'Legal Death of Brain-Damaged Persons' (letter)

LSG May 1993

There were a number of confusions in your interview with Mr Keith Blackwell, the solicitor representing the Hillsborough victim Tony Bland ('Moral maze' [1993] *Gazette*, 28 April, p 10). In particular I do not understand, speaking as a parliamentary draftsman, what Mr Blackwell's objection is to the possible setting up of what he calls 'some statutory, grey, bureaucratic system, drawn up by parliamentary draftsmen and implemented by civil servants'; or even what he means by this description.

On the question of the point at which a person who needs life support is to be treated in law as dead, the courts at present rely solely on medical opinion. Lord Goff said of Tony Bland, who was in a permanent vegetative state because his cerebral cortex but not his brain stem had been destroyed: '[He is alive] because, as a result of developments in modern medical technology . . . it has come to be accepted [by the medical profession] that death occurs when the brain, and in particular the brain stem, has been destroyed' (*Airedale NHS Trust v Bland* [1993] 1 All ER 821at 865). This means that because of medical opinion judges will not treat patients like Tony Bland as in law dead, even though legal considerations require it.

This abdication of judicial responsibility is open to criticism. It may be that for the purpose of the application of a particular legal doctrine or enactment (for example relating to homicide or the distribution of property on death) it is necessary to treat a person who, while not brain dead in the medical sense, has no chance of recovering consciousness as having died when he entered that state.

Unless the law adopts this course, a person might be convicted of murder and sentenced to life imprisonment (the mandatory penalty) because he shot in the head or stabbed through the heart a patient who, like Tony Bland, was in a permanent vegetative state. This cannot be right.

Whether such a patient should be treated as legally dead for every purpose, or for certain purposes only (and if so which) needs exploring. No doubt this will be done by the Select Committee now considering the matter.

Probably it will be found that a single cut-off point should be applied for *all* legal purposes. This is because patients who are in a permanent vegetative state are effectively dead when considered from the point of view of human life as it has hitherto been known and understood by the law.

In the light of developing medical science the courts ought to be prepared to lay down a rule that, where there is no possibility of restoring consciousness, a person 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 in *Airedale NHS Trust v Bland* (at 878). 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 brain damage.

As a corollary the courts 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

body to be treated as if it were in all respects a corpse, though of course it should be in order for those in charge of it to terminate life support.

If the courts will not take this course, then Parliament must step in. It does not require the 'bureaucratic system' feared by Mr Blackwell. In accordance with usual legal doctrine, it should be made a simple question of fact. The test would be whether medical evidence proves that a person whose body is living with support is in a permanent vegetative state. If two independent doctors are satisfied of this, and certify accordingly, that should be enough without recourse to the court.

.{*The Law Society's Gazette*, May 1993.} LSG6 1993(08)