ITALIAN REPUBLIC

IN NAME OF THE ITALIAN PEOPLE

THE SUPREME COURT OF CASSATION

FIRST CIVIL DIVISION

Composed of Their Honours Messrs.

Dr. LUCCIOLI Maria Gabriella - President

Dr. BONOMO Massimo - Judge

Dr. GIULIANI Paolo - Judge

Dr. SAN GIORGIO Maria Rosaria - Judge

Dr. GIUSTI Alberto – Reporting Judge

Has issued the following

RULING

On the appeal of:

E.B., as the guardian of the disabled daughter E.E. represented and defended, under special proxy at the bottom of the appeal, by the lawyer Avv. Vittorio Angiolini and Avv. Vacirca Sergio, with address of service at the office of the latter in Rome, Via Flaminia, n. 195;

- appellant -

versus

Avv. X, as guardian ad litem of the disable E.E., defended by herself , with address of service in Rome, at the office of Avv. Giovanna Fiore, Via degli Scipioni n. 94;

- appellee –

and versus

PUBLIC PROSECUTOR'S OFFICE OF MILAN, in person of the Director of Public Prosecutions pro tempore; PUBLIC PROSECUTOR'S OFFICE OF THE COURT OF CASSATION, in person of the Director of Public Prosecutions pro tempore;

- summoned –

And on the appeal of:

Avv. X, as guardian ad litem of the disable E.E., defended by herself , with address of service in Rome, at the office of Avv. Giovanna Fiore, Via degli Scipioni n. 94;

- cross appellant –

versus

E.B., as the guardian of the disabled daughter E.E.; PUBLIC PROSECUTOR'S OFFICE OF MILAN, in person of the Director of Public Prosecutions pro tempore; PUBLIC PROSECUTOR'S OFFICE OF THE COURT OF CASSATION, in person of the Director of Public Prosecutions pro tempore;

- summoned -

Opposing the decree of the Court of Appeal of Milan escrowed on 16th December 2006

Having heard in public hearing on 4th October 2007 the report made by the Reporting Judge Dr. Alberto Giusti;

Having heard , for the appellant, lawyer Avv. Vittorio Angiolini and, for the appellee and cross appellant, Avv. X;

Having heard the Public Prosecutor, in person of Deputy Public Prosecutor Dr. Giacomo Caliendo, who concluded for the dismiss of the appeal

DEVELOPMENT OF THE PROCESS

1. – With the appeal under Article 732 of the Civil Procedure Code, E.B., as the guardian of the disabled daughter E.E., claimed before the Tribunal of Lecco, upon appointment of a guardian ad litem under article 78 of the Civil Procedure Code, the emanation of an order to interrupt the forced-feeding by nasogastric tube that has kept alive the dependent adult, in a state of irreversible vegetative coma since 1992.

The guardian ad litem, appointed by the President of the Tribunal, agreed to the appeal.

The Tribunal of Lecco, with its decree of 2nd February 2006, declared the appeal inadmissible and adjudged as manifestly groundless the allegations of constitutional illegitimacy subordinately proposed by the guardian and by the guardian ad litem.

Neither the guardian, nor the guardian ad litem – according to the trial judges - have substantive representation, nor therefore procedural representation, of the dependent adult in reference to the claim because that concerns an issue of personal rights, for which our legal system does not permit representation unless it is expressly provided for by the law, which is not so in the present case.

Furthermore, the absence of a legal provision for such representation is perfectly in line with constitutional dictates, and the gap cannot be filled with an interpretation which conforms to the Constitution.

Moreover, even if the guardian or the guardian ad litem were vested with such power, the claim – in the opinion of the trial judges - would have to be dismissed, because its acceptance would contrast with the principles expressed by constitutional system. In fact, in accordance with articles 2 and 32 of the Constitution, a therapeutic or feeding treatment, even invasive, essential to keep alive a person incapable of giving consent, is not only lawful, but mandatory, as the expression of the solidarity duty placed upon citizens is even more significant when, such as in this case, the person concerned is not able to manifest her will.

Based on articles 13 and 32 of the Constitution every person, if they have the capability of self-determination, may refuse any strongly invasive therapeutic, or alimentation treatment, even if necessary for their survival; whereas if the person is non compos mentis, the conflict between the right of freedom and self-determination, and the right to life is only hypothetical and must be resolved in favour of the latter, since the person is unable to express any will, there is no issue of self-determination or freedom to protect. Article 32 of the Constitution excludes the possibility of making a distinction between life worthy, and not worthy of being lived.

