

# Capacity, Making Decisions and the Court of Protection

Dr Chris Danbury

Consultant Intensive Care Physician

# Key Statutes

- Family Law Reform Act 1969
- Mental Health Act 1983
- Human Rights Act 1998 - article 2 and 8 in particular, although Article 5 for DoLS / LPS
- Mental Capacity Act 2005
- Coroners and Justice Act 2009

I'm only going to talk about English Law

# What is the Decision?

- Cost
- Whose Decision is it?
- Best Interests

# Cost

- R. v Cambridge Health Authority [1995] EWCA Civ 49

*“it was for the [health] authority's judgment and not that of the court to allocate its limited budget to the maximum advantage of the maximum number of patients”*

- N v ACCG and others [2017] UKSC 22

*“[This] was a case in which the court did not have power to order the CCG to fund what the parents wanted.”*

# Whose Decision

- Burke, R (on the application of) v General Medical Council & Ors [2005] EWCA Civ 1003

*“Ultimately, however, a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient’s clinical needs.”*

- Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

*“... the court has no greater powers than the patient would have if he were of full capacity.”*

- N v ACCG and others [2017] UKSC 22

*“Nor did [the court] have power to order the actual care providers to do that which they were unwilling or unable to do.”*

# Best Interests

- Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

*“... in considering the best interests of this **particular patient at this particular time**, decision-makers **must** look at his welfare in the widest sense, not just medical but social and psychological ... they **must** try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they **must** consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.”*

# Best Interests Conflict

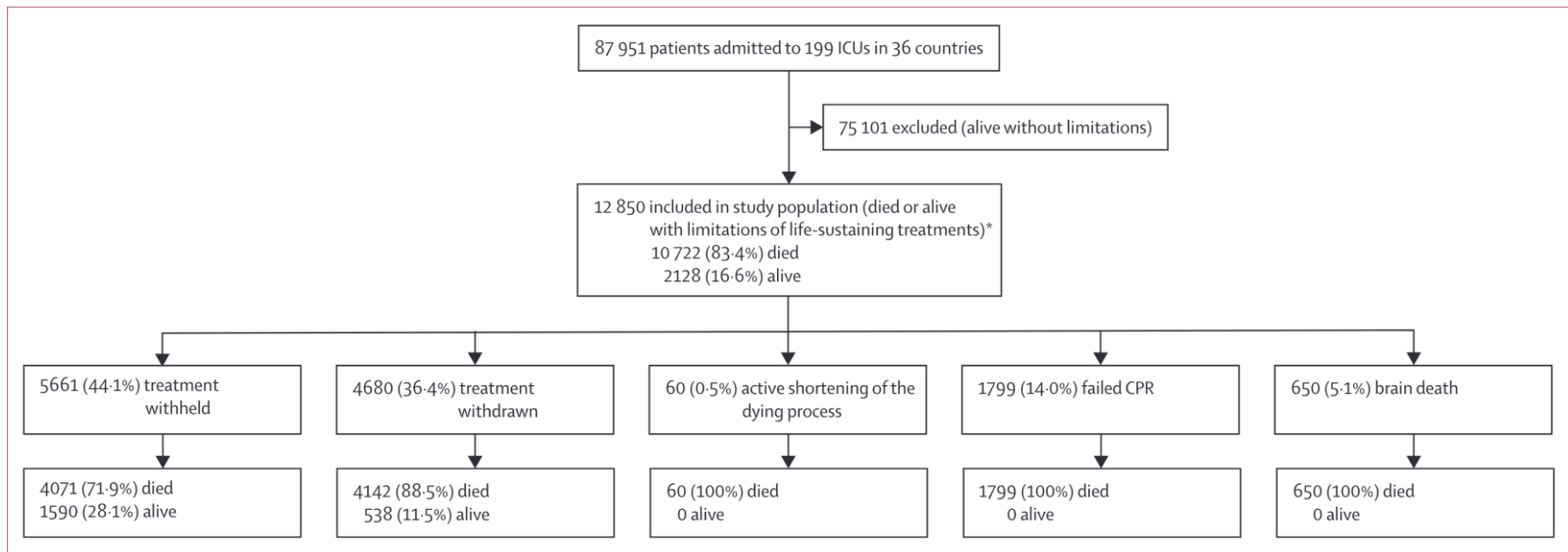
# Conflict

- 70% of ICU staff members have reported conflicts in intensive care – staff/staff and staff/family
- Families, ICU physicians and nurses report conflicts in up to 80% of patients requiring a treatment-limitation decision

Azoulay E et al “Prevalence and Factors of Intensive Care Unit Conflicts: The Conflicus Study.”  
*American Journal of Respiratory and Critical Care Medicine* 180, no. 9 (2009): 853–60.



