

## **LEPU UPDATE 31 July 2018: Supreme Court verdict on the Case of Y**

**Key question considered:** When is it necessary to seek the approval of the court before Clinically Assisted Nutrition and Hydration ('CANH') is withdrawn from a person with a prolonged disorder of consciousness ('PDOC')?

**Supreme Court verdict:** Lady Black, delivering judgment on behalf of the Supreme Court, concluded in clear terms that there was no requirement either at common law or under the ECHR for court approval to be sought in the way contended for by the Official Solicitor. Importantly, in so doing, this verdict also answered the wider question of when it is necessary to go to court before withdrawing or withholding any form of life-sustaining treatment from a person lacking the capacity to consent to or refuse such treatment. By deciding that there is no distinction in law between CANH and any other form of intervention, the Supreme Court judgment means that decisions regarding CANH are to be made on the same footing as other forms of treatment (i.e. mechanical ventilation or vasopressors).

The Legal & Ethical Policy Unit on behalf of the Faculty and the Intensive Care Society submitted a written intervention to this case. This was recognised as helping the court to put the question in appropriate clinical context (see sections 117 and 118).

The full verdict is available [here](#). The summary conclusion is in section 126.

**Practical implications:** This verdict now makes the position clear in this area:

In England Wales, where

- the provisions of the MCA 2005 are followed; and
- the relevant guidance is observed (click [here](#) for the current interim guidance); and
- there is agreement upon what is in the best interests of the patient,

life-sustaining treatment (whether CANH or another form of such treatment) can be withdrawn (or withheld) without needing to make an application to the court.

If at the end of the process of decision-making, the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient's welfare, a court application can and should be made – so that the court can be asked to make this crucial decision on behalf of the patient. Where there is disagreement between clinicians and family, mediation may be a faster way of resolving matters whilst preserving relationships.

One immediate practical implication is that the joint guidance being worked on by the BMA, GMC and RCP can proceed to publication on the same basis that the interim guidance had been predicated; that guidance will set out a detailed decision-making process along the lines identified by Lady Black in her judgment.

Whilst the judgment is undoubtedly welcome at many levels, the handing back of this responsibility does carry with it the real need to ensure that the MCA is understood and applied with care and with attention to its spirit, as well as its letter, in the clinical context. A key part of this is ensuring that there is effective communication between clinicians and the patient's family or others with an interest in the patient's welfare. The BMA/GMC/RCP guidance outlined above will undoubtedly help in the specific context of CANH withdrawal.

This decision did not directly concern the position in **Scotland**, where no equivalent requirement to go to court had been identified by case law. However, the reasoning applies in the same fashion, and the principles identified as to decision-making will apply by analogy to clinicians applying the Adults with Incapacity Act. The BMA/GMC/RCP guidance will not apply directly in Scotland, but again will be of assistance by analogy.

**Detailed summary:** You can read a more [detailed summary](#) of this case on Alex Ruck Keene's website, from which the above commentary freely quotes. Alex is a Barrister at 39 Essex Chambers and acted in a pro bono capacity for the Faculty and the Society during our written intervention on this case. We are thankful for the hard work provided pro bono by Stuart Marchant (Bevan Brittan Solicitors) and Annabel Lee (39 Essex Chambers).

The story has been covered extensively in the news, including by the BBC [here](#).