a principle which even they have not yet dared articulate.

Bibliography

Books

Aristotle Nicomachean Ethics retrieved on 19th July 2011 and available from:
<http://socserv.mcmaster.ca/~econ/ugcm/3ll3/aristotle/Ethics.pdf>

Biggs, Hazel (2001) Euthanasia, death with dignity and the law Hart
Publishing: US and Canada

Brazier, Margaret & Cave, Emma (2007) Medicine, Patients and the Law (4th
ed) Penguin Books: London

Dworkin, Ronald (1994) 'Life's Dominion: An Argument about Abortion,
Euthanasia and Individual Freedom' Vintage: London

Wacks, Raymond (2009) Understanding Jurisprudence Oxford Uni Press:
Oxford & New York

Journals

Finnis, J. M (1993) 'Bland: Crossing the Rubicon?' Law Quarterly Review
109(Jul), 329-337

Heywood (2010) 2010 'R. (on the application of Purdy) v DPP: clarification
on assisted suicide' in Law Quarterly Review vol. 126 p. 5-8

Keown, John (1997) 'Resisting Moral and Intellectual Shape to the Law after
Bland' Law Quarterly Review 113(Jul), 482-503

Cases

A Hospital v SW [2007] EWHC 425 (Fam)

[https://assignbuster.com/analyse-the-legal-issues-raised-by-the-case-of-
airedale-nhd-trust-v-bland-1993/](https://assignbuster.com/analyse-the-legal-issues-raised-by-the-case-of-airedale-nhd-trust-v-bland-1993/)

Airedale NHS Trust v Bland [1993] AC 789

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

Frenchay Health Care NHS Trust v S [1994] 2 All E. R. 402

Purdy v DPP [2009] UKHL 45

Re B [1998] 1 F. L. R. 411

Re H. (Adult: Incompetent) [1998] 2 F. L. R 36.