



Obligation and Hope

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Review

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The WA Supreme Court (in August 2009)¹ ruling on whether Brightwater, the organisation caring for quadriplegic Christian Rossiter, could accede to Mr Rossiter's wish to refuse nutrition will no doubt be considered a landmark. That it may be, but we should not see it as a landmark decision that decides on a question of euthanasia or a so-called right to die. The decision upholds the general (and generally accepted) principle that a person with the (legal) capacity to make a decision can decide not to have a medical procedure. In this case the medical procedure is one that allows Mr Rossiter to be fed via a percutaneous endoscopic gastrostomy (PEG) tube.

Martin CJ emphasised in his judgement that this

“is not about euthanasia. Nor is it about physicians providing lethal treatments to patient who wish to die. Nor is it about the right to life or even the right to death. Nor is the court asked to determine which course of action is in the best interests of a medical patient. The only issue which arises for determination in this case concerns the legal obligations under Western Australian law of a medical service provider which has assumed responsibility for the care of a mentally-competent patient what that patient clearly and unequivocally stipulates that he does not wish to continue to receive medical services which, if discontinued, will inevitably lead to his death.”²

The decision, however, has a two effects – affirming the legal principle; and allowing a person to choose to die while in care that in normal circumstances would keep the person alive.

Already a number of concepts have been introduced that would benefit from clarification, if not close discussion. But before I go on I would like to apologise to Mr Rossiter for using his name and situation so as to make a general case about obligations. A part of his personal story is in the public domain and I might therefore claim a right of sorts to use it, but I have not spoken with him and he has not consented to the use I propose to make of his story. I have, however, sent him a draft of this paper. In focusing on issues Mr Rossiter's case raises there will almost certainly be no benefit to Mr Rossiter himself, but I hope that I can contribute, even minimally, to a better understanding of some of the issues involved.

Despite the inevitability of Mr Rossiter's death should he refuse the treatment that will feed him, in legal terms the WA Supreme Court's decision is not about a supposed right to die. However most of the public will likely interpret the decision in this light. And in doing so they may focus on rights to the exclusion of obligations, which would be a grave mistake. Members of a society accept that each member has some rights and some duties. These rights and duties or obligations generally occur together, but how this happens is not a simple matter. When rights and obligations do occur together, one does not cause the other; the one is the necessary flip side of the other and there is a reciprocal relationship between them. But rights and duties (or obligations) are reciprocal in two senses³.

Firstly, each adult member of a society has both rights and duties. She or he gets the benefits of having the rights, but also has the burden of associated duties. If the duties are not fulfilled then certain rights may be removed. Take killing, for example. In the normal course of my living in a society I have a duty not to kill another human. If I do so and am found guilty at law (e.g. of unlawful killing) then I am likely to have my right to freedom removed and I will be put in jail. This, in broad terms, is the situation which Brightwater sought to clarify with its Supreme Court case so that the organization, and the nurses caring for Mr Rossiter, could not be considered to have killed him. This also raises the thorny moral question of whether there is a difference between killing a person and letting a person die, but I don't propose to pursue that line further here.

Secondly, each adult member of society is connected to every other member of the society through a network of rights and duties. Each member of a society has a right that other members fulfil their duties. Each member has a duty

¹ Supreme Court of Western Australia, in the matter of Brightwater Care Group v Rossiter, CIV 2406 of 2009, and the case of Rossiter v Brightwater Care Group, CIV 2436 of 2009. <http://www.supremecourt.wa.gov.au/publications/pdf/DraftJudgment.pdf>

²<http://www.supremecourt.wa.gov.au/publications/pdf/DraftJudgment.pdf>

³ Duties and obligations are not identical, but for the purposes here they will be conflated. I hope that in doing so there is greater clarity about the issues here rather than a degree of obfuscation.



to each other member, and each other member has a right that that duty be fulfilled. Now that Mr Rossiter's right to refuse a medical treatment has been affirmed, there is a corresponding obligation on his carers to attend to this right when he chooses to assert it.

These two senses of the reciprocity involved in rights and obligations might sound complex, but they are part of the normal contractual arrangements for members of a society.

However, if we focus on someone's claimed right to the exclusion of our duties or obligations – of whatever sort – we are always, in a sense, reacting. In cricketing terms, we go on the back foot, on the defensive. If, on the other hand we focus on our obligations we move into a more proactive regime in which we as moral operators take the lead. This is not to say that in accepting my obligations I do not expect some rights in return, but it is to say that by starting with obligations we enter a different dynamic.

