also difficult to reconcile with modern ideas of children's rights, the more so at a time when human rights (which clearly extend to children) are under the spotlight. Doubtless the Court was correct in its view that the conclusion reached in this case would be unlikely to be affected by implementation of the Human Rights Act 1998 or by anything the Court in Strasbourg might or might not do. But there is also a *moral* dimension to human rights which surely requires us to continue to ask difficult and uncomfortable questions on behalf of vulnerable, in this case helpless, children. Would it really have been consistent with the human rights of Jodie for nature to be allowed to take its course solely because, hypothetically, the hospital happened to be in agreement with the parents? This is not a new problem for the law. It came to prominence a quarter of a century ago in *Re D (A Minor) (Wardship: Sterilisation)* [1976] Fam. 185 when only the chance intervention of an educational psychologist prevented, in wardship proceedings, an 11-year-old girl from undergoing the sterilisation operation favoured by her mother. Nor, sadly, is it an uncommon, let alone rare, dilemma. What, if anything can the law do about it and is it indeed at all the concern of the law that children be treated equally in like situations? If this is a requirement of a true commitment to the (human) rights of children, further thought perhaps needs to be given to the introduction of mandatory judicial procedures which might operate in a limited category of grave cases and which would *require* the medical authorities concerned to bring the matter before the courts.

ANDREW BAINHAM

DEHYDRATION AND HUMAN RIGHTS

IN *NHS Trust* v. *Bland* [1993] A.C. 789 the House of Lords held it lawful for a doctor to withdraw tube-delivered food and fluids from his patient in persistent vegetative state (pvs) even though this would cause death by dehydration. The most controversial aspect of the case was the further ruling by three of their Lordships that it was lawful even though the doctor's purpose was not merely to withdraw what he regarded as a futile "medical treatment" but was precisely to kill the patient. As one of their Lordships, Lord Mustill, rightly recognised (even though he thought withdrawal ethically justifiable), this ruling left the law "morally and intellectually misshapen", prohibiting intentional killing by an act but permitting intentional killing by omission.

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In *NHS Trust A* v. *M; NHS Trust B* v. *H* [2000] All E.R. (D) 1522 the question before Butler-Sloss P. was whether the withdrawal of tube-delivered food and fluids from two patients in pvs would breach the European Convention on Human Rights. Mrs. M, aged 49, was in pvs as a result of a cardio-respiratory arrest during surgery in September 1997. Mrs. H had been in pvs probably since January 2000 and her tube had become blocked. The diagnoses were not disputed by counsel for the Official Solicitor who represented both patients, Mr. Emmerson Q.C. Nor did he oppose the application by the two hospital trusts for declarations that it would be lawful to discontinue artificial nutrition and hydration.

The judge observed that since the implementation of the European Convention, the principles laid down by *Bland*, by which she was no longer bound, fell to be reconsidered, principally in the light of Article 2, but also of Articles 3 and 8. She adopted three key questions set out by Mr. Emmerson in his submission.

First, was a patient in pvs alive? She concluded that the answer was clearly affirmative.

Secondly, did the withdrawal of artificial nutrition and hydration constitute an "intentional deprivation of life" within Article 2(1)? Her Ladyship noted that in *Re A (Children)* [2000] 4 All E.R. 961 Robert Walker L.J. adjudged that the word "intentionally" in Article 2 was to be given its ordinary and natural meaning. She was persuaded by the majority in *Bland* that the doctor's intention or purpose in withdrawing tube-feeding from a patient in pvs was indeed to bring about the patient's death. However, she ruled, such withdrawal did not amount to an intentional "deprivation" of life since this required a deliberate act as opposed to an omission. The death of the patient would be a result of the illness or injury and that could not be described as a deprivation. The analysis of the issues by the House of Lords in *Bland* was, she concluded, entirely in accordance with Article 2 and withdrawal would not infringe the negative obligation to refrain from taking life intentionally. An omission to provide medical treatment would only be incompatible with that Article where there was a positive obligation to take steps to prolong life.

Thirdly, if withdrawal did not constitute an intentional deprivation of life, were the circumstances such that the Article imposed a positive obligation to provide life-sustaining treatment?

