

## Consent...who gives it for anaesthesia for children?

Informed consent for anaesthesia and surgery has always been associated with fairly controversial issues, none more so than the promulgation of the National Health Act a few years ago, followed by the Children's Act.

To begin with, the question needs to be addressed as to why consent is needed from an ethical point of view. Essentially, it hinges on the principle of autonomy (*autos* means self and *nomos* rule). Thus, autonomy implies freedom from the control of others (liberty) and freedom from excessive personal limitations (capacity), and is simply the right to decide for oneself. Beauchamp and Childress discuss two important issues in *The principles of biomedical ethics*, namely the principle of autonomy and respect for autonomy. Their theories of autonomy involve understanding, reasoning and choice, and that autonomous action is described as acting intentionally, with understanding, and without controlling influences that determine one's actions. As far as choice is concerned, there are definitely factors that affect it, such as ignorance (what is the procedure? what is on the consent form?), coercion, and temporary or partial incapacity. Beauchamp and Childress also allude to the consequences of respect for autonomy, which are informed consent, truth telling (providing full disclosure) and confidentiality. When considering autonomy, its limitations are a contentious issue. These may affect the individual, such as immaturity, incapacity, irrationality, ignorance and imposition (coercion and exploitation), as well as the community, such as endangering public health, potential harm to others and competition for limited resources.

The Children's Act of 2005 defines a child as being < 18 years of age, and states the following on the issue of informed consent:

- A child may consent to his or her own medical treatment, or to the medical treatment of his or her child, if the child is over the age of 12 years, and is of sufficient maturity and has the mental capacity to understand the benefits, risks, social, and other implications of the treatment.
- A child may consent to the performance of a surgical operation on him or her, or on his or her child, if the child is over the age of 12 years and is of sufficient maturity and has the mental capacity to understand the benefits, risks, social, and other implications of the surgical operation, and is duly assisted by his or her parent or guardian.
- The parent, guardian or caregiver of a child may consent to the medical treatment of a child if the child is under the age of 12 years, or is over that age, but is of insufficient

maturity or is unable to understand the benefits, risks and social implications of the treatment.

- The parent or guardian of a child may consent to a surgical operation on a child if the child is under the age of 12 years, or is over that age, but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.
- The superintendent of a hospital, or the person in charge of the hospital in the absence of the superintendent, may consent to the medical treatment of, or surgical operation on, a child, if the treatment or operation is necessary to preserve the child's life, and is so urgent that it cannot be deferred.
- The Minister may consent to the medical treatment of, or surgical operation on, a child, if a parent or guardian of the child unreasonably refuses (to do so), or is incapable of (doing so), or cannot be readily traced or is deceased.
- The Minister may consent to the medical treatment of, or surgical operation on, a child, if the child unreasonably refuses to (consent).
- A High Court or Children's Court may consent to the medical treatment of, or a surgical operation on, a child, in all instances when another person who may give consent in terms of this Section refuses (to do so), or is unable to give such consent.

How do we interpret this?

How does one decide that a 12-year-old child is mature enough to understand the risks and consequences of anaesthesia and surgery?

The Health Professions Council of South Africa (HPCSA) ethical guidelines on the issue state the following:

"The South African courts have held that legally, for proper informed consent, the patient must have:

- Knowledge of the nature or extent of the harm or risk.
- Appreciated and understood the nature of the harm or risk.
- Consented to the harm or assumed the risk.
- The consent must have been comprehensive, i.e. extended to the entire transaction, inclusive of its consequences.

A healthcare practitioner who is providing treatment, or undertaking an investigation, has a responsibility to discuss it with the patient and obtain consent as the practitioner will have a comprehensive understanding of the procedure or treatment, how it is to be carried out, and the risks attached to it.

When this is not practicable, healthcare practitioners may delegate these tasks, provided they ensure that the person to whom they delegate the tasks:

- Is suitably educated, trained and qualified.
- Has sufficient knowledge of the proposed investigation or treatment, and understands the risks involved.

A healthcare practitioner will remain responsible for ensuring that, before he or she starts any treatment, the patient has been given sufficient time and information to make an informed decision, and has given consent to the investigation or procedure.

Healthcare practitioners must assess a child's capacity to decide whether or not to consent to, or to refuse, a proposed investigation or treatment, before it is provided. In general, a competent child will be able to understand the nature, purpose and possible consequences of the proposed investigation or treatment, as well as the consequences of non-treatment".

The South African Constitution provides that "a child's best interests are paramount in every matter concerning a child".

Therefore, a healthcare practitioner's assessment must take the following into account:

- A minor with sufficient maturity over the age of 12 years can be treated as an adult, and is legally competent to decide on all forms of treatment, and on medical and surgical procedures.
- A female of any age is legally competent to consent to a termination of pregnancy (Choice on Termination of Pregnancy Act).
- When a child is not legally competent to give or withhold informed consent, the parent or guardian may authorise investigations or treatment which are in the child's best interests. Such parent or guardian may also refuse any intervention, if he or she considers that refusal to be in the child's best interests, but healthcare practitioners are not bound by such a refusal, and may seek a ruling from the court.
- In an emergency, when there is no time to contact the parent or guardian, and the healthcare practitioners consider that it is in the child's best interests to proceed, they may treat the child, provided it is limited to treatment which is reasonably required in that emergency. In such circumstances, consent must be given by the clinical manager in state hospitals.
- When a legally competent child under the age of 18 years refuses life-saving treatment, application may be made to the court for authorisation of treatment that is in the child's best interests. Legal advice may be helpful on how to deal with such cases.
- When healthcare practitioners decide to apply to the court, they should inform the patient or his or her representative of their decision, and of his or her right to be represented at the hearing, as soon as possible.

## Forms of consent (children and adults)

To determine whether or not a patient has given informed consent to any proposed investigation or treatment, the healthcare practitioner must check how well the patient has understood the details and implications of what is proposed, and not simply rely on the form in which their consent has been expressed or recorded, especially when the initial consent was obtained by a third party.

### Express consent

Patients can indicate their informed consent, either orally or in writing. In some cases, the nature of the risks to which the patient might be exposed make it important that a written record is available of the patient's consent and other wishes in relation to the proposed investigation and treatment. This helps to ensure later understanding between the healthcare practitioner, patient and anyone else involved in carrying out the procedure or providing care.

Except in an emergency, in instances in which the child has the capacity to give consent, healthcare practitioners should obtain written consent. This should be signed primarily by the child, and also by the parent or guardian "assisting" the child.

### Implied consent

Healthcare practitioners should be careful about relying on a patient's apparent compliance with a procedure as a form of consent. Submission in itself may not necessarily indicate consent. For example, the fact that a patient lies down on an examination couch does not indicate that the patient has understood what the healthcare practitioner proposes to do and why.

### Reviewing consent

A signed consent form is not sufficient evidence that a patient has given, or still gives, informed consent to the proposed treatment and all its aspects.

Healthcare practitioners must review the patient's decision close to the time of treatment, and especially when:

- Significant time has elapsed between when the consent was obtained and the start of treatment.
- There have been material changes in the patient's condition, or in any aspects of the proposed treatment plan, which might invalidate the patient's existing consent.
- New, potentially relevant information has become available, for example about the risks of the treatment or other treatment options.

But when all is said and done, and one has read the law and the HPCSA guidelines, it behoves us to remember the words of our South African Constitution, which states that we must always act in the best interests of the child.

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