ACCESS TO EXPERIMENTAL TREATMENT/THERAPY IN THE COURT'S INTERPRETATION

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ACCESS TO EXPERIMENTAL TREATMENT OR DRUG

- Clinical trials
- Expanded access
- Compassionate use
- Preapproval access
- Emergency use authorization

CLINICAL TRIALS

- **Clinical trial** is any research study that prospectively assigns human participants or groups of humans to one or more health-related interventions to evaluate the effects on health outcomes.
- Interventions include but are not restricted to drugs, cells and other biological products, surgical procedures, radiological procedures, devices, behavioural treatments, process-of-care changes, preventive care, etc.
- http://www.who.int/topics/clinical_trials/en/

EXPANDED ACCESS

- Expanded access, sometimes called "compassionate use," is the use outside of a clinical trial of an investigational medical product
- https://www.fda.gov/NewsEvents/PublicHealthFocus/ExpandedAccessCompassionateUse/

EXPANDED ACCESS

- Expanded Access: A process regulated by the Food and Drug Administration (FDA) that allows manufacturers to provide investigational new drugs to patients with serious diseases or conditions who cannot participate in a clinical trial.
- https://definedterm.com/a/document/1096

COMPASSIONATE USE

Compassionate use is a way of making available to patients with an unmet medical need a promising medicine which has not yet been authorised (licensed) for their condition.

A medicine can be marketed in the European Union (EU) only after it has been authorised. However, it is sometimes in the interest of patients to have access to medicines before authorisation. Special programmes can be set up to make these medicines available to them under defined conditions. This is known as 'compassionate use'.

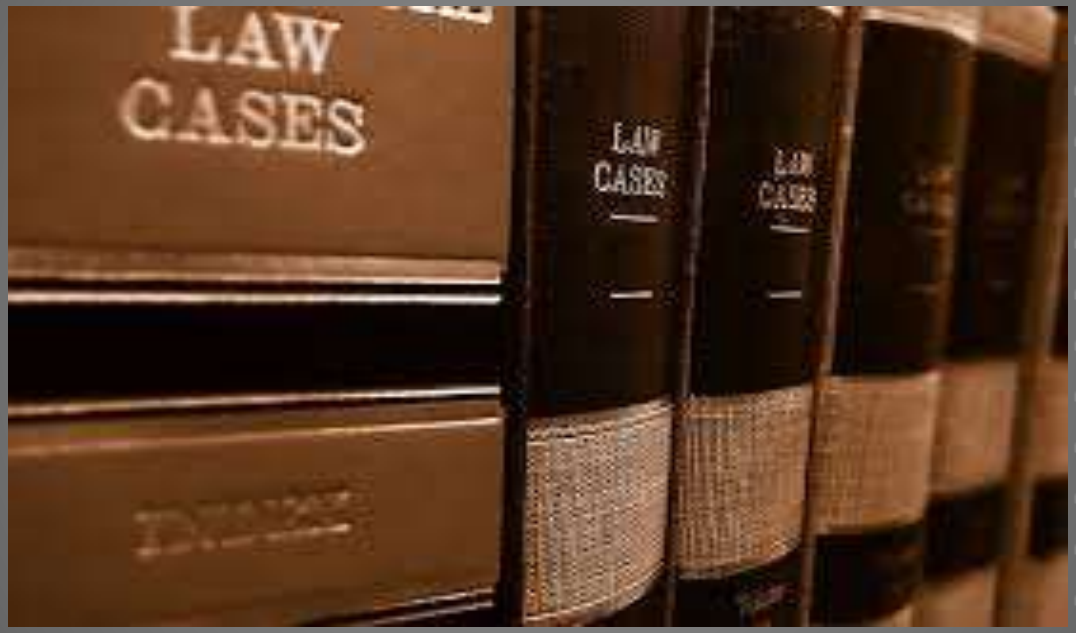
http://www.ema.europa.eu/docs/en_GB/document_library/Other/2010/01/WC500069898.pdf

LIFE-THREATENING DISEASE

- For the purpose of expanded access to investigational drugs for treatment use, **immediately life-threatening disease or condition means a stage of disease in which there is reasonable likelihood that death will occur within a matter of months or in which premature death is likely without early treatment. Serious disease or condition means a disease or condition associated with morbidity that has substantial impact on day-to-day functioning.**
- Short-lived and self-limiting morbidity will usually not be sufficient, but the morbidity need not be irreversible, provided it is persistent or recurrent.
- Whether a disease or condition is serious is a matter of clinical judgment, based on its impact on such factors as survival, day-to-day functioning, or the likelihood that the disease, if left untreated, will progress from a less severe condition to a more serious one(21 CFR 312.300(b)
-).

