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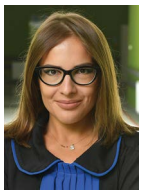
Persistent therapy in the light of case law and literature in the aspect of the patient's rights and the physician's corresponding obligations

Uporczywa terapia w świetle orzecznictwa i doktryny w aspekcie praw pacjenta i skorelowanych z nimi obowiązków lekarza



Kamila Kocańda[1], Agnieszka Zwierzchowska[1, 2], Michał Bączek[3]

[1]Institute of Medical Sciences of the Jan Kochanowski University in Kielce, Kielce, Poland
[2]Świętokrzyskie Psychiatry Center in Morawica, Poland
[3]1st Clinic of Cardiology and Electrotherapy, *Collegium Medicum*, Jan Kochanowski University, Kielce, Poland

Abstract

Persistent therapy is the continuation of treatment despite having assessed the patient's clinical condition as showing no prospect of improvement, having exhausted all available treatment options and having found that continued therapy would extend the patient's suffering with no chance of improvement. Persistent therapy is an exception from the physician's obligation to provide medical assistance in each case when a delay could result in the threat of loss of life, serious bodily injury or serious health disorder.

Provisions of Polish law do not provide for any special procedure for consent by an authorized body (e.g., court) for discontinuation of treatment as the result of a finding of no medical indications for its continuation. Accordingly, it rests upon the medical staff to make and implement the decision in this regard. This includes first and foremost making a collective decision, reflecting all circumstances relating to the patient's clinical condition in the medical records, and giving effect in practice to the patient's rights — including the right to be informed about the condition of one's health, to give informed consent to the provision of medical service, and to die peacefully and with dignity — as appropriate given the patient's state of consciousness.

Key words: persistent therapy, patient's rights, physician's obligations

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There is no definition of persistent therapy in Poland's legal system. At present, the term appears in Article 32 of the Code of Medical Ethics [1] (hereinafter 'CME'), whereby in terminal conditions the physician is not required to undertake and conduct resuscitation or persistent therapy and use extraordinary measures, provided that the decision to discontinue resuscitation belongs to the physician and involves the assessment of chances of a cure. This is an exception from the physician's obligation to provide medical assistance in each case when a delay could present the threat of loss of life, serious bodily injury or serious health disorder [2].

Address for correspondence: dr n. prawnych Kamila Kocańda, Instytut Nauk Medycznych, Uniwersytet Jana Kochanowskiego, ul. IX Wieków Kielc 19, 25–317 Kielce, Poland, e-mail: kamila.kocanda@gmail.com

Persistent therapy is inextricably linked with the concept of terminal condition and terminal stage (terminal phase, end-stage). In literature, a terminal condition is defined as an irretrievable condition caused by a trauma or illness having caused progressing, serious and permanent deterioration of health with the resulting medically substantiated belief that any therapy would be futile [3]. Literature also distinguishes the concept of the terminal stage, which is the end stage of the life of an incurably ill patient, when death is beyond any doubt expected to follow in the closest days [4]. Close synonyms in popular use among medical staff include 'terminal patient', 'terminally ill' or simply 'terminal illness'. The common denominator in all these terms is the fact that in keeping with the current state of medical knowledge this is a permanent incurable condition that will lead to the patient's demise.

Accordingly, persistent therapy will be the continuation of treatment despite having assessed the patient's condition as showing zero chance of improvement, having exhausted all available treatment options and having found that continued therapy would extend the patient's suffering with no chance of improvement. In line with the CME in such a situation the physician has the right, but not obligation, to discontinue the treatment. Discontinuation of treatment must not be confused with omission, which, in criminal law, is dependent on the existence of the perpetrator's special duty to prevent the consequences of an event and may provide the basis for holding the perpetrator criminally liable in particular for failure to render assistance [5]. Article 162(1) of the Polish Criminal Code (CC) implies the existence of an obligation to render assistance to a person in direct danger of loss of life or severe health impairment, and this obligation exists only at the time when such assistance is possible (whatever the expected effectiveness might be) and does not pose a danger to the person providing assistance or to others, to the extent defined in the last part of the provision. The obligation to render assistance to a person in direct danger of loss of life or severe health impairment, therefore, begins with the occurrence of the state of threat to the interests referred to in Article 162(1) CC and ends with the provision of assistance by a specialized entity, cessation of the threat, or death of the person in danger [6]. Thus, if deciding to discontinue persistent therapy, the grounds for such a decision must be sufficiently demonstrated. Those will in particular include the exhaustion of all available treatment options, absence of prospects of improvement, and extension of the patient's suffering in the event of continuation of therapy. Ineffectiveness of treatment from the perspective of improvement should not in itself provide the sole criterion for deciding that continued treatment would be persistent therapy. A significant element here is the link between continued therapy and the patient's suffering, as well as violation of the patient's dignity.

