

# CHILD RIGHTS AND THE LIMITS OF PARENTAL CONSENT IN MEDICAL PROCEDURES

OANA-MARIA HANCIU\*

## Abstract

*Parental consent regarding a child includes the right of them to consent or not to a certain treatment on behalf of the child, but for this to be valid it must be governed by the child best interest.*

*Even if the parents believe in a sincere way of the rightness of their decision regarding the child interest, if the procedures are not adequate for the child age and for his real needs and this has a irreversible and damaging effect, the parental consent must be limited.*

*Also, the right for life and medical treatment of a minor child is prior to any religious beliefs of parents.*

*This paper has the purpose to present some procedures in order to protect the children and to limit the parental consent, so that the parental rights to determine medical treatment for the child will not be used in damage of child best interest.*

**Keywords:** *child rights, parental rights, limits, decision factors, health professionals.*

## 1. Introduction

One of the most important achievements of the Council of Europe, as an intergovernmental organisation, is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This international treaty defines the inalienable rights and freedoms of all citizens and asks the State parties to guarantee these rights. Meanwhile, it institutes an international system of protection: the states and private individuals may inform the authorities from Strasbourg in case of the Convention violations. Romania has ratified both the European Convention of Human Rights and the European Social Charter.

The international community, particularly in the second half of the last century, has permanently expressed interests related to the issue of human rights. In this respect, was adopted in 1948 the Universal Declaration of Human Rights by the General Assembly of the United Nations and two international covenants of human rights, further followed by different treaties, resolutions and declarations related to the protection of human rights.

Concerning the protection and promotion of children's rights on 20th November 1989 the General Assembly of the United Nations developed the Convention on the Rights of Child, followed by the Optional Protocol to the Convention relating to the Rights of the Child, on the involvement of children in armed conflicts, and Optional Protocol to the Child's Rights Convention, concerning the sale of children, child prostitution and child pornography in 2000. In Romania, the human rights and therefore the children's rights are promoted and mainly protected by the Romanian Constitution which specifies in article 15: *The citizens benefit from rights and freedoms established through the Constitution and any other laws and have the duties stipulated by them.*

In Romanian legislation, the protection of the children's rights is mainly governed by Law no. 272/2004 concerning the protection and promotion of the children's rights. But, as member state of the Convention on the Rights of the Child, Romania has assimilated in its internal law the principles and standards assumed by the international commitments related to the protection of the children's rights.

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\* Lawyer, Bucharest Bar (oanahanciu@gmail.com).

This paper aims to present the importance of observing the superior interest of children in the medical procedures, and as well presenting some procedures for their protection even by limiting of the parental consent when this is not in accordance with the child best interests.

The Human Rights legislation is relevant to health care providers, since it regulates the relationship between individuals and medicine. Doctors should be well aware of the human rights legislation and be focused on patient interests closely linked to the law requirements.

Therefore, in the present case, it is of paramount importance that state institutions and medical staff closely observe the children's rights and when doctors and parents disagree about the best interest of the child, the courts should be in the position to determine the destiny of a sick child.

## 2. Law impact related to the child rights and medicine

The human rights law influences directly the medical decisions. It is important for the decisions made, both from the individual point of view and from the medical deontology point of view, to be adopted with transparency and accuracy and by observing the human rights.

Human rights are legal instruments which represent fundamental human interests and are therefore closely aligned with ethical practice. As part of the general ethical treatment of patients, all health professionals should be familiar with their obligations keeping in mind fundamental human rights regulations in accordance with human rights legislation. As for instance, in 1998 in United Kingdom was adopted the Human Rights Act by Medical Ethics Department<sup>1</sup>.

Relevant to health professionals are the articles from ECHR, as follows:

- right to life (Article 2)
- prohibition of torture, inhuman or degrading treatment or punishment (Article 3)
- right to liberty and security (Article 5)
- right to a fair trial (Article 6)
- right to respect for private and family life (Article 8)
- freedom of thought, conscience and religion (Article 9)
- freedom of expression (Article 10)
- right to marry and found a family (Article 12)
- prohibition of discrimination (Article 14)

According to the European Convention, the rights can be divided into three types: <sup>2</sup>

- absolute rights (Article 3), from which no derogation is permitted although even these rights are open to interpretation;
- limited rights (Article 2, 5 and 6) where the limitations are explicitly stated in the wording of the Article; and
- qualified rights (Articles 8, 9, 10 and 12) where derogation is permitted but any action must: be based in law, meet Convention aims, be non-discriminatory, necessary in a democratic society and proportionate.

The introduction of a "right to life" in the European Convention does not mean that doctors must always strive to prolong life but that specific consideration must be given to this right as part of the medical decision-making process. Article 2 imposes positive and negative obligations on public

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<sup>1</sup> The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK <http://www.bma.org.uk>

<sup>2</sup> The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK <http://www.bma.org.uk>

authorities. They have *positive* duties to take adequate and appropriate steps to protect the life of individuals in their care, as well the *negative* duty not to take life intentionally<sup>3</sup>.

