

## CASE REPORTS

### CONSENT FOR SURGERY IN VIEW OF AN AMBIGIOUS COURT DECISION – CASE REPORT

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Guardianship courts seem to issue decisions in case of the need to obtain consent for surgery, amongst other things, when the patient is unable to consciously express written consent, and at the same time does not have a legal representative or a statutory representative does exist, but settlement with him is impossible. The presented study case demonstrated the abnormalities of applying court procedures, as well as the responsibilities and dilemmas posed in front of a surgeon. A specialist surgeon wanted to help the patient and he was able to accomplish his mission.

**Key words:** agreement of a third person, court agreement, limb amputation

Guardianship courts issue decisions in case of the need to obtain consent for surgery, in accordance with art. 34 paragraph 3, Act of December 5-th, 1996, concerning the profession of doctors and dentists (Dz. U. 1997, Nr 28 pos. 152), when the patient is unable to consciously express written consent, and at the same time does not have a legal representative or a statutory representative does exist, but settlement with him is impossible. A relevant criterion to apply by the physician for court permission is time: does the patient require emergency or planned surgical intervention. Consent is not required in case of emergency, such as loss of life, significant body damage, or serious health disturbance (art. 34 par. 7, act of December 5-th, 1996, concerning the profession of doctors and dentists). In case of an emergency intervention, consent is not required, in case of planned surgery-consent is a must. The judges themselves are unable to assess the patients' medical condition, due to lack of appropriate qualifications. The court shall issue a decision granting consent on the basis of gathered material – annexed to the document, or during subsequent legal proceedings. Not

always is the procedure properly applied by the court, which is illustrated by the presented study case (1-4).

#### CASE REPORT

A patient hospitalized at the ER of a Clinical Hospital was qualified by a vascular surgeon for amputation at the right thigh level. The reason for the above-mentioned was colliquative necrosis of the right foot with a tendency to spread towards the lower limb, and ulceration of the dorsal part of the foot during the course of generalized atherosclerosis and ineffective conservative treatment.

That same day the patient was subjected to a psychiatric consultation. The patient was diagnosed with psychoorganic syndrome with the following annotation: the patient is not able to give a conscious consent for planned surgery.

The vascular surgeon from the Department where the patient was admitted requested permission to perform surgery to the Family and Juvenile Division of the District Court. The

application was accompanied by medical documentation, including the vascular surgeons' and psychiatric consultations. Until 2:50PM the next day consent was not obtained. The patient was signed up for surgery the following day. The surgeon informed the patients' daughter of the ongoing situation and necessity to sign the consent for surgery the next day. The daughter was not a legal representative of the patient.

The court order was sent to the hospital the next day after submitting the application to the court at 3:05PM. Considering the consent to perform surgery the court decided as quoted: " found no grounds for consent to perform lower limb amputation surgery". The court confirmed the inability of the patient to consent to surgery, due to the diagnosed psychoorganic syndrome, as well as the fact that conservative treatment proved ineffective. The court pointed too art. 34, paragraph 1 and 3, Act of December 5-th, 1996, concerning the profession of doctors and dentists, which demonstrated the need to obtain court approval. Furthermore, the court finds as quoted: " the above-mentioned applies only to increased risk situations, and not life-threatening conditions, when the physician performs surgery without patient consent". According to the court: " it was not suggested that surgery was of high-risk". The court stated that there is therefore no basis to assume, considering available medical data, a condition of increased risk.

The patient underwent surgery after obtaining written consent from the patients' daughter.

## DISCUSSION

In order to obtain permission to perform surgery, a proper application was submitted to the court for approval, along with medical data including the vascular surgeons' and psychiatric consultations. Medical data is most important for the court when assessing the patients' general condition and consent for surgery. Similarly important for the court is the submission of the petition for surgical consent. The petition is evidence that the patient's condition has been assessed as non life-threatening.