Rights and obligations are complex in themselves and also share a complex relationship. The following points are far from an exhaustive coverage but they may give some sense of the complexity of rights:

Rights

Rights are a contentious areas of both philosophy and the law.

A right is, roughly, an entitlement that constrains behaviour. That is, my right constrains others' behaviour toward me. If I have a right (or entitlement) to X then you have a corresponding obligation to behave toward me in a certain way. You have a choice whether to meet the obligation or not. As we have just seen, rights and obligations are in a sense pair-bonded and in practice we generally can't separate them, but for the purpose of clarification, it will pay to deal with rights by themselves.

- **Normative force.** Rights have normative force in that they guide us in how to behave, how to value certain things, and how to determine good actions from bad and right actions from wrong.
- **Inalienable.** Moral rights are generally thought to be inalienable: that is, they cannot be traded or given away. If I waive my right I am not saying I do not have the right, merely that I will not exercise it.
- **A claim to have a right can conflict with other claims to having a right.** E.g. A miner's claimed right to extract minerals may conflict with an indigenous group's claimed cultural rights to protect ancient rock art. Rights are putative until they are resolved or settled. Once they are settled and agreed on, conflicts are resolved. However, in practice, if rights are the only item in your ethics toolkit you will always be dealing with conflict.
- **Moral v. legal rights.** The paradigms of moral rights and legal rights are not aligned e.g. I may have legal rights that infringe or otherwise impact on others' moral rights and vice versa. Also, types of rights may

be incommensurable so that getting legal redress for infringement of some moral rights may not be possible and the allocation of some legal rights to one group may infringe the moral rights of another. The legal rights of miners in come to mind here: their right to mine, granted by a court, can override claimed rights of landowners.

- **Rights may be implied or stated.** Some rights may be presumed as a consequence of belonging to a group or they may be granted explicitly (such as legal rights). Some rights are commonly considered natural rights: we have them simply because we are human. But the area of natural rights is itself contentious, with philosophers divided on whether there are such things as natural rights. Those who argue against natural rights will often claim that morality has no need of the hypothesis that there are such rights.
- **Absolute rights.** There are also claims that certain rights are absolute. A right to life is a prime example. But an absolute right to life may conflict with another right that may be claimed to be absolute: the right to use all necessary means to defend one's own life.
- **Rights involve reciprocal relationships.** As discussed earlier, there are two main senses in which the reciprocal relationship operates. There are also two main schools of thought on the relationship between rights and obligations:
 - my right exists because you have an obligation (which is called the control theory);
 - or your obligation exists because of my right (the interests theory).
- **Rights may be active or passive.**
 - An *active* right takes the form: 'A' has the right to Θ (where Θ is an active verb). Someone with this type of right can freely choose to perform certain actions. E.g. A football coach (A) has an active right to move (Θ) players to and from his bench.
 - A *passive* right takes the form: 'A' has the right that $P\Theta$. A person with a passive right should be free from having certain actions done to them. E.g. a University academic (A) has a passive right that the University (P) not fire (Θ) her for publishing unpopular views.
- **Rights may be negative or positive.** That is, there is the (negative) right to be left alone and the (positive) right to get help when you need it. These are sometimes classified as
 - liberty rights (which are negative rights) and
 - welfare rights (which are positive).
 If I have a liberty right to eat ice cream, the obligation on others is to leave me alone to get on with it. If I have a welfare right to breathe, say, the obligation on others is to help me to breathe.
- **Rights have complex structures.** Following the work of Hohfeld (1919) they can be seen to comprise four 'incidents': the **privilege**, the **claim**, the **power** and the **immunity**.



- I have a **privilege** to do 'x' if I have no duty to [do] 'x'. I might, for example, exercise the privilege to attend my local primary school to assist with children's reading even though I don't have children attending the school.
- I have a **claim** that P does 'q' if and only if P has a duty to me to do 'q'. I have entered into a contractual arrangement to work for a university. The university has a duty to pay me for my work and I have a claim on the university in this regard.
- I have a **power** if and only if I have the ability to change my or another's 'incidents'. I have a limited power to change the contractual arrangement between myself and the university: in effect, I can terminate the contract – subject to certain conditions.
- I have **immunity** if and only if P does not have the ability to alter my 'incidents'. I have a limited immunity against certain actions by the university in regard to the contract.
- **It is also important to note that one may have a right to do wrong.** The right to academic free speech, for example, is a right to do (some form of) wrong. I have the right to speak even if some of what I say has the capacity to cause harm.

Whatever we may think about the rights of people such as Mr Rossiter, his request actually goes to the heart of the question of what our obligations are to people in our community and is an issue that cannot be fully addressed in legal terms. An obligation is something that binds us to behave in some way (it shares a common root with the word 'ligature'). Being bound does not, however, imply lack of choice.

