

Judicial Compassion

Commentary on Compassion and the Law: A Judicial Perspective

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District Judge Eldergill has, in his article 'Compassion and the Law: A Judicial Perspective' (published in issue [x.] of the *Journal*), made an important contribution to consideration of the judicial role and law. The purpose of this commentary is threefold, to: (a) contextualise the significance of Judge Eldergill's contribution with wider reference to the law and associated literature, (b) develop consideration of the place of compassion as a judicial quality, and (c) analyse the current place and potential for compassion as a basis for judicial decision, with some cautions.

Before doing so, the key features of Judge Eldergill's article are summarised. The principal feature is the statement that compassion is an instrument of justice. This is illustrated with reference to mental health law, including whether decisions about a person are in their 'best interests'. This best interest test requires the judge to decide issues relating to the care and treatment of those lacking capacity having regard to the values, beliefs, wishes and feelings of the person. Here, Judge Eldergill connects the decision to the 'qualities required of a judge'. The judge must, through experience, understanding, courage, empathy and compassion, he argues, 'emotionally evaluate' the evidence and to try 'to feel and understand what the case and possible outcomes mean for the [person]' [p x].

This brief summary does not, necessarily, do justice to the breadth and depth of Judge Eldergill's article, including his important distinctions between compassion and related concepts such as pity and empathy. However, the two features of the article emphasised here – the 'qualities required of the judge' and how compassion can inform judgment – are sufficient for extended consideration.

Significance

Judge Eldergill breaks significant ground in his article. There is relatively little reference to compassion in law in the United Kingdom and a corresponding dearth of associated literature. Compassion is referred to sporadically across a range of laws. A number of instances occur in legislation. Law on criminal sentencing (section 30, Crime (Sentences) Act 1997) allows the Secretary of State, following consultation with the parole board, to at any time release a life prisoner on licence if satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds. The Immigration Rules provide for leave to remain in the United Kingdom for family members in the most exceptional compassionate circumstances. According to regulations governing the NHS, the third guiding principle of the NHS Constitution provides that: 'Respect, dignity, compassion and care should be at the core of how patients and staff are treated'; and, following the Health and Social Care Act 2012, s.1B of the National Health Service Act 2006 requires the Secretary of State to have regard to the constitution.

There are occasional references to compassion in common law. For instance, it has been applied to reduce a homicide to manslaughter if done to aid another in danger. Lord Holt CJ said in *R v Mawgridge*:

'[I]f a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty ... and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter ... for when the liberty of one subject is invaded, it affects all the rest: it is a provocation to all people, as being of ill example and pernicious consequence.' ((1707) Kelyng 119 at pp 136-137.)

It might be thought that Equity's concern with hardship would accommodate compassion, but the word compassion is not explicitly applied in the discernible case law.

Given Judge Eldergill's statement that compassion is an instrument of justice, what might we make of this patchy and perhaps somewhat thin reference to compassion in law? Clearly, the dearth in legislation is a reflection of the will of Parliament. The paucity of such reference reflects something of prevailing values in our society. Perhaps the trend in modern times in recognising individualism and of protecting negative rights, such as liberty, rather than promoting social duties may account for this situation. Of judge-made law, there is another explanation.

Compassion has often been seen as inimical to legal principle, a threat to impartiality: unruly subjective emotion to law's reason, objectivity and balance. Compassion is thus opposed to law's requirement for dispassionate adjudication. Law's abjection of emotion can be traced to Plato. Thomas Hobbes rejected compassion as a basis of adjudication on similar grounds. Sir Edward Coke said that common law was the 'absolute perfection of reason' (The Second Part of the Institutes Of the Lawes of England, London, M. Flesher & R. Young, 1642, p 179).

Yet, an increasing body of scholarship recognises that emotion and reason are not necessarily incompatible in judging (S Bandes & J A Blumenthal, 'Emotions and the Law' (2012) 8 Ann Rev Law Soc Sci 161); that compassion – whether defined, for instance, as an attribute, emotion, or trait – has a legitimate role to play in adjudication (B Zipursky, '*Deshaney* and the Jurisprudence of Compassion' (1990) 65 NYU Law Rev 1101).

