

Terminal Patients and the Right to Refuse Medical Treatment in Argentina

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Abstract

The right to health has many dimensions. On the one hand, it entails positive duties for states to protect the health of individuals. On the other, it encompasses patient decision making regarding personal health, an idea which is closely linked to the right to autonomy and the right to free development of the individual—that is, to dignity.¹ This is why the informed consent of the patient and her right to make a choice according to her own values should be honored, even when her decision may seem irrational or imprudent. When patients are incapable of providing informed consent—for example, if the patient is unconscious—the law can authorize certain persons to act as a proxy on their behalf. In Argentina, the Patients’ Rights Act (2009) as amended by the Death with Dignity Act (2012) states that if a patient is unable to provide informed consent, consent may be provided on her behalf by her close relatives, affinal kin, or legal guardian, in this order of preference.² The Patients’ Rights Act also permits patients to set up advance directives regarding health decisions to be made if they become terminally ill. In 2015, the Argentine Supreme Court of Justice discussed the scope of patient autonomy in the case *D., M.A. s/ declaración de incapacidad*.³ This case presented a question that had yet to be explored by the court: how can we determine an unconscious patient’s will if she does not have written advance directives concerning whether a life-sustaining medical treatment should be continued? This article examines the grounds of the Argentine Supreme Court’s decision in *D., M.A.* First, we describe the case law that existed prior to *D., M.A.* Then, after explaining the facts of the case, we discuss the ruling and raise doubts about its scope.⁴

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Case law prior to *D., M.A.*

The Argentine Supreme Court had previously ruled on patients' right to autonomy in the cases *Bahamondez* (1993), and *Albarracini Nieves* (2012). Both cases dealt with patients who needed blood transfusions but, as Jehovah's Witnesses, refused treatment.

In *Bahamondez*, the patient was conscious when he refused the transfusion. Justices Fayt and Barra held that human dignity is inviolable and that other values are instrumental compared to respect for persons.⁵ Thus, *Bahamondez* was free to refuse the blood transfusion. This ruling was issued before the constitutional amendment of 1994, which conferred constitutional status on the right to health.⁶

In *Albarracini*, the patient was hospitalized in a critical condition while unconscious. He had previously signed an affidavit before a notary public where he had stated his wish not to receive blood transfusions even under risk of death. With the Patients' Rights Act already in effect, the Supreme Court considered that patients, when accepting or refusing a specific treatment, "have the right to make a choice according to their own values or points of view, even when it may seem irrational or imprudent, and that free choice must be respected."⁷

Facts of the case

Marcelo Diez suffered a traffic accident in the Province of Neuquén in 1994 that left him hospitalized and unconscious. He underwent several surgical procedures and was administered various analgesic drugs. He required permanent care to satisfy his basic needs.

His sisters legally requested an authorization to discontinue artificial hydration and nutrition and all therapeutic treatments used for Diez's artificial life support. The request was denied by the court of first instance and the court of second instance. The Supreme Court of Justice of Neuquén granted their request.

The court framed its ruling around the Patients' Rights Act, despite the fact that the act was passed after the accident. The Office of the Public Prosecutor for Incompetent Persons (Ministerio

Público de Incapaces) and the *ad litem* curator of Diez appealed the judgment, arguing that he was not in the terminal condition required by law. Thus the case was brought to the Argentine Supreme Court of Justice.

The Supreme Court ruling

The Supreme Court explored three questions. The first concerns how to determine the situations in which a patient may refuse treatment. The court based its decision on article 2 of the Patients' Rights Act, which allows patients to refuse treatment and hydration and nutrition procedures when they suffer from an irreversible disease or are terminally ill. Although Diez was not terminally ill, the court considered him to be in an irreversible and incurable condition because of his injuries and the fact that according to medical experts, there was no medical precedent that suggested a prospective recovery.⁸ Under this reasoning, the court subsumed the case under the permission granted by the Death with Dignity Act.⁹ Furthermore, the court considered life support measures to be included in the "medical treatments" mentioned by the law.

