

Refusing medical treatment : legal aspects

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INTRODUCTION

1. It regularly happens that a patient does not share the point of view of his physician and that he refuses to consent in a medical treatment.

Let me give you some examples :

- a Jehovah's witness refuses a blood transfusion ;
- a Christian Scientist refuses almost every medical treatment ;
- a hunger striker refuses food, medical treatment,..
- after several suicide attempts a person leaves a note saying he does not wish to be reanimated.

2. Several interests and values coincide in this field.

First of all there is the principle of autonomy, the principle of self-determination and the principle of freedom of religion : each patient is entitled to make his own decision about his body and his medical treatment. This decision may not accord with the point of view of the medical community. This does not matter. The patient decides on a basis of autonomy : he has the right to be wrong.

On the other hand, the principle of autonomy is not absolute : there are some exceptions which are generally accepted. We can think of legal exceptions for the security and best interest of the society :

- vaccination of children (poliomyelitis) ;
- treatment of persons with well-determined infectious diseases ;
- alcohol and blood tests for drunken drivers, etc...

3. Contrary to the principle of autonomy, there are thus some others principle which could support a medical intervention even when the patient does not want to be helped : the obligation of assistance, human dignity, the protection of a human being, justice, interest of third parties, ...

More specific, article 422 of the Penal Code stipulates that every citizen is compelled to give assistance to a person in great danger. The non-

assistance of a person in great danger is a criminal offence.

A. The law on patient's rights and the competent patient

4. Quite important is also the Law on patients rights (1) which provides that a physician must inform the patient about the goal, the nature, the alternatives, the urgency, the length, the frequency of the treatment, the post treatment, the relevant risks, the financial consequences and last but not least the consequences of a refusal of the patient to be treated.

This informed refusal is of extreme importance in this matter. It means that a patient who refuses a medical treatment had to be informed by his physician about the consequences and the risks of this refusal.

According to the Law on patient's rights, the physician has to inform the patient about the relevant risks : "A risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to undergo the proposed therapy" (2).

When a blood transfusion could be life-saving, it is well understood that the physician has to inform the patient about the consequences of an operation without a blood transfusion.

Moreover one has to wonder whether a physician should undertake an operation on a Jehovah's Witness refusing a transfusion, knowing that there is a real chance that a blood transfusion will be necessary ?

5. The patient has the right to refuse or to withdraw his consent to any medical treatment (article 8, § 4 Law on patients rights).

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More specific a Jehovah's witness has the right to refuse a life saving blood transfusion. If an adult person is competent and thus understands what is involved, she can refuse a life saving act, even if most of us would find this unreasonable and irrational.

The English Court of Appeal pointed this out very clear in the case of *Re T (3)* in which an adult woman, apparently a Jehovah's witness, refused a life saving blood transfusion :

"A patients right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.... (...).

A man or woman of full age and sound understanding may choose to reject medical advice and medical or surgical treatment either partially or in its entirety. A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well-considered..."

At the patient's or the physician's request, the refusal or the withdrawing of the consent will be written down and added to the medical record.

The refusal or the withdrawing of the consent does not imply that the right on a quality treatment disappears. The physician still owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment.

B. The law on patient's rights and the incompetent patient

6. What happens when a Jehovah's witness is incompetent at the moment he needs a blood transfusion ?

Different hypothesis are possible.

First of all it is possible that the patient has written down his wishes in a advance directive. Advanced directives can be divided into instruction directives and proxy directives and some directives contain both.

In a *"instruction directive"* the competent patient gives instructions about types of acceptable and unacceptable interventions, he specifies the types of care he wants or does not want to receive. By drafting such an advance directive, the patient exercises his right on self determination and anticipates on a time where he may be unable to participate in decisions on his own health care.

According to the Law on patient's rights (art. 8, § 4), these advance directives are binding. The physician is obliged to respect an advance

directive as long as the patient did not revoke his decision on a moment where he was able to do so.

In other words, when a Jehovah's witness of age has written down an advance directive wherein he refuses a blood transfusion for the time he is unable to make his own decisions, the physician is compelled to respect the advance decision of the patient.