2. – Against such decree, the guardian appealed to the Court of Appeals of Milan, claiming - after opportune judicial inquiries regarding the wishes of E.E., at the time manifested contrary to therapeutic obstinacy, and, where needed, regarding the control of constitutionality – an order to interrupt the forced-feeding of E.E., as an invasive treatment of the personal sphere, perpetrated against human dignity. The guardian ad litem, having appeared before the Court, requested the admission of the appeal, and he himself also made a claim, intended to be a cross appeal. The Public Prosecutor argued for the rejection of the appeal, agreeing with the arguments put forth by the Tribunal as the basis of the appealed decree.

3. – The Court of Appeals of Milan, with a decree dated 16 December 2006, in amendment of the appealed decree, declared the appeal admissible but it was rejected on its merit.

3.1. – The Court of Milan does not share the ruling of the Tribunal on the point of the inadmissibility of the claim, because the legal representatives of E.E requested that the judge order the interruption of artificial nutrition and hydration, on the basis that such a medical device constitutes an invasive treatment of psychophysical integrity, contrary to human dignity, not practicable against the will of the incompetent or, in any case, absent their consent.

According to the territorial Court, on the grounds of the combined provisions of Articles 357 and 424 of the Civil Code, in the power to care for the person, vested in the legal representative of the incompetent, can include the power to provide informed consent for medical procedures. The "care of the person" implies not only care of economic interests, but – above all – those of an existential nature, among which health is undoubtedly understood as not only psychophysical integrity, but also the right to accept or refuse treatment: such a right cannot be limited in any case when the interested person is not in a condition to determine it themselves.

The presence in the case – indicated as necessary by the Court of Cassation with ordinance 20 April 2005, n. 8291 – of the guardian ad litem, who joined the claim of the guardian, overcomes every problem of possible conflict between the ward and the guardian.

Considering the state of total incapacity of E. and of the serious consequences that the suspension of the actual treatment would produce, the guardian or, in her place, the guardian ad litem must apply to the Court in order to obtain its interruption.

3.2. - On the merits, the Court of Appeal observes that E. – who cannot be considered clinically dead, because death is determined by the irreversible cessation of all encephalon functions – is in a permanent vegetative state, a clinical condition that, according to medical science, is characteristic of a subject who "ventilates, in whom the eyes can remain open, the pupils react, the reflexes of the trunk and spinal cord persist, but there is not any sign of psychological activity nor engagement with their environment and the only motor reflex responses consist of redistribution of muscular tone." The

vegetative state of E. has been unaltered since 1992 – when she suffered a cranio-encephalic trauma pursuant to a road accident – and this is irreversible, while the cessation of alimentation through the nasogastric tube would surely lead to her death in the course of very few days.

The territorial Court reports that from the concordant depositions of three friends of E. – those in whom she had confided shortly before the tragic accident that reduced her to this condition – it emerges that she had become deeply upset after visiting her friend A., in the hospital - who was in a coma following a road accident. She had declared that she considered preferable the situation of another boy, *F.*, who, in the same accident, died instantly, rather than remaining immobile in hospital at the mercy of others and attached to a tube; she had manifested these convictions also at school, during a discussion about it with her nun teachers.

According to the judges of the appeal, these should be treated as general declarations, rendered to third parties with reference to facts which occurred to other people, in moments of strong emotionality: as E. was very young; she found herself in a state of physical well-being and not in the actual condition of illness; was without certain maturity with respect to the themes of life and death; and she wouldn't have been able to imagine the situation in which she now is. It would not be possible therefore to attribute to the declarations of E. the value of a personal, aware and an actual volitional determination, considered with full knowledge of the facts. The position of E. would then be assimilated to that of any another incompetent person that never had declared anything about the care and the medical treatments to which she must be subjected.

The Court of Appeal does not share the thesis – sustained by the guardian and endorsed by the guardian ad litem – according to whom, in relation to medical treatment - the forced-feeding through nasogastric tube - that maintains E. in life exclusively from a biological point of view without any hope of improvement, only the verification of a precise will, expressed by E. when she was conscious, favorable to the pursuit of life at any cost, could permit the treatment, today being imposed on her, as not degrading and not contrary to human dignity.