Judge Eldergill rejects clearly the view that compassion is incompatible with law's objectivity when he observes: 'The notion that judicial objectivity requires being dispassionate and that objective decision-making is contaminated by empathy, sympathy and compassion is impossible to support' [p x].

Recognition by judges of the importance of compassion as a judicial attribute tends to emanate from judges in the USA and Canada. Both former Madam Justice

L'Heureux Dubé and Chief Justice Dickson of the Supreme Court of Canada approved of compassionate justice (C L'Heureux Dubé, 'Making a Difference: The Pursuit of a Compassionate Justice' (1997) UBC Law Rev 1). Mary Schroeder, Judge of the US Court of Appeals for the Ninth Circuit, wrote that 'justice with compassion is a legitimate, even necessary end for judges to strive to achieve, if the law is to serve human needs' ('Compassion on Appeal' (1990) 22 Ariz State LJ 45, at p 46). True, there still are many opponents – including other judges – to compassion in judging, even in the USA where many judges standing for election to judicial office publicly advertise that they will be compassionate.

Judicial qualities

Judge Eldergill's treatment of compassion as a judicial quality is therefore noteworthy and important. He sees compassion as instrumental in how to apply the best interests test. This 'quality' is also seen by Judge Eldergill to inform the other judicial responsibilities, for instance managing his court, including interacting with court staff and court users (lawyers, witnesses, complainants, defendants, relatives etc). An increasing amount of scholarly attention is being paid to the role of judicial emotion management in court (T A Maroney & J J Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2014) 6 Emotion Review 142) and the relationship between perception of justice and judicial behaviour, including compassion (S Beier and others, 'Influence of Judges' Behaviors on Perceived Procedural Justice' (2014) 44 J App Soc Psych 46). Nor should it be forgotten that judges, too, experience suffering and need to manage their own emotional labour (S Roach Anleu & K Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32 J Law & Society 614). Many legal scholars have long argued for accommodating compassion as a judicial attribute (eg J Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) So Cal Law Rev 1877).

A fine example of this in England is the recent study of family law judging by John Eekelaar and Mavis Maclean (Family Justice (Hart, 2013)), where their empirical work on judging in family courts found relatively little formal adjudication and significant amounts of negotiation, persuasion and even counselling. In family cases where, following the cut backs in legal aid parties largely represent themselves, and where emotions often run high, emotional sensitivity may be seen as a crucial aspect of judging.

It is significant – though perhaps not surprising given the historical treatment of compassion in relation to law – that compassion does not feature in England and Wales as a requirement in the person specifications for judicial posts or in continuing education through the Judicial College.

Judge Eldergill's approach to compassion in his article makes clear that compassion is fundamental to the 'quality of decision-making' (which we take here to include sufficiency of decision-making). How so? We try here to condense the essence of this approach. Judge Eldergill describes compassion as 'sympathy in action' [p x]. 'Sympathy', he says, 'literally means to feel or suffer with' – which may be triggered by empathy (requiring 'an ability to imagine the other person's feelings and situation and what it is like for them') [p x]. A compassionate person, he concludes, 'sympathises with [the other's] distress [and] responds to it by seeking to alleviate it or to remove its source' [p x]. At this point, one might reasonably ask: how is one to both *know* the other's suffering, and how is one to recognise *what counts* as suffering? These are not only matters of import to substantive and procedural law; they also present epistemological and ethical challenges. If the person understands the cause of his/her suffering and can communicate this, it may, Judge Eldergill says, simply involve listening. Undoubtedly, Judge Eldergill then conveys a deeper appreciation of compassion by drawing, at least in part, on his experience of 'spending many years visiting psychiatric wards' [p x]. If the person is 'confused, embarrassed, depressed, anxious, experiencing hallucinations, affected by delusional beliefs or [has] a severe learning disability', he says, 'then empathy is important' [p x]. How then does this enable a judicial decision?

