



REVISTA BRASILEIRA DE ANESTESIOLOGIA

Publicação Oficial da Sociedade Brasileira de Anestesiologia
www.sba.com.br



SCIENTIFIC ARTICLE

Ethical and legal duty of anesthesiologists regarding Jehovah's Witness patient: care protocol



Augusto Key Karazawa Takaschima^{a,*}, Thiago Mamôru Sakae^{b,c},
Alexandre Karazawa Takaschima^d, Renata dos Santos Teodoro Takaschima^e,
Breno José Santiago Bezerra de Lima^a, Roberto Henrique Benedetti^{a,f}

^a CET Sianest SBA, Florianópolis, SC, Brazil

^b Universidade do Sul de Santa Catarina (Unisol), Imbituba, SC, Brazil

^c Universidade Federal de Santa Catarina (UFSC), Florianópolis, SC, Brazil

^d Direito Estadual – Santa Catarina, Florianópolis, SC, Brazil

^e Complexo de Ensino Superior de Santa Catarina (Cesusc), Florianópolis, SC, Brazil

^f Hospital Florianópolis, Florianópolis, SC, Brazil

Received 26 February 2015; accepted 24 March 2015

Available online 12 September 2016

KEYWORDS

Anesthesiology;
Bioethics;
Rights;
Transfusion;
Blood products;
Blood

Abstract

Background and objectives: Jehovah's Witnesses patients refuse blood transfusions for religious reasons. Anesthesiologists must master specific legal knowledge to provide care to these patients. Understanding how the Law and the Federal Council of Medicine treat this issue is critical to know how to act in this context. The aim of this paper was to establish a treatment protocol for the Jehovah's Witness patient with emphasis on ethical and legal duty of the anesthesiologist.

Content: The article analyzes the Constitution, Criminal Code, resolutions of the Federal Council of Medicine, opinions, and jurisprudence to understand the limits of the conflict between the autonomy of will of Jehovah's Witnesses to refuse transfusion and the physician's duty to provide the transfusion. Based on this evidence, a care protocol is suggested.

Conclusions: The Federal Council of Medicine resolution 1021/1980, the penal code Article 135, which classifies denial of care as a crime and the Supreme Court decision on the HC 268,459/SP process imposes on the physician the obligation of blood transfusion when life is threatened. The patient's or guardian's consent is not necessary, as the autonomy of will manifestation of the Jehovah's Witness patient refusing blood transfusion for himself and relatives, even in emergencies, is not forbidden.

© 2016 Sociedade Brasileira de Anestesiologia. Published by Elsevier Editora Ltda. This is an open access article under the CC BY-NC-ND license (<http://creativecommons.org/licenses/by-nc-nd/4.0/>).

* Corresponding author.

E-mail: takaschima@uol.com.br (A.K. Takaschima).

PALAVRAS-CHAVE

Anestesiologia;
Bioética;
Direito;
Transfusão;
Hemoderivados;
Sangue

Dever ético e legal do anestesiologista frente ao paciente testemunha de Jeová: protocolo de atendimento**Resumo**

Justificativa e objetivos: Os pacientes testemunhas de Jeová recusam transfusão sanguínea por motivos religiosos. O anestesiologista deve dominar conhecimentos jurídicos específicos para atender esses pacientes. Entender como o direito e o Conselho Federal de Medicina tratam essa questão é fundamental para saber agir dentro desse contexto. O objetivo deste artigo foi estabelecer um protocolo de atendimento do paciente testemunha de Jeová com ênfase no dever ético e legal do anestesiologista.

Conteúdo: O artigo analisa a Constituição, o Código Penal, resoluções do Conselho Federal de Medicina (CFM), pareceres e jurisprudência para entender os limites do conflito entre a autonomia de vontade da testemunha de Jeová em recusar transfusão e a obrigação do médico em transfundir. Baseado nessas evidências um protocolo de atendimento é sugerido.

Conclusões: A resolução do CFM 1021/1980, o Código Penal no artigo 135, que classifica como crime a omissão de socorro, e a decisão do Supremo Tribunal de Justiça sobre o processo HC 268.459/SP impõem ao médico a obrigação de transfusão quando houver risco de vida. Não é necessário concordância do paciente ou de seu responsável, pois não é proibida a manifestação de vontade do paciente testemunha de Jeová ao recusar transfusão sanguínea para si e seus dependentes, mesmo em emergências.

© 2016 Sociedade Brasileira de Anestesiologia. Publicado por Elsevier Editora Ltda. Este é um artigo Open Access sob uma licença CC BY-NC-ND (<http://creativecommons.org/licenses/by-nc-nd/4.0/>).

