https://doi.org/10.25143/socr.21.2021.3.181-190

May the Patient's Will, Expressed by Means of Assistive Communication Technologies, be Admissible as Evidence in Court Proceedings?

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Abstract

The article is dedicated to hallmark the problem of accepting evidence of a patient's will by a court in diverse proceedings, and it being communicated by non-classical means. Modern technologies allow patients to communicate utilizing various electrified appliances, in case the disabled person suffers from an ailment, or a health disorder affecting speech and mental abilities. Such appliances may truly enhance the patient's quality of life; however, it is uncertain whether such patient may be found to be a competent witness, or the information reflecting their will obtained in a non-classical method may be found to be as convincing evidence by the court. Currently, there is very little judicial precedent dealing with obtaining evidence of the patient's will by means of assistive communication technologies, though recent Italian legacy has shown such evidence may be accepted by the court, in case forensic-psychiatric examination approves adequacy of the cognitive abilities of the patient, rendering their will competent. Diverse legal systems render the question of patient's competence differently, and the issue of accepting information as evidence obtained by means of assistive communication technologies will surely become more frequent in disputes relating to testament validity or determining the patient's will to undergo or forego medical treatment. Such cases may be of high relevance in civil proceedings on withdrawal of life-supporting treatment, which will ultimately result in the patient's demise.

Keywords: patient's autonomy, patient's legal capacity, withdrawal of life-supporting treatment, assistive communication technologies, theory of evidence, critically-ill patients.

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Introduction

Concerns relating to the expression of patient's will in relation to conducting deeds or expressing a firm desire concerning their medical treatment have been topical for already a long time in diverse civil law scholarship. Expressing gratitude towards assistive communication technologies (hereinafter – *ACT*), patients being silenced by degenerative ailments are able to communicate and express their will by means of various mechanical devices, such as E-Tran tables and voice synthesisers, attached to computers or special appliances. Simultaneously, it may be really complicated for the court to determine the actual competence of a non-verbal patient. American courts have withdrawn the presumption of non-verbal witnesses as incompetent ones long ago – at common law of the previous ages, such witnesses were deemed incompetent with no exception. The United States case law represents that the competence of a witness suffering from an ailment having a substantial impact on their speech or behavior should be dealt upon an individual approach [1, *610–614*]. Not so long ago, as in the year 1950, the Supreme Court of Canada affirmed a decision to expel 2 mentally-retarded children from school, who repeatedly caused nuisance owing to their behavior and outlook [2, *482–486*]. However, this does not seem to be the fashion nowadays owing to highly developed systems of inclusive education. At the same time, the United States case law has a multitude of recent examples relating to discrimination or special education lawsuits on basis of restrictions in right of education for handicapped persons, or failing to facilitate it, involving the issue of ACT as well [3, *134–139*; 4, *3–9*; 5, *2–5*].

Patient's Will and Assistive Communication Technologies

The will of the patient (the author refers to an ill person, maintained in a hospital, or otherwise frequently undergoing treatment, whose health condition renders substantial complexification in its everyday activities, involving concluding deeds, communicating etc.) usually concerns either the deeds they conclude, or expressing their will concerning their further treatment (frequently, courts have problems to define the will of a person, silenced by accident, having little to no chances of any recovery – such as, for instance, the recent case of Marcelo Diaz in Argentine, where the Supreme Court allowed to dislodge his life-support appliances [6, *22-ff*).

