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„FALSE“ MANDATORY MEDICAL TREATMENTS

Summary

Principle of authonomy of the will has not been consistently enforced in any branch of law because this cannot be done without simultaneous threat to legal certainty, the private interests of others or the collective interests. Legal subject, actually his autonomy, through a whole series of general and relative limitations, is put in the foreground of the common good and the collective or private interests that are more prevalent at the given moment.

Medical Law, novel part of a letter-day legal system, is no exception in this sense. Namly, legal institute of informed consent is a primary medium for excrecising authonomy of the will in Medical Law and it is still the basic rule. However, the exceptions to that rule exists.

In the following lines we will classify the situational deviations from the principle of autonomy of the will expressed through informed consent. For this purpose, we will divide all exceptions into two groups. The first group consists of interventions that we have marked as „real“ interventions undertaken by the force of law, and the second consists of those interventions which are marked as „false“ mandatory interventions. Second group is in our focus in this paper.

Key words: informed consent, consent of the injured party, civil liability, unlawfulness, mandatory medical treatments.

1. INFORMED CONSENT – TERM AND THE SCOPE

The conception of informed patient consent is in advance projected ethical minimum that has to be achieved during medical intervention. Even though the idea is not entirely new, it didn’t gain full momentum until the second half of the 20th century. Although the socio-economic roots of this change are

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far more complex, it is in principle the result of a fundamental change in regard to, firstly in the relation researcher – subject of research, and then in the relation medical representative– patient[1].

What did the mentioned change and introduction of the requirement for the informed consent essentially bring? In order to reach the answer to this question, it is necessary to first know that the consent of an informed patient, strictly legally speaking, is a manifestation of another legal institute with a significantly broader effect. It is a legal institute of the injured party's consent. The logic of presenting views, therefore, is very simple – if we want to understand exactly how does a manifestation of one legal institute works, it is necessary to take a step further in the direction of proper understanding of the legal institute from which it derives.

The consent of the injured party works on a relatively simple principle. Actually, if the person who suffered the damage agreed in advance[2] to the harmful consequences of another person's actions, he has no grounds to demand compensation from the person responsible[3]. In order to avoid any doubts, this does not mean that the injured party cannot pursue a lawsuit. A person that has beforehand consented to the damage may file a lawsuit and seek compensation for damages. In that sense, there are no obstacles, since no one can prevent any subject, if he believes that some of his rights have been violated, disputed or endangered, from seeking protection. The subject can go to court even when his

[1] V. Jeremić, „Informirani pristanak: komunikacija između liječnika i bolesnika“, *JAHR*, 4 (1), 2013, 525.

[2] When we say "in advance", this term should be interpreted in a broader context. From the standpoint of the legal system which puts tremendous effort to provide high level of legal certainty, it would be ideal situation if one who consents to damage provides its consent prior to harmful action. However, although legislator remains silent, it is considered that person consented in advance if consent was given during harmful action, but before damage is caused. Once damage is caused, any consent to a damage would be considered as "remission of debt".
Compare: Zakon o obligacionim odnosima, "Sl. list SFRJ", br. 29/78, 39/85, 45/89 - odluka USJ i 57/89, "Sl. list SRJ", br. 31/93, "Sl. list SCG", br. 1/2003 - Ustavna povelja i "Sl. glasnik RS" (later in text: ZOO RS), br. 18/2020, art. 163, sec. 1 and 2 and art. 344. Also: N. Đurđević, „Pristanak oštećenog kao osnov isključenja protivpravnosti štetne radnje“, *Pravni zbornik*, br. 2-3, 1995, 135.

[3] Principle of individual liability in Law of Torts, unlike Criminal Law, is not inviolable. There is significant number of different and especially important cases of liability for another, and from perspective of this paper the most important one is liability of employee for damage that employers cause to third party. That is why we use term "person responsible", because person who caused damage and person who is liable are not necessarily the same person.

belief is completely and/or obviously wrong, and even when he knows or must know that it is wrong.

Therefore, if the injured party decides on such a step and sues the person responsible despite previously given consent, it is considered that with his contradictory behavior he has abused the right to sue, that is, the right to demand compensation for the damages. It is clear that this form of abuse should be opposed. However, the trouble is that the state, that is the court as the body before which the procedure is conducted, cannot know what is happening in every specific relation and on which statements of intention it is possibly based. Therefore, in order for the other party to successfully oppose to these types of abuse of rights, the legal order leaves it with one effective mean by which it will be pointed out to the court to the committed abuse and invite him not to satisfy the claim for damages that the other party points out.

