REPORTING RESTRICTIONS APPLY TO THIS CASE

30 July 2018

PRESS SUMMARY

THE COURT ORDERED that until further order

1. No one shall in connection with these proceedings publish or reveal
   (a) the name and/or address of Mr Y, of any member of his family or of the hospital in which he was treated;
   (b) the identity of any of the treating medical staff (doctors, nurses or others) at the treating hospital;
   (c) any picture of any of the above
   (d) any other material that is likely to lead to the identification of Mr Y

or publish or reveal any information which would be likely to lead to identification of Mr Y or his family in connection with these proceedings.

2. Nothing in this Order shall prevent any person from:
   (a) publishing information about proceedings in the Court of Protection in relation to applications of this kind;
   (b) publishing information contained in any public judgment given in this case;
   (c) subject to any order made in proceedings under section 11 of the Contempt of Court Act 1981, publishing information relating to any part of the proceedings before any court other than a court sitting in private and in particular publishing a full report of, or of any part of, any Coroner's inquest held in public;
   (d) publishing information which does not contravene paragraph 1;
   (e) inquiring whether a person is protected by this order;
   (f) seeking information while exercising any function authorised by statute or by any court of competent jurisdiction;
   (g) seeking information from the Official Solicitor.

An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants) [2018] UKSC 46
On appeal from [2017] EWHC 2866 (QB)

JUSTICES: Lady Hale (President), Lord Mance, Lord Wilson, Lord Hodge and Lady Black

BACKGROUND TO THE APPEAL

The question in this appeal is whether a court order must always be obtained before clinically assisted nutrition and hydration ("CANH"), which is keeping a person with a prolonged disorder of consciousness ("PDOC") alive, can be withdrawn, or whether, in some circumstances, this can occur without court involvement.

In June 2017 Mr Y, an active man in his fifties, suffered a cardiac arrest which consequently led to extensive brain damage due to lack of oxygen. He never regained consciousness following the cardiac arrest and required CANH to keep him alive. His treating physician concluded that, even if he regained consciousness, he would have profound disability and would be dependent on others to care for him for his remining life. A second opinion from a consultant and professor in Neurological Rehabilitation

considered Mr Y to be in a vegetative state without prospect of improvement. Mrs Y and their children believed that he would not wish to be kept alive given the doctors' views about his prognosis. The clinical team and the family agreed that it would be in Mr Y's best interests for CANH to be withdrawn, which would result in his death within two to three weeks.

On 1 November 2017, the NHS Trust sought a declaration in the High Court that it was not mandatory to seek the court's approval for the withdrawal of CANH from a patient with PDOC when the clinical team and the patient's family agreed that it was not in the patient's best interests to continue treatment and that no civil or criminal liability would result if CANH were withdrawn.

The High Court granted a declaration that it was not mandatory to seek court approval for withdrawal of CANH from Mr Y where the clinical team and Mr Y's family were in agreement that continued treatment was not in his best interests. The judge granted permission to appeal directly to the Supreme Court. In the intervening period Mr Y died but the Supreme Court determined that the appeal should go ahead because of the general importance of the issues raised by the case.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lady Black gives the sole judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

It has not been established that the common law or the European Convention on Human Rights (ECHR) give rise to the mandatory requirement to involve the court to decide upon the best interest of every patient with PDOC before CANH can be withdrawn **[126]**.

The fundamental question facing a doctor, or a court, considering treatment of a patient who is not able to make his or her own decision is not whether it is lawful to withdraw or withhold treatment, but whether it is lawful to give it. It is lawful to give treatment only if it is in the patient's best interests. If a doctor carries out treatment in the reasonable belief that it will be in the patient's best interests, he or she will be entitled to the protection from liability conferred by section 5 of the Mental Capacity Act ("MCA") 2005 **[92]**.

The starting point on whether there is a common law requirement to seek a court order is the House of Lords decision in *Airedale NHS Trust v Bland* [1993] A.C. 789. However, there can be no question of the House of Lords in that case having imposed a legal requirement that in all cases of patients in a persistent vegetative state an application must be made to court before CANH can be withdrawn. Instead they "recommended… as a matter of good practice" that reference be made to the court **[93-94]**. Therefore, when the MCA 2005 came into force in 2007 there was no universal requirement, at common law, to apply for a declaration prior to withdrawing CANH and the MCA itself did not single out any class of decisions which must always be placed before the court **[95]**. The MCA 2005 Code of Practice (the "Code") does speak of applications to court in cases such as the present but does so in a contradictory fashion on the issue of whether such applications are mandatory **[97]**. Further, no requirement to apply to court can be found in the post-MCA 2005 case-law **[98]**.

The ECHR does not generate a need for an equivalent provision to be introduced **[102]**. The European Court of Human Rights' (ECtHR) decision in *Lambert v France* 62 EHRR 2 and subsequent cases have repeatedly set out factors relevant to the administering or withdrawing of medical treatment. These are factors which the UK has complied with. First, the UK has a regulatory framework compatible with the requirements of article 2 in the form of the combined effect of the MCA 2005, the Code, and professional guidance, particularly that of the GMC **[105]**. Second, the MCA 2005 requires doctors to take into account the patient's express wishes and those of people close to him, as well as the opinions of other medical personnel **[108]**. Third, the opportunity to involve the court is available whether or not a dispute is apparent **[109]**.

Lambert and subsequent decisions show that the ECtHR does not regard it as problematic, in principle, that a decision to remove CANH from a patient with PDOC should be made by a doctor without obligatory court involvement **[110]**.

CANH is medical treatment and it is not easy to explain, therefore, why it should be treated differently from other forms of life-sustaining treatment **[116]**. In any event, it is difficult to accept that one can delineate patients with PDOC from other patients in such a way as to justify judicial involvement being required for the PDOC patients but not the others. In all cases, the medical team make their treatment decisions by determining what is in the patient's best interest **[119]**.

If it transpires that the way forward is finely balanced, there is a difference of medical opinion, or a lack of agreement from persons with an interest in the patient's welfare, a court application can and should be made **[125]**.

References in square brackets are to paragraphs in the judgment

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html