By all means, patient's best interest should be the priority to any medical decision and if there is a dispute between doctors and patient wish or patient relatives, the courts will be often asked to determine which is the best decision regarding patient's best interest.

Many decisions in medical practice involve patients' human rights. The rights that are affected needs to be identified first. The next stage of the process is to consider whether it is legitimate, in the circumstances, to interfere with those rights. In order to assess this, it is necessary to be familiar with the concept of proportionality.

Any interference with a Convention right must be proportionate to the intended objective. This means that even if there is a legitimate reason for interfering with a particular right, the desired outcome must be sufficient to justify the level of interference proposed. This involves a similar thought process to that used by doctors in many contexts, for example, to decide whether a breach of confidentiality is justified in the public interest. In those cases, doctors must consider whether the legitimate aim in disclosing information (to prevent or detect a serious crime, for example) is sufficiently serious to justify breaching confidentiality. These decisions are made by balancing the competing interests and by careful assessment of the individual factors in the particular case. In some cases a breach of confidentiality will be justified and in others it will not and those making the decision may be called upon to justify their actions. Although the term "proportionality" may be new to doctors, the concept is not.

In every decision doctors must consider relevant Convention rights and must be able to demonstrate legitimate grounds for interfering with such rights. Where different rights come into conflict (such as Articles 2 and 3), the doctor must be able to justify choosing one over the other in a particular case. Any decision, either to provide or withhold treatment, could be open to challenge using the Human Rights Act. It is therefore essential to build into the decision-making process consideration of how the decision could be justified from a human rights<sup>4</sup> perspective.

There are some cases, like emergencies, when doctors may proceed without parental consent or court authority. For example, it could be the case of parents who are Jehovah's Witnesses and refuse to consent blood transfusion for a child, transfusion which is vital to child survival. In this case parents would say that article 8 (endorsing their right to family life) and article 9 (guaranteeing religious freedom) of the European Convention of Human Rights offers them the right to decide child medical treatment. But in this case, when it is a matter of survival, the child best interest should be prior to any parents religious convictions.

In contrast with this example, the decision of ECHR<sup>5</sup> in *Glass versus United Kingdom* is relevant. According to this decision doctors are warned not to stretch the definition of emergency. It also places a strong emphasis on a presumption of parents' right to make decisions about the treatment of their young children.

David Glass was a child with multiple disabilities. In 1998, he suffered a series of infections after a tonsillectomy. Doctors believed that David had little awareness or pleasure in his surroundings, and that he was dying. They decided that if David stopped breathing he would not be resuscitated, and administered diamorphine to relieve any distress. His mother vehemently objected both to the administration of diamorphine and the doctors' decision not to resuscitate David. On one occasion she successfully resuscitated David herself. The relationship between Davids' family and doctors deteriorated into acrimony and violence. Mrs. Glass unsuccessfully challenged her son to

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<sup>3</sup> The impact of the Human Rights Act 1998 on medical decision-making Guidance from the BMA's Medical Ethics Department, 2007, UK <http://www.bma.org.uk>

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<sup>5</sup> *Glass v. The United Kingdom*, Application No. 61827/00, Judgement of 9 March 2004

English Courts. She eventually took his case to the European Court of Human Rights in Strasbourg and won. The court rules that administering diamorphine to David, against the wishes of his mother, violated Article 8 of European Convention on Human Rights. Doctors violated David's right to respect for his privacy, notably his bodily integrity. Where children are too young, or otherwise unable to make their own decisions about medical treatment, doctors must normally seek consent from the parents who speak on their child's behalf. Where doctors consider that parents are not acting in the child's interests, they must seek authority from a court before overruling the parents – except where intervention is immediately necessary to save the child's life<sup>6</sup>.

Also, the Convention related to the children's rights specifies in Article.3par.1:

*In all actions concerning children, made by the institutions of public or private social assistance, courts, administrative or legal authorities, the children's interests will prevail.*

*2. The Party states engage to provide to the children the necessary protection and care in order to assure their welfare, taking into account the rights and obligations of their parents, legal representatives or of any other persons to whom they were legally trusted and for this all the appropriate legislative and administrative measures will be taken.*

Parental responsibility refers to the rights, duties, powers and responsibilities that most parents have in respect of their children. Parental responsibility includes the right of parents to consent to treatment on behalf of their children, providing the treatment that it is in the interests of the child.

Parental responsibility means that parents have a statutory right to apply for access to their children's health records, and if the child is capable of giving consent, he or she must consent to the access. Competent children can decide many aspects of their care for themselves. Where doctors believe that parental decisions are not in the best interests of the child, it may be necessary to seek a view from the courts, whilst meanwhile only providing emergency treatment that is essential to preserve life or prevent serious deterioration.

Parental responsibility is a legal concept that consists of the rights, duties, powers, responsibilities and authority that most parents have in respect of their children. It includes the right to give consent to medical treatment, although as it is discussed below, this right is not absolute, as well as, in certain circumstances, the freedom to delegate some decision-making responsibility to others.