More precisely, the defendant party at the very moment of giving consent acquires abstract possibility to defend in the current civil proceedings in the substantive field by pointing out one special objection – consent of the injured party. This is, of course, under the condition that that abstract possibility is concretized by the actual causing of the damage. The defendant's side will, if the existence of the prior evidence is provided, definitely reject the claim with an objection.

The conditions whose fulfillment is required in order for the consent of the injured party to produce the projected effect through the legal norm are: adequate intellectual, cognitive and willing capacity of the injured party, his statement which clearly defines the absence of the desire to further protect his legally protected good, as well as a valid temporal link between consent and the fact of causing damage.

Thus, this institute represents a functional symbiosis of two principles. Firstly, the principles of autonomy of will[4] which enables the holder of a legally protected good to dispose of his good, among other things, by also not insisting on his legal protection. Likewise, part of this symbiosis is the principle of prohibition of abuse of subjective rights. It does not allow the contradictory behavior of individuals, in this case of the injured party to introduce uncertainty into legal life by invoking the tortfeasor for liability, even though according to the original statement of the injured party this should not be the case. Identical symbiosis, but narrowly specialized, is represented by the informed consent.

[4] M. D. Ginsberg, "Beyond Canterbury: Can Medicine and Law Agree about Informed Consent? And Does It Matter?", *Journal of Law, Medicine & Ethics*, 45 (1), 2017, 106.

Namely, informed consent is a form of concretization, directly of the legal institute of the consent of the injured party, and through it, therefore indirectly, of the mentioned principles of autonomy of will and prohibition of abuse of subjective rights whose symbiosis it represents[5]. The concretization, i.e., specialization of the legal institute that indicates the direction of the institution. In this case, the fact that this legal institute covers a very limited number of special cases in which the damage occurs, in contract to the institute of consent of the injured party, from which it derives by concretization[6]. More precisely, the informed consent application domain is narrowed by only those damages that occurred during medical intervention. If we observe exclusively from normative aspect, it further follows that legal institute of informed consent refers to institute of injured party's consent, as *lex specialis* to *lex generalis*.

It is considered that through the legal institute of informed consent, the idea expressed in the maxim *voluntas aegroti suprema lex* is fully realized. More precisely, that means a deviation imposed by law from the classic text of the Hippocratic Oath. The deviation goes in the direction of putting the patient's autonomy in the foreground. From this, by further concretization of the mentioned principle, specific authorizations are moving from the fact that the patient solely decides, according to his intentions, whether to seek help and from whom, and whether to agree to any of the offered treatments, or if he will leave the treatment and at what time[7].

However, the centuries old principle is respected in parallel in the implementation of medical interventions that is expressed through the maxim

[5] Informed consent as a principle, we might say, was created by combining two requirements in legal system. The first has historical dimension and refers to obligation of medical personnel to obtain consent before intervention. Second request, somewhat more recent, complements the first one and refers to obligation of medical personnel to provide patient with relevant information's of certain quality, to compensate patients lack of expertise.

J. Berg *et al*, *Informed consent: Legal theory and clinical practice*, Oxford University Press, New York, 2. Ed, 2001, 41.

Observation on quality and quantity of information's that should be provided to patient in more detail at: S. Radulović, *Činjenice odlučujuće za isključenje protivpravnosti pri medicinskoj intervenciji i njihov međusobni odnos*, Doktorska disertacija, Kosovska Mitrovica, 2015, 221-233.

[6] Consent of informed patient, if we put on a side non-legal dimension of this institute, connects two separate legal arias – Constitutional Law and Law of Obligations i.e.Tort Law (тако: R. R. Faden, T. L. Beauchamp, N. M. P. King, *A History and Theory of Informed Consent*, Oxford University Press, New York, 1986, 23).

[7] О томе: I. Sorta-Bilajac, "Informirani pristanak – konceptualni, empirijski i normativni problemi", *Medicina fluminensis*, 47 (1), 2011, 38-39.

primum non nocere, since the patient's consent to a certain treatment, or even his insistence on the implementation, does not oblige the medical representative to undertake the intervention. This is especially true if deems that, according to his best conviction, that implementation of that intervention would not be medically indicated, particularly if he considers it would be contraindicated.