It is virtual that various progressive ailments affect mental abilities of the patient and cast a doubt on their legal capacity. Approaching a potential end of life, the patient may consider drawing up a will, and the patient's competence is an ultimate pre-requisite for rendering their will valid. Simultaneously, not every disabled person may write a will owing to their ailments. In former Latvian law, the jurisprudence frequently featured litigation between civil parties, alleging invalidity of a will, based on the testator's conjectural incapacity, considering the testator drew up a will at hospital, or died in its premises, being

(allegedly) considerably morbid [7, *11–12*; 8, *93–94*]. The Civil Cassational Department of the Latvian Senate also ruled that personal rights, such as the right to file a divorce action on behalf of a mentally ill patient, may not be lodged by their guardian, as some personal rights are too inalienable from their respective holder in order to be exercised by means of legal representation – such was the ruling CKD No. 72 / 36 in the case of *Lacis* (1936) [9, *64–65*]. The issue of the patient's competence had to be resolved by courts by means of witness (including expert witness) testimony, as well as forensic-psychiatric examinations; in case the lower court had clearly defined that the patient was competent, the Senate dismissed the appeal in cassation, as such circumstances belong to the factual side of the case, and thus were not subject to appeal in cassational order [7, *12*]. For instance, in the case of *Doroškevič* (1938), the testator died in a psychiatric clinic, casting a serious doubt on his legal capacity, but since the appellate court established he was capable of drawing the will at the time of concluding this deed, this fact was not revised by the Senate, which rendered it as virtual [7, *11–12*]. In the case of *V. Grzibovsky v. City of Riga* (1937), where a man sued the city of Riga and other parties for a failure to provide him medical assistance after his leg was overrun by a bus (a gangrene had developed shortly after the injury and the leg was subsequently amputated), plaintiff was denied to be accepted to Riga City Hospital II. However, when he found another hospital for treatment, plaintiff refused to undergo amputation in Riga City Hospital I (the operation was conducted at a different hospital). The Senate did not consider this circumstance as a major fact which could change the resolution of the case, claiming that gangrene had developed shortly after the injury, but not owing to plaintiff's lack of consent, but the delay in medical treatment (judgment was handed down for plaintiff against the City of Riga, but was dismissed against other defendants). [10] In this case, not even an outstanding medical malpractice case (which was seldom in the First Period of Independence), but the fact plaintiff's uncontested will not to undergo amputation is particularly interesting from an era when medicine was very paternalistic.

In modern Latvian law, the will of the patient is strictly necessary to conduct a medical intervention, provided by law [11], and repeatedly affirmed in jurisprudence [12, *9*; 13, *8*]. However, the law on patient's rights does not touch the issue of the patient's will rendered in alternate ways – the patient may be mentally competent to conclude a deed or express their will to undergo treatment but may not physically express it. The situation is even more complexified as the Patient's Rights Law does not clearly establish the boundaries of the right to refuse medical treatment [11, *Articles 6.4–6.6*]. Claiming that there are *no* boundaries, euthanasia with all the deplorable consequences may be recklessly legalised [14, *9*]; though in fact, any form of euthanasia is forbidden in the Republic of Latvia. Patients approaching towards the end of their lives, may gradually lose their ability to express themselves, conduct deeds or decide for their medical treatment – in legal terms, they lose legal capacity.

Already in the 1980s and 90s, a number of English-speaking authors suggested that dementia patients, regardless of being in-patient or out-patient, cannot be considered

incompetent by default [15, *69–72*; 16, *151–157*]. In the legal terms, there has to be firm and convincing evidence that such person is competent to conclude a deed, or to express their will in regard with medical treatment (i.e., patient's autonomy). The author of this article does not uphold a presumption that literally every patient of such nature should be deemed as legally competent, unless there is firm evidence that they are incompetent.

A presumption of legal incapacity of a person suffering from progressive neurodegenerative ailment, such as dementia or having been badly injured in an accident rendering the patient in a shock condition or suffering from a chronic disease causing repetitive and severe pain and distress, is logical from the Civil Law point of view, which may sound old-fashioned at first. However, deciding upon a testament, or upon end-of-life issues (where it is legally permissible) bears legal consequences. In those jurisdictions, where a living will (or a "patient's testament") is already legalised, patients suffering from neurodegenerative ailments may draw them up, at least to a certain extent [17, *503–505*]. It should, however, be considered that their actual capability of understanding legal consequences of their decisions is subject to proof. The law should not bend in the way to comfort such patients, rendering them competent if they are apparently not. The legal institute of a guardian may be a solution on some occasions, yet, not always.

