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Admission of a minor to a psychiatric hospital under Polish law. Part II.*

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Summary

The prevalence of mental disorders among minors is steadily increasing in our country as well as in Europe. Contact of a minor with a psychiatric health service, and especially the admission of such a person to a psychiatric hospital as a matter of urgency, however, raises a lot of legal and medical controversy. Urgent admission allows the consent of both the minor and his legal guardian to be bypassed. The article deals with legal issues related to the direct threat to life of minors for psychiatric reasons, and also presents the conditions that must occur for admission without consent not to be subject to legal tort.

Key words: minors, admission without consent to a psychiatric hospital, Mental Health Protection Act

The admission of a minor in urgent situations

Admission of a minor to a psychiatric hospital in the so-called urgent mode means placing in a hospital without the consent of an authorized legal representative and without the consent of a minor over 16 years old, or even against their will. This mode is applicable in specific cases. The first of them was formulated in Article 22 paragraph 2a of the m.h.p.a. Pursuant to this provision, in urgent cases the person referred to in paragraph 2 (a mentally ill person or a mentally handicapped person unable to consent to or determine his/her attitude towards being admitted to a psychiatric hospital and treatment) may be admitted to a psychiatric hospital without first obtaining the consent of the guardianship court. In this case, the person admitting the patient is obliged, if possible, to obtain a written opinion of another doctor, if possible a psychiatrist, or a written opinion of a psychologist. According to Article 22 paragraph

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2c of the m.h.p.a., if the person referred to in paragraph 2 is opposed to admission to a psychiatric hospital, and his/her current behavior indicates that it directly threatens his/her own life or health or life or health of other persons, the provisions of Article 23 paragraph 3–5 and Article 25 and 27 of the m.h.p.a. are applied. The first application of Article 22 paragraph 2a of the m.h.p.a. applies to a situation where a person who is to be admitted to a psychiatric hospital is not able to consent to admission or even express his/her attitude towards admission to hospital and treatment, but does not oppose this admission. The second situation occurs when the patient is strongly opposed and then similar rules apply that apply to admission to the hospital without consent pursuant to Article 23 of the m.h.p.a. The provision of Article 22 paragraph 2a of the m.h.p.a. does not generally apply to minors because either the admission to a psychiatric hospital requires only the consent of the legal representative or this consent may give rise to the lack of consent of a minor over 16 years of age who is unable to express it. The provision of Article 22 paragraph 2a of the m.h.p.a. may be appropriately applied in such a special case when there is an urgent need to admit a minor to hospital, the legal representative agrees to this admission but cannot do so without the consent of the guardianship court (e.g., guardian, parent whose parental authority has been limited, parents who initiated proceedings before the guardianship court because they could not agree on a common position as to whether the child should be admitted to a psychiatric hospital).

The admission of a minor under Article 23 of the m.h.p.a.

However, as the minor is concerned, the procedure of admission to a hospital without the consent as referred to in Article 23 of the m.h.p.a applies. This provision sets out three conditions for such admission, which must be met cumulatively [1]. First of all, admission can only take place if the patient already has a mental illness[1]. It is not sufficient to apply this mode in the presence of psychopathological symptoms that may only indicate a mental illness, which requires diagnosis. Secondly, the current behavior of this person must indicate that because of this disease the patient directly threatens his/her own life or the life or health of others. A direct relationship between the existing mental illness and the threat that the ill person poses to his/her life or to the life or health of others (e.g., acts of aggression) is required here. Admission to hospital in this mode is not allowed if the patient's behavior poses a threat to his/her own health only [1–3]. Thirdly, the application of the procedure specified in Article 23 of the m.h.p.a. takes place when there is a lack of consent required in Article 22 of this Act. The above provision leaves the psychiatrist a fairly wide discretion as to the admission to a psychiatric hospital in the above procedure, but it may also cause in practice significant doubts as to the situations in which the direct threat to life or health, as referred to in Article 23 paragraph 1 of the m.h.p.a., and also on the basis

[1] Legal codes usually use historical names for mental states. For the sake of clarity of the content of the article, the authors decided to leave it as it is.

of what premises it is assessed whether the patient is already posing a threat to his/her own life or only health.