Nevertheless, it can be obvious what informed consent is, we completely agree with that, only to those who have just started studying this concept in all its ambiguity[8]. We have already talked about this in part, in the introductory considerations, informed consent is not "only" a legal institution. More precisely, it would not be correct to characterize it as purely legal phenomenon. Particularly, it would not be correct to characterize it as a legal institute that promotes the absolute supremacy of the patient's will in regard to the other party that participates in the legal case in question. Informed consent has a far greater reach, and therefore we believe that, proved that we aspire to accuracy and completeness of the presentation, it is better to speak about it as a kind of value[9].

In that sense, we fully agree with the definition of informed consent in which it is defined as a medical-ethical area that is a link between fundamental ethical knowledge and clinical practice. It is a link on which the attitude towards the patient is tested, whereby, in this process, the analysis comes to the fore, then the evaluation of medical knowledge and ethical potential in issues related to the patient's personality, freedom of opinion and freedom to decide, his rights and protection of those, during medical intervention or research, but also issues regarding participation of relatives, representatives, and general communication in the relationship between the medical representative, medical institution, patient, and possibly his representative[10].

It further follows that, although in a strictly legal sense that is, informed consent essentially is not a unilateral declaration of intent. Namely, informed consent is not, as it is often understood, just a signature on a form that is presented to the patient immediately before the implementation of intervention[11]. It is, at least it should be, although it is not in accordance with its legal nature[12], a *joint*

[8] Berg J., *op. cit*, 3.

[9] It is possible to study informed consent, not just like legal institute, but even like a doctrine.
V. Jeremić, *op. cit*, 525-526.

[10] N. Gosić, *Bioetika in vivo*, Pergamena, Zagreb, 2005, 135 and on.

[11] On legal and essential differences between formal consent in a form of a signature and consent as a process of communication in detail at: K. I. Reid, "Informed Consent in Dentistry", *Journal of Law, Medicine & Ethics*. 45 (1), 2017, 78-81.

[12] M. D. Ginsberg, *op. cit*, 109.

decision [emphasized by S.R.] on the (non)implementation of the medical intervention that was formed as a result of continuous[13] communication between two equal, competent and autonomous subjects – medical representative and the patient[14]. It represents the culmination of the creative process in which the patient's competences for making a decision on (non)consent are upgraded through a valid corpus of relevant information obtained from a designated medical representative, and its autonomy is achieved through the subordination of expertise of the medical representative[15]. It is precisely in this creative moment that we see, from our standpoint, the best illustrated reasons regarding why informed consent is a value. In our opinion, it represents the overall harmonization of a whole series of scientific, ethical and personal demands identified in a complex relationship in which, firstly, the medical representative and the patient participate, but not only them, also the medical institution, as well as the state.

2. MEDICAL INTERVENTIONS WHOSE PERMISSIBILITY DOES NOT DEPEND ON THE PATIENT'S PRIOR CONSENT

Although it can be rightly said that the autonomy of will is a basic principle, not only of the law of obligations, but also of the entire legal order, it is not unlimited. On the contrary, respect for the autonomy of will is not unlimited. It cannot be without simultaneous threat to legal certainty, the private interests of others and the collective interests. That respect ends where personal initiative conflicts with principles and interests that are still considered more important in relation to it. Specifically, the autonomy of will, favors private interests, but the legal order, especially that part of the order, which is marked as a civil law, intends to promote and protect those interests, for the purpose of their later unhindered realization. However, not at all costs. When the private interests, maybe not oppose, but certainly do not coincide with the interests of the wider social community in which the individual aspires to realize his interests or with

[13] In context of continuous communication our undivided attention grabbed the term "preventive ethics". In detail at: K. I. Reid, *op. cit*, 81-82.
[14] V. Jeremić, *op. cit*, 526. Similar: J. Berg, *op. cit*, 3.
[15] The term „consent“ comes from Latin language. Latin term *consentire* from which term "consent" derives literally means "feeling together" or "mutual feeling" (*con* – together, *sentire* – feelling).
Tако: S. M. Wolf, E. Clayton, F. Lawrenz, "The Past, Present, and Future of Informed Consent in Research and Translational Medicine", *Journal of Law, Medicine & Ethics*, 46 (1), 2018, 7-8.

the private interests of individual subjects that have priority, law must play its basic role – the role of the main mechanism of socialization. That will leave aside the interests of the individual and his autonomy, through a whole series of general and relative limitations, and put in the foreground the common good and the collective or private interests that are more prevalent at the given moment.

