Introductory Note by FB

The article below is a further addition to my writings on assisted suicide. Others are included within the Topic 'Suicide Act 1961'. The Topic can be found on this website at *www.francisbennion.com/topic/suicideact1961.htm*

LEGAL DEATH OF BRAIN-DAMAGED PERSONS

Evidence to the House of Lords Select Committee on Medical Ethics by Francis Bennion

Note The Committee has 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.

1. I submit the following evidence. My qualifications to do so are as follows. I have been associated with legislation since 1948, when on coming down from Balliol I worked on *Halsbury's Statutes* for a year. I entered the Parliamentary Counsel Office (where Government Bills are drafted) in 1953 and in two spells served a total of 14 years, rising to the rank of Parliamentary Counsel. In 1968 I founded the Statute Law Society, and was closely involved in the production of its first three reports on improving the legislative system. I gave oral and written evidence to the official Renton Committee on the Preparation of Legislation in 1975. I have written many articles on statute law, and two textbooks. *Statute Law* (Longman) was first published in 1980 (third edition 1990). *Statutory Interpretation* (Butterworths) was first published in 1984 (second edition 1992). In 1991 I founded the Statute Law Trust. My experience also includes practice at the Bar and a period as lecturer and tutor in jurisprudence at St Edmund Hall, Oxford. Since 1984 I have been a research associate at the University of Oxford Centre for Socio-Legal Studies and a member of the University Law Faculty. Apart from a number of legal textbooks, I have also written two books on ethics: *Professional Ethics: The Consultant Professions and their Code* (Charles Knight, 1970) and *The Sex Code: Morals for Moderns* (Weidenfeld & Nicholson, 1991).

2. Apart from the general remarks in paragraphs 3-6 below, my evidence is entirely confined to the case of persons who are in a permanent vegetative state.

General remarks

3. *Refusal to receive medical treatment* I submit that the present law under which an adult of full capacity is entitled to refuse any form of medical treatment, even where it is needed to preserve his or her life, should be preserved. Especially since the crime of suicide was abolished, this ranks as a basic human right which the law should respect. Any contrary consideration can arise only from adherence to a particular value system (whether or not religiously inspired). In our multicultural and multi-faith society it is not the business of the law to uphold by the coercive force of the state any value system of this kind unless it is generally agreed and non-controversial. The so-called sanctity of life is not generally agreed as a blanket concept. Human life is commonly agreed to be worthy of great respect, but not to be an overriding value in all cases. On some points, for example certain cases of abortion, other values are commonly agreed to override sanctity of life.

4. *Euthanasia* I support the present law against deliberate intervention to end life, whether or not the patient gives consent. Euthanasia is open to too many openings for abuse to be tolerable in a civilised society.

5. *Medical advances* I believe that the law should adopt as a guide the test of whether a person is being kept alive *unnaturally*, that is by procedures that are possible today only because of technological advances and drug development. Where a person is being kept alive unnaturally in this sense, certain 'quality of life' criteria should be admitted (by the law and medical ethics) which would not be admissible were the patient being kept alive 'naturally'. This is because new techniques may impose a quality of life on the patient which is below that resulting from 'natural' treatments.

6. Since the patient of full age and capacity has both the right and ability to choose, we are only concerned here with other patients. In such cases some person must be given the right to decide on the patient's behalf that treatment be discontinued where their quality of life falls below an acceptable level. Generally, the best person for this is the medical practitioner in charge of the patient, with a right of recourse to the court where a near relative wishes to object. Here advance wishes expressed by the patient, as by a 'living will', should be accorded respect. The person vicariously taking the decision whether or not to discontinue treatment should attempt to reach the decision which the patient would have reached had he or she been able to take it.

Persons in a permanent vegetative state

7. 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. The following main part of my evidence is concerned with a particular form of that condition which is known to medical science as 'a persistent vegetative state'. This is the form of it where, as in *Airedale NHS Trust v Bland* [1993] 2 WLR 316, through irreversible brain damage the patient has no possibility of ever recovering consciousness. I will call this form 'a permanent vegetative state', which I consider a more accurate description. The word 'persistent' does not connote permanence, and it is only where, as in the case of Anthony Bland, the vegetative state is demonstrably permanent that what I now wish to say applies. His 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 to brain cells.

8. 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 [by the medical profession] 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*.'[1]

[1] *Airedale NHS Trust v Bland* at 366-367 (emphasis added).

9. The italicised passage is saying that 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 are not the same as the medical considerations, and I submit that in law such a person should be treated as dead. Because the judges have rejected the opportunity to lay down this rule, it now falls to Parliament to do so.

10. So my submission is that, in the light of developing medical science, Parliament should now lay down a rule that, where there is no possibility of restoring consciousness, a person who through brain damage is in a 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.[2] 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'.[3]

11. 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'.[4] In my submission it is not. Lord Browne-Wilkinson contrasted 'medical' and 'legal' death.[5] However he did not dissent from the view that they should be treated 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'.[6] 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.'[7]

12. The law should recognise this difference. It should not be governed by the same test as 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 it 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

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[2] *Airedale NHS Trust v Bland* at 381. On the same page he referred to this limited form of existence as life 'in the purely physical sense'.

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

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

[5] *Airedale NHS Trust v Bland* at 381.

[6] *Airedale NHS Trust v Bland* at 350.

[7] *Ibid.*, p 355.

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.

13. As a legislative draftsman, I offer the following as the possible wording of such a Bill.

> 1. Death of brain-damaged persons
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> (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.
>
> 2. Supplemental provisions
>
> (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.
>
> (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.

14. The above would require further 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.

15. The remainder of this evidence gives further arguments in favour of these suggested provisions.

The importance of death in law

16. 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. The registration system would work under my proposed Bill, though minor consequential amendments to the 1953 Act might be required.

17. 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 dead.[8] There is no presumption as to the time during the seven years at which he died.[9] 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.

18. 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 1707, which are still in force. They apply the seven year period to beneficiaries under settlements.

[8] *Prudential Co v Edmonds* (1877) 2 App Cas 487, 509.

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

19. Another important category concerns the law of unlawful 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.)[10]

20. 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.'[11]

21. 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.

Civil death

22. 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 *civiliter 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 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.'[12]

23. 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,

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[10]Murder is further discussed towards the end of this evidence.

[11]*Airedale NHS Trust v Bland* at 381.

[12]Sir W Blackstone, 1 *Commentaries* (1765) 128-9. Emphasis in original.

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 developing 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.)

Proof of death

24. 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).

25. It is most undesirable that the system of recourse to the court envisaged by the House of Lords in *Airedale NHS Trust v Bland*, following *In re F. (Mental patient: Sterilisation*) [1990] 2 AC 1 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 this 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, 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.[13]

Murder

26. 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 guilty of murder? In *Airedale NHS Trust v Bland* Lord Browne-Wilkinson said (at 383): 'Murder consists of causing the death of another with intent to do so'. Later (also at 383) he said regarding a possible charge of murder: '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'.

27. 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.

28. 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'.[14] 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.

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[13] In *Airedale NHS Trust v Bland* at 373-374 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'.

[14] **3 Inst. 47.**

The decision in *Airedale NHS Trust v Bland*

29. 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 NHS Trust v Bland*. While the House of Lords' opinions leave the matter far from clear, I suggest that the 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.

30. 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.

31. 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 approve the killing of a patient who is not in law already dead.

3 June 1993.

1993.009