Place and potential of compassion in judicial decision-making

Judge Eldergill refers to mental health law (in the context of the jurisdiction of the Court of Protection). It is helpful here to elaborate the relevant jurisdictional basis of such law.

Mental Capacity Act 2005

The Mental Capacity Act 2005 (MCA) established the Court of Protection with powers to make declarations as to incapacity, and to take decisions on behalf of mentally incapacitated persons in their best interest in relation to deprivations of liberty, personal finance, social care and medical treatment. Section 4 requires that such a best interests determination must be considered with reference to the person's past and present wishes and feelings and in particular any relevant written statement made by him when he had capacity, (b) the beliefs and values that would be likely to influence his decision if he had capacity and (c) the other factors that he would be likely to consider if he were able to do so.

According to Lady Hale the purpose of best interests is to 'consider matters from the patient's point of view', and this requires a decision-maker to 'try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be' (*Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591, at pp 608 and 607 respectively; see also *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181, [2005] 1 WLR 3995, at p 87). The ability to imaginatively put oneself in the position of the other and to think from their perspective, including understanding their suffering, appears to be necessary in order to understand their best interests. Liezl van Zyl has argued that a best interest assessment requires a decision-maker to understand the 'nature or quality of the patient's experiences' (*Death and Compassion: A Virtue-based Approach to Euthanasia* (Ashgate, 2000), p 207). She goes on to argue that '[c]ompassion plays a central part in such decision-making...as...it involves an attempt to understand a person's situation by

imagining what she, given her beliefs, values and circumstances, is undergoing' (p 207). It is worth emphasising the word 'attempt' in that quote. Compassion may require (perhaps often requires) a person to acknowledge they cannot fully understand what the other person is going through, but they seek to do the best they can to respond in the most sensitive way.

Best interests has also been interpreted as entailing a 'welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, emotional and welfare considerations' (*Re MM (an adult)* [2007] EWHC 2003 (Fam), 99). Judge Eldergill focuses on how compassion performs an instrumental role in enabling a deeper appreciation of the feelings and beliefs of the suffering individual. It is possible to envisage a further role for compassion by treating it as part of the social welfare of a person; that is, for her to be in a relationship of care with someone who is capable of, and best placed to, respond to her person-specific needs or concerns by taking her perspective. The judicial role in this respect is to assess the ability of others to exercise compassionate care. Such a use of compassion is beginning to emerge in relation to child welfare decisions (eg *Re K, H H (children)* [2013] EWHC 165 (Fam), [2013] 2 FLR 565, at pp 573-574).

It might be tempting to conclude that it is in attending to the 'feelings' only of the incapacitated person, that compassion comes into its own. Compassion, as Judge Eldergill reminds us, incorporates that element of sympathy that involves 'suffering with'. Indeed, the etymological root of compassion ('com'- 'pati') means 'together' 'to suffer'. Yet, to quarantine compassion with 'feelings' only may unnecessarily and impermissibly cordon off the significance of wishes from a compassionate calculus. We may suffer not only because we feel but because we also believe in, reason towards, and wish for a certain outcome. Suffering may also be, for instance, existential.

In one context compassion is excluded from an assessment of best interests. The MCA Code of Practice states in relation to withholding or withdrawing life-prolonging treatment that the decision-maker 'must not be motivated by a desire to bring about the person's death for whatever reason, even if this is from a sense of compassion' (ch

5.31). According to Lady Hale, the decision should be whether it is in the best interests of an individual to be given the treatment, and not on the basis that it would be in the best interests to bring about death by withholding or withdrawing treatment (*Aintree*, above).

Inherent jurisdiction and human rights

The Mental Capacity Act 2005 did not extinguish the inherent jurisdiction of the High Court. As Munby LJ points out: the statutory scheme in the Act is not comprehensive ('Dignity, Happiness and Human Rights' (2011) Eld LJ 32). That long-standing protective jurisdiction extends to wards of court, including vulnerable children and adults who may not necessarily lack capacity as defined in the Act (see *Re SA (Vulnerable Adult) with Capacity: Marriage* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867).