- The terms expanded access, access, and treatment use are used interchangeably to refer to use of an investigational drug when the primary purpose is to diagnose, monitor, or treat a patient's disease or condition. The terms compassionate use and preapproval access are also occasionally used in the context of the use of an investigational drug to treat a patient. Although these terms have been used informally in the United States and are used outside the United States, they are not defined or described in FDA regulations. This has led to some confusion or lack of clarity about the meaning of the terms (e.g., whether they refer to all expanded access or a type of expanded access, such as individual patient expanded access).

CASES



AMERICAN WAY

- U.S. v Rutheford 1979
- Abigail I 2006
- Abigail II 2007

U.S.V RUTHEFORD

- the U.S. Supreme Court in Rutherford stood by the FDA actions and concluded that **the right to access unproven therapies did not exist in this case**
- **No evidences that Laetrile was safe and effective**

ABIGAIL I

- the U.S. Court of Appeals for the District of Columbia heard Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach
- and was asked to address the same fundamental question raised in
- Rutherford

- A three-judge panel held in favor of the alliance and a right to access experimental therapies. They framed the question as one of whether terminally ill patients have **a fundamental right to make informed decisions that may prolong their lives, specifically access to experimental therapies that have completed phase I testing**

AUTONOMY

- The three-judge panel pointed to **a longstanding tradition in America of protecting a right to control one's body, demonstrated in the right to self-defense and self-preservation** (including an exception to violate some laws in order to preserve one's life, for example to damage another's property). And while there is no long-standing general duty to rescue or save another's life, there **is long-standing liability for interfering with an individual's ability to save him-or herself**

ABIGAIL II

- In a landmark decision, the en banc review overturned the appeals court's decision in Abigail I and agreed with the FDA that there is no fundamental right to access experimental therapies for anyone, including the terminally ill.
- This time, the court "**reframed the issue not as a personal autonomy right to control one's body but as a right to access something that is presently inaccessible: drugs that FDA has not yet approved for marketing and use by the public**"

BALANCE – RISK AND BENEFITS

- Therefore, FDA prohibitions on the sale of drugs were seen by the court as "entirely consistent with our historical tradition"

- **The court suggested that the law could someday strike a balance between access to experimental drugs and appropriate risk taking**

IN WHAT MOMENT ?

- This issue, despite prior legislation and the ongoing development of FDA rules, continues to be presented before the courts. There was, for example, a 2008 case in the Third Circuit Court of Appeals in which a pharmaceutical company was held not to have an obligation to provide a promising treatment in phase II studies to a patient with Duchenne muscular dystrophy [17]. Ongoing innovation and development in medicine is bound to increase **the tension over how early to provide access to non-FDA-approved drugs to patients who have no other treatment options available**
- http://journalofethics.ama-assn.org/2013/08/pdf/hlaw1-1308.pdf

EUROPEAN WAY

- Peerbooms 2001[ECJ]
- Hristozov and Others v. Bulgaria 2012 [ECHR]
- Durisotto v. Italy 2014 [ECHR]

PEERBOOMS C-157/99 12 JULY 2001

- Mr Peerbooms fell into a coma following a road accident on 10 December 1996. He was taken to hospital in the Netherlands and then transferred in a vegetative state to the University Clinic in Innsbruck in Austria on 22 February 1997.
- 32. The Innsbruck clinic gave Mr Peerbooms special intensive therapy using neurostimulation. **In the Netherlands, that technique is used only experimentally at two medical centres and patients over the age of 25 years are not allowed to undergo this therapy. It is therefore common ground that if Mr Peerbooms, who was born in 1961, had remained in the Netherlands, he would not have been able to receive such treatment.**
- 33. By letter of 24 February 1997, Mr Peerbooms's neurologist requested Stichting CZ to pay the costs of the treatment at the University Clinic in Innsbruck.

SCIENTIFIC EVIDENCE

- **the absence of scientific evidence of its effectiveness, that type of treatment was not regarded as normal within the professional circles concerned** nor, consequently, as a benefit qualifying for reimbursement under Article 8 of the ZFW.

- medical or hospital treatment **must be sufficiently tried and tested** before its cost will be assumed under its social security system

- **that authorisation cannot be refused on that ground where it appears that the treatment concerned is sufficiently tried and tested by international medical science**

HRISTOZOV AND OTHERS V. BULGARIA

13 NOVEMBER 2012 , APPLICATIONS NOS. 47039/11 AND 358/12,

- **Summary of facts:**
- The ten applicants were cancer sufferers who complained that they had been denied access to an unauthorised experimental anti-cancer drug. Bulgarian law stated that such permission could only be given where the drug in question had been authorised in another country. While the drug was permitted for "compassionate use" in a number of countries, nowhere had it been officially authorised. Accordingly, permission was refused by the Bulgarian authorities.

