

# MIDNIGHT LAW: Scotland



## Disagreement regarding the treatment of patients who lack capacity

### SITUATION

Disagreement with family (or patient representatives) about medical treatment decisions in Scotland, for patients who lack capacity.

### STEPS TO CONSIDER

#### [1] Have you formally established that the patient lacks capacity?

- An adult must be assumed to have capacity unless it is formally established that he lacks capacity (as per Part 1, Section 6, Adults with Incapacity Act Scotland)

#### [2] Have you assessed the patient's:

- Present and past wishes and feelings as far as they can be ascertained by any means of communication, whether human or mechanical aid, appropriate to the adult.

#### [3] Have you talked to:

- The nearest relative and/or primary carer of the adult.
- Any continuing power of attorney, welfare attorney or guardian.
- Any person whom the sheriff has directed to be consulted.
- Any other person appearing to have an interest in the welfare of the person, where these views have been made known to the person responsible for authorising treatment.

#### [4] Have you determined that the proposed treatment is:

- Of benefit to the patient and such benefit cannot be reasonably achieved without the intervention.
- The least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

#### [5] Local steps to resolve disagreement:

- Second Opinion from another clinician and/or team within the Health Board.
- Case Conference involving family and/or patient representatives (as listed in 3).
- Documentation of areas of agreement and disagreement.
- Allow time for reflection.

#### [6] Formal steps to resolve disagreement:

- Second opinion – external to the Health Board.
- Mediation.
- Contact the Mental Welfare Commission if disagreement is with guardian or attorney. (The MWC may nominate a pre-approved medical practitioner).
- Take legal advice through your Health Board's Legal Office. An application to the Court of Session may be required, and a Curator Ad Litem appointed.
- Early legal advice is recommended, where there is disagreement regarding treatment withdrawal/limitation decisions, given the lack of legal precedent, in Scotland.

### GUIDING PRINCIPLES

Any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision, or act for themselves should be made for their benefit and involve the least restrictive option.

Medical Practitioners have statutory authority under Part 5, Section 47, of the Adults with Incapacity Act, to provide emergency medical treatment, to safeguard or promote the physical or mental health of an adult, who lacks capacity.

Conditions apply, but in cases of disagreement, treatment to preserve life, or serious deterioration, can still be provided.

### KNOW THE LAW

1. Adults with Incapacity (Scotland) Act 2000. (NB the Provisions of the Act do not apply to decisions regarding the limitation, or withdrawal of treatment).
2. Law Hospital NHS Trust v Lord Advocate 1996 CSIH (NB predates Adults with Incapacity Act).