Direct threat to life or health of a minor

There is a direct threat to life or health when – assessing the situation in the light of the principles of life experience and the patient's current behavior in the course of the illness – it can be concluded that there is a real threat of loss of life or damage to health in the near future. To put it differently, a direct threat to the patient's life or the health or life of others occurs when, in the light of life experience and the current course of the ilness, it is highly probable that the patient left alone will perform an act aimed at his/her own life or the life or health of another person. Directness in this context does not mean that the patient must take steps towards the final (executive) phase of the assassination of these goods (e.g., knife swings). The most important here is a high degree of probability, a serious risk that such an attack may occur in the near future (also the preparatory phase). It is about the existence of a temporal relationship between the actions taken and the eventual effect, but this effect does not have to be immediate [4]. To assess these premises, the patient's current behavior in the course of the illness is of paramount importance, which affects the degree of predictability of the occurrence of a specific effect in the near future based on the patient's behavior in the present. The real threat arises from the situational context and will occur, for example, in the case of a patient who has attempted suicide in the past, and who has now accumulated a large amount of sleeping pills or verbally, in a raised voice, expresses the threat of taking his/her own life. There will be no real threat when such a patient declares only "I've had enough of such a life and you will see that someday I will be able to take my own life" [1, 5, 6, 8].

Another doubt when applying Article 23 paragraph 1 of the m.h.p.a. concerns the distinction of a situation in which a patient's behavior threatens his/her health from a situation in which his/her life is already threatened. In practice, these situations can be difficult to distinguish because there is a group of cases in which it is difficult to ascertain with the probability bordering with certainty whether an attack causing health threat (e.g., self-mutilation) will not lead to life-threatening condition. In such dubious situations, a psychiatrist should take into account a certain margin of error and first of all take into account the patient's safety and make admission to the hospital if he/she finds that to his/her best knowledge the patient's life is threatened. Such a decision is not easy (especially in the dynamic course of events) because in many situations the effect of actions taken by the patient suffering from a mental illness is unpredictable, which should also be taken into account by the court when reviewing admission to hospital pursuant to Article 25 of the m.h.p.a.

When assessing the existence of the conditions of Article 23 paragraph 1 of the m.h.p.a., it is extremely important for the psychiatrist to make an extensive interview about the patient's behavior, especially if the doctor himself/herself is not a witness to these behaviors (compare, e.g., the judgment of the Court of Appeal in Szczecin of November 23, 2016, I ACa 1155/15, LEX No. 2188830). The content of the opinion

of the second psychiatrist or psychologist referred to in Article 23 paragraph 2 of the m.h.p.a., which should take into account all the conditions of Article 23 paragraph 1 of the m.h.p.a. It should be remembered that the description of the situation that caused the patient's admission to a psychiatric hospital without the consent and the opinion of a psychiatrist or psychologist are key evidence in subsequent court proceedings conducted pursuant to Article 25 of the m.h.p.a.

The problem of assessing the conditions specified in Article 23 paragraph 1 of the m.h.p.a. was handled by the Supreme Court, which in its decision of February 14, 1996 (II CRN 201/95, LEX No. 24925) explained that the interpretation of the provision should be strict, but it should also take into account its purpose and function, which is to protect the patient and third parties against the threat arising from his or her morbid behavior. Therefore, the Supreme Court indicated that an interpretation should be sought that, while respecting the patient's rights guaranteed by the Act, would allow the use of statutory regulations forcing hospitalization when there are actual and legal grounds for doing so. The Supreme Court also stated that the concept of 'security threat' is blurred, it includes an element of prediction (hospitalization is to prevent what has not yet occurred). Therefore, it is not possible to correctly assess the conditions of Article 23 paragraph 1 of the m.h.p.a in isolation from the moment of anticipating and assessing what may happen next. In order to conclude that the patient's behavior poses a threat to health or life, it should be established that there have been circumstances (in the patient's previous behavior) that objectively and reasonably assessed indicate the existence of a state of emergency, i.e., a state in which a real possibility of violation of his/her own or someone else's life (or someone else's health) by the patient. From this point of view, as indicated by the Supreme Court, it is necessary to determine and evaluate – using medical knowledge and the principles of life experience – a person's specific behavior.

Similar premises as in Article 23 paragraph 1 of the m.h.p.a., for admission of a patient to a psychiatric hospital without the consent referred to in Article 22 of the m.h.p.a., have been included in Article 24 of the m.h.p.a. Significant differences relate to the fact that pursuant to Article 24 of the m.h.p.a. a person may be admitted to a psychiatric hospital even if there is no mental illness (there are doubts in this respect), but that person has a mental disorder. A stay in a psychiatric hospital in this mode may not exceed 10 days.

As for the third condition for admission to hospital pursuant to Article 23 or 24 of the m.h.p.a, i.e., lack of consent – in relation to a minor, lack of consent may be the result of circumstances attributable to the legal representative (sometimes the patient) or remaining outside of him/her. The main reason for the lack of consent on the part of the minor's legal representative is the deliberate refusal of his/her consent to admit the minor to a psychiatric hospital. This refusal can be expressed in any form so long as the will of the legal representative is articulated sufficiently, e.g. by submitting a written statement "I refuse consent" or by verbal or even tacit opposition to consent. The above catalog of cases also includes the situation when dual consent is required, as referred to in Article 22 paragraph 4 of the m.h.p.a., and a minor over 16 years of age and his/her representative make contradictory statements, which requires the intervention of

a guardianship court or if both of these entities refuse to consent and the minor's health status justifies urgent admission to a psychiatric hospital.