Introduction

Jehovah's Witnesses patients refuse blood transfusion.¹ They claim religious impediment based on a literal interpretation of the Bible. Inclined to spread their beliefs, this American movement grows significantly. Thus, the medical care of members of this denomination is growing increasingly in hospitals,² some in need of emergency blood transfusions. Based on decisions made by the Brazilian Judiciary in the Constitution, Penal Code, Code of Medical Ethics, and resolutions of the Federal Council of Medicine (CFM), we elaborated an anesthetic care protocol of Jehovah's Witnesses who need transfusion.

Initially, we will address concepts of bioethics important for understanding the subject. Then we will review the jurisprudence and finally present a protocol suggestion for this situation.

Freedom of choice and manifestation of will

In its Article 5, the Constitution³ guarantees full freedom to the Brazilian citizens. This constitutional guarantee is reflected in the principle of freedom of choice. Clinically speaking, manifestation of will is understood as the patient's choice for a form of treatment or even of no treatment.⁴ Examples of patient's will are the decision to continue smoking despite facing a lung problem or the option of a patient to get pregnant even with coexisting illnesses that imply life-threatening during pregnancy or childbirth.⁵

The manifestation of will makes the decision of the patient public. In this sense, Article 22 of the Code of Medical Ethics⁶ states: "The physician shall: not fail to obtain the patient's or his/her legal guardian consent after informing

him about the procedure to be performed, except in cases of imminent risk of death". As stated, consent is a requirement for elective medical practice.⁴ Usually, the patient signs a term declaring to be aware of the medical procedure and its corresponding risks and takes them willingly. This is the manifestation of will most used routinely. Another way of manifestation of will is the Jehovah's Witnesses refusal to receive blood transfusions.

Judicial doctrine states as valid requirements of the manifestation of the will: capable agent, object not prohibited by the law, and in a manner prescribed by law.⁷ Fulfilled these criteria, the Jehovah's Witness patient manifestation of refusing blood transfusion is absolute. This right is based on the Brazilian Constitution³ (Article 5, Section II) that guarantees: "No one is obliged to do or refrain from doing something except by virtue of the law". As there is no legal provision in the law requiring someone to consent to any treatment, no need to agree to be submitted to blood transfusion.⁷

Legal regulation of blood transfusion

Strictly speaking, law refers to the rule issued by the legislative power. Within this concept, there is no legal or constitutional provision regulating the obligation of blood transfusion in Brazil.⁸ However, the Federal Council of Medicine, as well as the Regional Council of Rio de Janeiro (CREMERJ), issued a resolution on the subject. By having constitutional provision, some authors consider that the medical councils' legislative and regulatory power emerge from the Constitution itself.⁹ Its resolutions are not laws in the strict sense, but have the force of law. Thus, the resolution of CFM 1021/80¹⁰ states in its conclusion:

“In case of refusal to allow blood transfusion, the physician, according to his Code of Medical Ethics, should observe the following conduct:

1. If there is no imminent danger to life, the physician shall respect the will of the patient or the patient's legal guardians.
2. If there is imminent danger to life, the physician will perform blood transfusion, regardless of the patient's consent or of his/her legal guardians.”

The Regional Council of Medicine of the State of Rio de Janeiro (CREMERJ), in line with the CFM issued the Resolution No. 136/99¹¹ to regulate the subject, of which we cite the following articles:

Article 1 – The physician, formally aware of the patient's refusal to receive blood transfusion and/or blood components, should use all of the optional methods of treatment available.

Article 3 – The physician, when analyzing the presence of risk of death for a patient in any situation, should make use of all means at his disposal to ensure the patient's health, including blood transfusion and/or blood component administration and, if necessary, report to the competent police authority his decision, if the resources used are contrary to the wish of the patient or his/her relatives.

It is clear that both resolutions impose on the doctor the duty of providing blood transfusion when the patient's life is at risk. Regarding the coercive power of these resolutions, the Attorney General of Rio de Janeiro, in an opinion involving the Pedro Ernesto University Hospital in Rio de Janeiro and the Jehovah's Witness patient who refused a blood transfusion, stated: “...certain is that it will not be tranquil, from the disciplinary standpoint, the situation of physicians who, from the same perspective, do not comply with the Resolution No. 136/99 of the Regional Council of Medicine of the State of Rio de Janeiro (CREMERJ), which specifically deals with the refusal to receive blood transfusion and blood components. This act states that doctors have the tendency to avoid the need for transfusions, but predicts its forced fulfillment in case of imminent danger to life (emphasis of the arbiter). Hence, the judgment of direct action of unconstitutionality before the Federal Supreme Court is suggested.”¹² The opinion positioning is to respect the will of the patient. However, it recognizes that the CREMERJ Resolution 136/99 imposes on the physician the duty to perform transfusions. For disagreeing with its content, the prosecution suggests the direct action of unconstitutionality judgment of this resolution, acknowledges the obligation of unconstitutionality of this resolution, and accepts the duty obligation that is imposed on doctors when suggesting its cancelation.