Firstly, because, according to the current law, E. is alive, given that death occurs with the irreversible cessation of all encephalon functions. Secondly because – beyond all issues regarding the nature of medical therapy, of therapeutic obstinacy (defined as medical cures unrelated to the hope of the patient's recovery) or of normal means of support that make it possible to give forced-feeding to which E. is subjected – it is unquestionable that, since E. is not in a condition to feed herself otherwise, and receiving nutrition from a nasogastric tube is the only way of feeding her, suspension would lead the ward to certain death in the turn of few days: it would be equivalent, therefore, to an indirect omissive euthanasia.

According to the appeals judges, there would not be any possibility of making any distinctions between lives worth and not worth being lived, having to refer only to life as constitutionally guaranteed right, independent of the quality of life and of subjective perceptions of said quality that may exist.

"If it is undoubted that, in virtue of the right to health and to self-determination in the health field, the competent subject can refuse even life-saving treatment, in the case of an incompetent (of whom the will is not certain, as in the case of W.) who is receiving only a treatment of nutrition, that is independent of the invasive methods with which it is carried out (nasogastric tube) is surely indispensable because of the impossibility of the subject to otherwise feed himself and that, if suspended, it would take him to death, the judge – appointed to decide whether to suspend, or not, such

treatment – has to take into account the irreversible consequences which the requested suspension would bring about (death of the ward), making it necessary to balance rights equally guaranteed by the Constitution, as the right of self-determination and dignity of the person and the right to life". Such balance – as judged by the Court of Appeals – "has to be resolved in favor of the right to life, where it observes its systematic collocation (Article 2 of the Constitution), privileged with respect to the others (contemplated by Articles 13 and 32 of the Constitution), within the constitutional Charter"; furthermore, in light of national and international legislations, life is a supreme good; the existence of a "right to die" is not available (as has recognized the European Court of Human Rights in the ruling 29 April 2002 in the case P. v. United Kingdom).

4. – In order to challenge the decree of the Court of Appeal, the guardian E.B., in an act served on 3rd March 2007, has presented the appeal consisting of only one complex ground, whilst the counter-appellant guardian ad litem Avv. X has proposed a cross-appeal, based on two grounds.

The appellant and the cross-appellant have both filed a memorandum for the defense shortly before the hearing.

GROUNDS OF DECISION

1. – With the only grounds illustrated with the memorandum - alleging violation of Articles 357 and 424 of the Civil Code, in relation to Articles 2, 13 and 32 of the Constitution, as well as omitted and insufficient grounds about the crucial point of the controversy – the guardian, as principal appellant, calls upon the Court to assert, as a principle of law, "the prohibition of therapeutic obstinacy, i.e. that no one should be subjected to invasive treatments of their own person, even if the effect is the artificial prolongation of life, without the utility and the benefit of it being concretely and effectively verified". If that interpretation is precluded because of Articles 357 Civil Code and 732 of the Civil Procedure Code, or by other legislative norms, the appellant declares that it raises an issue of constitutional legitimacy of all such legislative norms, for violation of Articles 2, 13 and 32 of the Constitution, from which it assumes the full operability of the prohibition of therapeutic obstinacy, as derived.

According to the appellant, the Court of Appeals of Milan has misconceived and completely misrepresented the meaning it attributes to the indispensability and inalienability of the right to life. The importance of the inalienability of the right to life, unlike that which happens by other constitutional and fundamental rights, relates to the fact that, in the mapping of modern constitutionalism, it constitutes a right different from all others: life is an indispensable presupposition for the enjoyment of any sort of freedom and, exactly for this reason, cannot allow that the person give to others the decision about his own survival or that the right ends with its renunciation. However, the indispensability and inalienability of the right to life is guaranteed in order to avoid that subjects different from those who must live, who could be in a state of weakness and incompetence, arrogate arbitrarily the right to interrupt the life of others; but it would be wrong to construct the inalienability of life in homage to others' interests, public or collective, superseding and distinct from that of the person who lives.

Furthermore – as the appellant asserts – the Constitutional Court has specified that in the protection of personal freedom, inviolable according to Article 13 of the Constitution, postulates the sphere of determination of the power of the person to dispose of his own body. And the jurisprudence of the Court of Cassation, in recently reestablishing the source of liability of the physician, just the fact of not having informed the patient, or of not having previously solicited and obtained assent for the treatment,

has clarified that here we are outside of the hypothesis in which the consent of the right holder is valid as justification from tort liability for whomever did the invasive therapy in the individual sphere: on the contrary, free and informed consent is perceived as an intrinsic element so that the intervention of whomever even is professionally competent to provide care is, per se, legitimate.