In the context of the physician's right to discontinue the treatment, it is impossible not to mention the connection with the patient's rights. First, the patient's right to receive medical services should be mentioned [7]. The patient has a right to receive medical services corresponding to the current state of medical knowledge, whereas the physician is under a duty to practise his/her profession in line with the indications of up-to-date medical knowledge, available methods and means of prevention, diagnosis and treatment of diseases by the principles of professional ethics and with the exercise of due diligence [8]. Discontinuation of persistent therapy is not tantamount to complete cessation of the provision of medical services. For instance, steps will be taken to alleviate the pain (by administration of appropriate medicines and use of medical products) or provide care (hydration, nourishment), which will satisfy the humanitarian requirements in respect of reducing the painfulness and harshness of death to the extent possible.

Inextricable from the patient's right to receive medical services is the right to die peacefully and with dignity [9]. Protecting the dignity of death means respecting the patient in the last stage of life, excluding either the acceleration of death (euthanasia) or its protraction by so-called 'persistent therapy' [10]. Here, the right to dignity includes freedom from persistent therapy, the right to alleviate the pain and other sufferings, the right to consent to or refuse proposed therapy, and the protection of so-called information autonomy [11]. By this right, the patient is entitled to expect medical personnel to respect his or her dignity by recognizing in the patient's person a coequal participant in human interaction, that is to respect the patient's subjectivity [12]. Thus, this right guarantees the patient the cessation of therapy if it continued to be futile but also the inclusion of the patient in the decision-making.

Besides the right to die with dignity and the right to receive medical services, an important right for the patient and corresponding obligation for the physician is the obligation to provide information about the patient's condition [13]. The scope of such information, in line with the applicable provisions of law, must include information about the patient's condition, diagnosis, proposed and possible diagnostic and therapeutic methods, expectable consequences of their use or omission, the outcome of treatment, and prognosis [14]. In the light of court decisions, the duty to provide the appropriate information is an integral part of the physician's obligations relating to the therapeutic process itself. The correct fulfilment of the obligation to inform is a necessary precondition of the patient's ability to give informed consent for the decided treatment ('informed consent' or 'conscious consent'), and the inefficacy of consent given as a result of being provided with incorrect or incomplete information makes the physician's conduct unlawful [15].

In the vast majority of cases, however, discontinuation of therapy refers to patients whose condition precludes them from giving informed consent (unconscious or unable to communicate). Accordingly, there is no way of effectively providing information about the patient's health condition. Thus, the patient is in no position to give informed consent or object to the inclusion of persistent therapy or discontinuation of already initiated procedures. What is necessary in such a case is to determine whether the patient has made a *pro-futuro* declaration ('living will') concerning the lack of consent to therapy or life support in a condition showing no prospect for improvement or has appointed an attorney to make such decisions. In the absence of such information, the matter of any persistent therapy should be decided together with the legal representative or a person who is close to the patient. Here, it is necessary to highlight the inappropriate practice of restricting access to information and failure to provide information about potential methods of treatment in those situations where, by the current state of medical knowledge, the foregoing has a high probability of not achieving the expected result. Both the patient and the close person have a right to be given comprehensive information allowing them to fully comprehend the patient's condition and make their informed decision concerning (consent to) further treatment.

Regardless, the ethical, moral and legal burden of deciding on the use of the therapy will be incumbent on the physician participating in the decision-making. Accordingly, the recommendation for such cases is to consult, in so far as possible, with a different physician, of the same speciality if possible, or some other speciality appropriate for the relevant case, to arrive at the decision 'by committee', exercise due diligence and share the burden of responsibility for the decision.

The patient's informed consent is a crucial element in the decision-making process on the continuation or discontinuation of persistent therapy. In principle, the direction of the medical proceedings is to be decided by the physician; however, obtaining a statement of will from the patient or the patient's attorney-in-fact appointed for such decisions or a close person consenting or objecting to any further medical actions, is a necessary condition for the conduct of these proceedings.

