ISSUES IN MEDICINE

Pacemakers and end-of-life decisions

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May the pacemaker of a patient who is terminally ill be turned down at the request of the person concerned or in terms of an advanced directive (a 'living will'), or does such an act constitute 'active' euthanasia?[1]

Refusal of treatment

It is accepted in South African law that patients have the right to refuse medical treatment even if it may cause them to die, if they have the legal capacity to make such a decision.[2] In English law the principle 'extends to situations where the person, in anticipation of his … entering into a condition such as PVS [persistent vegetative state], gives clear instructions that in such event he is not to be given medical treatment … designed to keep him alive'.[3] It is submitted that similar principles apply in our law where patients have made a 'living will' that reflects their current wishes. It is no different from patients issuing an advance directive that they do not wish to undergo a blood transfusion should the need arise even if it may result in death.

'Living wills'

'Living wills' are advance directives which state that if a person suffers from an incurable disease or injury that cannot be successfully treated, artificial life-sustaining treatment should be withheld or withdrawn and the patient left to die naturally.[4] 'Living wills' have not yet been recognised by South African courts or legislation and are still being considered by the government.[5]

0Even though there is no statutory recognition of living wills in South Africa, it is submitted that they should be regarded as legally binding, provided that they were made when the patient was mentally competent, and doctors are satisfied that they reflect the patient's current wishes.

Are pacemakers an 'artificial means' of keeping people alive?

It has been suggested that pacemakers are fitted to improve the quality of life rather than as life-support mechanisms,[2] and this may be true while the patient is in good health. Where, however, patients suffer from serious illnesses or injuries that would otherwise result in their death but for the presence of the pacemaker, the latter becomes an 'artificial means' of support that delays the dying process.

The courts have held that the withdrawal of treatment in circumstances where the patient's condition is terminal and the prognosis is hopeless does not amount to a new intervening act between the underlying cause of death and the withdrawal of treatment.[6] It is submitted that the same principle applies to the turning down of a pacemaker which results in the underlying illness or injury causing the death of the patient.[6]

Pacemakers and brain-dead patients

The new National Health Act now defines 'death' as 'brain death'.[7] In the unlikely event that a brainstem-dead person's pacemaker continues to function, he or she would be legally regarded as dead. Therefore turning down the pacemaker would have no effect on the person's status as a deceased person – a person who is already dead cannot be killed by turning down a pacemaker.

Pacemakers and PVS patients

PVS patients have 'a functioning brainstem [but] a total loss of cerebral cortical functioning'.[8] Where such patients face a hopeless prognosis and the pacemaker is artificially prolonging the dying process (and the patient has not made a 'living will'), the doctor should consult with the patient's relatives in accordance with the *Declaration of Venice*[9] and the Mental Health Act.[10] In cases where a 'living will' has been made the wishes of the patient should be respected. In both situations the resultant death of the patient is regarded as due to the underlying illness or injury rather than the turning down of the pacemaker and legally there is no causal link between the reduction of pacemaker activity and the death of the patient.[6]

Pacemakers and comatose non-PVS patients

Patients in comas differ from PVS patients in that the latter are incapable of emerging from a coma, while the former may recover if the damage to the brain is not permanent or insufficient to prevent recovery.[11]

Where it is not known whether or not a non-PVS patient may emerge from a coma in a mentally competent state, the patient's pacemaker may not be turned down to hasten death.

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The turning down of a pacemaker under such circumstances may amount to murder – unless it can be shown that the prognosis was hopeless and that the patient's death resulted from the injury or illness that originally caused the coma.[8] In cases where comatose patients become PVS the principles regarding PVS patients and pacemakers will apply.

Turning down a pacemaker to hasten death — 'active' or 'passive' euthanasia?

In law there is a distinction between a positive action that causes death (e.g. giving a patient a lethal injection) which amounts to murder,[12] and the stopping of an action that allows death (e.g. switching off a ventilator) which may not amount to unlawful homicide, if done in reasonable circumstances.[11] Turning down a pacemaker to enable a patient with a hopeless prognosis to die naturally from the underlying cause is similar to switching off a ventilator under the same conditions. Both acts can be regarded as 'passive' rather than 'active' euthanasia because the prognosis is hopeless and the patient dies from the underlying cause.

Advising pacemaker patients about 'living wills'

Patients fitted with pacemakers should be told of the possible consequences should they become incapacitated as a result of a major illness or injury, particularly where the pacemaker may delay the dying process. The possible choices for end-of-life decisions, including the advisability of making a 'living will', should be discussed. Such discussions should form part of the informed consent procedure before implantation of the pacemaker. This is because patients must also be told the consequences of any procedure to which they consent.

It is advisable, but not essential, that 'living wills' should include specific reference to pacemakers in the context of 'artificial' means or support. The Living Will Society of South Africa (SAVES) now includes a pacemaker clause in its living wills.

1. McQuoid-Mason D. Pacemakers and 'living wills': Does turning down a pacemaker to allow death with dignity constitute murder? *South African Journal of Criminal Justice* 2005; **18:** 24-40.
2. Dada MA, McQuoid-Mason DJ, eds. *Introduction to Medico-Legal Practice.* Durban: Butterworths, 2001: 28.
3. Airedale NHS Trust v Bland [1993] 1 All ER 859 (HL): 860 (per Lord Keith).
4. Kennedy I, Grubb A. *Medical Law: Text with Materials,* 2nd ed. London: Butterworths, 1994: 1334-1339.
5. South African Law Commission. *Euthanasia and the Artificial Preservation of Life.* Project 86, 1998: xxii. Pretoria: South African Law Commission.
6. Cf S v Williams 1986 (1) SA 1188 (A): 1195.
7. South African Parliament. National Health Act No. 61 of 2003, Section 1.
8. American Academy of Neurology. Position of the American Academy of Neurology on certain aspects of the care and management of the persistent vegetative state patient. *Neurology* 1989; **39:** 297.
9. World Health Organization. *Declaration of Venice on Terminal Illness.* Geneva: WHO, 1983.
10. South African Parliament. Mental Health Act No.18 of 1973, Section 60A(1).
11. Clarke v Hurst NO 1992 (4) SA 630 (D): 646.
12. S v Hartmann 1975 (3) SA 532 (C): 534.