People with parental responsibilities are entitled to give consent for medical treatment on behalf of their children. Usually parents wish to make the right decision about their young child's best interests, and most decision making is, rightly, left to children and parents with appropriate input from the clinical team. In cases of serious or chronic illness, parents may need time, respite facilities, possibly counseling, and certainly support from health professionals, but in most cases they are best placed to judge their young child's interests and decide about serious treatment. There are limits on what parents are entitled to decide, however, and they are not entitled to inappropriate treatment for their children or to refuse treatment which is in the child's best interests.

The decision capacity of the children, related to the agreement with medical treatment, depends on several factors, such as: the intelligence degree, the comprehension level and their capacity to assess correctly the medical advice.

Competent minors may be able to invoke their rights to challenge a decision to provide treatment against their wishes. It is possible that a young person could use the Convention rights (in Articles 5, 8, 9 or 14) to appeal against a decision to provide treatment against his or her wishes. So, people under 18 can give valid consent to treatment, proving they have sufficient understanding of the proposed treatment.

However in case the treatment is dangerous and might generate permanent sequels, obtaining the parents agreement becomes compulsory. Also, in all the agreements concerning the

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<sup>6</sup> Brazier M. & Cave E. , *Medicine, patients and the law*, (London, Penguin books – 2007), p.390

medical procedures, there should be a balance between the real psychological capacity and the legal capacity of agreement, in this respect being some essential differences.

In the support of this statement is the *Declaration from Helsinki*, updated by the World Medical Association in 1996, which mentions: “*In case of legal incapacity, the agreement should be obtained from the legal guardian, as stipulated by the national laws. Where the physical or mental incapacity makes impossible to obtain an agreement in full knowledge or when the subject is a minor, the agreement of the relatives who are liable for him replaces that of the subject, always in compliance with the national laws. When the minor is indeed able to express his own agreement, this should be obtained together with that of the legal guardian.*”

For instance, in Switzerland, Germany, England, concerning minors, the agreement in full knowledge, signed of the parents or of those exercising the tutor authority, is enough. In France, it is necessary, except the parents agreement also the interference of three experts, of which two doctors outside the team that will assess the taking-off or the transplant. In case of taking off from a minor unable of any agreement, recently the Convention on bioethics has set that, unto the general forbiddance to take off organs or tissues from a subject unable to express his agreement (art. 20, paragraph 1), take off regenerative tissues (such as bone marrow) from a subject unable of agreement may be consented under some specific conditions <sup>7</sup>(art. 20, par. 2).

However the parents rights to determine a medical treatment for their children derives from the parental liability and these rights may be removed only under the conditions when there are clear indications that the superior interest of the child is damaged by the inopportune and inadequate decisions of the parents. The usual procedures and the preventive measures do not generate any problem. The situation becomes more complicated when these procedures have a harmful and irreversible effect, case when if the parents decisions are not compliant with the best interests of the children, their agreement should be limited, even if they believe sincerely that they act in the superior interest of the children.

As to the above stated, it may be the case of the cosmetic operations. Does the parent have the right to submit his child to such an intervention only to be promoted in his career of model or simply just for esthetical reasons absolutely useless? Certainly not. It is not any longer the case of the best interests of the child, but of some parental ambitions.

So any medical procedure should be conceptually based on the best interests, and also, except the cases of medical emergency when life is in danger, the administration of a medical treatment in the absence of a consent may be considered an illegal action.

Also<sup>8</sup> the treatment of the persons not being able to make a decision, may require a certain behaviour to the clinician:

- Act in the superior interest of the person
- Follow a legal provision or a regulation, valid for the respective case or
- Use one of the substitutes for the decision factors.

Nevertheless, the doctor should protect the patient life when the patient is not enough informed about his denial or he has an irrational decision behaviour and in this case the doctor may address to the courts for an equitable and legal settlement of the situation. The patient denial should be recorded by the doctor in the observation chart both when it is about the personal denial of the patient or when the patient appoints somebody else for this.

The principles which should govern both the medical activity and the patient autonomy are the patient safety, the absence of the negative effects and the justice principle.

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<sup>7</sup> Stan C (2009)., *Malpraxisul medical*, (Editura Etna, Bucuresti), p. 62

<sup>8</sup> Stan C (2009)., *Malpraxisul medical*, (Editura Etna, Bucuresti), p. 64

### 3. Conclusions

In conclusion when there are different opinions related to the child treatment between the parents and the medical staff, the solution is granted in the care of the courts. In principle the parental rights are practiced commonly by both parents. However there are cases according to the New Civil Code, when this minor protection may not be obtained by the aid of the parents, the tutor or guardianship, assign to foster home or any other measures specially provided by the law may be instituted.

Also, when a child is able to communicate, they should take into account his opinion related to the medical treatment that he is going to be subject to. There should be a balance between his best interests and his will or not his to attend the treatment. There is a good practice to obtain the child agreement in these cases. The forced treatments which imply a major psychic stress of the child should have a strong justification.

The general principle that should have the precedence is saving the life.

The challenges of the modern world in the medical field should be compliant with the legal system of the human rights protection.

It is however necessary to put in practice better the internal, European and international law, in force related to the superior interest of children in medical procedures and a greater legal liability of all the decision factors.

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