According to art. 34, Act of December 5-th, 1996, concerning the profession of doctors and dentists, the physician may perform surgery in case of a patient unable to consciously ex-

press written consent, after obtaining consent from his legal representative or when an agreement with him is impossible, after obtaining permission of the guardianship court. In the presented study case there was no legal representative, thus, the decision was undertaken by the court. The surgeon can perform surgery without consent of the legal representative or guardianship court, when the delay caused by court proceedings would prove to be life-threatening or cause significant body damage. The most important decision that the surgeon has to undertake, regardless anyone's consent, is whether surgical management can wait. If the patient requires immediate surgical intervention, the physician does not wait for consent. In such a case the physician is obliged, if possible, to consult with another physician of the same specialization. The surgeon should immediately notify the legal representative, actual guardian, or guardianship court of the undertaken activities and circumstances. The patient should be informed about the possible circumstances. The physician also annotates with justification, the medical data.

The content of the decision can be received unequivocally. No grounds for consent to perform surgery-lower limb amputation is unambiguous. It is not known whether there are no indications for surgery, or is it a life-saving surgical intervention. It seems that the above-mentioned citations demonstrated that the court took the position that the case was life-threatening, and consent is not required. It is completely illogical and unfounded.

The court did not examine the patient in person and did not entrust the examination to a medical expert.

The court indicated that the procedure was not only of high-risk, but also life-saving. Life-saving procedures also require court authorization if emergency intervention is not necessary. Lack of discussion concerning "time" was the reason for the ambiguity of the court.

Moreover, the court delayed the issuance of the decision for one day. In case of life-threatening situations the court should not afford such a delay in undertaking the decision.

The court should immediately notify in his decision and clearly indicate that the physician does not require a consent and may perform surgery.

The physician obtained the daughter's consent and performed surgery, despite lack of

court consent. It is unambiguous that the physician understood the court's decision as lack of consent for treatment. If the physician understood the decision in such a way, he would not ask for the daughter's consent.

The daughter was not a legal representative of the patient in light of the Act on the profession of doctors and dentists. The above-mentioned clearly indicates that consent may be obtained from a legal representative and not the actual guardian. This is evidence that the person who may consent to surgery must have legal legitimacy (parents as legal representatives of a child or guardian appointed by the court), not just be actually taking care of the patient. The Act on the profession of doctors and dentists distinguishes between the legal representative and actual guardian. The latter should be notified only in case of emergency intervention in selected situations, although he is not specified in the Act as a subject to consent- in contrast to the legal representative (5, 6, 7).

The Medical Ethics Code contains different legislations, according to art. 15, where diagnostic, therapeutic, and prophylactic management require patient consent. If the patient is unable to consciously sign a written consent, his legal representative or actual guardian should do so. The Medical Ethics Code allows, as sufficient, consent of the actual guardian. However, the above-mentioned is not a source of law and should be adapted to the existing regulations of the Act concerning the profession of doctors and dentists.

The physician who obtains consent only from the actual guardian should not be subject

to penalization for infringement of regulations of the Act concerning the profession of doctors and dentists, when he has not violated the ethical principles of the Ethics Code.

Considering the presented study case the court exceeded its authority, and perhaps even endangered the patients' life and health. The courts decision was confusing, illogical, and unacceptable. The court possessed medical data concerning the patients' condition, which enabled the physician to act only after judicial consent.

In light of the courts decision the physician did not require anybody's consent, even that of the patients' daughter.

The physician acted in the best way possible, considering the presented case.

In emergency situations, when delayed intervention is unacceptable the physician can act without consent, including that of the court, based on art. 34 paragraph 7, Act on the profession of doctors and dentists. However, if the physician, despite the above-mentioned legal possibilities applies for judicial consent, an emergency condition is not at stake (8). In such a case consent from the court is a must.

## CONCLUSIONS

1. The decision of the court concerning consent for surgery should be clear, simple, and raise no doubts as to their interpretation.
2. The patients' medical condition is certified by the documentation submitted by the physician for surgical consent or by another physician called upon by the court to examine the patient.

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