Let's transfer that knowledge to the subject matter. The principle of autonomy of will as a means of realizing the interests of individuals, as well as its general or specific limitations, are most often related to that part of the law of obligations which, perhaps somewhat simplified, is called contract law. Under contract law, autonomy of will, with a dose of simplification comes down to freedom of contract. Freedom of contract is not unlimited. It is limited, firstly through a general formulation in which public order, mandatory regulations and good customs are placed in front of it, and then through the whole series of so-called special limitations arising from the specificity of particular situations. Although the association in this area is the clearest and even though autonomy of will in contract law is a very interesting phenomenon, from the point of view of medical law we are more interested in autonomy of will and its place among the principles of regulation of other sources of obligation relations. Specifically, we are thinking about causing damage.

Positive law, namely, allows a person to exercise his autonomy, among other things, also by not protecting his legal goods when they are threatened, disputed or violated. If it so wishes, the person may, through prior consent for causing damage, to his own goods, material or immaterial, firstly expose to potential damage, and then, when the damage actually occurs give up on the claim for compensation. Certainly, such treatment of someone's legal goods depends, in the first instance, on the will of the person to whom those goods belong, but it also happens that the law allows intrusion into other people's legal goods and causing damage also without prior consultation with that person. This usually happens when it is necessary for the protection of, primarily general, but also of some private interests. Such cases, however, represent only occasional exceptions to the dominant principle of autonomy of will expressed through the consent of the injured party, which for some reasons of legal certainty, have to be explicitly enumerated according to the system *numerus clausus*.

What is valid for the general principle, is absolutely valid for all its emanations. Informed consent is therefore no exception in this regard. Namely, when due to the state of emergency in which the patient finds himself or some other circumstances which the legislator recognizes primacy cannot be given to autonomy of will, we encounter what we consider situational deviations from the

universality of the legal institute of informed consent. Therefore, informed consent is still the rule, nothing has change in that regard, especially since the famous case Schloendorff v. Society of New York Hospital in which it was set as a principle. However, the exceptions to that rule exist, and they are no less interesting than the rule itself[16]. Whether they confirm it or question it, can be discussed, but we will not deal with that in this paper.

Instead, in the following lines, we will classify the previously mentioned situational deviations from the principle of autonomy of will in this field. To this end, we will divide all exceptions into two groups. The first group consists of interventions that we have marked for the purposes of this paper as real interventions undertaken by the force of law, and the second those interventions which are, although they are not the antipodes of the first one, in the true sense of the word, undertaken by the force of law as false interventions.

2.1. Real and false interventions which are undertaken by force of law — classification criterion

The previously obtained consent of the patient, provided that he has relevant information regarding his condition and the proposed medical intervention represents, it is not disputed, the basis for the permissibility of implementation of intervention. However, our positive law knows a whole range of situations in which medical intervention is carried out without the request for previously obtained patient consent. Medical interventions in those situations are allowed even without the realization of this legal fact, which, as we have mentioned, aims to justify the implementation of intervention. Justification in the form of patient's consent in those situations, in fact, is not necessary, because the same is found directly in the letter of the law. The letter of the law and the position of the legislator expressed through it are those who in specific and precisely determined cases authorize prescribing the medical representative, sometimes even oblige him to undertake the intervention, regardless of the possible attitude of the patient about it. More precisely, regardless of whether the

[16] We will, however, leave the idea of "implied consent" on a side for now because in situations regulated by this principle there is no risk of damage or that risk is negligible. On "implied consent" in detail at: J. Kirby, "Informed consent: what does it mean?", *Journal of medical ethics*, 9, 1983, 71; S. Kusa Kumar, P. Ambika Prasad, D. Siddhartha, "The Importance of Informed Consent in Medicine", *Scholars Journal of Applied Medical Sciences (SJAMS)*, 1(5), 2013, 458; K. Satyanarayana Rao, "Informed consent: an ethical obligation or legal compulsion?", *Journal of cutaneous and aesthetic surgery*, 1 (1), 2008, 33.

patient agrees with the implementation of a specific medical intervention or not, the intervention will either be carried out directly without determining his will or he will be imposed with the duty to undergo the intervention under the threat of execution of a certain sanction, most often a misdemeanor.

