

# Consent and a Patient's Right to Refuse Blood Transfusion or Medical Treatment

The professions of medicine and nursing are noble callings and are both subject to the Hippocratic Oath. This requires that while everything possible should be done to heal and ease suffering, nothing should be done which causes harm to the patient.

Difficult ethical and practical problems arise where treatment or a particular form of treatment is necessary to save life but where the patient refuses such treatment. This short article briefly examines the legal position.

## Refusal of blood transfusion

### Two scenarios arise:

- The first is where an adult patient specifically refuses blood transfusion in respect of him or herself.

In the case of *Phillips vs De Klerk, 1983*, an electrical engineer sustained serious injury in a motor vehicle accident and an urgent blood transfusion was recommended by the treating orthopaedic surgeon to save the man's life. The patient was deteriorating by the minute but the patient's wife refused consent to the transfusion because they were Jehovah's Witnesses. However, an urgent application to allow the blood transfusion was granted by the court.

Ironically, the blood transfusion was never administered as the patient was transferred to another hospital where he recovered without having to undergo the treatment. Seven months later, the patient brought an application to the Supreme Court to set aside the earlier order. Essentially,

his contentions were that he was fully conscious on admission to the first hospital and had given full instructions to the staff that he not be given a blood transfusion. He had offered to furnish the hospital and treating doctor with a written absolution from any possible claim against them arising from his refusal to permit a transfusion.

The application succeeded on the basis that the patient was *compos mentis* at the relevant time and that he was entitled to refuse the blood transfusion. It is submitted that the situation would be different if the patient was unconscious or incapable of validly expressing his will.

There have been some interesting debates and articles about whether the refusal of an essential blood transfusion by a patient was not effectively the same as the patient committing suicide.

A distinction is drawn between the situation of a person who is about to jump off a building or shoot himself and where death is imminent, whereas a refusal of medical treatment will not always be an immediate threat to the life of a patient. Similarly, it was suggested by Strauss (*Doctor, Patient and the Law, 3<sup>rd</sup> edition*) that a hunger striker who manifests an intention to starve to death is comparable to that of the suicide and that intervention in the form of medical treatment would be justifiable on the basis of necessity. It would then follow logically that if a refusal of a blood transfusion would probably lead to imminent death, medical intervention might be authorised by court.

- The second scenario involves children.

The law clearly permits the best interests of the child with regard to his right of life to be protected, notwithstanding the parent's refusal to consent to a blood transfusion (and presumably any lifesaving form of treatment). The case of *Hay vs B* and others heard in the Johannesburg High Court in October 2002 concerned a matter where a paediatrician was of the view that an infant would probably not survive if a blood transfusion were not administered. The parents opposed the recommendation on the grounds of their religious beliefs and because of the perceived risk of infection associated with blood transfusions.

The court held that in terms of Section 28(2) of the Constitution the child's best interest was of paramount importance and that law enforcement agencies, all right-thinking people and ultimately the court as the upper guardian of all children were under a duty to afford children protection. The court emphasised that while the parents' concerns were neither reasonable nor justifiable, parents' reasons for refusal in general should not be ignored and that proper consideration had to be given to such reasons. One can postulate the situation perhaps where certain medical procedures were recommended which were of a controversial nature and it was uncertain whether the treatment might be in the best interest of the child.

It is therefore reasonable that the healthcare provider, faced with the refusal by a competent adult to undergo a recommended blood transfusion, should require the patient to sign a document. In it, the reasons for the transfusion should be set out as well as the probable consequences of the failure to have the transfusion, and the patient's clear instruction that such transfusion should not be carried out. The document should be witnessed and signed by both parties, each of whom should retain a copy.

### Refusal of treatment

The law is very similar to that concerning blood transfusion. It is submitted by Strauss that the fundamental issue is that a person is master of his/her own body, i.e. *dominus membrorum sororum*, and there are no grounds justifying medical intervention other than:

- The patient's consent or the consent of someone legally capable of consent on his behalf
- *Negotiorum gestio*, which entitles a doctor to administer emergency medical treatment in cases where on account of the patient's condition, he/she is unable to consent;
- Necessity, i.e. where the interests of society are at stake (which would entitle a doctor to treat the patient even against his/her will), for example, where medical intervention is necessary to prevent the spreading of a contagious disease.

The law is quite clear, and as long ago as 1923 the court held in the matter of *Stoffberg vs Elliot* that 'any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body and is a wrong entitling him to damages if he suffers any'.

Unfortunately, it is a fact that few patients, particularly in state hospitals, are properly informed with regard to the risk/benefit of medical procedures or surgery. Cases can arise where consent purportedly given without such consent being 'informed' may not be consent at all. Many jurisdictions follow best practice



with regard to recording in writing the reasonable or probable consequences of treatment as opposed to no treatment. The same principles would apply to the refusal to remain in hospital for treatment.

In terms of Section 7 of the National Health Act of 2003 a health service may not be provided without the user's informed consent unless:

- A user is unable to give an informed consent and such consent is given by a person:
  - mandated by the user in writing to grant consent on his or her behalf; or
  - authorised to give such consent in terms of any law or court order;
- The user is unable to give informed consent and no person is mandated or authorised to give such consent, and the consent is given by the spouse or grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;
- The provision of a health service without informed consent is authorised in terms of any law or a court order;
- Failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or
- Any delay in the provision of the health service to the user might result in his/her death or irreversible damage to his/her health and the user has not expressly, implicitly or by conduct refused that service.

### Children/minors

The new Children's Act 38 of 2005 promulgated with effect from 1 April 2010 contains far-reaching provisions regarding consent by children, namely:

A child may consent to his/her own medical treatment if he/she is over the age of 12 years and if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment (Section 129 (2)).

Similar provisions apply to surgery (Section 129 (3)) but the child is required to be assisted by a parent or guardian. The parent, guardian or caregiver of the child may provide for consent of treatment or surgery subject to various conditions found in the Act.

It is submitted that healthcare practitioners should, wherever possible, secure the consent of parents or guardians to any form of treatment or surgery and that a child over 12 should be part of the informed consent process, save for emergencies.

Similarly, where the treatment or surgery is elective as opposed to life saving, increasing recognition should be given to the wishes of the child in accordance with the child's age and maturity and of course subject to the Constitutional imperative whereby the best interests of the child should be the determining factor. Where any doubt exists in a situation of conflict, the court should be approached for an appropriate order.

It is incomprehensible to conceive of a situation where a parent or guardian might not wish to act in the child's best interests but ignorance and an inability to understand risk / benefit imperatives could well give rise to such a situation, especially in the South African context.

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