***Airedale NHS Trust v. Bland***

**Lord Smith of Erie (Stephen W Smith)**

[1] I would like to start off this judgment by expressing how difficult a task has been set before us. The facts are explained in detail above. Anthony Bland has spent the last three and a half years in a persistent vegetative state (PVS) from which he will never recover. The doctors inform us that the only still functioning part of his brain is the brain stem. Indeed, from what I understand, it is the only part of his brain which still exists. His chances of recovery are non-existent; his chances of improvement are the same. The doctors and the family are of the opinion that the best thing at this point would be to remove artificial nutrition and hydration (ANH) and other treatments from him. As a consequence, he will die. If those treatments are not removed, Anthony Bland will likely live for another five to ten years. While the doctors believe removal to be the best option available to them, they also wish not to be charged with murder for having done so. As a consequence, they seek a declaration from this Court that their decision is lawful and will not lead to criminal charges.

[2] Murder is one of the most serious crimes which can be committed and it requires that there be both an intention to kill or cause grievous bodily injury (*mens rea*) and an action which causes death (*actus reus*). There are also several defences which either eliminate or lessen the responsibility in a particular case. There are thus clear enough guidelines about what constitutes murder and what might remove responsibility for a specific death. The question before this court is whether the crime of murder is made out and, if so, whether there is a defence.

[3] The first avenue to avoiding any charge would be if Anthony Bland were already dead. Since murder requires an action which causes death, it is not possible to commit if the person in question is already dead. Unfortunately for the doctors, Anthony Bland is still alive under any medical or legal definition of death currently in use. His heart beats, his lungs take in oxygen, his brain stem continues to function. While he does not feel or think, that does not mean he is not alive. We must therefore accept that Anthony Bland, since he is alive, is capable of being killed.

[4] The second possibility is to claim that the doctors’ conduct is lawful because they only wish to stop feeding Anthony Bland and that constitutes a lawful omission rather than an action. Since it is not an action at all, it cannot be an action which causes death. Consequently, there may not be the necessary *actus reus* required for murder. I am unconvinced by this line of reasoning for two reasons. First, I will note that the distinction between actions and omissions on which this particular argument relies is a contentious one. This has been recognised in a noted article written by Professor James Rachels entitled ‘Active and Passive Euthanasia’, (1975) 292 *New England Journal of Medicine* 78-80. Rachels posits a case where we have two different individuals, both of whom attempt to kill a young relative in order to gain inheritance money. The first kills the child by drowning him in a bath. The second comes into the bathroom intending to drown the child but sees the child slip and fall into the bath. He stands by waiting in case it becomes necessary to further drown the child but this is unnecessary. Rachels argues that if we do not think that the first person is worse than the second (and he believes we will not) then we cannot hold to the distinction between actions and omissions. I find this to be a compelling argument.

[5] More importantly, the removal of ANH is simply not an omission under current definitions. An omission is the failure to do something. What the doctors wish to do in this case is to remove treatment. The removal of something is doing something. Under standard definitions [*The Shorter Oxford English Dictionary* Clarendon Press 1993) Vol I, p 21, Vol. II, p 1994], it is an action. Indeed, if an individual other than the doctors involved wished to remove the ANH from Anthony Bland, I do not believe anyone would hesitate to suggest that they have undertaken an action sufficient to satisfy the *actus reus* requirement for murder. If we hold that removing ANH is an omission if doctors do it in treating a patient in their care, but an action if someone else does it, all that we have actually done is to change the definitions of act and omission. I see no reason to do that.

[6] Indeed, it is situations such as this which go to show how false this distinction between actions and omissions really is. The truth of the situation is that the removal of ANH is a complicated process which will involve a number of things which individually are considered actions and a number of things which are individually considered omissions. To presume that there is only one kind of event involved – either action or omission – is to miss the complexity of the process. Medical treatment, perhaps especially treatment at the end of life, will often involve both actions and omissions and the maintaining of a distinction between the two is not likely to truly be beneficial to helping doctors sort their way through the ethical and legal problems that are involved in end of life care.

[7] A third possibility is to claim that while what the doctors are planning to do is an action, they should not be prosecuted because they lack the requisite *mens rea* for murder. In other words, the claim is that the doctors do not have the intention to kill Anthony Bland. Instead, they merely foresee that his death will occur as a result of the removal of ANH. It can then be likened to similar cases where death has occurred not because those involved wished someone was dead, but because the actions involved meant that death was a side effect (see *R v Adams* [1957] Crim LR 365).