As regards the patient's will, it must be noted that the right of self-determination is not absolute but may be subject to limitations, though only when prompted by a different constitutional rule, principle or value (interest) and the degree of limitation is adequately proportionate to the importance of the interest supporting it. In criminal law, treatment without consent is defined as an independent offence [Article 192(1) CC]. The lack of consent preceded by the receipt of information renders the medical activity unlawful [16]. Court decisions indicate that we can only speak of the patient's consent when before giving it the patient had received sufficient and understandable information as defined in Article 31(1) o the Act of 1996 on the Profession of Physician, that is information about the condition of the patient's health, diagnosis, proposed and possible diagnostic and therapeutic methods, expectable consequences of their use or omission, the outcome of treatment, and prognosis. The above knowledge is a necessary element of the patient's consent to a specific course of treatment. Consent not preceded by discernment is deemed to be incomplete [17].

Thus, the patient, as long as being conscious, should receive complete information about his or her condition, including all of the above-listed elements. The same information should be given to the legal representative, a person close to the patient or the attorney-in-fact appointed for treatment decisions when it is not possible to obtain effective consent from the patient. The Polish legal system does not provide for any particular procedure enabling the court to make any specific decision in this matter [18]. The law only provides for the court's involvement in a closed list of cases concerning in particular the patient's consent to a high-risk procedure. They, however, do not provide for a judicial decision to be made in cases concerning the discontinuation of treatment in consequence of a finding of lack of medical grounds to continue it. Such a procedure would enable the verification of the physician's decision by a judicial authority extrinsic to the healthcare establishment. But since there is no such procedure, the decision is incumbent solely on the physicians.

It must be emphasized that at each time the analysis and verification of the grounds for the exercise of the right under Article 32 CME should be reflected in medical records. The entry should contain detailed medical rationale provided by the physician exercising the right, including without limitation notes from consultants and examinations, about outcomes of further treatment and predicted results of the therapy, as well as accounting for the patient's consciousness and ability to express the patient's will in a sufficient manner concerning the use of persistent therapy.

In summary, the above analysis shows that persistent therapy is a medically, legally and ethically complex set of problems. Plenty of obligations and responsibilities are placed on the physicians' shoulders. The matter is made all the more difficult by the fact that there is no definition of persistent therapy in the current legislation, nor is there any court procedure of the kind present in many European jurisdictions. In the context of the multiple obligations incumbent on medical staff it is of primary importance to give effect to the patient's rights including the right to receive information about one's condition, to give consent to receive medical services, and the right to die peacefully and with dignity.

Streszczenie

Uporczywa terapia to kontynuowanie leczenia mimo dokonania oceny stanu klinicznego i stwierdzenia braku szans na poprawę zdrowia, wyczerpania dostępnych możliwości terapii oraz określenia, że jej prowadzenie przedłużałoby cierpienia pacjenta bez realnej szansy na poprawę stanu zdrowia. Stanowi ona wyjątek od obowiązku lekarza udzielania pomocy lekarskiej w każdym przypadku, gdy zwłoka w jej udzieleniu mogłaby spowodować niebezpieczeństwo utraty życia, ciężkiego uszkodzenia ciała lub ciężkiego rozstroju zdrowia.

W przepisach polskiego prawa nie przewidziano szczególnej procedury związanej z wyrażeniem zgody przez uprawniony organ (np. sąd) na zaprzestanie leczenia w wyniku stwierdzenia braku wskazań medycznych do jego kontynuacji. W związku z tym na personelu lekarskm spoczywa zarówno podjęcie decyzji w tym przedmiocie, jak i jej wdrożenie. Powyższe obejmuje przede wszystkim podjęcie decyzji w sposób gremialny, odnotowanie wszelkich okoliczności związanych ze stanem klinicznym w dokumentacji medycznej, a także zastosowanie w praktyce praw pacjenta obejmujących prawo do informacji o stanie zdrowia, do wyrażenia świadomej zgody na udzielenie świadczenia zdrowotnego, godnego umierania w spokoju i godności, przy uwzględnieniu stanu świadomości pacjenta.

Słowa kluczowe: uporczywa terapia, prawa pacjenta, obowiązki lekarza

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14. See Article 31 of the Act of 5 December 1996 on the Professions of Physician and Dentist (restated text: Dz.U. 2020.514, as amended).
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16. Provincial Administrative Court in Warsaw, judgment of 2 July 2020 in VII SA/Wa 692/20, LEX nr 3052543.
17. Court of Appeals in Białystok, judgment of 9 April 2018 in I ACa 791/17, LEX no. 2537613.
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