Private Client analysis: Following media reports raising concerns around the use of ‘do not resuscitate’ orders (DNRs), Merry Varney, partner at Leigh Day, considers the current legal position on DNRs.

Background
A recent report in *The Telegraph* suggested that an audit of 9,000 dying patients, conducted by the Royal College of Physicians, reveals that one in five families were not informed that a DNR had been put in place. The same study showed that in 16% of cases there was no record of a conversation with the dying patient, or explanation for the lack of one, for the decision to put in place a DNR.

What is the legal context around DNRs and such orders being placed on patients?
DNRs refer to a decision not to administer CPR to a patient who suffers a cardio respiratory arrest. How the decision is made and who can make it is a matter of law and local policy. Professional guidance on DNR decision-making has also been published by the Resuscitation Council, the Royal College of Nursing and the British Medical Association.

The legal requirements of the decision-making process are different depending on whether a patient has the mental capacity to make healthcare decisions and to provide their personal views on a DNR decision. The Human Rights Act 1998 (HRA 1998) and the Mental Capacity Act 2005 provide legal protections for patients in relation to how the decisions are made, but ultimately a DNR decision can be made either by consent or by a doctor unilaterally.

Both the decision-making process and the decisions themselves can be subject to legal challenge—however, a disputed DNR is unlikely to be quashed if the correct process has been followed and no clinical expert agrees it is inappropriate.

What is the proper consent process around DNRs?
DNRs are not always about consent. An individual with capacity can at any time make an advance decision that they do not want to receive CPR in the event of suffering a cardio respiratory arrest.

If no advance decision has been made, and a doctor considers a patient may not benefit from receiving CPR, the patient (who has capacity) should be given information about DNR decisions and have a consultation with their doctor about the right decision. The doctor (or other healthcare professional) should explain why a DNR decision is appropriate. This may be because for clinical reasons it is unlikely to restore life, or because although it may restore life, it would be a significantly lower quality of life and/or amounted to prolonging suffering. A patient should be afforded the opportunity to provide their views on whether they wish to receive CPR or allow a natural death, and armed with this information, the doctor makes the final decision. This may be with or without consent of the patient and as long as they have capacity, the extent of family involvement will depend on the patient’s wishes.

If a patient does not have the relevant mental capacity, the law requires involvement of those who may be able to provide on the patient’s behalf. This could include family, carers, deputies, power of attorney holders, a GP and/or an independent mental capacity advocate. Again, ultimately consent is not necessary and a DNR decision can be made by a clinician acting in a patient’s best interests.

How have recent cases informed our understanding of DNRs?
The recent cases of *Tracey v Cambridge University Hospital NHS Foundation Trust* [2014] EWCA Civ 822, [2015] 1 All ER 450 and the High Court decision in *Winspear (Personally and on behalf of the estate of Carl Winspear, Deceased) v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB), [2015] All ER (D) 134 (Nov) have both confirmed that DNR decisions engage the right to respect for private and family life enshrined in HRA 1998. This confirmed that DNR decisions were not just about clinical judgements but that a decision-making process had to be
followed to avoid human rights violations. The cases focus particularly on the mandatory right to information and consultation regarding DNR decisions unless exceptional reasons exist.

**Could improper use of DNRs open doctors or hospitals to legal action?**

DNRs can be subject to legal action on various grounds and decisions made inappropriately could also lead to complaints to the General Medical Council. Legal challenges may arise out of defects in the decision-making process or, there may simply be a fundamental disagreement about what is in the best interests of a patient without capacity. Decisions based on erroneous and/or uninformed judgments about quality of life or that are made entirely unilaterally are likely to be open to legal action.

**What is needed in this area to bring about clarity for all parties?**

Discussing DNR decisions is often emotional and challenging, especially if there is no prior knowledge about CPR and what a DNR decision is and so on. Promoting greater awareness among patients and families of why and when DNR decisions may be appropriate and what they mean, would in my view, provide welcome clarity. I also think this is a difficult area for clinicians as ensuring they understand the legal requirements of the decision-making process is key to ensuring patient’s rights are upheld.

*Interviewed by Anne Bruce.*

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