It is clear from this statement that these cases are in fact, very different from each other. However, regardless of all the heterogeneity of this group, that does not mean that among the situations we are observing, it is not possible to notice some common moments and raise them to the level of classification criterion. That would, furthermore, allow more order to be introduced into the subject matter and facilitate the navigation in the sea of norms scattered in various legal acts, which unfortunately, is a distinct feature of medical law in the Republic of Serbia.

Therefore, the basic question is what moment can be taken as a classification criterion. There are several moments that, more or less equally compete for this position. Some of them certainly deserve to be presented in some future papers. However, it seems to us that one stands out for its significance and that is the concrete possibility of actually examining the patient's will. Namely, in both groups of cases of medical interventions that are undertaken without insisting on the patient's consent, the question of the patient's possible consent or dissent to the intervention, is not raised. However, in the group of interventions that we have marked as real interventions that are undertaken by the force of law, the will can be determined, but such determination is not approached, because the will does is not treated as a fact that is legally relevant. In the second group of cases, in the case of so-called false interventions undertaken by the force of law, the patient's will cannot be determined, at least not without unnecessarily endangering his life or current health condition. Therefore, the legislator does not insist on it either, but finds the justification for the implementation of the intervention precisely in the need to not compromise the life and health of the patient unnecessarily.

At this point, we should also offer an explanation of the terminology that we have chosen for the purpose of designating the classification factors. Certainly, we mean the terms "real" and "false" interventions that are undertaken by the force of law. Namely, the justification for performing both groups of interventions is found in explicit, situation-oriented norms. Since in the first group of cases the patient's attitude towards the intervention and his will to undergo it or not, if there was any need for it, could be determined, indeed, it can really be rightly said that such interventions are undertaken by force of law

because the existence of authority in a legal norm is, in essence, the only legally relevant fact on which the permissibility of the intervention depends.

On the other hand, in the second group of interventions that we marked as false, the justification for performing the intervention is in the very letter of the law, but only and purely because the patient's will cannot be determined in a specific case. If the specific situation was different, i.e., if the attending physician had the opportunity to obtain the patient's consent, the intervention would not have been allowed without the patient's affirmative statement. Thus, the specificity of the second group of medical interventions is the fact that it is a legal norm, that is, the authorization contained in it, is a secondary or better said, subsidiary condition for the permissibility of a medical intervention. Subsidiary in the sense that its fulfillment is not required, if the prior primary condition is fulfilled in the form of obtained informed consent.

2.2. Prominent cases of false medical interventions undertaken by the force of law

When it comes to false interventions that are undertaken by the force of law, the most significant case surely represents the situation in which the patient's health or even life is in imminent danger. As a rule, precisely in those situations when the urgency of the patient's condition requires a quick reaction, communication is proving to be more difficult or impossible. Also, as a rule, in these situations the patient's representative is not present, or it is not possible to reach them in a timely manner[17]. Then the question of how to proceed arises. More precisely, the question is whether to give priority to the norms of the Criminal Code of Republic of Serbia[18] and the ZOO RS, which oblige to provide assistance or literally adhere to the need for the patient's consent.

Dilemmas about that resolves the special legal act[19] which allows medical intervention, that is considered urgent in the sense that it does not suffer

[17] Possible answers on what to do in these situations in SarsCov-19 pandemic scenario in detail at: B. Arun, "Clinical Trials during the COVID-19 pandemic: Challenges of putting scientific and ethical principles in practice", *Perspectives in Clinical Research*, 11 (2), 2020, 62.

[18] Krivični Zakonik Republike Srbije, "Sl. glasnik RS", br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019 (latter in text: KZ RS), art. 127, 253, 296.

[19] Zakon o pravima pacijenata, "Sl. glasnik RS", br. 45/2013 i 25/2019 - dr. zakon, (latter in text: ZOPP RS), art. 18.

delay due to the state in which the patient is, to be performed even without the prior consent of the patient. This refers, above all, to situations where the patient is unconscious, in a coma or is unable to express his will for other reasons[20]. In other words, the urgency of the state requires the creation of a presumption that the patient would agree to an emergency intervention if he had the opportunity to express his will. Based on this assumption, intervention becomes permissible.

