The case of Tony Bland

Anthony David "Tony" Bland was born on 21st September 1970 and died of deliberately induced kidney failure on 3rd March 1993. He was injured in the Hillsborough disaster, named after the football stadium where 95 people died and many others were injured, as a result of thousands of fans being pushed and crushed against steel fencing, installed to prevent hooliganism.

Tony Bland suffered severe injures and he stopped breathing. His brain was deprived of oxygen, and by the time breathing was restored his upper brain had been severely damaged, leaving him in the misnamed "persistent vegetative state."[1] This is a condition of chronic wakefulness without awareness, in which the person responds in a reflex way, but not in a voluntary, purposeful way. It is frequently misdiagnosed.[2]

Tony Bland was neither dead nor dying. His brain stem still functioned; he could breathe and digest food normally. He was fed by a nasogastric tube, and evacuated by catheter and enema. Infections were treated with antibiotics.

Both his doctor, Jim Howe, and his parents wanted to stop assisted feeding and all medical treatment so that he would die. Only four months after his accident Dr Howe decided that feeding and antibiotics should be discontinued, but the Coroner advised him that directly causing Tony Bland's death might result in criminal proceedings.

Paradoxically, Howe had previously treated serious conditions in Tony Bland including pneumonia, urinary fistula and septicaemia[3] before applying to the courts for permission to stop feeding and hydrating him. Howe claims that he treated Tony Bland's serious medical problems, from which he might well have died naturally, on the advice of a barrister he consulted from the local Regional Health Authority. His motives for doing so are unclear.

Three years later the Airedale Hospital Trust made an application to the High Court, supported by an *amicus curiae*[4] instructed by the Attorney General, and opposed by the Official Solicitor, whose role was to represent Tony Bland's interests, for a declaration to the effect that:

- the Trust might lawfully discontinue all life-sustaining treatment and medical support measures, including ventilation[5], and nutrition and hydration by artificial[6] means;

---

[1] "PVS" is misnamed because, although it actually refers to "vegetative functions" such as breathing and respiration, in common parlance it is taken to mean that the individual is "like a vegetable" – an epithet that applies to no human being. No Less Human prefers the kinder, and more accurate term "Persistent Non-Responsive State."

[2] Andrews K. Murphy L, Munday R, Littlewood C Royal Hospital for Neurodisability. Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit. *BMJ* 1996; 313:13-16 (6 July)

[3] "The Persistent Vegetative State, treatment withdrawal and the Hillsborough disaster: *Airedale NHS Trust v Bland*." Dr. Jim Howe. *Practical Neurology* 6 (4):238-246 August 2006.

[4] "Friend of the Court"

[5] Tony Bland was not on a ventilator, and could breathe normally

[6] Tube feeding is assistive, not "artificial." There is nothing "artificial" about the food and fluids supplied. See "Euthanasia by omission in Australia: What the Parliament does not allow, the Courts allow" by Dr. John I. Fleming. *Bioethics Research Notes* 15 (12) June 2003

- that no medical treatment[7] need be given "except for the sole purpose of enabling Tony Bland to end his life and to die peacefully with the greatest dignity and the least distress"[8];
- if death should then occur, its cause should be attributed to the natural and other causes of his present state; and
- that none of those concerned should, as a result, be subject to any criminal or civil liability. [9]

The declarations were granted by Sir Stephen Brown, President of the Family Division of the High Court, who claimed in his summing up that "to his parents and family [Tony Bland] is dead. His spirit has left him and all that remains is the shell of his body."[10] His decision was unanimously affirmed by the Court of Appeal and the House of Lords, the UK's highest point of legal appeal.[11] Its findings and assumptions in the *Bland* case included that the whole purpose of withdrawing food, fluids and medicines was to end his life, and that this was *not* authorising euthanasia[12] and that Tony Bland's existence in PVS was not a benefit to him.[13]

Tony Bland died on 3rd March 1993 after nine days without food and water.

The courts considered that it was in his "best interests" for treatment to be withdrawn and that its discontinuance was in accordance with good medical practice.[14] This reinterpreted the traditional definition of "best interests"[15] to include seeking a non-dying patient's death by removal of life sustaining measures.

In fact, Lord Mustill argued that Tony Bland had no interest at all in being kept alive[16] and "no best interests of any kind."[17] He was later to observe that the case has left the law in a

---

[7] "The judges in *Bland* were aware that there was no medical consensus on whether tube feeding was "medical treatment" or not, but they came to regard it as "part of Tony Bland's medical treatment." This was soon corrupted to the shorthand "medical treatment" which ... carries a connotation equating it with medication, ventilation and even renal dialysis." Dr. Anthony Cole on behalf of the Medical Ethics Alliance "Medically Assisted Feeding: The Corruption of Terms and Draft Legislation" paper given at a meeting in the House of Lords 5 November 2002

[8] It had been argued that Bland could "feel nothing" so this reference to "distress" is at best incongruous.