We have obligations to others – and possibly to ourselves⁴. We are bound, that is we are under some moral or legal pressure, to act in certain ways to certain things or groups of things. The things to which we are bound to act in certain ways includes but is not limited to, people. For example, we are bound to act in certain ways toward animals such as pets and public goods such as street signs and clean air.

One approach to obligation is based on the value – this may be seen in terms of intrinsic value – that people have in and of themselves. In this view, our obligation to other people comes from the value that they have in and of themselves. That is, people have a non-instrumental value, a value that is beyond that which they may have for any particular purpose. In fact to use a person merely for some instrumental purpose is to disrespect their very humanity. This is part of a Kantian moral approach that I won't go further with here.

Another approach which recognises value in humans is one in which we come under an obligation simply in coming face to face with a person. The primary obligation

at the point when we face someone, is to ask: how can I help you? If we disregard genuine answers to that question and continue to give only what we want to or are comfortable with we move into a paternalistic charity, avoid the tough decisions and fail to value fully life in all its complexity. Of course we should not merely accede to someone's wish otherwise we may end up helping someone commit a wrong, such as would happen if someone asked for help in a robbery. That is, our obligation is still to ask: how can I help you? But we do need to make *wise* decisions on what to do.

In medical ethics the major operating principles are respect for autonomy, not causing harm, attempting to bring a benefit and justice. If we are truly to respect the autonomy (literally self-governance or self-determination) of people such as Mr Rossiter we will attend very carefully to their honest, and rationally-considered wishes. We might well readily accede to someone's claim right to be left alone, but Mr Rossiter wants not merely to be left alone, he wants some assistance such as pain relief so that should he choose to refuse food he can be free enough of pain and aware enough of his surroundings to do such things as watch and enjoy television for as long as he can.⁵ This assistance is crucially important as it necessarily involves others and places a burden on them. Here we should note, also, that the assistance is required not only of Brightwater, the legal entity charged with his care, but of individual professionals on a daily, if not hourly, basis. This presents an extra dimension to the problem because the principles underpinning medical ethics – which grew out of research ethics – do not transfer directly or unproblematically to *the professions*. That is part of an argument made elsewhere⁶ and not to be pursued here, except to note that the ethics of the relationship between professional carer and patient are not straightforward. The professional relationship between carer and cared-for is not fully explained by the standard principles of medical ethics. For a start, the focus

⁵ Martin CJ noted in his judgement on the two cases brought that there was a subsidiary question that focused on the legality of Mr Rossiter's doctors prescribing analgesics "for the purposes of sedation and pain relief as he approaches death" and that this "subsidiary issue seems... to raise more complex questions than the primary questions..." The decisions in the case turned on sections of the Western Australian Criminal Code, particularly Sections 262 and 259. On the subsidiary issue Martin CJ found "Dr Benstead's rights and obligations or the right of any other medical practitioner treating Mr Rossiter with respect to the provision of palliative care if and when Mr Rossiter directs Brightwater to discontinue the provision of nutrition and hydration are no different to the obligations which attend the treatment of any other patient who may be approaching death. Even more specifically, in my view there is no reason why section 259(1) would not apply to the provision of palliative care to Mr Rossiter even though the occasion for the provision of that palliative care might come about as a consequence of Mr Rossiter's informed decision to discontinue the treatment necessary to sustain his life. ... "It seems to me, therefore, that I should not grant any specific declaratory relief in relation to those issues other than to declare that any person providing palliative care to Mr Rossiter on the terms specified in subsection (1) of section 259 would not be criminally responsible for providing that care notwithstanding that the occasion for its provision arises from Mr Rossiter's informed decision to discontinue the treatment necessary to sustain his life."

⁶ Millett, S and Tapper, A. (2009). "Autonomy and trust in professional ethics". Submitted to *Australasian Journal of Professional and Applied Ethics*, August.

⁴ The notion of obligations to self is, however, contentious



on justice conflicts with care, as shown by the differences between Lawrence Kohlberg and Carol Gilligan.

People such as Mr Rossiter wish to limit their suffering. They may do so with good palliative care, but this is unlikely to address all aspects of their suffering. Suffering itself is another complex issue and one that is very hard to pin down with any precision. For example:

- Can suffering be explained in terms of “pain”? No, pain has a location whereas suffering doesn’t.
- Can we differentiate between degrees of suffering?
- Are there qualitative differences between experiences of suffering?

And so on.

