

BRIEF REPORT

Informed consent of the minor. Implications of present day Spanish law

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In Spain, any person under the age of 18 is a minor. Generally, minors lack the legal capacity to take legally binding actions because they are deemed incapable of legally binding consent. Spanish civil law recognises, however, that the child, in accordance with the law and being sufficiently mature, may act for himself. It stands, then, that consent, as expressed by the "sufficiently mature" minor, should be legally valid.

Physicians who care for children are frequently uncertain of the special legal requirements governing the doctor-patient relationship when the patient is a minor.

Society is moving towards a new patient-doctor relationship based on the idea of participation in the medical decision making process. One of a doctor's obligations is to obtain the patient's (or legal representative's) consent before providing treatment. Paternalistic attitudes remain, however, especially in the case of minors. Society increasingly recognises minors as free agents with their own personality and this is also the case with Spanish law concerning the legal right of minors. Situations continually arise in which the doctor must take into consideration the rights of minors to be informed, to be listened to and, perhaps, to offer (or not) their consent. This last consideration, however, provides the greatest problems. The Spanish *General Act on Health* (art 10) says that: "... prior written consent is necessary before any medical intervention", although an exception is made when the patient is not mentally capable of taking such decisions, in which case family members or legal representatives must do so. If a patient is not mature enough to consent to medical intervention it is clear that the parents or legal representatives must give permission. However, article 162.1 of the Spanish civil law says that: "Parents who have custody of their children also represent them legally, except in cases referring to the rights of the person, when the child, in accordance with the law and being sufficiently mature, may act for himself". Therefore, consent, as expressed by the "sufficiently mature" minor, should be legally valid.

Nevertheless, article 155 of Spanish penal law (as opposed to the civil law) specifies: "In so far as bodily harm is concerned ... any consent given by a minor or person considered incompetent will not be accepted as valid". This article could also be applied to medical treatment—for example, surgical intervention which, although considered to be in the patient's best interest, was given without consent.

It is important to define the concept of minor as understood by the law before determining the validity of consent. Different opinions exist on this point. Most legal experts accept however, in accordance with the Spanish constitution (art 12) and the civil law (art 315) that a minor is a person who has not reached eighteen.

The Spanish *Code of Ethics and Deontology for Physicians* also fails to clarify the situation. It considers that a minor is not in a condition to give consent although it does state that the opinion of a minor should be taken into account according to age and maturity (arts 7.5, 7.6).

In January 2001, Catalonia, which has regional autonomy, introduced a law on patients' rights. This law, which is solely applicable to Catalonia and not to the rest of Spain, states that adolescents of sixteen and over must personally give consent (art 7).

PROBLEMS

One of the problems which may arise as a result of taking into consideration Spanish law as it stands is that a doctor may be obliged to ask for the consent of a minor's legal representative before carrying out even trivial treatment. This is clearly going against the tide in a society which grants increasing freedom of action to minors in accordance with their maturity and level of understanding. Since the Spanish civil law and the *Code of Ethics and Deontology for Physicians* only refer to "sufficiently mature" and "age and maturity", and make no mention of specific situations or ages, it is evident that the whole situation as regards minors' consent is confusing.

If we wish to accept the consent of minors with sufficient judgment, how do we set about this? Do we consider the consent of both minors and legal representative to be necessary, in which case the consent of the representatives alone is not sufficient or do we consider that minors with sufficient judgement can authorise the action without the representatives' consent?

PROPOSALS

The tendency of present day Spanish law is to favour the doctrine of the mature minor and so the competence which adults are supposed to have is, in questions of health, frequently extended to sixteen year olds. In our opinion, the presumption of competence should not refer to a specific age but to sufficient maturity. To make an individual evaluation of a minor's capacity protocols should be drawn up for application in medical practice. Unfortunately, there is little consensus as to how the capacity of minors can be assessed in this respect.

In case of conflict between an adolescent and parents, or when decisions which will greatly affect the patient's life must be taken, a clinical ethical committee should be consulted. Only as a last resort should the case come before a judge. In the mean time, however, the most obvious and straightforward solution would be to reduce the age of consent in medical matters, either by the promulgation of a new law similar to the Catalanian model or by modification of the Spanish *General Act on Health* accompanied by similar modification of Spanish penal law.

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