- The European Court of Human Rights held that there had been **no violation of Article 8**
- Considering that the restriction in question concerned the patients' right to respect for private life, protected by Article 8 of the Convention, it observed a trend among European countries towards allowing, under exceptional conditions, the use of unauthorised medicine. **However, the Court found that this emerging consensus was not based on settled principles in the law of those countries, nor did it extend to the precise manner in which the use of such products should be regulated.**

- The Court further held that there had been **no violation of Article 2** (right to life) and **no violation of Article 3** (prohibition of torture and of inhuman or degrading treatment) of the Convention in this case.

ART. 2

- Article 2 might include the duty to put in place an appropriate legal framework in order to protect people's lives. In the Court's view, **Article 2 could not be interpreted as requiring that access to unauthorised medicine for the terminally ill be regulated in a particular way.**

ART. 3

- **It could not be said that by refusing the applicants access to a product – even if potentially life-saving – whose safety and efficacy were still in doubt, the authorities had directly added to the applicants' physical suffering**.

- **the Court does not consider that the authorities' refusal reached a sufficient level of severity to be characterised as inhuman treatment**

MARGIN OF APPRECIATION

- 123. As regards the consensus within the Contracting States, the Court observes that, according to the comparative-law information available to it, a number of those States have made provision in their laws for exceptions, in particular in the case of terminally ill patients, to the rule that only authorised medicinal products may be used for medical treatment.
- 124. On the basis of the above considerations, the Court concludes that the margin of appreciation to be afforded to the respondent State must be a wide one, especially as regards the detailed rules it lays down with a view to achieving a balance between competing public and private interests

DURISOTTO V. ITALY
6 MAY 2014 (DECISION ON THE ADMISSIBILITY)

- **Summary of facts:**
- This case concerned the refusal by the Italian courts to authorise the applicant's daughter to undergo compassionate therapy (experimental treatment known as the "Stamina" method) to treat her degenerative cerebral illness. The therapy was undergoing clinical trials and, under a legislative decree, was subjected to restrictive access criteria. The applicant alleged in particular that the legislative decree in question had introduced discrimination in access to care between persons who had already begun treatment prior to the entry into force of the decree and those who – like his daughter – were not in that situation.

- The Court declared the application **inadmissible** (manifestly ill-founded) under Article 8 (right to respect for private and family life) and under Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the Convention.

- **scientific committee set up by the Italian Ministry of Health had issued a negative opinion on the therapeutic method in issue and the scientific value of the therapy had not therefore been established**
- Thus, in particular, **the prohibition on access to the therapy in question pursued the legitimate aim of protecting health and was proportionate to that aim.**
- **the therapeutic value of the "Stamina" method had, to date, not yet been proven scientifically.**

POLISH VIEW

- WSA 12.12.2007
- WSA 21.03.2016

VII SA/WA 1201/07 - DECISION WSA W WARSZAWIE 12.12.2007

- **Chemoimmunotherapy**
- **The Insured, in the field of health insurance, has the right to health services that meet the requirements of current medical knowledge based on scientific evidence and medical practice** within the Fund's resources. The Authority pointed to the opinions of three independent experts and medical literature, believing that in the light of the opinions, **the treatment is not justified in the medical literature and remains experimental**, as also confirmed by the opinion of the National Consultant in the field [...] and the President of the Polish Society [...]

VI SA/WA 63/16 - WYROK WSA W WARSZAWIE, 21.03.2016

- Therapy with use of monoklonal anti CD 20 antibody
- According to the authority, it is clear that there are no indications for the use of rituximab in the case of an aphasia diagnosed by the applicant, **The drug, in addition to registration instructions, is an experimental therapy**.
- However, **it should be stressed that the opinions of both the provincial and national consultants in the field of dermatology and venereology, as indicated in the contested decision, indicate that foreign treatment in the applicant's situation is the only form of assistance which can prevent not only the deterioration of his or her health but, .The position of consultants expresses the current state of medical knowledge and thus constitutes a standard of conduct, which should be supported by the fact that the condition of necessity of providing life saving assistance or improving the applicant's health is fulfilled.**

CONCLUSIONS

- No European compromise about compassionate use/expanded access
- Individual decision in every case
- Evidence based medicine versus new unproved methods
- Balance between individual and social interest
- Protection of health versus right to privacy
- Similar judicial view: if lack of evidences, no approval to use new method or new therapy (positive and negative obligations of states)