

# MIDNIGHT LAW:

## Relatives recording conversations

For England, Northern Ireland, Scotland & Wales



### SITUATION

A patient is sedated and ventilated and her husband has asked for an update. On sitting down with the husband, he asks if he can record the update on his mobile phone for the benefit of updating her parents who aren't present.

### ISSUES TO CONSIDER

Benefits of recording to patient care

- Recordings can assist relatives to reflect upon, and understand the content of the discussions, as well as inform others not present at the time
- Recordings could be used by the patient at a later date to help understand events

Other benefits

- Recordings could form a permanent record that could be reviewed in any subsequent court action, inquests etc.

Risks of recording

- Incapacitated patients are unable to consent to creation of recordings containing their personal information, which may be held or distributed by their relatives
- Recordings made on personal devices are not able to be protected from subsequent digital manipulation or distortion as there is no 'master copy'.

Social media considerations

- Increasing use of social media platforms to provide updates for friends and relatives can lead to inadvertent breaches of patient confidentiality if materials on personal devices are posted on online platforms

### RECOMMENDATIONS

- You may refuse permission to record if you believe it will negatively impact on patient care e.g. by inhibiting discussions regarding end of life care or other highly sensitive issues. Refusal for reasons relating to privacy of healthcare workers are harder to justify.
- Consider offering a written transcript of the conversation, if this is preferable.
- Permission could be sought from your hospital to record future conversations, but there must be an agreed means for recording and storing such recordings within the medical record.
- You should remind all family members of the importance of respecting patient confidentiality by being mindful of what patient information they post on social media platforms, or share by any other means.
- It is advisable to develop written guidelines for your unit regarding the use of recordings and sharing of confidential medical information relating to an incapacitated patient on social media platforms.
- Relatives who covertly record conversations should be aware that this will erode trust with healthcare workers, however it is unlikely that they will have broken any laws.
- We strongly advise that you do not allow any photographs or video recordings of an incapacitated patient to be made by relatives.

#### GUIDING PRINCIPLES:

You are obliged to protect patient confidentiality, however it is reasonable to assume a patient would want those closest to them to be kept informed of their general condition and prognosis, unless indicated otherwise.

#### KNOW THE LAW:

Data Protection Act 2018 may apply to posting of recordings of identifiable people on social media without permission if not for personal reasons.

Article 8 of the Human Rights Act gives a reasonable expectation of privacy.

#### FURTHER READING:

*Making and using visual and audio recordings of patients.* General Medical Council

*Confidentiality: good practice in handling patient information.* General Medical Council