The borderline between legality and illegality of providing health services in anaesthesiology and intensive care units

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Physicians providing health services in intensive care units (ICUs) often undertake or continue treatment of patients without complying with the basic condition of the treatment’s legality i.e. obtaining the patient’s informed consent to treatment. Unfortunately, this is usually because the physician lacks knowledge that such consent in fact has to be obtained. Since the majority of patients hospitalised in ICUs are unconscious or unable to give informed consent to necessary medical procedures, the problem is a serious one.

Obtaining the patient’s consent is regulated by statutory provisions as well as by the Polish Code of Medical Ethics. Article 16 of the Act on Patient Rights and Ombudsman for Patient Rights of November 6, 2008 provides that: “a patient has the right to give consent to specific health services or to refuse such consent.” A similar regulation is included in Article 15 of the Polish Code of Medical Ethics. This reads: “diagnostic, therapeutic and preventive management requires the patient’s consent” and “initiation of diagnostic, therapeutic and preventive management without the patient’s consent is admissible only exceptionally in special cases of a threat to life or health of the patient or other persons.”

Provision of health services without the patient’s consent may result in disciplinary, civil, and criminal sanctions. For example, Article 192 of the Polish Criminal Code provides that: “anyone who performs a therapeutic intervention without the patient’s consent is liable to a fine, the restriction of liberty or imprisonment for up to two years.” Prosecution is initiated at the request of the injured party. Hence, failure to comply with this obligation can result in serious consequences for the physician who has not observed this requirement.

Inability to obtain the patient’s informed consent during ICU hospitalisation imposes special legal duties on physicians at such wards, provided for in the Act on Medical and Dental Professions of December 5, 1996: legalisation of procedures that have been already conducted and obtaining consent to future ones. The required conduct is detailed in Articles 32–35 of the Act on the Medical and Dental Professions of December 5, 1996.

In accordance with these regulations, examination or provision of the patient with any other health services without his or her consent is admissible if the patient requires immediate medical assistance, and due to his or her condition or age cannot give consent to it and if it is not possible to communicate with the patient’s statutory representative or actual guardian. The decision to undertake medical procedures without the patient’s consent should be discussed with another physician, if possible. Information about any lack of patient consent should be included in the patient’s medical records. This manner of conduct concerns providing health services that require only oral consent.

Such conduct does not pertain to situations in which the law requires written consent, i.e. situations when it is necessary to perform surgery or apply a method of treatment or diagnosis involving a higher risk for the patient.

In such cases, the physician may perform surgery or apply a method of treatment or diagnosis that brings about higher risk for the patient without the consent of the patient’s statutory representative or competent guardianship court, when the delay caused by obtaining such consent would constitute a threat to the patient’s life, or could result in damage to his or her body or a serious health disorder. In that case, the physician is obliged, if possible, to consult with another physician, ideally of the same specialisation. The physician should also immediately notify the statutory representative, actual guardian or guardianship court of the procedures conducted (legalisation of actions). Moreover, the physician may perform surgery or apply a higher-risk method of treatment or diagnosis to a patient who is a minor, incapacitated, or unable to give written informed consent, having obtained the consent of his or her statutory representative, or when this is impossible having obtained the consent of the guardianship court (prior consent).
The regulations presented above stipulate that, in special circumstances, consent can be given by an entity different from the patient (proxy consent) or by another entity (concurrent consent).

In a case when the patient cannot make decisions concerning treatment, the consent is given by another person. According to the law, such a proxy consent is granted by a statutory representative in the case of a minor (under the age of 16) or in the case of a person unable to give autonomous consent (incapacitated person), or guardianship court if a person does not have a statutory representative or he or she cannot be reached. The consent to examination only may in special cases by given by the actual guardian of the patient (Articles 32 [6] and 34 [5–6] of the Act on Medical and Dental Professions of December 5, 1996). The statutory representatives of a minor are his or her parents (Article 98 [1] of the Family and Guardianship Code).