Moreover, there are wise restrictions for guardian activities relating to facilitating health of their beneficiary. For instance, a Dutch court ruled that a legal guardian has no right to file a no-cardiopulmonary resuscitation order for their elderly mother, affected with severe senile dementia, as matters of life and death are way too personal to be decided by someone apart from the person itself [18, *Section 3.3–3.7*]. At the same time, an American court in Colorado has ruled to affirm an order authorising a patient's legal guardian to institute a "do-not-resuscitate" order for a severely handicapped man, finding it serves the best interests of the patient [19, *593–597* / *Section III–V*]. This is an example how diverse the guardian powers may be assessed by the courts – in both cases, the patients were incapable of deciding for themselves primarily owing to their mental condition. The common law tradition, however, seems to be more inclined towards the boundaries of guardian powers and the patient's autonomy, which does not seem to be acceptable in civil law jurisdictions.

However, as emphasised before, the law should not be made to comfort a patient, allowing them everything their consciousness would desire, but rather be adequate in representation of their legal rights. A Dutch approach on end-of-life issues seems to be an exception from civil law tradition: mentally ill people may also request to end their life by a physician, though such practice is very rare even in the Netherlands [20, *243–247*]; in fact, the number of such cases in 2015–2017 did not substantially increase since the 1990s [21, *1797–1800*]. In 2020, a Dutch court, deciding upon a case on compulsory crisis measures relating to a mentally-retarded and mentally-ill person, intimated that euthanasia (the patient had suicidal tendencies and requested it) could be a subject of a review, in case ordinary treatment would not succeed [22, *Sec. 2.1–2.2*]. It should be

denoted that the actual number of such requests (including their fulfillment) cannot be assessed from a lawyer's view by at least considering the claims for a court order: there is no necessity to ask for it in the Netherlands to obtain permission to conduct any form of euthanasia.

From the viewpoint of classically-shaped civil law, a mentally-ill person's legal competence would be of the same level, as of a patient in a permanent vegetative state, meaning zero – both would possess a legal representative, responsible for their health. However, the latter may have a "patient's testament", which may serve as evidence of their will. Not many countries from Eastern Europe have ever approached this institute of civil law (the author acknowledges the existence of an institute of civil law), but upon explanations of the Constitutional Court of Hungary in the case (IV. 28), drafting such a will and certifying it would be the same as of an ordinary testament [23, *Section IX, para. 4*]. The author of the article supports lack of creating a blend of civil law and bioethics, and not attempting to comfort a patient presuming their legal competence in any situation, apart from, the brain death. In the 1970-80s, American courts clarified that brain-dead people have to be considered legally dead (i.e. cases of *Lovato* (1979) and *Bowman* (1980) [24, *1078–1080*; 25, *411–412, 417–419, 733, 735–737*]), which is designated by a set of medical measures, involving electroencephalogram (EEG) to determine brain function. Brain-dead people do not express any autonomy – they are legally dead and thus possess no civil rights, despite technically being maintained alive by machines.

Patients may express their will in various ways, and it is correct to assume that cognitive abilities are the key pre-requisite to assess the competence of such person. In terms of testifying, the Supreme Court of Colorado presented a firm position in the case of *Howard v. Hester* (1959): "...if the witness has the capacity to observe, recollect, and communicate he is competent, and his mental deficiency is considered only in so far as it affects the weight to be given his testimony" [26, *108*]. The same court in the trial of *Welborn Alexander* (1986) did not disqualify the victim (testifying as witness), having slight-to-moderate speech and hearing impairments. Upon the court report, the victim of a sexual assault made her testimony through her interpreter using American sign language [27, *1305–1307*]. American states may have different rules for determining competency of such witnesses, which may considerably vary.

