



ISSUES IN MEDICINE

Parental refusal of blood transfusions for minor children solely on religious grounds — the doctor's dilemma resolved

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Parental refusals of blood transfusions

It is common knowledge that if a doctor wishes to overrule a refusal by parents to consent to a blood transfusion for their child the doctor can always approach the High Court as the upper guardian of all minor children. A recent High Court judgment has now held that a refusal by parents to consent to a life-saving blood transfusion for a minor child solely on religious grounds is unconstitutional,¹ and therefore unlawful.

In *Hay v B*,¹ Dr Hay, a paediatrician, had applied to the High Court for an urgent order allowing her to give a life-saving blood transfusion to a baby against the wishes of the parents. The parents opposed the doctor's application on the grounds that blood transfusions were contrary to their religious beliefs and that they were concerned about the risks of infection associated with blood transfusions. In her application Dr Hay stated that although there was no guarantee that the baby would survive if it received a blood transfusion, if it did not it would probably die. She also said that it was highly unlikely that the transfused blood would be contaminated.¹

The High Court found that the concerns about infected blood were unwarranted and granted an immediate order authorising the doctor to give the baby a blood transfusion. It subsequently gave a judgment in which it stated that: (i) in terms of the Constitution² a child's 'best interests' were of paramount importance; (ii) the right to life in the Constitution³ is a basic constitutional value and the baby's right to life could not be violated; (iii) while the parents' religious beliefs had to be respected, and their concerns were understandable, they were not reasonable and justifiable and could not override the baby's right to life; and (iv) the interests of the baby in receiving the blood transfusion outweighed the reasons given by the parents for opposing it.¹

As the High Court has held that during a medical emergency it is a violation of a child's constitutional rights for

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parents to withhold consent to a blood transfusion solely for religious reasons, and that such a limitation is not reasonable and justifiable in terms of the Constitution, it is submitted that doctors should regard such refusal of consent as unlawful. Therefore the common law rules regarding emergency medical treatment should apply.

Emergency medical treatment

The Constitution provides that nobody may be refused emergency medical treatment.⁴ The common law states that in emergency situations medical treatment may be given without the consent of the patient, or persons legally competent to give consent on behalf of the patient, provided it is not against the consent of the patient or such other persons.⁵ However, if the refusal to consent to treatment during a medical emergency is unlawful (e.g. refusing to consent to a life-saving blood transfusion for a minor child solely on religious grounds), the doctors should refuse to comply, and proceed with the treatment. In such instances the conduct of the doctors would not be regarded as going against the consent of the patient, or the persons competent to give consent on behalf of the patient, because the refusal to consent is in itself unlawful. For instance, the recognition of such an unlawful refusal of consent to save a child's life or to prevent the child suffering serious injury or disability during a medical emergency would be against public policy and unconstitutional.³

Therefore, if during medical emergencies doctors are refused consent by parents or guardians to treat young children who are incompetent to consent for themselves, and this is done *solely on religious grounds*, the doctors should counsel the parents or guardians that their conduct is unlawful, and advise them that while the doctors will try to respect their religious feelings, if medical treatment is necessary to save the child's life, or to prevent it suffering severe physical injury or disability, such treatment will be undertaken without their consent. Where the grounds for refusal are solely based on religion it is no longer necessary for doctors to seek a court order to overturn the parents' refusal as such refusal is unlawful. The parents may seek a court order to prevent the doctor from saving their child's life, but where their refusal is based solely on religious grounds they will not succeed.



Conclusion

Although parents have the right to dignity,⁶ privacy⁷ and freedom of conscience and religion,⁸ the High Court has held that such rights are superseded by a child's right to life in cases where the child's life is at risk. In South Africa, as in other countries,⁹ refusals of blood transfusions during medical emergencies for minor children by parents solely on religious grounds are unlawful. Thus it is no longer necessary for doctors to seek a court order every time parents refuse to allow their children to receive a life-saving blood transfusion solely on religious grounds. In such circumstances the doctors will be acting lawfully if they proceed with a blood transfusion,

against the wishes of the parents, in order to save the child's life.

1. *Hay v B* 2003 3 SA 492 (W) 494-495.
2. Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996.
3. Section 11 of the Constitution of the Republic of South Africa Act 108 of 1996.
4. Section 27(3) of the Constitution of the Republic of South Africa Act 108 of 1996.
5. McQuoid-Mason DJ, Strauss SA. Medicine, dentistry, pharmacy and other health professions. In: Joubert WA, Faris JA, eds. *The Law of South Africa*. First reissue. Vol.17, para. 203. Durban: Butterworths, 1999.
6. Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996.
7. Section 14 of the Constitution of the Republic of South Africa Act 108 of 1996.
8. Section 15 of the Constitution of the Republic of South Africa Act 108 of 1996.
9. For England see *T (a Minor) Wardship: Medical Treatment* [1997] 1 All ER 906 (CA); for the United States see *Jehovah's Witnesses of Washington v King County* 278 F Supp 488 [WD Wash], *aff'd per curiam* 390 US 598, *reh denied* 391 US 461 [1967].