7. Another type of advance directives are the *"proxy directives"* in which the patient specifies a surrogate or proxy holder he wants to make decisions in his place if he is ever unable to do so. According to the Law on patient's rights the proxy directive is only binding when it has been signed by both the patient and by the surrogate.

The proxy holder exercises the same rights as the patient could have done if he was capable to do so. The physician has to inform the proxy holder about the diagnosis, all aspects of the proposed treatment, and the informed refusal.

The informed proxy holder can refuse a life saving blood transfusion for the incompetent patient.

8. But often the patient has not appointed a proxy holder.

In that case the patient's rights will be exercised by the spouse or partner who are living together with the patient.

If this person is absent or refuses to act, the rights of the patient will be exercised in descending order by a child of age, a parent, a brother or sister of age of the patient.

If these persons are absent or refuse to act, the physician will take care of the interests of the patient.

This will also be the case if there is a conflict between two or more of the above mentioned people (art. 14, § 2 Law on patient's rights).

9. As explained, the proxy has the power to exercise the patient's rights and to refuse a treatment or a blood transfusion for the incompetent patient.

But this power is not endless. The Law on patient's rights has set some boundaries on the power of the proxy.

In the interest of the patient and to avert a life threatening situation or a serious affect of his health, the physician can deviate from the proxy's point of view.

But if the proxy who has been appointed by the patient, can prove the express will of the patient, the physician has to incline.

The sole allegation that the incompetent patient would refuse a life saving blood transfusion, does not meet that requirement.

10. If in an emergency situation, the will of the patient or his proxy is not clear, every necessary intervention can be taken by the physician in the best interest of the patient (art. 8, § 5 Law on patient's rights).

11. If the patient is a minor, his patient's rights will be exercised by his parents or his guardian.

Taken into account his age and his maturity, the minor patient will be involved in the exercise of his rights.

If the minor is capable to make a reasonable judgment of his own interests, he can exercise his rights by his own (art. 12 Law on patient's rights).

12. If the minor patient is not capable of understanding the consequences of the (refusal of the) treatment, his parents will exercise his rights.

If the parents are Jehovah' witnesses, they might quite certainly refuse a life saving transfusion for their minor child.

As mentioned earlier the decision - power of the parents is not absolute. The physician has to deviate from the parents opinion when the minor's life or health is in danger.

The physician must act in the best interest of the child without taking into account the decision of the parents.

Hence, the physician must proceed to a life saving blood transfusion to save the life of the minor, even if this is contrary to the parents wishes.

13. Things are more difficult when the minor is mature enough to make his own decision.

The minor, supported by his parents, can refuse a life saving blood transfusion.

The physician 's task is not an easy one. He will have to examine if the minor's decision is voluntary or the result of persuasion or undue influence by his parents.

If the physician comes to the conclusion that the consent of the minor is not freely given, but is coerced, he may decide that the consent or refusal is invalid. Hence, he can give a life saving blood transfusion.

If on the other hand, the minor's refusal is the result of a competent and free decision without unlawful coercion of the parents, the physician will have to respect his decision.

Lord Donaldson stated it as follows :

"I personally consider that religious or other beliefs which bar any medical treatment or treatment of particular kinds are irrational, but that does not make minors who hold beliefs any the less 'Gillick competent' [a fortiori adults]. They may well have sufficient intelligence and understanding fully to appreciate the treatment proposed and the consequences of their refusal to accept that treatment" (4).

1. Law on patients rights 22 august 2002, Belgisch Staatsblad/Moniteur Belge, 26 september 2002 ; see for a first comment : D. MAYERUS and P. STAQUET, "La loi du 22 août 2002 relative aux droits du patient et son impact sur la relation patient - médecin », DCCR, 2002 ,7 ; H. NYS, "De wet betreffende de rechten van de patiënt", R.W., 2002-2003, 1120 ; C. TROUET and I. DREEZEN, "Rechtsbescherming van de patiënt", NjW, 2003, 9.
2. J. WALTZ and T. SCHEUNEMAN, "Informed consent to therapy", *Nw.U.L. Rev.*, 1970, 639-640.
3. Re T (adult : refusal of treatment) [1992]4 All ER 649 (CA).
4. Re W (a minor) (medical treatment) [1992]4 All ER 627.