In terms of civil law jurisdictions, cognitive abilities and a sufficient way to express oneself are seemingly determinant. Several Italian cases demonstrate how the will of the patient relating to their end of life was expressed by means of ACT, and were accepted by courts as convincing evidence, proving the patient's cognitive abilities were sufficient to render them competent. The first one is the case of *Giovanni Nuvoli* (2007). The ward in this case was a famous football referee who was suffering from amiotrophical sclerosis (ALS) in the last few years of his life. The malady rendered him bed-ridden and immobilised, though he had adequate cognitive abilities. Not once, Nuvoli expressed himself for an ultimate wish to die, but no one apparently allowed him to do so (those days, euthanasia was banned in Italy).

Previous year before Nuvoli's case, Piergiorgio Welby had lost his legal battle asking a court authorisation to switch off his ventilator – Welby having suffered from fasciocapulo-humeral muscular dystrophy for most of his life (died aged 60) practically committed a suicide requesting an anaesthesiologist to assist him a couple of days after the court declined his claim [28, *5–10*]. Nuvoli had also attempted to end his life before he could die of natural causes, but any attempts were blocked as illegal. By July 2007, Nuvoli was kept at home with life-supporting machinery, and his de-facto wife Maddalene Soro, with whom he had cohabited for over twenty years, filed a claim to the court of Sassari to be empowered to represent him, including all his personal affairs, as well as external representation of his will. It may be presumed Nuvoli would ask to withdraw his life-support (but who would allow it to him, remains rhetorical). However, a public prosecutor had intervened into the proceedings, claiming that Nuvoli could autonomously express his will by using a voice synthesiser (the model was "MyTobii"), or by means of an eye gaze upon an alphabetic table.

Other relatives of Nuvoli opposed to administering M. Soro as a guardian, but for their private reasons. They did not oppose the fact that Nuvoli could express his will by means of a voice synthesiser. The public prosecutor claimed that Nuvoli was fully capable of expressing his will by the device, and the patient was later examined by medical experts in the presence of the tutelary judge. Nuvoli expressed a firm will to die and stop his treatment, declaring by means of a voice synthesiser that he would not tolerate resuscitation measures in case of termination of treatment. It was declared that Nuvoli's equipment was functioning properly, and Nuvoli's intellectual abilities were adequate. M. Soro was appointed as his guardian for limited purposes: the court found he could declare his will himself by means of his voice synthesiser.

Concerning the expression of the patient's will by extraordinary means, the court said: "There is no doubt that said speech synthesiser should be recognised as a suitable technical tool, in the light of the 2nd paragraph Art. 3 [of the] Constitution [of Italy], to remove the obstacle, that prevents Mr. Nuvoli, due to his illness, to express himself autonomously, effectively impairing his freedom and making equality with other citizens fail." [29]

Nuvoli, however, was not encouraged with such judgment (probably, he could assume the court could satisfy his plea to terminate life-supporting treatment), started a hunger strike shortly after the judgment was pronounced, and died a week thereafter.

Another case, adjudicated by the court of Modena in 2009, also involved the issue of a patient's expression by ACT. The wife was applying to be appointed a guardian for her incapacitated husband, a 52-year-old physician. The husband was suffering from ALS on later development stages, causing complete immobilisation, an instalment of a PEG tube (nutrition and hydration) and an assisted ventilation after tracheostomy. He was placed at home. The man, upon the visit of April 23, 2008, was able to express his will upon

the upcoming therapies in case of a total loss of capacity to communicate. The report discloses that in fact he was not able to speak as people do – by vocal cords, but means of a low-tech E-Tran table indicating the letters by eyelids to an "interlocutor" (probably one of the nursing stuff who holds the table). On May 6, the tutelary judge visited the disabled man. He expressed a "living will" that though his intellect will continue working despite ALS, he would suspend assisted ventilation and artificial nutrition in case of his full incapacity (e.g., severe dementia). The judge wrote his living will that was confirmed by the disabled man.

