

Changes in the law

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Legal framework (1)

Generally it is the patient's consent which makes invasive medical treatment lawful. It is not lawful to treat a patient who has capacity and refuses that treatment. Nor is it lawful to treat a patient who lacks capacity if he has made a valid and applicable advance decision to refuse it: see 2005 Act, sections 24 to 26. Nor is it lawful to treat such a patient if he has granted a lasting power of attorney (under section 10) or the court has appointed a deputy (under section 16) with the power to give or withhold consent to that treatment and that consent is withheld; but an attorney only has power to give or withhold consent to the carrying out or continuation of life-sustaining treatment if the instrument expressly so provides (section 11(8)) and a deputy cannot refuse consent to such treatment (section 20(5)).

Aintree v James (Lady Hale)

Legal framework (1)

Section 5 of the Mental Capacity Act 2005 now provides a general defence for acts done in connection with the care or treatment of a person, provided that the actor has first taken reasonable steps to establish whether the person concerned lacks capacity in relation to the matter in question and reasonably believes both that the person lacks capacity and that it will be in his best interests for the act to be done. However, section 5 does not expressly refer both to acts and to omissions, the giving or withholding of treatment. The reason for this, in my view, is that the fundamental question is whether it is lawful to give the treatment, not whether it is lawful to withhold it.

Aintree v James (Lady Hale)

Legal framework cont.

Who decides on best interests?

- A health and welfare attorney with the relevant power; or
- Otherwise: decision maker not specified in the MCA or Code of Practice
- In this context: decision maker will be the senior clinician in charge of the patient's care (usually a consultant or a GP)

Developments in case law (1)

- Correct question is whether it is appropriate to provide or continue treatment (including life-sustaining treatment), rather than to withdraw it. (*Aintree v James*)
- Patient-centred decisions. What is right for this patient based on their own wishes, feelings, beliefs and values. (*Briggs v Briggs*)
- Shift away from decision making based on diagnosis and more emphasis on prognosis and level of certainty. (*Re N*)

Developments in case law (2)

In conclusion, having looked at the issue in its wider context as well as from a narrower legal perspective, I do not consider that it has been established that the common law or the ECHR, in combination or separately, give rise to the mandatory requirement, for which the Official Solicitor contends, to involve the court to decide upon the best interests of every patient with a prolonged disorder of consciousness before CANH can be withdrawn. **If the provisions of the MCA 2005 are followed and the relevant guidance observed, and if there is agreement upon what is in the best interests of the patient, the patient may be treated in accordance with that agreement without application to the court.**

NHS Trust v Y (Lady Black)

Best interests: basic principles

- Must start from the strong presumption that it will be in best interests to prolong life.
- BUT: this can be rebutted where there is clear evidence that the patient would not want life-sustaining treatment provided in the circumstances that have arisen.
- The decision is about what is in the best interests of that *individual* patient and not influenced by the views of others.
- NB, always remember that patient-centred decision can lead to **continuation** of life-sustaining treatment even in face of clinical doubts if clear that what person would have wished (*Re TG* [2019] EWCOP 21)

If there is disagreement...

If, at the end of the medical process, it is apparent that the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient's welfare, a court application **can and should be made**.

NHS Trust v Y (Lady Black)

- And nb, cannot simply continue to provide CANH and/or decline to carry out best interests decision-making on the basis of conscientious objection: (*A CCG v P* [2019 EWCOP 108])

Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- www.mclap.org.uk
- www.mentalhealthlaw.co.uk
- www.courtofprotectionhandbook.com
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