Article 2 did contain a positive obligation to take adequate and appropriate steps to safeguard life, and the standard laid down by the European Court of Human Rights in *Osman* v. *United Kingdom* (1997) 29 E.H.R.R. 245 was similar to the *Bolam* test for negligence

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in English law. Consequently, in a case where a responsible clinical decision was made to withhold treatment on the ground that it was not in the patient's best interests, and that decision was made in accordance with a "respectable body of medical opinion", the State's positive obligation was discharged. Indeed, since the High Court reviewed and could reject the medical opinion as to best interests in pvs cases, domestic law imposed a higher test than that set by the European Court.

On the assumption that Article 3 required to be considered, the judge stated that withdrawal of tube-feeding would be for a benign purpose in accordance with the best interests of both patients. Moreover, she ruled that the Article required the victim to be aware of the inhuman or degrading treatment he or she was experiencing or at least to be in a state of physical or mental suffering, and that the Article did not therefore apply to the instant cases.

Similarly, there would be no breach of Article 8 which, she said, protected "the right to personal autonomy, otherwise described as the right to physical and bodily integrity". In seeking to determine the scope of the positive obligation under Article 2, she ruled, assistance could be derived from Article 8. She felt it unnecessary to decide whether the wishes and feelings of families formed part of the patient's right to respect for family life, adding that if they were relevant they could not outweigh any positive obligation to preserve the patient's life, and doubted whether families had rights under Article 8 separate from those of the patient.

The judge's view that "intentionally" in Article 2 should be given its ordinary meaning is welcome and avoids the domestic law's artificial and confusing conflation of intention and foresight. However, her ruling that intentional "deprivation" of life requires an act rather than an omission is an incoherent interpretation of the unambiguous words of Article 2 which seriously undermines its scope. Her ruling is all the more remarkable in the light of the European Court's view that Article 2 is one of the most fundamental provisions and must be strictly construed.

Her ruling that Article 3 requires the victim to be aware or suffering is equally unpersuasive. Why is it not inhuman or degrading for a doctor to subject an insensate patient to a lingering death from dehydration if the doctor does so to end a life he considers no longer worthwhile? The judge said that in the instant cases the purpose was "benign", but was not the purpose, in her judgement, precisely to kill?

Further, she confused autonomy (which patients in pvs do not have) with the right to bodily integrity (which they do), and her

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view that the cause of death would be the pre-existing illness or injury, rather than dehydration, begs the question. Not only may patients in pvs live for many years if provided with food and fluids but, as Lord Mustill recognised in *Bland*, the doctor's withdrawal of treatment is in law a cause of death, at any rate if it is unlawful.

It is regrettable that counsel for the Official Solicitor did not articulate and defend the principle of the inviolability of life, on which English law and Article 2 are historically based, a principle which has no truck with the incoherent distinction between intentional killing by an act and intentional killing by omission. Nor does he appear to have advanced the argument that tube-feeding is basic care rather than "medical treatment".

In short, an ideal opportunity to restore the law's moral and intellectual shape has been sadly missed.

JOHN KEOWN

SLOW PROGRESS IN STRIKING OUT DILATORY LITIGANTS: "NO SECOND BITE AT THE CHERRY"

FOR many years the problem of delay has plagued English civil proceedings. The main instrument used to counter it has been the power to strike out claims on the basis of "want of prosecution" (*Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, C.A.; *Birkett* v. *James* [1978] A.C. 297, H.L.). But, notoriously, this doctrine long ago lost its snap. Now the Court of Appeal in *Securum Finance Ltd.* v. *Ashton* [2000] 3 W.L.R. 1400 has sharpened the doctrine's bite, or at least lengthened its leash, by deciding that this power of dismissal extends to claims which are not yet statute barred.

The present case has twice proceeded to the Court of Appeal, on the first occasion as *Arbuthnot Latham Bank Ltd.* v. *Trafalgar Holdings Ltd.* [1998] 1 W.L.R. 1426. These are the main facts underlying both decisions. Arbuthnot lent money to Trafalgar. The Ashtons guaranteed the loan and, to support the guarantee, they provided a mortgage in favour of Arbuthnot over their Essex home. In the first action Arbuthnot sought repayment of the debt and made claims against the debtor and the guarantors. That action was struck out because of the claimant's excessive delay. Chadwick L.J. in the *Securum* case (at para. 51) confirmed that the basis of the striking out in the *Arbuthnot* case had been "limb 2" of the *Birkett* v. *James* rules, *viz.*:

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