

# MIDNIGHT LAW



**A patient is diagnosed as dead according to neurological criteria and withdrawal of mechanical ventilation is proposed. Family members refuse to accept this.**

## BACKGROUND

- There is no statutory diagnosis of death in the United Kingdom. Instead, the Courts have adopted the definition and criteria for human death as laid out in the Academy of Medical Royal Colleges 2008 Code of Practice<sup>1</sup>.
- When a family refuse to accept the diagnosis of death according to neurological criteria, it is not the Academy's definition of death that is being challenged, but the method used to reach it.

## GUIDANCE

- The primary purpose of diagnosing death according to neurological criteria is to confirm a clinical suspicion that the person is dead. All active medical therapies can then be withdrawn, the possibility of organ donation explored, and funeral arrangements begun.
- Where dispute exists, an urgent application should be made to the High Court to establish whether or not the patient is dead.
- As noted by the Court of Appeal in *Re M*<sup>2</sup>, it is not a matter for the Court of Protection as there is no basis for any best interests declaration to be made in respect of a person who is dead. You are seeking a declaration that the person is dead.
- Once a person is dead, they are under the jurisdiction of the coroner. If there is a dispute about whether death has occurred, the coroner does not have jurisdiction until death is confirmed.
- Attempts at other forms of dispute resolution should be undertaken, but the nature of the patient's position means that applications to the court should not be delayed and should be progressed in parallel to other forms of mediation.
- It is essential that when diagnosing death according to neurological criteria guidance endorsed by professional organisations<sup>3</sup> is followed as it is this that will be scrutinised by the High Court.
- The evidence required in support of the application will be confirmation that the relevant Codes and guidance have been followed, the outcome of the clinical tests and the supporting contemporaneous medical records and any further opinions obtained. If additional investigations have been conducted, despite not being mandated, they should also be put before the court.
- If the person is declared dead by the Court, then withdrawal of mechanical ventilation must follow, since there is a common law obligation of the personal representatives of the deceased (and ultimately a statutory obligation on the relevant local authority) to arrange for a proper and expedient disposal of the body.
- It is difficult to see any other outcome where there is a consensus of medical opinion as to the diagnosis of death than an order confirming the same. Unless there is a dispute between clinicians, or procedural irregularity in the establishment of the diagnosis, the result of the court application is likely to be successful.
- It is possible that in due course matters may proceed in a similar way to withdrawal of artificial, nutrition and hydration in patients in a permanent vegetative state, so that a clear checklist is set out which, if fully complied with, results in an application being determined by the court on the papers, without requiring an oral hearing. Presently however, where dispute exists, an application to determine whether or not the patient is dead must be made to the High Court as a matter of urgency.

## GUIDING PRINCIPLES

1. Where there is dispute an urgent application to the High Court must be made without delay.
2. Alternative forms of dispute mediation should be undertaken in parallel to the High Court application.
3. It is essential when confirming death according to neurological criteria guidance endorsed by professional bodies is followed as it is the practical application of this guidance and any supporting information that will be scrutinised.
4. Once a declaration is made by the High Court that the person is dead, withdrawal of mechanical ventilation must follow to allow for a proper and expedient disposal of the body.

## FURTHER READING

1. [Academy of Medical Royal Colleges. A code of practice for the diagnosis and confirmation of death. Academy of Royal Colleges; 2008.](#)
2. [Re M \(Declaration of death of a child \[2020\] EWCA Civ 164](#)
3. [Gardiner D, Manara A. Form for the Diagnosis of Death using Neurological Criteria \(full guidance version\).](#)