The best interests test has been shaped by the European Convention on Human Rights. Emerging reliance on respect for dignity in the case law on the particularly vulnerable person in the case law suggests a further potential foothold for compassion in judicial decision-making. In his discussion of dignity and human rights, Munby LJ notes that while the Convention does not refer explicitly to dignity, it 'is surely immanent in the Convention' (see 'Dignity', above, at p 34). In the context also of discussion of the right to private life under Article 8, he proceeds to state: 'in all our dealings with the incapacitated [P] we must show our respect for P as a human being, as a unique individual, requiring of us understanding, empathy and compassion' (see 'Dignity', above, at p 35). Munby LJ originally developed the connection between compassion and dignity in a case concerning a policy restricting manual handling by professional carers (*R (A, B, X and Y) v East Sussex County Council (No. 2)* [2003] EWHC (Admin) 167). In this case two severely disabled children suffered distress at the prospect of being mechanically lifted at home, and were unable to access certain social activities outside of the home because of a lack of lifting equipment. Munby J (as he then was) observed

that: 'the positive obligation of the state to secure their essential human dignity, calls for human empathy and humane concern' (A, B, X, Y, above, para 93).

Elaborating on the meaning of compassion, as an aspect of humanity and dignity, Munby J stated that compassion will often include a tactile element, such as the 'caring touch of the human hand' (above, para 120). It will also include a personal element, such that 'our instinctive preference is to be fed by a nurse with a spoon rather than through a naso-gastric or gastrostomy tube' (para 120). Compassion is not only treated by Munby J as a necessary response to the humanity and dignity of the receiver of care. He recognises that 'the compassion of the carer is itself a vital aspect of our humanity and dignity' (para 120). Though this point might be more fully developed, it resonates with relational approaches which recognise that the good of another is an aspect of our own good, for instance emphasising the intermingled nature of the interests of those within a caring relationship (see J Herring and C Foster, 'Welfare Means Relationality, Virtue and Altruism' (2012) 32 *Legal Studies* 480).

Munby LJ has further examined the role of dignity in relation to the process by which the state, using the example of a local authority, allows relevant affected parties under Article 8 to participate effectively in the decision-making process. 'Fundamental to the process of properly engaging P in the decision-making process, is listening to and taking account of P's wishes and feelings', he adds ('Dignity', above, p 35). In his own judgments, Judge Eldergill has recognised that a person-centred and responsive approach to the experiences of those affected by a decision is needed; one which is based on a therapeutic rapport, which takes account of different perspectives, and demonstrates understanding and sympathy towards the predicament of those in need (JH [2011] EWHC 2420 (COP)). Both case law and ex cathedra judicial observation recognise some linkages between respect for dignity, attending to the wishes and feelings of the person, and compassion. Indeed, it has been submitted elsewhere that the developing jurisprudence in the Court of Protection, particularly in relation to end of life decisions, reflects a compassionate approach (V Butler-Cole, Compassion and

litigation: decisions at the end of life in the Court of Protection, conference paper, Symposium on Law & Compassion, 1 July 2015).

Judge Eldergill elaborates, in his article, the qualities that might enable that 'listening to and taking account'. It is not only an empathetic process, one which identifies with the person, but as Munby LJ also recognises, one which, in the court's duty to determine 'best interests', may require alleviation of the suffering of another: compassion. These developments are hugely important because they may signal a shift away from a legal formalist approach to welfare which is based on outdated antinomies (for example of emotion versus reason) that lead to the rejection of legitimate and important concerns for the welfare of another as impermissible sympathy (eg *CC v KK* [2012] EWHC 2136 (COP), 25) or compassion.