Disrespect to a council resolution is subject to administrative sanction. The physician who does not perform blood transfusion when needed bears this risk. However, this is not the only punishment to which a doctor may be subject.⁸ There is the possibility of experiencing civil (action for damages and/or governmental regressive actions if the State is condemned by the doctor's omission) and administrative consequences before the governmental disciplinary committees to which he is linked, in the event of public servants

doctors, and, of concern, criminal proceedings, if denied assistance is understood (Article 135 of the Criminal Code).¹³

Boundaries

The boundary between the autonomy of the patient's will and the doctor's duty to act is the risk of death. The Criminal Code¹³ Article 146 establishes as a crime against personal freedom: “Embarrassing someone, either by violence or serious threat, or after having reduced, by any other means, his/her resilience ability to not to do what the law allows, or to do what it does not require”. The exception directly related to medical action is in Paragraph 3 of the same Article: “It is not included in the provision of this article: the medical or surgical intervention performed without the consent of the patient or his/her legal guardians, if justified by imminent threat to life”. Thus, if blood transfusion is necessary to save the patient's life it may not be considered a violation of the Jehovah's Witness autonomy of will.

In some medical conditions, when the possibility of serious bleeding is expected before a major surgery, the doctor requests judicial authorization for prophylactic blood components administration in Jehovah's Witnesses patients. Some judges deny this request.⁸ Others clarify that is not the judiciary responsibility to authorize or prescribe medical treatment, confirm the authority of the medical act and underline the necessary independence that an emergency situation requires, stating that the doctor has an obligation to take the necessary measures to treat patients. Any clinical picture that requires blood transfusion should be treated without judicial mediation.

Jurisprudence

There are a large number of lawsuits involving Jehovah's Witnesses and doctors.⁸ Noteworthy, the Supreme Court of Justice (STJ) decision in the lawsuit (HC 268,459/SP)¹⁴ pending in court for over 20 years referring to a 13-year-old daughter of a Jehovah's Witnesses.

The patient had sickle cell anemia. In a severe vaso-occlusive crisis, the parents took her daughter to a hospital emergency department in São Paulo. The condition was serious. Clinical examination and laboratory tests had indicated the need for transfusion of packed red blood cells to treat the patient. Her parents did not authorize the procedure. They brought a doctor of their trust, also a Jehovah's Witness, who threatened to sue the medical assistants if the girl were transfused. Transfusion was not performed and the girl died hours after admission to the hospital.

Prosecutors indicted the girl's parents for murder. This type of crime is judged by a jury court. In this particular case, the deceit was characterized as eventual, in which the defendants adopted a known risk behavior. A similar example would be that of a drunk driver who hits and kills a pedestrian. When drinking alcohol above the permitted, the defendant takes the responsibility to cause a potential accident and kill someone. According to the indictment, by refusing blood transfusion, the parents contributed directly to the death of their daughter. The lawyer appealed to the Court of São Paulo arguing that parents could not

be accused of murder. The application was dismissed. The defense appealed to the Supreme Court with an application for habeas corpus with the same thesis. The case was tried by the 6th Chamber of the STJ. The rapporteur, in her report and vote, asserted that the parents could not be held responsible for the death of their daughter. In her opinion, the parents' refusal could not be a reason for not transfusing the teenager. The blame would fall on doctors who should have transfused the patient, even against the will of those responsible. There would be no crime in refusing blood transfusion for oneself or his/her dependents, as religious freedom and the manifestation of the will are constitutional rights. It is stated in her report the CFM Resolution 1021/1980.

It should be noted that the vote of the rapporteur, in agreeing to the defense arguments, was accepted by the STJ. The parents would be innocent because the manifestation of will is free and absolute, it is not a crime. There would be no need to agree to the transfusion. The doctor has a duty obligation that the patient or legal guardian has not. Transfusion should be performed regardless of the patient's or guardian manifestation of will being contrary.