Further cases of lack of consent regarding a minor patient, as referred to in Article 22 of the m.h.p.a. cover all these situations independent of the legal representative, when it is not possible to immediately obtain the consent of the entitled person, e.g., the patient is taken to the hospital and there is no possibility of contact with his/her legal representative due to stay abroad or such contact exists, but it is temporarily not possible to make immediate consent in writing. The next group of cases of lack of consent of a legal representative concerns those situations in which a legal representative wants to consent to a minor's stay in a psychiatric hospital, but he/she cannot do so immediately because the consent of the guardianship court is required (e.g., guardian, parent whose parental authority has been limited).

In all of the above cases, it is the duty of the head of the medical entity to notify the guardianship court about the admission of a minor to a psychiatric hospital without consent (Article 23 paragraph 4 second sentence and Article 24 paragraph 3 in conjunction with Article 23 paragraph 4 second sentence of the m.h.p.a.). This notification must take place within 72 hours of admission to the hospital. This obligation exists even if the consent of the authorized entity is expressed during the stay in the hospital. This is required by ensuring judicial control over forced placement in a psychiatric hospital, as referred to in Article 25 of the m.h.p.a. In accordance with Article 26 paragraph 1 of the m.h.p.a., in the event that a person admitted to a psychiatric hospital without their consent subsequently agreed to stay in that hospital, the guardianship court will discontinue the proceedings initiated as a result of the notification or request of an authorized person, if he or she considers that that person has consented. According to Article 26 paragraph 2 of the m.h.p.a., before discontinuing the proceedings, the court is obliged to hear the person referred to in paragraph 1. The above regulation confirms that the information obligation of the head of the hospital to which the patient was admitted without consent also exists if the patient has consented to stay in the hospital even before the hospital was notified. In every case of involuntary admission to a hospital, the guardianship court must ensure that the subsequent declaration of consent has been made in an unforced manner and with due discernment, taking into account the mental disorder affecting the patient. The assessment of whether consent has been granted should take into account the definition in Article 3 subparagraph 4 of the m.h.p.a. Consent, according to this definition, means the freely expressed consent of a person with mental disorder who – regardless of his or her mental health – is in fact able to understand the information provided in the available way about the purpose of admission to a psychiatric hospital, his/her health condition, proposed diagnostic and therapeutic activities, and about the foreseeable effects of these actions or their inaction. The above refers to the consent given by the patient, not his/her legal representative. In the case of a minor, this may concern a double consent granted by an underage patient over 16 years of age (Article 22 paragraph 4 first sentence of the m.h.p.a.). However, this does not mean that under Article 25 of the m.h.p.a. the guardianship court does not control the situation when consent should be expressed by the legal representative of a minor patient. In this case, before any discontinuation

of proceedings pursuant to Article 26 of the m.h.p.a. the guardianship court should ensure that the legal representative has actually given his/her consent. However, it is not necessary to hear the patient. Article 26 paragraph 2 of the m.h.p.a. ordering such a hearing refers directly to the person mentioned in paragraph 1 of this provision, i.e., to the person admitted to the hospital. Therefore, this does not apply to the legal representative [1, 7, 8]. In such a case, the guardianship court should by all available means of evidence determine whether the consent of the legal representative for admission of the minor to the psychiatric hospital has been given. However, this, in turn, obliges the head of the hospital to notify the guardianship court about admission to the hospital without the consent referred to in Article 22 of the m.h.p.a., as provided for in Article 23 paragraph 4 second sentence of the m.h.p.a., also when the required consent was expressed by a legal representative before the notification was sent to the guardianship court. It is the guardianship court that is entitled to review the legality of admission to a psychiatric hospital (in terms of granting follow-up consent), and not a psychiatrist.

Still another mode of admission to a psychiatric hospital without the consent referred to in Article 22 of the m.h.p.a. provides for Article 29 of this Act. However, this is called application procedure, in which, upon admission to a psychiatric hospital, a psychiatrist already has a decision of a guardianship court authorizing the placement of a patient in a treatment facility and from a formal point of view, this element is sufficient.

The paternalism of the psychiatric health service is controversial even when it concerns adults. The issue becomes even more complicated when it concerns minors. Additionally, urgent admission of a minor to a psychiatric hospital without consent becomes a special situation. This issue is widely discussed in psychiatric and legal literature. There are many issues on which different positions are presented. The above issues should be constantly discussed, in order to avoid mistakes and stigmatization related to psychiatric treatment without the patient's consent [9–16].

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