Judicial review and other influences in judicial decision-making

There are a number of other ways in which compassion may inform judicial decision-making. Judicial review may allow considerations of compassion within the policy or decision-making of a public authority, as evidenced by the review of the DPP policy on prosecution of assisted suicide in the case of *Nicklinson and Another* ([2014] UKSC 38). There is growing recognition that the wide array of regulatory bodies engaged in issuing codes of practice, guidelines, statements of principle, and determinations, which elaborate on primary legislation also inform law (J Montgomery, C Jones & H Biggs, 'Hidden Law-Making in the Province of Medical Jurisprudence' (2014) 77 MLR 343). A number of such sources refer to compassion (such as the Code of Conduct for Healthcare Support Workers and Adult Social Care Workers in England; Compassion in Practice; NICE Quality Statements; and MCA Code of Practice), and that these may inform judicial decision-making (see *Re McFarland* [2004] UKHL 17, 24).

Cautions

It should be evident from the foregoing that we agree that compassion can have an *appropriate* place as a judicial quality and in judicial decision. Judges are not entitled to seek to relieve any or – even if it were possible (which we dispute) – all suffering. This is appreciated by Judge Eldergill in his decisions on the care of patients suffering from dementia. He has recognised that no option, whether home care, or institutional care, can guarantee an absence of suffering or distress (Sykes).

The definition of suffering and the determination of whose suffering counts are contested issues, even in moral philosophy. Should compassion apply to humans only or to all sentient beings? Is it owed to individuals only or also to groups (for example, a tribe, community, or population)? This might be a particular issue in a court case where a judge may determine what will be compassionate for the parties before them, but what about the interests of those impacted by the decision but not present in the court room?

There is also an issue of judicial resources. Undertaking the kind of sensitive analysis promoted by Judge Eldergill takes time. While in many cases this will be important and necessary, that comes with a cost. A magistrate with a long list of minor criminal cases to deal with may simply lack the time and resources to be as compassionate as she might like.

It would also be naïve to believe that judging does not, at times, lead to (and, in some jurisdictions, causes) suffering. For instance, judges must apply sanctions: deprivation of liberty, denial of parental access to children etc. Compassion is not a panacea in the face of all disputes: it cannot be dispositive of all dilemmas nor is it necessarily uni-focal (since more than one party to a dispute may suffer). An outcome which may be compassionate towards one party may lack compassion for the other party. Even in moral philosophy – and resonances may here be found in law – compassion may need to be balanced with, for instance, respect for autonomy, sanctity of life, and distributive justice. And actual or potential suffering may need to be weighed

alongside the benefits of a course of action under consideration. But if the judicial role is so circumscribed, it would also be naïve to expect judges alone to bear the torch for compassion in law. If compassion has value in law, its expression is shared by others who produce, interpret, and apply law: including the legislature, executive, professional bodies, and educators.

And perhaps most importantly, if compassion is accepted as having a role in judging it is necessary to recognise that – like other accepted judicial qualities, such as sensitivity and impartiality – it is potentially undermined by unconscious biases. Psychological research points to ‘similarity bias’; where compassion is associated with the similarity between observer and sufferer (N R Feigenson, ‘Sympathy and Legal Judgment: A Psychological Analysis’ (1997) 65 Tennessee Law Rev 1). However, in so far as we all are differently situated by background (including class, ethnicity, gender etc), this calls for awareness of the risk of similarity bias rather than avoidance of judging.

Conclusion

This commentary emphasises, with reference to the relative paucity of consideration of compassion in law and associated scholarship in the United Kingdom, the importance of Judge Eldergill’s reasoning for compassion as ‘an instrument of justice’, while also developing cautious arguments for such recognition in the jurisprudence and jurisdiction of both the Court of Protection and High Court.

Dermot Feenan, Research Fellow, and Daniel Bedford, Lecturer, School of Law, University of Portsmouth co-ordinated the Symposium on Law and Compassion, Institute of Advanced Legal Studies, London, 1 July 2015. Professor Jonathan Herring, DM Wolfe-Clarendon Fellow in Law, Exeter College, Oxford, was discussant of Judge Eldergill’s paper at the Symposium.

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