This decision is considered critical because, as it followed the criminal and not civil proceedings, it delimited the State tutelage on the issue. When transfusion is necessary, the physician has an obligation to act, give priority to life-saving over freedom. The State, while maintaining complete freedom of action regarding religion, shall conduct the protection of fundamental rights, determine to those responsible for public and private health all procedures necessary for the preservation of life.¹⁵

Protocol service

Based on the study on the subject, we have developed the following anesthetic protocol for Jehovah's Witnesses patients:

- (1) Identification of emergency situation and transfusion requirements.
Faithfully document the clinical condition, vital signs, and additional tests. The need for transfusion should be evident.
- (2) Do not attempt to change the will or manifestation of will of the patient or relatives.
Patients or their relatives are going through difficult situation. At a time when faith and religion serve as support; confirming the commitment of non-transfusion is very important for Jehovah's Witness. It is not advisable to discuss or ask permission for the transfusion. It is unnecessary. The social worker, psychologist, or even nurse may talk to relatives and say that the emergency team understands and fully supports the decision to not carry out transfusion, but that transfusion will be done to save the patient's life. This position is even more important with children and adolescents.
- (3) In case of physical resistance from relatives or patients.
If there is physical resistance from patients or guardians to prevent transfusion, request the presence of a police authority if necessary.

(4) Transfusion.

In case of life-threatening, transfusion is a medical duty. Prior commitment to the patient ensuring that blood components will not be administered during surgery, as well as a document signed by the patient or guardian do not exempt anesthesiologists from their responsibilities.

Conclusion

The CFM Resolution 1021/1980, the Criminal Code Article 135, which classifies failure to provide medical treatment as a crime, and the decision of the Supreme Court on the HC 268,459/SP process impose on the physician the obligation of blood transfusion when life is threatened. The consent of the patient or guardian is not necessary, as the autonomy of will manifestation of the Jehovah's Witness patient refusing blood transfusion for himself and relatives, even in emergencies, is not forbidden.

Conflicts of interest

The authors declare no conflicts of interest.

References

1. Silva LA, de Carli D, Cangiani LM, Gonçalves Filho JBM, da Silva IF. Tampão sanguíneo peridural em pacientes testemunhas de Jeová: relato de dois casos. *Rev Bras Anesthesiol.* 2003;53:633–9.
2. Imbelloni LE, Beato L, Ornellas A, Borges CRJ. Manuseio de grave diminuição de hemoglobina em paciente jovem, testemunha de Jeová, submetido à proctocolectomia total: relato de caso. *Rev Bras Anesthesiol.* 2005;55:538–45.
3. Brasil. Constituição. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 05 out 1988; 1988.
4. Godinho AM, Lanziotti LH, Morais BS. Termo de consentimento informado: a visão dos advogados e tribunais. *Rev Bras Anesthesiol.* 2010;60:207–14.
5. Barroso LR. Legitimidade da recusa de transfusão de sangue por testemunhas de Jeová. Dignidade humana, liberdade religiosa e escolhas existenciais. *Revista de Direito da Procuradoria Geral do Rio de Janeiro.* 2010;65:327–57.
6. Brasil. Código de Ética Médica. Diário Oficial da União. 24 set 2009;(183, seção I):90-2; 2009.
7. Bastos CR. Direito de recusa de pacientes submetidos a tratamento terapêutico às transfusões de sangue, por razões científicas e convicções religiosas, vol. 787. São Paulo: *Revista dos Tribunais.* Ano 90; 2001. p. 499–510.
8. Willemann F. Recusa a tratamento da saúde com fundamento em crença religiosa e o dever do estado de proteger a vida humana. O caso da transfusão de sangue em testemunha de Jeová. *Rev da Emerj.* 2010;13:155–90.
9. Willemann F. Parecer nº09/2009. *Revista de Direito da Procuradoria Geral do Estado do Rio de Janeiro.* 2010;65:327–57.
10. Brasil. Conselho Federal de Medicina. Resolução CFM nº 1.021/80. Diário oficial da União (Seção I - Parte II) de 22/10/80.
11. Brasil. Conselho Regional de Medicina do Rio de Janeiro – Resolução CREMERJ N (136/1999. Diário Oficial do Estado do Rio de Janeiro de 19/02/1999.
12. Tavares LLG. Parecer nº 01/2009. *Revista de Direito da Procuradoria Geral do Estado do Rio de Janeiro.* 2010;65:357–9.

13. Brasil. Código Penal. Decreto-Lei nº 2.848, de 7 de dezembro de 1940. *Vade mecum*. São Paulo: Saraiva; 2013.
14. Brasil. Superior Tribunal de Justiça. Habeas-corpus no 268.459/SP, da 6ª turma do Superior Tribunal de Justiça, Brasília, DF, 2 de setembro de 2014.
15. Moraes A. Estado deve tutelar direito à vida independentemente de questões religiosas Revista Consultor Jurídico, 20 de agosto de 2014. Available at: <http://www.conjur.com.br/2014-ago-20/justica-comentada-estado-tutelar-direito-vida-independentemente-questoes-religiosas> [accessed 19 Feb 2015].