We have a practically identical legal setting in the situation where the intervention that the patient consented to started, but there was a need to change the procedure[21]. For example, the patient is placed under total anesthesia, and then during the procedure, it turns out that the procedure needs to be expanded or completely changed. The logic of regular cases in which medical intervention is undertaken, orders a discontinuation of the initiated intervention, the patient is taken out of anesthesia, and it is required that his consent for a new or extended procedure is obtained. However, when the degree of urgency to change or expand the procedure is extremely high, so much so that any delay would endanger the life or health of the patient, it is allowed to continue with another or extended procedure even if the patient did not consent to it. The assumption in this case is that the patient would consent to this procedure if the need was recognized earlier[22]. Therefore, the law, on the basis of this irrefutable presumption, otherwise quite well-founded in most cases, allows the implementation of an intervention to which the patient has not *de facto* consented.

3. CONCLUDING REMARKS

Undertaking medical intervention in itself is not allowed. On the contrary, it is considered impermissible. This is because almost every medical

Compare to: K.L. Zaleski, D.B.Waisel, "Withholding Information from an Anxiety-Prone Patient?", *AMA Journal of Ethics*, 17 (3), 2015, 210; J. Kirby, *op. cit*, 71;S. Kusa Kumar, P. Ambika Prasad, D. Siddhartha, *op. cit*, 456.

[20] Discussion on what is ethical background for this normative frame and what situations are included in this frame in detail at: J. Radišić, *Profesionalna odgovornost medicinskih poslenika,* Institut društvenih nauka, Beograd, 1986, 215-216.

[21] First to ask this question in domestic legal theory is professor Jakov Radišić at: J. Radišić, *op. cit*, 182.

[22] Background for the idea on presumed consent can be found in: ZOPP RS, art. 18. paragraph 4 which is based on several different theoretical research. Some of them can be found at: J. Radišić, *op. cit*, 181-182; N. Đurđević, "Pretpostavljeni pristanak pacijenta na lečenje prema nemačkom pravu", *Medicinsko parvo i medicinska etika*, Univerzitet u Beogradu i Institut za društvene nauke, Beograd, 1994, 47-48; P, Klarić, "Odogvornost za štetu zbog grešaka u medicini", *Izlaganje prema zapisniku sa tribine kluba pravnika od 12.09.2001. godine*, 2001, 6.

intervention — this does not refer only to interventions that are extremely invasive such as, let's say, surgical — it produces certain harmful consequences. As such, without a legally valid justification, it is considered an unauthorized intrusion into the legally protected goods of the patient. Moreover, the intention in the newer theory of law is to declare medical activity dangerous, and on that basis replace the subjective responsibility of a medical representative with an objective one. Although the idea of objectifying the responsibility of medical representatives for the damage caused is not particularly close to us, one thing is certain: the harmful consequences that occur during a medical intervention can be of different character, scope, and intensity. However, even when it is clear to the layman's understanding that they are a regular accompanying consequence of the intervention, the damage caused requires a call for accountability, and in the case of fulfillment of other conditions, obliges to compensation.

Thus, medical interventions are in principle considered to be an unauthorized encroachment on the legally protected goods of the patient. However, the theory of law, correctly recognizing the need of modern man to rely on medical activity in order to preserve its most important values — life and health, creates a controlled space within a complex health care system for the operation of medical professionals relaying on scientifically verified methods.

The controlled space we are talking about is very clearly demarcated so that there would be no doubts regarding rights, obligations, and responsibilities. The boundaries of this space are determined in one of two ways: by the patient's informed consent to a medical intervention or by an explicit legal norm. Beyond the limits set by the patient's informed consent or explicit legal approval to undertake the intervention, it is not possible to undertake it without considering that it is unlawful.

In other words, the most common being patient's consent, we will add in cooperation with other facts, the one that justifies the medical intervention, but sometimes it is an explicit legal norm that authorizes the medical representative to undertake the intervention regardless of the patient's will which is determined through his consent. Within the second group of cases mentioned, since our attention was focused on examining the situational universality of patient's informed consent, but also on bringing more order to this issue, we proposed a classification of interventions that are not based on patient consent to real and false. For that purpose, we used the possibility of prior examination of the patient's will as a classification criterion. On that basis, if the will can be examined beforehand, we have marked interventions as false interventions that

are undertaken by force of law. If, on the other hand, it is not possible to examine the will for any reason, we have marked such interventions that are undertaken on the basis of an explicit legal authorization as false.

