P’s wishes and feelings outweigh argument concerning futility of future treatment (Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust v TG and another)

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Private Client analysis: Elizabeth Fox, barrister at Serjeants’ Inn Chambers, advises that this case provides a reminder as to the importance of consulting families and ascertaining the individual’s wishes and feelings, and the values and beliefs underlying those wishes, prior to bringing an application for withdrawal of treatment.

Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust v TG and another [2019] EWCOP 21

What are the practical implications of this case?

‘The Lord giveth, and the Lord taketh away’ (Job 1:21). If this phrase reflects the patient’s (P) views on life, the Court of Protection will need to take it into consideration, as should the treating hospital prior to bringing an application for withdrawal of life-sustaining treatment. In this case, the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (the Trust) sought to withdraw endo-tracheal intubation, but the same principles would apply to withdrawal of clinically-assisted nutrition and hydration (CANH).

The recent case of *Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust v TG and another* confirms that the focus of any decision to withdraw CANH must remain firmly on the individual at the heart of the case, and on their wishes, views and beliefs.

The issue in this case was whether continuation of intubation was in the best interests of P. Withdrawal of treatment would certainly lead to P’s death. The Trust argued that given the medical evidence, there was no benefit in continuing treatment except that P would remain alive.

It is telling that none of the three very experienced advocates in this case could point Cohen J to any single case in which the court has terminated life support against the wishes of the patient. Unsurprisingly, Cohen J did not make this the first case to do so. Rather, he affirmed that P’s wishes and feelings will outweigh an argument pertaining to the futility of future treatment.

The other important take-away from this case is the matter of when to make an application to the court for withdrawal of treatment. It is a difficult question faced by many NHS Trusts grappling with a family’s wishes and competing demands.

The matter reached the Court of Protection for consideration some eight weeks following the insertion of an endotracheal tube. Cohen J referred to the Royal College of Physicians Guidance on prolonged disorders of consciousness, which makes clear that in the case of a non-traumatic injury, six months is required before a vegetative state is regarded as permanent. Cohen J commented that he was being asked to make the decision much earlier, at a point when it was possible that P could make some recovery and could return to live at home, even if she would be unaware of the fact. Indeed, Cohen J alluded to the fact that different considerations might apply if the position were unchanged within six months’ time—by which point more would be known about the potential for improvement.

Nevertheless, while it is important to ensure that sufficient time has elapsed, there may be other reasons for bringing a case such as this to court. Here, there was a clear dispute between the hospital and the family as to whether P should receive a tracheostomy, which might enable her to move to a nursing home (or even home). It was clearly in P’s best interests that this dispute was resolved sooner rather than later—on that basis it was plainly right to make an application (although not the one actually made).

What was the background?

P is a religious woman of the Catholic faith, who sadly suffered a massive subarachnoid haemorrhage while at church on 16 December 2018, followed by a secondary cardiac arrest. She suffered very extensive brain damage.

Eight weeks following the injury, medical evidence showed that she was in a vegetative state, with very small chances of meaningful improvement and no chance of meaningful recovery. If she were to regain consciousness, it would be a minimal consciousness at a very low level. Her memory will almost certainly have disappeared, and her previous personality will not emerge.

P's family, however, believed that P is able to respond to people who are close to her and to prayers. Medical evidence, which was preferred by Cohen J, was that the signals seen by the family were merely reflex actions. Indeed, her most likely—but still only possible, not probable—chance of improvement would be to a state in which her only responses would be to painful stimuli.

What did the court decide?

To many people, a life spent reacting only to pain would sound like a form of torture, but the Court of Protection is not designed to consider what 'many' people might want.

Citing *In re Briggs (Incapacitated Person) (Medical Treatment: Best Interests Decision) (No 2)* [2017] 4 WLR 37, it was acknowledged that the very strong presumption in favour of life was potentially rebuttable in circumstances in which it was evident that P would have wished to have treatment withdrawn.

The only factors in favour of withdrawal in this case were:

- ending a process which brings no, or no significant, benefit to P
- the removal of the possibility of indignity and/or pain

Evidence was provided that the latter was not an important consideration to P. These fairly meagre factors were more than counterbalanced by P's family and friends' evidence, which indicated that P felt that if her presence was a comfort to others, she would want to be there, whatever the cost to her. She also felt that life was for the Lord to take away, and the Lord only—she would never accept anyone else facilitating death. Indeed, she had said as much to a friend while watching a television programme referring to Dignitas.

Cohen J also noted that the decision to withdraw treatment would be irreversible. This is an important consideration given the relatively short length of time that had elapsed from injury and the potential improvement, however slight and however faint the possibility, in P's state.

This case provides a reminder as to the importance of consulting families and ascertaining the individual's wishes and feelings, and the values and beliefs underlying those wishes, prior to bringing an application for withdrawal of treatment. The same applies in any application concerning medical treatment—families and friends can provide important information, which is often missed amidst the competing demands of a busy clinical practice.

Elizabeth Fox is building a busy practice within all of the core areas of chambers' work, including but not limited to the Court of Protection and the inherent jurisdiction of the High Court. She also regularly advises on community care issues. Elizabeth has undertaken substantial academic research into legal issues concerning consent to medical treatment, which often feeds into her practical experience.

Interviewed by Kate Beaumont.

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