Best interests must be centred on the person's needs not those of the family

Richard Griffith, Senior Lecturer in Health Law at Swansea University, discusses the importance of not allowing unreasonable family demands for care influence the determination of best interests for a person who lacks capacity

The best interest approach was initially developed by the courts from cases concerning people who lacked mental capacity, which were brought before them for decisions on care and treatment (F v West Berkshire HA [1990]). The focus of the courts under this common-law approach was generally limited to the clinical needs of the patient, and nurses determining a patient's best interests were required only to consider the benefits of the proposed treatment against the risks and burden of the treatment.

In what is now the balance-sheet approach to best interests, if the benefits of treatment clearly outweighed the risks and burdens, then it was in the person's best interests to receive that treatment (Re A (Medical Treatment: Male Sterilisation) [2000]).

The concerns of the courts resulted in the introduction of the Mental Capacity Act 2005, which includes the following aims:

- To promote autonomy by setting out in legislation that a person aged 16 years and over has the legal right to make their own decisions where they have the mental capacity to do so
- To protect people who lack the mental capacity to make a particular decision by requiring that any act or decision made on that person's behalf is made in their best interests.

Under the Mental Capacity Act, the determination of a best interest is based on a more holistic approach, which requires nurses to consider the views and values of the person, and to consult with family and carers on their views about the person's best interests (Mental Capacity Act 2005, section 4).

The Supreme Court in Aintree University Hospitals Foundation Trust v James [2013] held that the best interests process in the Mental Capacity Act 2005 requires nurses to come to a decision from the person's point of view. The Supreme Court further held that, although the view of family and carers should be taken into account, they cannot demand the provision of care and treatment.

Acts in relation to care and treatment

Nurses and others are given general authority under section 5 of the Mental Capacity Act to act in relation to a person's care and treatment where:

- Before delivering the act of care, the nurse takes reasonable steps to establish that the person lacks capacity in relation to the matter
- When undertaking the act the nurse reasonably believes that the person lacks capacity and the act is in the person's best interests.

No requirement to provide futile treatment

Although the right to life is held in high regard by the European Convention on Human Rights, the authority to provide treatment under section 5 of the Mental Capacity Act 2005 does not compel nurses to provide treatment that would be futile (NHS Trust A v M [2001]).

Similarly, the authority to act does not engage the right to life where such treatment would preserve life at the expense of a person's dignity, even where family members insist that life-sustaining treatment should be provided (R (Burke) v GMC [2005]). Nurses are never justified in continuing life-sustaining treatment regardless of the risks and burdens inherent in the treatment.

The courts agree that adopting such an absolutist approach to care and treatment is not correct in law. The courts require that all decisions about the withholding of treatment are based on the person's best interests, not on the demands of family (Aintree University Hospitals Foundation Trust v James [2013]).

Dignity and best interests

In North West London CCG v GU [2021] (at para 63) Justice Hayden in the Court of Protection considered the concepts underpinning human dignity, concluding that:

- Human dignity is predicated on a universal understanding that human beings possess a unique value that is intrinsic to the human condition
- An individual has an inviolable right to be valued, respected and treated ethically, solely because he/she is a human being
- Human dignity should not be regarded merely as a facet of human rights, but also as the foundation for them. Logically, it both establishes and substantiates the construction of human rights
- Thus, the protection of human dignity and the rights that flow therefrom are to be regarded as an indispensable priority
- The inherent dignity of a human being imposes an obligation on the state actively to protect the dignity of all human beings. This involves guaranteeing respect for human integrity, fundamental rights and freedoms
- Compliance with these principles may result in legitimately diverging opinions as to how best to preserve or promote human dignity, but it does not alter the nature of it, nor will it ever obviate the need for rigorous enquiry.

In applying these concepts to the determination of best interests Justice Hayden held that each case will depend on the situation and be specific to the person and

their care and treatment. This reflects the approach of the Mental Capacity Act 2005 and the case law of the Court of Protection, which require that all those involved – health professionals, family members and carers – focus on the individual at the centre of the process.

In GUP v EUP, University College London Hospitals NHSFT [2024], the same judge sought to apply that concept of dignity to the case of a woman in her late eighties who had made a poor neurological recovery from a series of strokes, where the views of the family and the nurses and doctors caring for her had become increasingly divergent.

The family continued to hope for a meaningful recovery, while the view of the health professionals was that continued treatment was futile and that care should now focus on comfort and dignity.

The need to guard against compromise care plans

Although the family's and the health professionals' views on care and treatment had diverged, Justice Hayden criticised the continued treatment of the woman as a negotiated compromise between the family and clinicians, which had marginalised the person at the centre of the case. Justice Hayden reminded nurses and doctors that the person must always receive care that is identifiably in the person's own best interests, not based on a compromise between the views of the family and the clinicians.

The views of the family are relevant only in so far as they provide a conduit for the person's own wishes and feelings. They gain no dominion over a dying relative who lacks capacity. Justice Hayden concluded that continued hydration would serve no purpose and cause indignity and distress to the woman, and it was not in her best interests.

Conflict over what treatment is in a person's best interests

Nurses have a duty to act in the best interests of a person who lacks capacity to make decisions themselves under section 1(5) of the Mental Capacity Act 2005. That duty is open to challenge where another clinician, the person themselves or their family argue that the nurse's actions are not in a person's best interests.

Where that conflict cannot be resolved and the objection continues, then the case must be brought before the Court of Protection for a definitive decision of the person's best interests (Practice Direction (CP: Serious Medical Treatment) [2020]). A compromise plan of care that marginalises the person must not be used as an alternative to seeking the decision of the Court of Protection.

Where there is continued conflict, it is for the health body providing care and treatment to the person who lacks capacity to bring the case before the Court of Protection – it must not be left to the person's family to bring the case to the court's attention (Practice Direction (CP: Serious Medical Treatment) [2020]).

Conclusion

Nurses have a duty to act in the best interests of the person lacking capacity in their care. Where there is continued disagreement about the person's best interests, the matter can be resolved in a meeting of those concerned with the care and treatment of the person. This might include family, health professionals and carers. Where the conflict cannot be resolved, it is not open to health professionals to press ahead with treatment in the face of family objection, nor is it acceptable to reach a negotiated care plan that marginalises the person and compromises their identified best interests.

Where there is an irresolvable dispute, the case must be brought before the Court of Protection to resolve the conflict. **BJN**

KEY POINTS

- Nurses have a duty to act in the best interests of a person in their care who lacks capacity
- Although the view of family and carers should be taken into account when determining best interests, they cannot demand the provision of care and treatment
- A best interests determination must respect the dignity of the person
- Nurses must guard against compromise care plans that marginalise the person and infringe the person's dignity
- Unresolved disputes over best interests must be brought to the Court of Protection for a decision

Aintree University Hospitals Foundation Trust v James [2013] UKSC 67
F v West Berkshire HA [1990] 2 A.C. 1 (HL)
GUP v EUP, University College London Hospitals NHSFT [2024] EWCOP 3
NHS Trust A v M [2001] Fam 348
North West London CCG v GU [2021] EWCOP 59
Practice Direction (CP: Serious Medical Treatment) [2020] EWCOP 2
R (Burke) v GMC [2005] EWCA 1003
Re A (Medical Treatment: Male Sterilisation) [2000] 1 FLR 549