[9] John Keown "Euthanasia, Ethics and Public Policy: An Argument Against Legalisation" University of Cambridge Press 2002. "*The Implications of the Bland Judgment*" by John Finnis. The Law Quarterly Review, Vol. 109. July 1993

[10] Sir Stephen Brown's summing up in *Airedale NHS Trust v Bland* 1993

[11] *AIredale NHS Trust v Bland* [1993] 1 ALL ER 821

[12] Euthanasia is defined very narrowly as "a deliberate intervention undertaken with the express intention of ending a life. Therefore killing with withholding or withdrawing assisted food and fluids is not euthanasia because it involves removing or withholding "medical treatment" rather than initiating lethal treatment. Letter from Simon Vinogradoff, Medico-Legal Branch, Family Policy Division, Lord Chancellor's Department to Alison Davis 29 November1999 Lord Mustill, in the Bland Law Lords decision opined that "The ethical status of the two (acts and omissions) is for all relevant purposes indistinguishable."

[13] "The Withdrawal of Medical Treatment from Patients: Fundamental Legal Issues" Donald Robertson. [1996] 70 Australian Law Journal 723 at 728

[14] This is known as the "Bolam Test" from the case of *Bolam v Friern Hospital Management Committee* [1957]1 WLR 583

[15] Preserving life, maintaining or restoring health and minimising suffering.

[16] *Airedale NHS Trust v Bland* [1993] AC789 at 898

[17] Ibid at 897

"morally and intellectually misshapen" state.[18] It is relevant to note here that "the view of the majority at least of the House of Lords, three of them, if not the other two, that th[e] sort of discontinuance [proposed] may be proper, and indeed required, even when it is decided on with precisely the intention of terminating life. [19]

Dr. Keith Andrews of the Royal Hospital for Neurodisability in London noted in this regard that "instead of considering the futility of the treatment, the burden of the treatment ... the decision for the first time considered the worthwhileness of the patient, and the burdensomeness of the patient himself."[20]

Tony Bland became the first patient in legal history to die through the withdrawal of food and fluid done with the deliberate intention of bringing about his death.[21]

Implications of the *Bland* case.

In 1999 The British Medical Association published its own guidelines[22] which extended the *Bland* ruling considerably. In *Bland* Lord Mustill hinted that he might not reach the same conclusion for deliberately causing death patients with "very slight glimmerings of awareness" while Lord Browne-Wilkinson said that Tony Bland was an "extreme case" but expressed no view on other types of patients where the chances of recovery were slight.[23]

However, the BMA guidance condones the withdrawal of tube feeding from certain non-PVS patients, stating that "the BMA can see no reason to differentiate between decisions for patients in PVS and those for patients with other serious conditions'[24] such as serious stroke or severe dementia.[25]

It also advises that since "a body of medical opinion has developed[26] on withdrawal of assisted feeding, the BMA does not think that all such decisions require legal review.[27] This left us with the incongruous position that while cases of people in "PVS" or "near PVS" would continue to require court sanction[28] those with less severe disabilities would not.

In October 2002, Dame Elizabeth Butler-Sloss, the President of the Family Division of the High Court who had by then taken over from Sir Stephen Brown found that removal of tube feeding from Ms. H, aged 36 and Mrs M, aged 49[29] did not breach their human rights. She

---

[18] Ibid at 887

[19] Finnis, J. "Legal Implications of the *Bland* judgment" given at ALERT conference following Law Lords' judgment 25 May 1993.

[20] *BMJ* [1996] Letters. Andrews, K et al Misdiagnosis of PVS. See footnote 2

[21] *Airedale NHS Trust v Bland* [1993] AC 789. Lord Browne-Wilkinson noted that "What is proposed is to adopt a course of action (sic. - simultaneously others claimed it was *not* an action but an omission) with the intention of bringing about Anthony Bland's death. The whole purpose of stopping artificial feeding is to bring about the death of Anthony Bland."

[22] Withholding or Withdrawing Life-prolonging Medical Treatment: Guidance for decision making. *BMA* 1999

[23] [1993] AC789 at 885

[24] BMA Guidance, 54 para.21.1

[25] Ibid., 56 para.21.4

[26] See Bolam [1957] See Footnote 16

[27] Ibid., 56-7 para.21.4

[28] Ibid., 58 para 22.1(b)

[29] Ms. H was regarded as being "near PVS" while Mrs. M was thought to be in PVS

held that this did not breach Article 2 of the Human Rights Act 1998, which states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally"[30] There was no breach, so it was argued, because withdrawing tube feeding was an "omission" and not an "act."[31]

In 2006 the General Medical Council also issued guidelines on withdrawing and withholding treatments[32] stating that even when death is *not* imminent it may be judged that so-called "artificial" nutrition and hydration[33]may be withdrawn or withheld if it may cause suffering or be too burdensome in relation to the possible benefits. In the case of "PVS" the guidance notes that courts in England, Wales and Northern Ireland currently require that doctors approach them for a ruling. The courts in Scotland have not specified this requirement, but following the case of Janet Johnston[34] doctors are advised to seek legal advice on whether a court declaration may be necessary in an individual case.[35] The GMC guidelines note that withholding or withdrawing treatment is regarded in law as an 'omission' not an 'act'[36] again echoing *Bland.*

