

Diagnosis of Death in an Adult

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 06 April 2022

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Background

BN was a lady in her mid-40's attended NWAFT's Emergency Department due to the effects of migraine-type headaches. Whilst in hospital, BN became unresponsive and experienced seizure-like activity. Through imaging a diagnosis of aneurysmal subarachnoid haemorrhage and possible tonsillar herniation was made, BN remained unresponsive and could not breathe unaided.

Second opinions were sought from two separate NHS Trusts and all agreed that there was no neurosurgical option nor any effective treatment available. Discussions were held with BN's family regarding withdrawal of support but they were opposed to this on religious/cultural grounds. BN's family then disengaged with the clinical team.

The team at NWAFT undertook brain-stem death testing in line with the Code of Practice for the Diagnosis and Confirmation of Death prepared by the Academy of Medical Royal Colleges in 2008 and updated in 2010 ('the Code').

The test confirmed that BN's brain stem had ceased to function and, in line with the Code, BN was therefore, sadly, dead.

In the absence of any agreement by BN's family, an application was made to the High Court under the Inherent Jurisdiction for a declaration that BN had died.

The hearing took place on 16 March 2022 before Sir Jonathan Cohen.

The Law

A link to the Code can be found [here](#); it is clear in determining the steps that must be followed in order to confirm cessation of brain-stem function. The tests have to be carried out twice with both occasions being in the presence of both doctors; the tests are:

- Do the pupils react to light?
- Are there corneal reflexes?
- Is there eye movement on caloric testing?
- Are there motor responses in the cranial nerve distribution in response to stimulation of face, limbs or trunk?
- Is the gag reflex present?
- Is there a cough reflex?
- Have the recommendations concerning testing for apnoea been followed?
- Were there any respiratory movements seen?

The reported cases concerning 'diagnosis of death' have been in relation to children with the cases of Re M (Declaration of death of a child) [2020] EWCA Civ 164 and Re A (A Child) [2015] EWHC 443 (Fam) being notable examples.

Declarations were made in the Re A case and mirrored in the Re M matter. These set out that when cessation of brain-stem function is properly established, that:

1. Death has occurred because of the loss of "the essential characteristics necessary to the existence of a living human person namely (i) the irreversible loss of the capacity for consciousness (i.e. a permanent absence of consciousness), along with the (ii) irreversible loss of the capacity to breath; thus the inevitable and rapid deterioration of integrated biological function"
2. Permission can be granted to cease mechanical support, undertake extubation, cease medication and not to attempt CPR
3. Any actions undertaken in line with the matters listed at number 2 above, are lawful

These declarations were, again, mirrored in the case of BN and the judgment can be found here: [High Court Judgment Template \(baillii.org\)](#)

Conclusion

As far as we are aware, this is the first reported such case in relation to an adult. It is unusual as, ordinarily, the Court of Protection would be applied to for a best interests declaration that removal of life sustaining treatment was in the patient's best interests.

The interesting distinction here was that by virtue of the brain-stem tests, BN had been declared dead and as such there was no best interests decision to be made. Rather, and because of the resistance of BN's family, an application was made for a declaration that death had occurred.

That having been granted, the clinicians, whose actions were commended by the Judge, were permitted to take appropriate steps to remove the mechanical support.

The Trust were represented by **Ed Pollard**, partner, [Sarah Gledhill](#), associate, and **Emma Sutton**, counsel of Serjeants Inn.

If you have any questions, please do contact [Ed](#) or [Sarah](#).

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