[8] With all due respect to those who might present such an argument, I simply cannot see how it could work in this case. The purpose of removing ANH from Anthony Bland is so that he will die. There is no other intention that the doctors have in this particular case. If they remove ANH and Anthony Bland, through some fortuitous set of events, continues to live in the same manner in which he is now, the doctors will not necessarily be overjoyed. They will instead likely to try to find some other way to end his life. I say that not because I believe the doctors involved are evil or cruel. They are not. What they want to do in this case is to bring an end to a tragedy which has gone on for far too long. It has been difficult for the family and the healthcare team. It may not be difficult for Anthony Bland himself but it is hard to believe he would have wanted this had he given an opinion. The doctors, then, are not sadistic for wanting him to die, but they do want him to die just the same.

[9] To summarise then, there is the requisite intention to kill Anthony Bland and a sufficient *actus reus* to constitute a charge of murder. If that was all that was required, I would unfortunately have to conclude that the doctors should be charged with murder if they remove ANH from Anthony Bland and, as a consequence, Anthony should continue to exist in PVS until he dies from some other cause in five to ten years’ time. However, I believe that a deeper look provides a way through the ethical and legal tangles that this case creates.

[10] We can begin by looking further at intention. As I stated above, the doctors involved in the treatment of Anthony Bland do intend to kill him. In that way, they are no different than anyone else who might be charged with murder. However, there is an important difference between this case and an ‘ordinary’ murder. In the case of ‘ordinary’ murder, the individual in question not only means to kill or cause grievous bodily injury to someone but does so with an intention to disadvantage the person killed. In other words, in addition to intending to kill or cause grievous bodily injury to the victim, a standard murder case involves an intention to *harm* the victim. Since this harm is the result of the death of the victim, the intentions are collapsed together and the intention to harm forms part of the intention to kill.

[11] This case is different. While the doctors intend to kill Anthony Bland, they do not intend to harm him. There are two reasons for this. First, it is a debatable point regarding whether Anthony Bland can be harmed at all. Considering he has no higher brain functions and thus cannot think or feel, we might question whether or not anything we do to him can actually constitute harm to him.

[12] My own view, however, is that it *is* possible to harm Anthony Bland. If, for example, the healthcare team used him as a living ‘surgery doll’ for junior doctors to train on, we would find those actions to be degrading, even if the only person other than the healthcare team present was Anthony Bland. We would see them as being a setback of interests that Anthony Bland has, even in his current state, to dignity. This, according to the generally accepted conception of harm provided by Professor Joel Feinberg [*Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press 1984) vol. I], is harm to him. So, even if there is no other victim in such a scenario, we would find that Anthony Bland himself had been harmed in some way by being used as a ‘thing’.

[13] Merely because it is possible to cause harm to Anthony Bland, however, does not mean the doctors intend to do so. They argue that what they propose to do is not harmful to him. They argue – and Anthony Bland’s family agrees – that he would not have wanted to continue to exist in this state with no cognitive abilities and no prospect of recovery or improvement. They argue that he would not have wanted to cause distress to his family in the way in which his continued existence in PVS does. In short, they believe that if Anthony Bland was to be able to express an opinion, he himself would want the ANH removed.

[14] What the doctors are claiming, then, is that Anthony Bland will not be harmed by being killed. Instead they argue that his death is, in fact, beneficial to him, and that their responsibilities and duties as doctors require them to act in the benefit of the patient. While that most often will require that doctors attempt to keep patients alive, in this case the duty to act for his benefit (what philosophers call “beneficence”) means that they ought to remove treatment and allow him to die. This belief must be reasonable but, as long as it is, these treatment decisions are justified under the duties that doctors have. In that way, then, this is a unique case because the intention to kill does not include the intention to harm.

[15] This, therefore, provides a distinguishing factor between this case and other cases of murder. The question we must then ask is whether the law of England and Wales allows such a distinction to be a basis for decisions. One possibility is to use the concept of ‘malice’ which had been a basis for the law of murder for a significant period of time. However, after *R. v. Maloney*, [1985] AC 905, [1985] 1 All ER 1025, it would be unlikely that the use of malice in this way is consistent with the law of England and Wales.