In some cases, it is required to obtain the consent of the patient as well as of another entity. Concurrent consent is practiced when the patient is a minor but is 16 years old, or when the patient is incapacitated but able to knowledgeably express his or her opinion on the consent to treatment.

The provisions included in Articles 32–35 of the Act on Medical and Dental Professions of December 5, 1996 impose on ICU physicians additional duties resulting from an inability to obtain a patient’s informed consent. Failure to comply with these obligations may result in very unpleasant consequences, both for the physician and for the head of ICU, as mentioned above.

In accordance with the ruling of the Supreme Court of May 16, 2012 (III CSK 227/11): “In a democratic country of law, one of the main indications of the individual’s autonomy and freedom of his or her choices is the right to self-determination including choosing the method of treatment”. The reflection of this law is the institution of consent to medical procedure, being one of the reasons of the treatment’s legality. Due to this fact, the Act on Medical and Dental Professions (consolidated text, Journal of Laws, 2011, No. 277, Item 1634, as amended) provides that the physician may conduct an examination or provide other health services, subject to exceptions stipulated by the act, following the patient’s consent (Article 15 [1]). The patient’s consent, as the factor morally sanctioning the diagnostic, therapeutic and preventive management, is also included in the code of medical ethics (Art. 15, item 1). “… The patient’s consent within the meaning of Article 32(1) and Article 34(1) must be ‘explained’ and ‘informed’ so that the patient consciously accepts the risk related to the treatment and assumes this risk on him or herself. Only this consent excludes illegality of the physician’s interventions. The mere approval of a procedure given by the patient who was not presented with intelligible information cannot be construed as consent in the juridical meaning of the word, and so does not comply with the requirements of Article 32(1) and Article 34(1) of the Act, which in turn leads to the conclusion that the physician’s action under such circumstances is undertaken illegally.”

“In medical practice, the rule of mutual trust between the patient and the physician cannot go too far. A person’s life, also legally (Article 23 of the Criminal Code), was classified as one of his or her personal rights, and apart from special cases it is the patient who should take the informed decision as to performance of procedures and methods of treatment, especially unconventional ones, which involve considerable threat to his or her organism” (ruling of the Supreme Court of June 14, 1983, case file IV CR 150/83).

In the ruling of October 27, 2005 (III CK 155/05), the Supreme Court found that: “the rule of respect for the patient’s autonomy demands obeying his or her will, regardless of the motives (confessional, ideological, health-related), and thus it has to be assumed that the lack of the patient’s consent to a given procedure (type of procedure) is binding for the physician and lifts the criminal and civil responsibility, whereas in the case of performance of the procedure — makes it illegal. […] the law does not order the patient to undergo the medical intervention, nor the physician to overcome the patient’s resistance neither by performance of procedures to which he or she did not give consent to or protested against, nor by applying to the court for the objection to be made void. […] the physician cannot prohibit discharge or apply to the guardianship court to dismiss the patient’s will, even if the patient’s condition requires further hospital treatment”.

Many healthcare entities create their own forms to obtain the patient’s informed consent. However, it should be borne in mind that there is not a provision of law that would regulate the admissibility of such forms. Using forms may be useful; however, they can only be treated as supportive in the process of obtaining the patient’s informed consent. “For even advanced electronic communication devices cannot prevent depersonalisation of contact, if only due to the fact that there are no two identical personalities, whether of the physician or the patient” [1].

According to some fellow physicians, treatment of patients under health- or life-threatening conditions is not enough to make the physician’s actions legal. Additionally, it is necessary — in some cases — to inform the court of the undertaken procedures and/or to obtain permission from the guardianship court under the provisions of Article 34 of the Act on Medical and Dental Profession of December 5, 1996.

In this issue of ‘Anaesthesiology Intensive Therapy’, the reader will find two articles devoted to the subject of a patient’s consent to ICU treatment that expand the knowledge on this issue, and thus increase the legal safety in our specialisation [2, 3].
References:

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