Medico-Legal **Opinion**

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Does the concept of next-of-kin have any place in medicine?

The exact nature of the role of a patient's next-of-kin is generally misunderstood, outlines ***Mr Stephen O'Leary***

Everyone, or at least almost everyone, has a next-of-kin. It is standard practice to be asked for your next-of-kin's contact details as part of the registration process when attending hospital or when joining a new practice. The next-of-kin or emergency contact is usually the person we want contacted if something doesn't go well, there has been a sudden change in our condition, or sometimes, we need to be collected despite insisting we can find our own way home. Despite the ubiquitous presence of next-of-kin in healthcare documentation, the exact nature of the role and the authority, or lack thereof, of a patient's next-of-kin is generally misunderstood.

In January 2018, the advocacy group Sage Ireland commissioned polling company Red C to do a survey of people's understanding of what next-of-kin meant, and what powers a next-of-kin had. Fifty-seven per cent of respondents, from a cross-section of society, stated that they understood their next-of-kin to be *"someone who can make healthcare decisions or consent to medical treatment if I am unable to"*.

The term next-of-kin is a legal concept which refers to a person's nearest blood relatives. The concept is used in the Succession Act 1965 as a means of identifying those to whom the estate of a person who died without a valid will should be distributed. A person's status as next-of-kin does not of itself bestow any authority or legal basis to make any healthcare decision or give consent for any procedure or healthcare treatment when the person is unable to themselves. Equally, a next-of-kin also has no legal entitlement to any information regarding the patient. They are, essentially, an emergency contact only.

Medical Council guide

As a patient's next-of-kin has no legal authority, if the patient is unable to make decisions on their own behalf, it falls to you as their doctor to decide how to manage their medical treatment. The Medical Council's *Guide to Professional Conduct and Ethics* (8th Edition, 2019) ('the Guide') states at paragraph 10.6 that:

If there is no-one with legal authority to make decisions on the patient's behalf, you will have to decide what is in the patient's best interests. In doing so, you should consider:

- *Which treatment option would give the best clinical benefit to the patient;*
- *The patient's past and present wishes, if they are known;*
- *Whether the patient is likely to regain capacity to make the decision;*
- *The views of other people close to the patient who may be familiar with the patient's preferences, beliefs, and values; and*
- *The views of other health professionals involved in the patient's care.*

Advance healthcare directives

Whilst the Guide also recognises that patients can make an advance healthcare directive, these only take effect if the directive covers the particular situation which has arisen and there is also nothing to indicate that the patient has changed their mind. If there is any ambiguity about the advance healthcare directive, then you must return to dealing with the clinical issues in accordance with what you determine to be in the patient's best interests. Currently, it is not possible for a patient to give another person any power to make healthcare decisions on their behalf under an advance healthcare directive. However, this will soon change.

The Assisted Decision Making (Capacity) Act, 2015, which is now due to commence in the first half of 2023, will make provision for a more powerful advance healthcare directive. Once commenced, the legislation will enable a patient to make an advance healthcare directive specifying what

their wishes are, the type of treatments that they want to receive and do not want to receive. Importantly, the legislation also provides that a person can nominate a designated healthcare representative. This person will have the power to act on behalf of the patient regarding the decisions in their advance healthcare directive. A designated healthcare representative has the power to advise on and interpret the patient's wishes: They can agree to or refuse treatment on the patient's behalf based on their advance healthcare directive. It will also be possible for people to inform the Decision Support Service of any advance healthcare directive they make. This will enable the Decision Support Service to provide a certified copy of the advance healthcare directive should the patient subsequently lose capacity.

Deceased patients

It is not uncommon after a patient passes away for their family to request a copy of their records. While this can, sometimes, be because litigation is contemplated, it is often for more mundane reasons, such as filing a claim with a life insurance company. A family member will contact the doctor or hospital requesting the relevant records on the basis that they are the deceased's next-of-kin. However, even if the person was nominated by the deceased to be their next-of-kin, it is only the deceased's legal personal representative, that is the executor or administrator of the deceased's estate, who is entitled to a copy of their records or who can consent to their release to a third party directly by a doctor or hospital. While it is, of course, understandable to want to assist the family at a time of loss, patient confidentiality continues to apply even after the patient has died. It is important, therefore, to ensure that a deceased's medical records are only released to someone with the appropriate authority to obtain them. This person is not necessarily the person identified by the deceased on a healthcare form as their next-of-kin.

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Conclusion

In short, a person's closest living blood relative or the person named on a healthcare form as their next-of-kin, currently, has no legal entitlement to any information about the patient or to make any decision on that patient's behalf. Where there is no-one with legal authority to make decisions on the patient's behalf, they can, and indeed should, be consulted on what the patient's known preferences, beliefs, and values are should a particular situation arise. However, the ultimate decision on what is in the patient's best interests when no-one else has legal authority to make the decision is one that remains, for now, to be made by the treating doctor. If you have any concerns about a patient's next-of-kin, and the extent to which you can engage with them, you should contact your indemnifier for advice.

Scenario 1

An elderly patient has been admitted to hospital from a local nursing home. The patient has lost capacity and is not expected to regain it. The patient has multiple co-morbidities and the patient's family advise you that the patient was always very clear that he would want his pain to be managed, but no life-prolonging interventions in the circumstances.

In accordance with the Guide, it is appropriate to ascertain the patient's known preferences, beliefs, and values as part of your decision-making process. However, it remains the doctor's decision to determine what is in the patient's best interests given both their clinical presentation and the patient's known preferences.

Scenario 2

An adult patient is involved in a serious, life-threatening accident. Given the nature and extent of the patient's injuries, there is almost no prospect of survival. The patient had never discussed such a circumstance with his family and he has no known preferences for the type of treatment he would want to receive in such a situation. The patient's family are adamant that every possible treatment and intervention should be carried out. As the treating doctor, it is your view that there is no clinical benefit to further treatment and that the patient's condition should be managed palliatively.

As there is no person with legal authority to make a decision on the patient's behalf, it is for the treating doctor to decide what is in the patient's best interests. In doing so, the Guide states that when making your decision you should consider which treatment gives the patient the best options, ascertain the patient's wishes if they are known – which in this case they are not – whether the patient is likely to regain the capacity to make the decision, get the views of those close to the patient who may be familiar with his beliefs, values, and preferences, as well as the views of other health professionals involved in the patient's care.

Scenario 3

A young child is brought into hospital requiring urgent surgery unexpectedly, due to a significant deterioration in their underlying condition. The child's parents are attending a family function and are en route to the hospital, but surgery will need to be done as soon as possible. As the patient's parents are able to provide consent on behalf of the child as the legal guardians, even though they are not physically present in the hospital, all reasonable efforts should be made to seek their consent before proceeding with the surgery.

References available on request