REFERENCES

Arun B., "Clinical Trials during the COVID-19 pandemic: Challenges of putting scientific and ethical principles in practice", *Perspectives in Clinical Research*, 11 (2), 2020, 59-63

Berg J., Appelbaum P., Lidz, C., Parker L., *Informed consent: Legal theory and clinical practice*, Oxford University Press, New York, 2. Ed, 2001,

Ginsberg M. D., "Beyond Canterbury: Can Medicine and Law Agree about Informed Consent? And Does It Matter?", *Journal of Law, Medicine & Ethics*, 45 (1), 2017, 106-111

Gosić N., *Bioetika in vivo*, Pergamena, Zagreb, 2005

Đurđević N., "Pretpostavljeni pristanak pacijenta na lečenje prema nemačkom pravu", *Medicinsko parvo i medicinska etika*, Univerzitet u Beogradu i Institut za društvene nauke, Beograd, 1994,

Đurđević, N., „Pristanak oštećenog kao osnov isključenja protivpravnosti štetne radnje", *Pravni zbornik*, br. 2-3, 1995, 131-137

Zaleski K. L., Waisel D. B. "Withholding Information from an Anxiety-Prone Patient?", *AMA Journal of Ethics*, 17 (3), 2015, 209-214

Jeremić V., „Informirani pristanak: komunikacija između liječnika i bolesnika", *JAHR*, 4 (1), 2013, 525-533

Kirby J., "Informed consent: what does it mean?", *Journal of medical ethics*, 9, 1983, 69-75

Klarić P., "Odogvornost za štetu zbog grešaka u medicini", *Izlaganje prema zapisniku sa tribine kluba pravnika od 12.09.2001. godine*, 2001

Kusa Kumar S., Ambika Prasad P., Siddhartha D., "The Importance of Informed Consent in Medicine", *Scholars Journal of Applied Medical Sciences (SJAMS)*, 1(5), 2013, 455-463

Radišić J., *Profesionalna odgovornost medicinskih poslenika,* Institut društvenih nauka, Beograd, 1986

Radulović S., *Činjenice odlučujuće za isključenje protivpravnosti pri medicinskoj intervenciji i njihov međusobni odnos*, Doktorska disertacija, Kosovska Mitrovica, 2015

Reid K. I., “Informed Consent in Dentistry”, *Journal of Law, Medicine & Ethics*. 45 (1), 2017, 77-94

Satyanarayana Rao K., “Informed consent: an ethical obligation or legal compulsion?”, *Journal of cutaneous and aesthetic surgery*, 1 (1), 2008, 33-35

Sorta-Bilajac I., “Informirani pristanak – konceptualni, empirijski i normativni problemi”, *Medicina fluminensis*, 47 (1), 2011, 34-47

Faden, R. R., Beauchamp T. L., King N. M. P., *A History and Theory of Informed Consent*, Oxford University Press, New York, 1986

Wolf S. M., Clayton E., Lawrenz F., “The Past, Present, and Future of Informed Consent in Research and Translational Medicine”, *Journal of Law, Medicine & Ethics*, 46 (1), 2018, 7-11

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„НЕПРАВЕ“ МАНДАТОРНЕ МЕДИЦИНСКЕ ИНТЕРВЕНЦИЈЕ

Резиме

Принципи аутономије воље ни у једној грани права не може бити потпуно доследно и безусловно спроведен без истовремене претње по правну сигурност, приватне интересе других субјеката или опште друштвене интересе. Правни субјект, односно његова аутономија, кроз серију општих и посебних ограничења, бива стављена у други план у односу на опште добро и опште или приватне интересе који су значајнији у датом тренутку.

Медицинско право, млада грана модерних правних поредака, није изузетак у том смислу. Наиме, правни институт пристанка информисаног пацијента је примарно средство за остваривање аутономије воље у медицинском праву и он је основно правило. Ипак, у односу на ово правило постоје значајни изузеци.

У наредним редовима класификоваћемо ситуационе девијације од принципа аутономије воље изражене кроз пристанак информисаног пацијента. У ту сврху, поделићемо изузетке у две групе. Прву групу чине интервенције које смо за потребе рада означили као „праве“ интервенције предузете по сили закона. Друга група, а она је у фокусу нашег рада, састоји се од интервенција које смо означили као „неправе“ мандаторне интервенције.

Кључне речи: Информисани пристанак, пристанак оштећеног, грађанскоправна одговорност, противправност, мандаторне медицинске интервенције.