Suffering may include an element of hopelessness or despair and as I discuss shortly, hope may have an important role to play in limiting suffering.

If we are honest with ourselves we will understand that extending life for its own sake may be also to extend suffering and may cause avoidable harms. Despite support for such a position in some religions, choosing a life of great suffering over a pain-free death does not seem, to a great many people, to be a rational choice. It may be a choice that a person of faith can make, and faith itself can play a part in reducing suffering. But what of those for whom faith is not in the picture at all or is not adequate? A faith-based position may bring hope and thereby reduce suffering, but only for those who have faith.

Here we need to remind ourselves that freedom from pain and suffering is not the same as freedom from harm. Harm is damage to our interests. We need not be conscious of harm for harm to be done to us – we need only look at the harms caused by passive smoking, fetal alcohol syndrome, asbestos, environmental lead pollution, and so on to see that harm can be done to us without us knowing it.

These distinctions between pain, suffering and harm are important and their import goes far beyond mere semantics.

Mr Rossiter may choose to die and now, as a result of the Supreme Court ruling, neither his nurses nor Brightwater will be held legally responsible for his death. And if his nurses accede to his wish not to be fed (or meet their obligations to him in this regard) they will not have harmed him. Death is not necessarily a harm.

It is a measure of our humanity and of our regard for others how we deal with death. It is also a measure of our humanity how we deal with pain, harm and suffering. What would it mean to bring a benefit to people like Mr Rossiter? We are obliged to ask that question and obliged to think very carefully about responses to it no matter how the answers make us feel.

It is not the only moral issue, but a key element in a case such as Mr Rossiter’s is finding an answer to the question of what it means to care *for* him. We might all care *about* Mr Rossiter and feel vicarious pain at his suffering, but it is only when we get up close and personal that we can really appreciate the very human pain and suffering and the very human frustration of people such as Mr Rossiter. Caring *for* him will involve limiting his pain and avoiding harm. But it also, crucially, involves limiting his suffering.

Could you look him in the eye and tell him that you, personally, were not prepared to give him what *he* believes is good for him? Is it enough to be free of pain? What about hope? What hope does someone in Mr Rossiter’s position have? A hope is not a mere wish. Mr Rossiter can wish that he were no longer a quadriplegic, but, unfortunately (given the present state of medicine) he cannot hope to be cured.

Obligation to optimize hope

We all have obligations to other people, and one of the more fundamental obligations in cases such as Mr Rossiter’s is to optimize hope, but not just any hope, and certainly not false hope. We should try to optimize what University of Kentucky philosopher John Nolt calls *satisfiable* hopes.⁷ He says

“Hope is an intentional attitude of a person toward a state of affairs, which we may call its **object-state**....To **hope** for a state of affairs is to value it (regard it as good and desire it) and think it possible...some hopes are satisfiable and some are not. A person’s hope is **satisfiable** ... if its object-state is possible and her assessment of its goodness and duration are not greatly exaggerated or otherwise misconceived⁸

Nolt notes that if there is no hope we are in a state of **despair**, which is a form of **suffering**.⁹

What the WA Supreme Court has done is uphold the general principle that we can refuse a medical procedure. One of the effects of this is that Mr Rossiter may choose to die, but another signally important effect of the decision is that he, and others in similar situations, have been given the **satisfiable hope** of ending their current state of suffering.

In the case of people such as Mr Rossiter where there had been no hope of ending suffering, there is now hope. And, we should note, the mere presence of hope itself limits suffering. It may have been a by-product of the Chief Justice’s ruling on the law but through this case the community will be able more effectively to act on our

“individual and collective duty ... to prevent or relieve despair, insofar as is reasonably possible and consistent with other obligations, by maintaining or increasing the magnitude of aggregate *satisfiable* hope.”¹⁰

⁷Nolt, J. (2009). “Hope, Self-Transcendence and the Justification of Environmental Ethics,” *Inquiry*, forthcoming.

⁸ Nolt, J. “Hope,”

⁹ Nolt, J. “Hope,”

¹⁰ Nolt, J. “Hope,”



Some are likely to argue that the court decision puts us on a slippery slope to various forms of euthanasia. I don't wish to argue that point here, but want to close with the observation that Mr Rossiter, through the agency of the court, has been given hope. He has, at last, the *satisfiable* hope of being able to *choose* and we, the community, are more able to fulfil our obligation to optimize hope and thereby reduce suffering for him, and people in like situations.

A paradoxical result may be that now people such as Mr Rossiter have had their right to refuse treatment affirmed, they may be less inclined to assert that right because the little bit of hope may have eased their suffering enough.

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CONFLICTS OF INTEREST

None