That fact – according to the appellant – underlines that the right to life, just because it is indispensable and inalienable, belongs to its owner and cannot be transferred to others, that they constrain him to live as they would want. What the Court of Milan should have not applied, in the case of E.E. as in any other case of treatments administered on the person by the physician or others concerned with the person for maintaining her in life, what is relevant is not the right to life, but "only and exclusively the legitimacy of the decision of a man, who usually and luckily in our case is a professionally competent physician, to intervene upon the body of a person in order to prolong life".

In the opinion of the appellant, the guarantee of the right to life is more complex for subjects non compos mentis, such as E.E., than for those who have consciousness and will. For those who are conscious and capable of expressing will, indeed, the first guarantee of the right to life lies in the freedom of self-determination regarding others' interference, even where it consists of providing treatment in the name of maintaining life.

The same type of guarantee is not sustainable for those in a state of incapacity. Courts have far-back identified, as a criterion of action, the self-legitimization of medical intervention, since he/she is dedicated to care-giving and equipped with suitable capabilities and professional skills. According to the appellant, the constitutional need would remain that the invasive treatment of the person, when it is not and cannot be assented by the subjected person, is provided under the direct control of judicial authority, because it certainly falls within the bounds of application of Article 13 of the Constitution.

The Court of Appeals of Milan has developed, in this sense, a contradictory argument. On the one hand, declaring the appeal of the guardian admissible, the territorial Court has not denied, and has in fact admitted, the necessity that the invasive treatment of E. is subjected to the control of judicial authority; meanwhile, at the same time and on the other hand, the same Court has then refused, judging on the merits, to notice any and every limit to the intervention of the physician, when the therapeutic treatment affects the right to life.

This contradiction, in the opinion of the appellant, would be the result of a radically mistaken statement, since the self-legitimization of the physician to intervene, also for treatments affecting the life, must stop when the treatments themselves constitute what we call therapeutic obstinacy.

According to the Code of medical ethics (Article 14), the physician must abstain from obstinacy in treatments from which it is not reasonably possible to expect a benefit for the health of the sick and/or an improvement of the quality of life. In this, is reflected the idea of not persisting in "futile" treatments, present in the Anglo-Saxon experience, or the prescriptions of the reform of the French Health Code introduced by the Statute 22 April 2005, n. 370, on the suspension and not providing, as "unreasonable obstinacy", of treatments that are "useless, disproportionate or not having any another effect than only the artificial maintenance of life".

Hence, when the treatment is useless, futile and does not benefit health, surely it is goes beyond the broadest concept of care and of medical practice, and the physician, as a professional, cannot provide it

without unjustifiably invading the personal sphere of the patient (Articles 2, 13 and 32 of the Constitution).

The appellant challenge the thesis – made by the Court of Milan – according to which, as the conservation of life is a good in itself, any treatment aimed to such a scope could not be a form of obstinacy. In fact, in situations that in which E. is, it is not the fading away, but the prolonging of life to being artificial, and to be the mere product of the action that a man performs in the individual sphere of another person who, only by such a way, becomes, literally, constrained to survive.

It is sustained that also for treatment aiming to prolong the life, as for any another medical treatment, it must be verified whether they render a benefit or a usefulness to the patient or fall within the ban on therapeutic obstinacy.

In the opinion of the appellant, the ban on obstinacy in treatments for which a benefit is not verifiable or an improvement of the quality of life would not be in contradiction with the prohibition of treatments directed to provoke death: because it is one thing that the physician must not kill, even under the false pretences of care giving; another thing is that the physician can and must abstain from those treatments that, even if capable of prolonging life, have been verified as not rendering benefits or usefulness to the patient, in removing him from the natural and fatal result of the state in which he finds himself and in forcing him to maintain some vital functions.

In the appeal it is sustained that the right to life is one – and it cannot contrast, contrary to what the Court of Appeal of Milan would want – with the guarantee of human individuality established by Articles 2, 13 and 32 Constitution. The normal way of guaranteeing the individuality of a man is self-determination; but when, as in the case of E., self-determination is no longer possible, because the person has irreversibly lost consciousness and will, it is needed at least to ensure that what remains of the human individuality, in which reposes the "dignity" described by Articles 2, 13 and 32 of the Constitution, not be lost. And such individuality would not be lost whenever another person, different from that who must live, would unlimitedly be able to interfere in the personal sphere of the incompetent in order to manipulate her end in the innermost, until the point of imposing the maintenance of vital functions which are otherwise lost.