# Decisions



**Figure 1: Study profile**

End of life categories comprised: treatment withheld, treatment withdrawn, active shortening of the dying process, failed CPR, and brain death. CPR=cardiopulmonary resuscitation. \*Includes patients who were brain dead

# Agreement

- An NHS Trust & Ors v Y & Anor [2018] UKSC 46

*“If the provisions of the MCA 2005 are followed and the relevant guidance observed, and if there is agreement upon what is in the best interests of the patient, the patient may be treated in accordance with that agreement without application to the court.”*

# Disagreement

- An NHS Trust & Ors v Y & Anor [2018] UKSC 46

*“If, at the end of the medical process, it is apparent that 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.”*

An NHS Trust  
and  
DJ (by his Litigation Friend, the Official Solicitor)  
[2012] EWCOP 3524

- Multiorgan failure
- IHCA
- Disagreement about treatment
- (Mild criticism by me from judge)

Conway, R (On the application Of)

v

The Secretary of State of Justice (Rev 1)

[2017] EWHC 2447 (Admin)

- Assisted suicide

University Hospitals Birmingham NHS Foundation Trust  
and  
HB (by her Litigation Friend, the Official Solicitor)  
[2018] EWCOP 39

- OHCA
- Clinical team felt certain treatments were not in HB's Best Interests
- Family disagreed

## Re QD (Habitual Residence) (No.2) [2020] EWCOP 14

- Lived in Spain with partner
- Brought to UK by children
- Partner wanted him returned to Spain
- ? Safe to travel
- Covid

Manchester University NHS Foundation Trust  
and  
KM (by his Litigation Friend, the Official Solicitor)  
[2021] EWCOP 42

- Travel back from Togolese Republic
- PE
- Developed Covid-19 in hospital
- ECMO
- Chances of liberation from ECMO



Imperial College Healthcare NHS Trust  
and  
Mrs C (by her Litigation Friend, the Official Solicitor)  
[2022] EWCOP 28

- Fall at home
- IHCA
- Chances of being successfully liberated (weaned) from mechanical ventilation
- Initial disagreement over length of time to allow for weaning from ventilation

# Cambridge University Hospitals NHS Foundation Trust v AH [2021] EWCOP 64

15th Dec 2021 | [News](#)



Simon Miller and Martha Gray, instructed by Simon Bruce (Solicitor) of Dads House Family Law Clinic, represented pro bono the family of AH in the Court of Protection before Mrs. Justice Theis.

The Court of Protection heard oral evidence over two days relating to a case concerning AH described as the 'most complex Covid patient in the world'. AH has been a patient at Addenbrooke's Hospital since the end of December 2020 having been admitted on an emergency basis suffering from severe symptoms of Covid-19. The main issue centered around whether the hospital was able to withdraw life sustaining treatment. In November the [Court of Appeal](#) overturned an earlier decision which permitted the hospital to withdraw treatment and remitted the case for re-hearing.

## Background

AH contracted Covid-19 in December 2020 and was admitted to hospital in late December 2020. By January 2021 her condition deteriorated, and she developed severe complications which led to multi-organ failure. AH sustained extensive damage to her nerves, muscles and brain.

AH is currently cared for in a critical care unit of the Hospital. She is dependent on mechanical ventilation, continuous nursing care, nutrition and hydration delivered via a nasogastric tube. AH is able to feel and show some degree of emotion and communication but does not have capacity to make decisions about her future treatment.

After hearing evidence from members of AH's family and a number of doctors and individuals who were involved in the care of AH, Mr Justice Hayden gave permission for the hospital to withdraw all life sustaining treatment for AH.

Following the decision of Mr Justice Hayden, AH's children sought permission to appeal from the Court of Appeal. The appeal was allowed and the case was remitted for re-hearing which took place in December.

## Remitted re-hearing

The issues in this hearing centred on the medical prognosis and what the family described as changes in how AH has reacted and communicated to them in recent months. Over two days oral evidence was heard on behalf of the hospital, an expert instructed on behalf of the Official Solicitor and of AH's children A, M, S and K and AH's sister, T.

Mrs Justice Theis having considered the evidence and having weighed in the balance the strong presumption that it is in AH's best interest to stay alive reached the conclusion that the burdens in these particular circumstances, with the prospect of no change and more probably a continued deterioration and risk of dying away from her family, outweigh the very considerable benefits. The declaration sought was granted.

# Manchester University NHS Foundation Trust and William Verden (by his Litigation Friend, The Official Solicitor) [2022] EWCOP 9

itv Watch Live Full Series Shows Categories News

itvNEWS Your Area ▾ Ukraine Coronavirus Politics World Climate Royal Health Entertainment Weather

## Lancaster mum wins appeal for son William Verden to have potentially life-saving kidney transplant

GRANADA | HEALTH | LANCASTER | ⌚ Wednesday 9 March 2022, 5:33pm



*At the centre of a treatment dispute is 17-year-old William Verden, who has a rare kidney disease.  
Credit: Family photo*

A mother has won an appeal for her teenage son to have a potentially life-saving kidney transplant after medical specialists **questioned whether it was in his "best interests."**

William Verden, 17, from Lancaster, has a rare kidney disease called steroid resistant nephrotic syndrome, which means they function at just 5%.

Mrs Marion O'Brien  
and  
Guy's and St Thomas' NHS Trust  
[2022] EWHC 2735 (KB)

- Clinical Negligence case
- Administration of Gentamicin
- Claimant barrister asked me whether the criticism I received in the DJ in the CoP was a reasonable criticism. This made the trial judge analyse my evidence closely.

St George's University Hospitals NHS Foundation Trust  
and  
Andy Casey  
[2023] EWHC 2244 (Fam)

- Punched in head, fall to ground
- OHCA
- Initial approach to CoP for brainstem tests
- Approach to High Court for a declaration of death

# RRO

- Be very careful!