The second question lies at the heart of the case: how should cases where patients cannot express their will be decided? The Patients' Rights Act regulates informed consent, which must be personal. Diez did not have formal advance directives, unlike *Albarracini Nieves*. The law also provides for situations where patients, for any reason, are unable to consent, in which case their relatives may consent on their behalf. The court analyzed whether it was possible to determine the will of Diez if he had no formal advance directives, concluding that it was possible to do so. An affidavit signed by Diez's sisters was enough to determine his will.¹⁰

However, the court emphasized that Diez's will had to be represented in the affidavit and that his sisters were not deciding on his behalf but merely voicing the will of their brother.¹¹ As the court stated:

What the [aforementioned] legally designated prescribed individuals must express is the will of the unconscious patient and his personal appreciation regarding his non-transferable idea of human dig-

*nity before becoming permanently and irreversibly unconscious.*¹²

Thus the Supreme Court adopted a more restrictive interpretation of the Patients' Rights Act. If Diez had not expressed to his sisters his wish to be taken off life support in a case like this, the request might have been denied in light of Diez's lack of consent.

The Supreme Court intended to prevent individuals from making this type of decision on behalf of somebody else based on their own understanding of "life with dignity." Diez's sisters may well have thought that, in that condition, their brother's life was not worth living. Therefore, the Supreme Court asserted that its ruling

*in no way entails approval or endorsement of a distinction between lives worth living and lives not worth living and it should not be understood to concede that the right to life may be restricted on account of the severity or seriousness of a physical or mental condition, or consent that the right to medical or social care for supporting a patient's quality of life may be limited.*¹³

That being said, when describing the requirements for determining whether consent exists, the court used a very lax standard. In this case, an affidavit signed by Diez's sisters was enough to determine that Diez had provided advance directives.

Is this a way to provide flexibility to the strict standard set for consent by representation? This may well be the case, as it proves difficult to imagine other ways of determining the will of the patient. This is an imperfect solution but may be the one that closest reflects the will of the patient. Nonetheless, such a solution could be controversial if a third party claimed that the patient's will was different. In that scenario, there is no obvious way to resolve the conflict.

Therefore, on the one hand, the Supreme Court's ruling seems to revoke the authority that the law had granted to family members to decide on behalf of the patient. On the other, it is often hard to find evidence of the patient's will regarding terminal care, as people rarely voice their wishes in that regard.¹⁴

The third question concerns how doctors

should deal with future cases. The Supreme Court stated that there is no legal obligation to require a judicial authorization for these types of cases. In this regard, the court followed its precedent on the decriminalization of abortion.¹⁵ Furthermore, it stated that there is a need to develop protocols to regulate a possible conscientious objection by health care providers. In *F., A. L. s/ medida autosatisfactiva*, the Supreme Court established guidelines for protocols for conscientious objection to abortion, which we think are applicable to these cases as well. The court stated that health institutions should allow their staff to exercise their right to conscientious objection without compromising patients' rights—for example, by requiring that the conscientious objection be expressed at the time that the protocol enters into force to guarantee that every health institution has staff to provide these services.¹⁶

Conclusion

We conclude with a final consideration: what is the scope of the Supreme Court's ruling? On the one hand, the court based its decision on the principle of autonomy and on the idea that each and every individual is solely responsible for making his or her major life decisions (in this line of reasoning, suicide, for instance, is not objectionable). On the other, the court cited the Patients' Rights Act to make the point that euthanasia procedures are not permitted.¹⁷ However, if autonomy is a fundamental value, just as self-induced death should not be objectionable, is outlawing euthanasia consistent with that value? Should patients be required to die a heroic death?¹⁸ In fact, the Supreme Court has previously held that the law cannot expect or require people to act heroically—that is, to "make enormous and immeasurable sacrifices."¹⁹ Following this line of thought, shouldn't Argentina be obligated to decriminalize euthanasia?²⁰ The autonomy-based arguments used by the Supreme Court in *D., M.A.* seemingly lead to that conclusion.²¹ This is a very active discussion in other countries (for example, in Canada) and an important forthcoming debate in Argentina.²²

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