[16] Such a concept does find use, however, in other jurisdictions. US States sometimes use malice to distinguish between first and second-degree cases of murder. Additionally, German Law has an additional element called *Schuldprinzip*, which provides an element of blameworthiness.[[1]](#footnote-1) In German law, in addition to proving the intention to kill, the State must also prove the additional element of wrongdoing.

[17] The law of England and Wales has never expressly accepted this concept within the law of murder. There are, however, cases within the law of England and Wales which provide grounding for the use of such a principle. These are previous medical cases where doctors were allowed to claim a defence on the basis that their actions were consistent with standard medical practice at the time. This includes, among others, the two cases of *R v Adams* [1957] Crim LR 365, and *R v Arthur* (1981) BMLR 1.

[18] In *Adams*, the doctor in question was allowed to argue a defence of double effect. Dr Adams argued that he provided the four injections of a drug combination in an attempt to deal with his patient’s pain. This defence was presented to the jury and the judge, Devlin J, as he then was, informed the jury that if Dr Adams’ intention was to deal with his patient’s pain, then he did not intend to kill her and he did not have the requisite *mens rea* for murder. While this case turns primarily on the question of whether there was an intention to kill at all, the underlying argument does rely, at least in part, on notions of the intention to cause harm.

[19] More important is the case of *Arthur*. In that case, a consultant pediatrician delivered a baby named John Pearson who was born with indications of Down syndrome. The parents rejected the child and Dr Arthur wrote ‘Parents do not want child to survive. Nursing care only.’ According to testimony by the nurses at trial, ‘nursing care’ meant the child was to be cleaned, kept warm and given food if he cried for it. The child died 69 hours later. At trial, Dr Arthur did not dispute any of the facts of the case. Instead, he presented expert witnesses who stated that they would have done exactly the same as Dr Arthur did in exactly the same circumstances. The jury was instructed that if Dr Arthur had merely provided what was standard medical treatment under the circumstances, then he did not have the requisite intention to kill and thus could not be convicted of murder. Like Dr Adams, Dr Arthur was acquitted of the charges.

[20] While neither of these cases makes any specific mention of the intention to harm, we can nevertheless use harm to explain how the actions involved in both cases are not blameworthy. In both cases, the doctors on trial provided reasons why they did not have the necessary intention and those reasons relied on what was considered proper medical treatment for their patient under the circumstances. Proper medical treatment must be for the benefit of the patient and must be something which does not constitute harm under the circumstances. Moreover, these cases appear specific to those within the medical profession. Other defendants who were not doctors would not have been able to rely on these claims in defence of a murder charge. If, for example, Dr Adams’ patient had received the injections from one of her children, they would not be able to rely on the pain-relieving aspect to justify their actions. These cases articulate, then, an idea that actions in question need to be more than intentional. They need to be ones for which harm is intended in addition to whatever actions are performed. If the requisite intention to harm is not present in addition to the intention to perform an action which brings about death, then what was done was not blameworthy.

[21] Consequently, we can articulate that, under certain specified circumstances, doctors might engage in actions which bring about the death of the patient in their care provided that they lack the necessary intention to *harm*. This intention to harm is different from the intention to kill. A doctor may therefore intend that the patient die as a result of the actions but only if the actions contemplated are done for reasons of beneficence. Such a rule is consistent with previous case law such as *Adams* and *Arthur* and with ethical principles about harm and doctors’ responsibilities to patients to act to their benefit.

[22] There is, of course, the possibility that the rule in question could be abused and it will therefore be necessary for it to be properly limited to avoid instances of abuse. In particular, it will be necessary to ensure that the treatment decisions doctors wish to perform in this and similar cases are ones in which the requisite intention to harm is not present. Furthermore, it will be necessary to ensure that the decisions of doctors are reasonable and consistent with their ethical and legal duties. This can be accomplished by the requirement suggested by the courts below. In all of these cases, a declaration from the court would be necessary before such conduct was lawful.

[23] It only falls to me to apply this rule to the case at hand. In this case, the removal is considered to be acceptable medical treatment under the circumstances. None of the expert witnesses objected to the proposed withdrawal of ANH in this case. Moreover, while Anthony Bland has not consented to the removal, his family has indicated that they agree with the treatment decision. Consequently, the doctors may withdraw the ANH from Anthony Bland.

[24] In conclusion, the appeal of the Official Solicitor is DISMISSED. The declaration sought by the doctor will be GRANTED.

1. Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) pp. 20-22. [↑](#footnote-ref-1)