

Chapter 1

Introduction

Abstract This chapter introduces the themes we explore in the book. When a person is unable to make a decision for herself others need to make the decision on her behalf. This is typically done based on an assessment of what is in that person's best interests, or what will best promote her welfare. This, we argue, entails an understanding of the Good Life. We argue that the Good Life, properly understood, does not consist in the selfish pursuit of one's own happiness, but is characterised by altruism, virtue and good relationships.

Keywords Best interests • Welfare • Well-being • Capacity • Virtue • Altruism

Facts matter. However learned a judge may be, unless she makes the right findings of fact, her judgment is unlikely to be right.

Similarly, unless the substantive law makes correct factual assumptions about its subjects, it is unlikely to be satisfactory.

The subjects of the substantive law are human beings. The idea of law is intrinsically offensive: laws compel us to do things, or not to do things, or to do or not do things in particular ways. Any law takes a good deal of justifying. The justification can only be that it improves the lives of its subjects: in short, that it tends to maximise human flourishing.

Implicit in every law, therefore, is the assumption that it maximises human flourishing. And implicit in that assumption (but rarely discussed), is a view of what human beings are—and hence what is good for them. Anthropology precedes jurisprudence. Or it should.

Our contention in this book is that the dominant anthropology of law-makers (both legislators and judges) is wrong. Law-makers have adopted uncritically the pastiche of human nature which dominates the thinking of unnuanced free-market capitalism. Humans, according to this account, are selfish atomistic entities: like billiard balls wearing City suits. Such humans have no difficulty identifying themselves. 'I am John Smith', one of them will say, and will wholly fail to understand that many questions are begged by that formulation. Nor will they have any difficulty identifying their desires: 'I want to accumulate wealth, and die before getting Alzheimer's disease'. When they talk about who they are and what they

want, there will be no mention of any other people. They owe nothing to anybody. They came from nowhere, are entirely self-made and have no dependents. No one will weep when they die, and nor should they.

We have not met anyone like this. This is not just because we live a cloistered life in Oxford, and ought to get out more. People like this simply don't exist. Accordingly a law based on their needs will be misconceived. Furthermore, if people like that did exist, the law should try to stop them from behaving in the ways that they do behave. It should try to stop them both in their own interests and in the interests of the other people in the society of which they are a part.

As a matter of basic biology, geography and sociology the atomistic claim is ludicrous. We share 99.8 % of our DNA with chimpanzees, and rather more with other humans. Everyone is at least a cousin. We did not contribute anything at all to our own genetic burden, to our own arrival in the world, or to the first few years in it. Even if we live in the most tightly hermetically sealed environment, exercising obsessive control over everything possible, we will not escape disease or death. Hermetically sealed environments would not be good for humans, as we will discuss, and in practice they don't exist. Fate, love, bosses, slips, trips, and the infuriating, exhilarating, painful, polishing, ecstatic, irritating slide of one human's skin against that of another are our lot. We have to live with it, and the law should too.

Why has the law failed so abjectly?

There are many reasons.

One is that that lawmakers themselves tend to see themselves as exemplars of the self-determining pastiche. And so they shape laws which embody as an ideal their narcissistic self-portrait.

Another is that the pastiche at least has the virtue of simplicity. It is far, far harder to legislate for the messy reality. It might be argued that it is impossible. We will deal with that objection in due course. We do acknowledge that simplicity is desirable in the law, and that workability is essential. But where the simple solution is plainly wrong, we hesitate to endorse it. The law can do better. It has shown that it can.

Yet another reason is that much of the law is concerned with situations where the pastiche produces workmanlike solutions. The law of contract is the obvious example. Contract is concerned with situations where X knows exactly what he wants from Y, Y has agreed that X should have it, and yet Y has defaulted. It is correct in these circumstances that the law should enforce the agreement. But this model has metastasized out of the commercial court into other areas of the law. It has sometimes done great harm. Many of our most influential jurists have cut their teeth on and paid their mortgages by the law of contract, and when they come to give judgments in areas other than contract, they tend to bring to those areas contract's rather simple and sclerosed assumptions about the needs and nature of the litigants.

There are two areas of the law where these assumptions most obviously fail to do the job: family law relating to children, and those parts of medical law that relate to

decisions made on behalf of patients lacking capacity. In both these cases English law demands a consideration of the welfare or the best interests of the child/patient.