The Mental Capacity Act (MCA) 2005 continues the pretence, first made in *Bland*, that assisted food and fluids are "medical treatment" that can be legitimately withdrawn or withheld from a mentally incompetent person by doctors, where that person has previously, when mentally capable, made a legally binding Advance Directives requesting removal of food and fluids if they should become incompetent.[37]

Bland affects the meaning of the MCA, and it is impossible to interpret the MCA correctly without understanding how it is affected by *Bland.* As long as *Bland* is not reversed, the MCA ensures that it is possible to continue to deny assisted food and fluids to people in "PVS" after application to the courts, which have never refused such an application. In fact a much wider range of patients without capacity are to be subjected to the same killing by "omission".[38]

The Government has made it clear that it will not reverse *Bland*[39] noting that since the courts have sanctioned "around 36 cases" of deliberate killing by withdrawing assisted food and fluids "and the Government does not disagree with it."[40] Thus as long as *Bland* remains in force, profoundly disabled people will be vulnerable to having their lives ended. This is particularly so since the MCA continues the overturn of traditional, objective concept of "best

---

[30] Human Rights Act 1998 Schedule 1 Part 1 Article 2.1.
[31] *NHS Trust A v. M; NHS Trust B v. H*. See also Footnote 14.
[32] "Withdrawing and withholding life-prolonging treatments: Good practice in decision making." *General Medical Council* 2006. Note here the presumption first made in *Bland*, that assisted food and fluids constitutes "medical treatment." See also footnote 9
[33] More properly known as "assisted nutrition and hydration" or "assisted food and fluids" See footnote 5.
[34] *Law Hospital v the Lord Advocate* [1996] SLT 848
[35] "Lecture Notes: Medical Law and Ethics" Philip Howard and James Bogle [2005] Blackwell publishing.
[36] GMC [2006] para 81. See also footnote 14.
Mental Capacity Act s.4(6)(a) – s.4(7)(a) and Code of Practice (5.34,5.37,5.42-5.44)
[38] "The Mental Capacity Act: A Disability Perspective." Alison Davis. *Catholic Medical Quarterly* August 2007
[39] Letter from Mr. David Goss, Bill Policy Officer in the Mental Ccapacity Bill legislative Division, Dept of Constitutional Affairs to the Association of Lawyers for the Defence of the Unborn. December 2004.
[40] Ibid

interests" first seen in *Bland* and replaces it with a subjective test, consideration only of the previous "wishes and feelings" of the incapacitated person.[41]

Another serious threat to the lives of the most vulnerable people has recently emerged in the "Liverpool Care Pathway for the dying patient"[42] Dr. Adrian Treloar a senior geriatrician, has said "the eligibility criteria do not ensure that only people who are about to die are allowed on to the pathway. For instance, patients with dementia, in whom dying can take years, and those who are bed-bound and unable to swallow may be eligible." He concludes "Deep Continuous Sedation (appropriate only in the last hours or at most days) may replace euthanasia."[43] [44]

Dr. John Keown notes that "the significance of *Bland* is profound ... there is little reason to expect the judgment to be confined to patients in PVS... The ramifications of the courts' adoption of an individualist and amoral understanding of autonomy may also prove profound, not least in its potentially corrosive effect on the legal prohibition of assisted suicide..."[45] And even pro-euthanasia campaigners occasionally admit this truth. Dr. Helga Kuhse once noted that direct killing by lethal injection would soon follow once withdrawal of food and fluids was allowed.[46]

What was started in *Bland* may well end in the direct killing of any sick, disabled or elderly person, on the grounds that such lives have no value. We all have reason to be very afraid.

Alison Davis
August 2009

---

[41] Alison Davis *Catholic Medical Quarterly* August 2007. See Footnote 39.

[42] A key recommendation of the National Institute for Clinical Excellence (NICE), the LCP has been developed to transfer the hospice model of care into other settings. Downloaded from http://www.mcpcil.org.uk/liverpool-care-pathway/pdfs/History

[43] "Continuous Deep Sedation." Dr. Adrian Treloar. *BMJ* Letters. 2008, 336:905(26 April)

[44] Rietjens J, van Delden J. Onwuteaka-Philipsen B, Buiting H, van der Maas P, van de Heide A. Continuous deep sedation for patients nearing death in the Netherlands; descriptive study. *BMJ* 2008 336: 810-3 12 April.

[45] Keown, J. [2002] p. 236.

[46] "If we can get people to accept the removal of all treatment and care – especially the removal of all food and fluids – they will see what a painful way this is to die and then, in the patient's best interests, they will accept the lethal injection." Dr. Helga Kuhse, then President of the World Federation of Societies for the Right to Die at their 5th Biennial Congress on the Right to Die held in Nice, France, September 1984.