The theses from the judgment are represented as underwritten:

- The Court held that the guardian is to respect the wills of the incapacitated relative, so must the doctor. The artificial life-support in a permanent vegetative state actually postpones death in case coma is irreversible. So do various surgical manipulations.
- The Court claimed there may be no treatment in case of lack of free and informed consent upon two judgments in bold.
- The Court affirmed that a living will may include suspending all the treatment. This is not in conflict with the constitutional provisions of life preservation or the duty of care lodged upon the legal guardian.
- The Court also discussed that Belgian and Dutch law practices a form of assisted suicide where some administered liquid is enhancing death (moreover, the court says, that there is a possibility to self-administer it). However, assisted suicide is not the same case as the presented one.
- The Court considers the "living will" to be an important instrument of right to self-determination, and upon the 2007 cassational judgment [30], it was held that if there is no written power of attorney, the presumed will may be determined upon the prior habits and customs of the person, being supplied with sufficient evidence. The case, upon the court, represented the ability (though not with the classic sense of communication) of the person to express their wish for further treatment (in a sense of its withdrawal). The court discussed that since the 2004 law was adopted (*Legge No. 6 del 2004*), an administrator may execute decisions of a mentally or physically incapacited person who is appointed by a court or by a tutelary judge to be their legal guardian (see Art. 408 (2); 410 (1) of the Civil Code – anticipating person's incapacity the administrator may be appointed) [31, *3*].
- The "provisional writing" is a power of attorney representing a living will. In such case, it will be legal if the administrator will claim for suspension of the life-supporting systems; and the court ascertains that currently the ward has capacity to ask to withdraw treatment which may include a wide variety of manipulations to keep them alive for many years owing to advancements of modern medicine. The court affirmed that cognitive abilities exercised by the patient are full and adequate [31, *4–6*]

- The patient's will must be respected, and the revocation of the will must be proved (otherwise being legally inconsistent), i.e., if not acting as written in the living will, proof must be provided as for interferences of the decision; otherwise such evidence must be brought before the court.
- When there is no direct law on "living wills" (such law was adopted in 2017), the principle is laid down upon the informed consent formed upon case law, Civil Code and medical ethics.
- The Court ascertained that the legal guardian does not express their own wills, but the wills of the patient, being a modern-way "executor" and the judge may empower the guardian to recall the physicians to do what they are obliged to do upon the "living will" of the patient.
- The Court appointed the administrator and empowered them in the following: (a) if the patient comes to the state of incapacity, to request the doctors to suspend the treatment; (b) request to provide necessary palliative care to mitigate his sufferings, and requires the administrator to inform the court on the condition of the patient (Office of the Tutelary Judge), communicating the medical records of clinical (of his health condition) and psychiatric reports (degree of loss of capacity and the loss of ability to want and understand) [31, *6–8*].

Conclusion

The article has displayed that a patient's communication may be rendered in many ways, both representing their will regarding medical treatment and a will to make deeds, or even testify in a court. Owing to various ailments, some patients may be deprived of their ability to communicate in an ordinary way. Formerly, oral testaments or testimony by non-verbal language were legal in such situations. As medical technologies advanced, various ACT appliances have been introduced to facilitate the will of a patient. However, courts have seldomly dealt with testimony, obtained by such extraordinary means. The recent jurisprudence of Italian courts depicts that such evidence may be admissible, in case the patient's cognitive abilities are proved to be adequate by medical experts. Contemporary and elaborating medical technologies, such as neuro-networks, will allow deciphering brain signals of non-verbal patients in the near future, and thus the courts will deal with the issues of admissibility of such evidence as well. Therefore, topicality of the research relating to expression of a patient's will by alternate means is arising and has prospective for further scientific investigation.

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