

Supreme Court rules that doctors and families can agree to allow people in long-term vegetative states to die without legal application

30/07/2018 (Public Law)

In an important judgment handed down today in *An NHS Trust and Others (Respondents) v. Y (by his litigation friend, the Official Solicitor)* [2018] UKSC 46 the Supreme Court held that a court order need not always be obtained before clinically assisted nutrition and hydration ('CANH') which is keeping a person with a prolonged disorder of consciousness ('PDOC') alive can be withdrawn.

The Supreme Court unanimously ruled that it had not been established that the common law or the European Convention on Human Rights (ECHR) gave rise to the mandatory requirement to involve the court to decide upon the best interest of every patient with PDOC before CANH could be withdrawn.

The fundamental question facing a doctor, or a court, considering treatment of a patient who is not able to make his or her own decision is not whether it is lawful to withdraw or withhold treatment, but whether it is lawful to give it. It is lawful to give treatment only if it is in the patient's best interests. If a doctor carries out treatment in the reasonable belief that it will be in the patient's best interests, he or she will be entitled to the protection from liability conferred by section 5 of the Mental Capacity Act ("MCA") 2005.

The starting point on whether there is a common law requirement to seek a court order is the House of Lords decision in *Airedale NHS Trust v Bland* [1993] A.C. 789. However, there can be no question of the House of Lords in that case having imposed a legal requirement that in all cases of patients in a persistent vegetative state an application must be made to court before CANH can be withdrawn. Instead they "recommended... as a matter of good practice" that reference be made to the court. Therefore, when the MCA 2005 came into force in 2007 there was no universal requirement, at common law, to apply for a declaration prior to withdrawing CANH and the MCA itself did not single

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out any class of decisions which must always be placed before the court. The MCA 2005 Code of Practice (the “Code”) does speak of applications to court in cases such as the present but does so in a contradictory fashion on the issue of whether such applications are mandatory. Further, no requirement to apply to court can be found in the post-MCA 2005 case-law.

The ECHR does not generate a need for an equivalent provision to be introduced. The European Court of Human Rights’ (ECtHR) decision in *Lambert v France* 62 EHRR 2 and subsequent cases have repeatedly set out factors relevant to the administering or withdrawing of medical treatment. These are factors which the UK has complied with. First, the UK has a regulatory framework compatible with the requirements of article 2 in the form of the combined effect of the MCA 2005, the Code, and professional guidance, particularly that of the GMC [105]. Second, the MCA 2005 requires doctors to take into account the patient’s express wishes and those of people close to him, as well as the opinions of other medical personnel. Third, the opportunity to involve the court is available whether or not a dispute is apparent.

Lambert and subsequent decisions show that the ECtHR does not regard it as problematic, in principle, that a decision to remove CANH from a patient with PDOC should be made by a doctor without obligatory court involvement.

CANH is medical treatment and it is not easy to explain, therefore, why it should be treated differently from other forms of life-sustaining treatment. In any event, it is difficult to accept that one can delineate patients with PDOC from other patients in such a way as to justify judicial involvement being required for the PDOC patients but not the others. In all cases, the medical team make their treatment decisions by determining what is in the patient’s best interest.

If it transpires that the way forward is finely balanced, there is a difference of medical opinion, or a lack of agreement from persons with an interest in the patient’s welfare, a court application can and should be made.

The judgment is [here](#).

Press coverage is [here](#).

Richard Gordon QC appeared for the Official Solicitor.

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