BUDDLEFINDLAY

Legal update - United Kingdom doctors legally required to consult patients on DNR notices

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In a landmark judgment last week, the English Court of Appeal ruled that a hospital's decision to place a "Do Not Resuscitate" (DNR) notice on a patient's file, without the patient's knowledge, was unlawful. As a result of this decision, medical staff in the United Kingdom now have a clear legal duty to consult patients in relation to DNR notices unless there are convincing reasons not to do so.

Background

David Tracey brought proceedings on behalf of his late wife, Janet Tracey, against the Cambridge University Hospital NHS Foundation Trust (the Trust).

Mrs Tracey was admitted to the Trust's care after sustaining a serious cervical fracture in a road accident. Two weeks prior to the accident, Mrs Tracey had been diagnosed with lung cancer and given an estimated nine months to live. During her admission, staff placed a DNR notice on her file. Her family discovered the notice and asked for it to be removed, emphasising that Mrs Tracey and her family wanted to be fully involved in her care and that Mrs Tracey would wish to receive full active treatment. A second DNR notice was later placed on Mrs Tracey's file, after her condition deteriorated and staff attempted to discuss resuscitation with her and consulted with her family. The proceedings were concerned with the process associated with the first DNR notice.

Decision

The English Court of Appeal ruled that the Trust's failure to involve Mrs Tracey in the first DNR decision violated her right to respect for her private life under article 8 of the European Convention on Human Rights. Lord Dyson, Master of the Rolls, noted that "*since a [DNR] decision is one which will potentially deprive the patient of life-saving treatment, there should be a presumption in favour of patient involvement*". Lord Justices Longmore and Ryder agreed that in addition to article 8 considerations, there was also a common law duty to consult patients regarding treatment decisions.

The Court held that there needed to be convincing reasons to support a decision not to involve a patient in a DNR decision, as the "*duty to consult is integral to the respect for the dignity of the patient*". Lord Dyson commented that "*the fact that the clinician considers that CPR will not work... [does not mean] that the patient is not entitled to know that the clinical decision has been taken*".

Lord Dyson acknowledged that DNR notices often involved "*sensitive decisions sometimes in very stressful circumstances*" but he cautioned doctors against "*being too ready to exclude patients from the process on the grounds that their involvement is likely to distress them*". The Court considered that distress alone was unlikely to be sufficient grounds not to involve the patient. Instead, the distress must be likely to cause the patient a degree of harm before it can be used as a justification for not involving the patient. In Mrs Tracey's case "*the Trust has not demonstrated that there were convincing reasons...not to consult her*".

The Court rejected Mr Tracey's argument that the Trust breached article 8 by not offering Mrs Tracey a second opinion, and found there was no obligation to offer a second opinion in a case of this nature, where the patient was being treated by a multi-disciplinary team all of whom took the view that a DNR notice was appropriate.

New Zealand context

In New Zealand, Right 6 of the Code of the Rights gives consumers the right to receive information that a reasonable consumer, in that consumer's circumstances, would expect to receive. Even where CPR is not clinically indicated (and therefore not offered to the patient), the patient still has the right to be informed of that clinical decision, and the reasons for it.

Coroner Matenga discussed the obligation to consult with, and notify a patient of, a DNR notice in the inquest into Folole Muliaga's death. Coroner Matenga found that Mrs Muliaga's doctor decided that resuscitation was not clinically indicated, but there was no documentation to evidence that this was discussed with Mrs Muliaga or her family. Coroner Matenga felt that even though the decision "*may be totally defensible and justifiable*" it was "*concerning that such an important decision*

was made and not communicated to Mrs Muliaga nor to her family". As noted by the Coroner, "a *decision to do nothing is still a decision concerning the health and care of the patient about which the patient has the right to be informed*" (Inquest findings, 19 September 2008).

Although DNR discussions can be very difficult to approach, it may help to incorporate the discussion into a general conversation about the patient's condition and prognosis. In the event that a practitioner decides that it is not appropriate to discuss a DNR notice with a patient (and/or the patient's family), then the reasons for this should be carefully documented. Although the UK decision is not binding in New Zealand, practitioners should be cautious about generally relying on and referencing distress as a reason to avoid a DNR discussion. Practitioners should consider documenting in detail the reasons for their concerns, including the likely harm that may be caused to the patient.

Tracey v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822

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