

MIDNIGHT LAW: Scotland

Approaching treatment plans for the person with a disability



SITUATION:

Clinical tools used to assess the benefits and outcomes of ICM treatment may not take specific account of the person with a disability. How can they be applied to treatment plans, in a way that is appropriate and consistent with the law?

CONSIDERATIONS:

Capacity and best interests

Although a patient with capacity may refuse treatment, they cannot demand that a doctor administers a treatment which the doctor considers is adverse to the patient's clinical needs. Where a patient is unable to consent to treatment, a doctor may lawfully give that patient treatment which is necessary in that patient's best interests.

Equalities Act 2010 and the European Convention on Human Rights (ECHR)

The definition of a disability is broad and treatment decisions will require consideration of **process** (e.g. communication support for the person) and **outcome** (what additional steps are needed to ensure, as far as possible, that the person with a disability can access critical care equitably?) Discrimination can arise not only where a person is treated differently because they have a disability, but also if policies that appear 'neutral' in fact affect disabled individuals as a group. A policy which may give rise to different outcomes for disabled people is only lawful if proportionate to the achievement of a legitimate aim.

What steps should I take?

- Ensure your decision making processes are consistent with the Equalities Act and the ECHR, to avoid discrimination.
- As with any patient with capacity, treatment decisions need, if possible, to be discussed with a patient with disability. Doctors must try to find out what matters to patients, so that they can share relevant information about the benefits and harms of proposed options and reasonable alternatives, including the option to take no action (GMC 2020 guidance on consent).
- Policies/guidance for clinical treatments that use screening tools validated for the non-disabled patient population should carefully be scrutinised for unlawful discrimination against disabled individuals.
- Discrimination is more likely to arise where decisions are taken about access to treatments based on judgments about quality of life, as opposed to survivability.
- DNACPR decisions must involve an individual who has capacity, unless doing so would cause physical or psychological harm.

What particular steps should be taken if a patient lacks capacity?

- Treatment decisions must be of overall benefit for the patient and made in accordance with the requirements of Part 5, s47 of the Adults with Incapacity (Scotland) Act 2000.
- For DNACPR decisions relatives/relevant others must be informed without delay where practicable and appropriate. However, these individuals cannot insist upon or refuse treatment on behalf of the patient. CPR should only be offered if there is a clear expectation that its aim can be achieved.
- If the patient is a vulnerable adult, e.g. has mental illness, learning disabilities or dementia, the involvement of a medical practitioner appointed by the Mental Welfare Commission, may be required.
- Disabled persons at risk of losing mental capacity should be encouraged to develop advance care plans that make their wishes clear, to assist in future medical decisions. These plans must be informed, current, made without undue influence from others, and clearly apply to the current clinical circumstance. Although Advance Decisions for the Refusal of Treatment (ADRTs) do not hold formal statutory weight under the Adults with Incapacity Act, they are likely to be given at least some weight by the courts in Scotland.

GUIDING PRINCIPLES

- A person has a disability if there is mental or physical impairment (the cause of which does not need to be known) and the impairment has a substantial and long-term effect on the person's ability to carry out normal day to day activities.
- Decision-making is an ongoing process focused on "meaningful dialogue".
- Follow the 7 steps of the GMC guidance "Consent: patients and doctors making decisions together", Nov 2020

KNOW THE LAW

- Adults with Incapacity (Scotland) Act 2000
- Equalities Act 2010
- Human Rights Act 1998
- European Convention on Human Rights
- Scottish Commission for Human Rights Act 2006
- R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822.

FURTHER READING

1. DNACPR Integrated Adult Policy: Decision Making & Communication. The Scottish Government, August 2016.
2. UN Convention on the Rights of Persons with Disabilities.
3. UK Equality and Human Rights Commission
4. Mental welfare commission

