

MIDNIGHT LAW:

Approaching Treatment Plans for the Person with a Disability



SITUATION

Some clinical tools used to assess the benefits and burdens of ICM treatment do not take specific account of the person with a disability. How can you apply clinical tools/guidance to treatment plans for an individual with a disability in a way that is appropriate and consistent?

CONSIDERATIONS

Equalities Act 2010 and the European Convention on Human Rights

The definition of a disability is broad. Responding to a disability will require thinking about

- **process** – for instance communication support for the person; and
- **outcome** – what additional steps are needed to ensure, as far as possible, that the person with a disability is able to access critical care and treatment on the same basis as a person without a disability.

Discrimination can arise not only where you treat a person worse because they have a disability, but also as a result of policies that appear 'neutral' but in fact affect disabled individuals as a group. Any policy which may give rise to different outcomes for disabled people is only lawful if it represents a proportionate way of achieving a legitimate aim.

What steps should I take?

- Ensure your decision-making processes are consistent to avoid discrimination. Record your decisions clearly, including the rationale for treatment decisions.
- Treatment decisions need to have consultation with the disabled person (wherever possible) so that the aims and limits of treatment are known to him/her in advance.
- DNACPR decisions must involve the person unless doing so would create harm *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822*.
- Where the person lacks capacity to participate in a DNACPR discussion you **must** involve those appropriately interested in their welfare, e.g. family: *Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250 (QB)*
- It may be appropriate to provide access to critical care treatments in a time limited manner to assess clinical benefit.
- When creating policies or guidance regarding clinical treatments that use screening tools that have not been validated for the patient population you wish to use them for, it is appropriate to consider whether the policy/guidance may lead to unlawful discrimination against disabled individuals.
- Discrimination is more likely to arise where decisions are taken about access to treatments on the basis of judgments about quality of life as opposed to survivability
- Disabled persons at risk of losing mental capacity should be offered the opportunity (including support) to develop advance care plans that make their wishes clear. The Recommended Summary Plan for Emergency Care and Treatment (ReSPECT) Process supports advance care planning for a person's clinical care in a future emergency in which they are unable to make or express choices.

GUIDING PRINCIPLES:

- A person has a disability if there is mental or physical impairment and the impairment has a substantial and long term effect on the person's ability to carry our normal day to day activities.
- The cause of the impairment doesn't need to be known e.g. cancer, HIV, MS.

KNOW THE LAW:

- Equalities Act 2010
- European Convention on Human Rights (ECHR)
- *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822*.
- *Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250 (QB)*

FURTHER READING:

- Convention on the Rights of Persons with Disabilities