The concepts of welfare and best interests play a central role in medical and family law.

Section 1 of the Children Act 1989 provides:

When a court determines any question with respect to

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.¹

In the case of adults lacking capacity, s 1(5) of the Mental Capacity Act 2005 provides: 'An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.'

The welfare principle in the Children Act and the best interests test in the Mental Capacity Act 2005 have generated plenty of academic and judicial discussion (Herring 1999a, b, 2014a; Eekelaar 2002; Donnelly 2010; Coggon 2010). There is, of course, fierce debate about what, on the facts of a particular case, the tests require—for instance whether a contact order is beneficial to a child, or whether it is in the best interests of a person lacking capacity to be involved in research. But, the debate often tacitly assumes that all the parties agree about the definition of the terms 'welfare' or 'best interests', and that there is therefore no need to question those definitions. In particular, it is routinely assumed that the only relevant perspective is that of the child or incapacitous adult, viewed as an atomistic entity.

Medical and family lawyers (e.g. Eekelaar 2002; Herring 2008) have been troubled by cases where there are two possible decisions:

- (a) a decision which benefits slightly the individual in question, but causes major harm to the family or carers, and
- (b) a decision which harms the individual slightly, but is a huge benefit to the family or carers.

At first sight the welfare principle or best interests test would appear to mandate (a) and outlaw (b). In *Re P (Contact) (Supervision)* (1996, p. 328) it was held that when considering the welfare principle 'the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child'. Similarly the best interests test under the Mental Capacity Act 2005, Section 4(7) appears to allow consideration of the views of carers *only* in so far as they relate to the best interests of the individual. It may seem, then, that the courts are expected to make best interests determinations by looking solely at the interests of the child or incapacitous adult, ignoring the impact of the decision on anyone else.

¹ Adoption and Children Act 2002, s 1 similarly provides that when a court or adoption agency is coming to a decision relating to the adoption of a child, '[T]he paramount consideration ... must be the child's welfare, throughout his life,' s 1(2). This changed the previous position under the Adoption Act 1976, s 6, by which the child's welfare was the first, but not the paramount, consideration.

But life is not so simple. Nor should the law be. We argue here that the court should not use (and in some instances has not used) the welfare or best interests test in such a narrow way. The interests of parents, friends, family members and carers should be and have been taken into account. However, this has often not been done explicitly. We argue that the courts should have no qualms about being explicit.

In this book we explore some of the philosophical, historical and scientific material on well-being. In doing so we hope to reveal some issues that are rarely considered expressly by the courts. We argue that a proper understanding of a person's well-being can require decisions to be made which will primarily benefit (or appear primarily to benefit) another person. We argue that the well-being of a person cannot be assessed in isolation, and that it is only by considering the network of relationships within which a person lives that well-being can be properly considered. Finally, we will argue that meeting one's obligations and cultivating virtues are both aspects of well-being. We thus challenge the assumption that deciding what is in a person's welfare or best interests involves considering solely matters relating to them or the impact of the decision on them. In other words, a judge properly applying the welfare principle or the best interests test should decline to make an order which causes significant harm to others in order to procure a small gain for the child or incapacitous adult.

Suppose, for instance, that a patient is in a minimally conscious state. The family and carers make a (resisted) application for a declaration that it is in the patient's best interests for life-sustaining treatment to be withdrawn. Using our model, it might be argued that the failure to grant the declaration caused significant harm to the patient's relatives and loved ones, while giving little benefit to the patient. If that is right, then, *since the patient's own welfare, broadly viewed, should be assumed to encompass a wish to deny detriment to his relatives/loved ones*, it may be right to grant the declaration. But is this the right way to view welfare/best interests?

We contend that behind judicial determinations of 'welfare', at least in England and Wales, there lies an essentially Aristotelian notion of the 'good life', and that an essential component of the 'good life' is that humans are quintessentially relational beings. One of the ways in which this relationality is expressed is by the courts' recognition that there will be circumstances in which it is in the child's/the incapacitous adult's best interests/welfare to act towards a third party in a way which, viewed objectively, seems altruistic. That approach, we suggest, is correct. It is concordant with the known facts about human beings. It is to those facts, and the philosophical work woven around them, that we now turn.

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