To the Covid-19 Inquiry from Mike Stone

Dear Covid-19 Inquiry,

The following is based on something I recently posted online, but here I've elaborated.

I think this is a good illustration of why guidance & documentation should **not** the 'UK wide' for CPR, contrary to the objectives of the Resuscitation Council UK as expressed to the Inquiry.

Basically, I suspect that many doctors 'instinctively believe' that the following must be true, when discussing treatments which might be of clinical benefit with family and friends if the patient lacks mental capacity:

'If the relatives do not have legal authority to make the decision, you should be clear that their role is to advise you and the healthcare team about the patient's wishes and preferences to inform the decision about whether attempting CPR would be of overall benefit to the patient. You must not give them the impression that it is their responsibility to decide whether CPR will be of overall benefit to the patient, or that they are being asked to decide whether or not CPR will be attempted.'

Now: that is NOT correct for England and Wales – but, it MIGHT BE correct in other countries. For England and Wales, not only is it legally incorrect, but it DOESN'T HELP TO STEER ANYONE TOWARDS CLEAR LEGAL UNDERSTANDING NOR TOWARDS CLEAR ANALYSIS EITHER.

The problem, is that our law – the Mental Capacity Act – is what the doctors must follow, in order to avoid being charged with wrongdoing [technically, not to avoid being charged, but in order to claim a legal defence against the charge: but in reality, if it is obvious the doctor could reasonably claim the defence, then I suspect the doctor would almost certainly not be charged].

And OUR law (in England and Wales) does not use the wording 'of overall benefit to the patient'. Our law would use 'is in the patient's MCA best interests'.

Nor does the MCA assign 'responsibility' in the context of best-interests decision-making - it simply says that a person claiming to have satisfactorily made a best-interests decision, must have complied with MCA section 4:

4(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

‘a person other than the court’ clearly INCLUDES family and friends.

If a Welfare Attorney possesses legal authority over CPR, then what happens is the attorney’s expressed decision about CPR removes the defence of the doctor – sections 6(6) and 6(7) of the Act.

So, for England and Wales, that paragraph above, should actually be:

‘If the relatives do not have MCA section 6(6) legal authority, you should be clear that their role is to discuss the patient’s MCA best interests with you and the healthcare team to inform best-interests determinations about whether attempting CPR would be in the patient’s MCA best interests. You must not give them the impression that it is their responsibility to decide whether CPR will be in the patient’s MCA best interests, or that their own determination as to whether or not it would be in the patient’s best-interests for CPR to be attempted can be imposed on you and the healthcare team.’

It is possible – it depends on the precise nature of their own law – that the wording I made *italic* above could be correct for Scotland, Northern Ireland or other parts of the world: **but it is not correct for England and Wales**.

In England and Wales, the legal-protections which clinicians need to claim, arise from having ‘satisfied’ MCA s4(9) – and it is section 4 which explains what best interests means/requires, not different wording [and not, if you work through the reasoning, ‘medical ethics’ either (the ‘ethics’ of MCA best interests must be found **within** the Act)]. Of course, a doctor cannot claim to have satisfied section 4(9) unless the doctor understands section 4, and has sought to gather the information/understanding described in 4(6), etc: and exactly the same is true for a Welfare Attorney; or indeed for a normal family-carer. The converse is of course also true: if a clinician, a legal proxy or ‘a normal relative/friend/family-carer’ has properly worked-through MCA section 4, then the person can say ‘I could honestly stand in front of a judge, and say that I believe I had reached a best-interests determination which is based on a correct application of MCA section 4’.

Regards,

Mike Stone