The ban on therapeutic obstinacy – it sustains – arises from here: it exists so that the intervention of the physician, which is artificial and invasive to the personal sphere of one who is incompetent and therefore defenseless, is within the boundaries of self-legitimacy of the physician as a professional, which he must care for and then render a tangible advantage for his patient. Such accurate verification of the usefulness or of the benefit of the treatment for the subjected person must be done especially when the treatment aims to prolong life, because "only and especially when the treatment itself aims to prolong life, the physician, as a professional, presses on to the maximum intrusion in the individual sphere of the other person, even modifying, or at least shifting, the border between life and death".

Of course we must not permit ourselves, not even and all the more so, for one who is incompetent or has disabilities, to distinguish between life worthy and not worthy of being lived. This consideration does not delete, however, that there are cases in which, because of the artificial prolongation of life, no usefulness or benefit is found and in which, indeed, the only result produced from the treatment or from the care is of sanctioning the triumph of medical science in defeating the natural outcome of death. Such a triumph is nevertheless an empty triumph, overturned in defeat, if for the patient and her health there is no further effect or advantage.

It is not life in itself, which is a gift that can ever be unworthy; to be unworthy can only be the artificial protraction of living, beyond what it otherwise would have, only thanks to the intervention of the doctor or in any case of another, who is not the person who is compelled to live.

The Court of Appeals of Milan, in the opinion of the appellant, had therefore misunderstood and misrepresented the meaning of the discovery during the trial, in which it verified, through witnesses, the conviction of E., previous to the accident that has reduced her to a permanent vegetative state, that it would have been "better" to die rather than to have that which "could not be considered life." The convictions of E. would have been asked and would have been the subject of the discovery not because some could think that these, manifested in a far away time, when E. was still in full health, are valid today as a manifestation of an appropriate will that can be assimilated to an actual dissent to the treatments she is undergoing. Instead, the investigation of E.'s convictions, when she could still manifest them, would have been requested and made because the Court of Appeal, in deciding for the maintenance of artificial nutrition and hydration, can evaluate and ponder every available element.

The permanent vegetative state (PVS) in which E. lies is a unique condition and different from any other, not comparable in some way to the condition of handicap, or the potential reversible conditions of the eclipse of consciousness and will such as a coma. In the condition of PVS, different from the others, it is possible to verify the tangible benefits or usefulness of the treatments or care, only aimed to postpone death under the biological point of view.

2.1. – With the first ground illustrated in the memorandum, alleging violation or false application of Articles 357 and 424 of the Civil Code, in relation to Articles 2, 13 and 32 of the Constitution, the guardian ad litem cross appellant, requests that the prohibition of therapeutic obstinacy be affirmed as a principle of law.

Repeating the same thesis contained in the principal appeal, in the cross appeal, it has been stressed how E. is not in a position to express any consent in respect of the acts that take an invasive form into her personal psycho-physical integrity, and appeals to the constitutional case law on the relevance of the protection of privacy from any interference upon the body or upon the psyche to which the subject did not consent. It underlines the protection of human dignity, inseparable from the idea of life itself, as a constitutional value, and it invokes, among others, Article 32 of the Constitution, which prohibits health treatments in contrast with the wishes of the person. It is affirmed that, when the treatment is useless, futile and does not improve health, surely it does not include every broad concept of care and of the practice of medicine, and the physician, as a professional, cannot administer it without unjustly invading the personal sphere of the patient.

2.2. – The second claim of the cross appeal is about the omission of and insufficient grounds on the decisive point of the controversy and asks that the Court decide according to the principle that no one should have to undergo treatments that are invasive of their own person, even if aimed at the artificial prolongation of life, without any usefulness and benefit being concretely and effectively verified. In the opinion of the cross appellant, the observance of the ban on therapeutic obstinacy should have been assured by the Court of Appeal of Milan within the accepted meaning of the prohibition of activity unrelated to the hope of recovery of the patient, independent of the treatment itself being aimed at maintaining life.

Also in the memorandum it is specified that the Court of Appeals had erroneously, after having admitted, held irrelevant the testimony of the friends of E.. According to the cross appellant, an eventual declaration about her own will to not be kept alive during the PVS has to be expressed ex ante (from one who found herself still in full health and perfectly able to understand and to express will), not having any relevance to the fact that the girl, then, was at a young age. The judgment of the Court of Appeals did not agree that the determinations of E. would have had value only if made at the moment of the illness.

3. - The principal appeal and the incidental appeal must be joined, on the grounds of Article 335 of Civil Procedure Code, both appeals being proposed against the same decree.

4. - Dealing with appeal of the decree filed on 16 December 2006 – therefore falling within legislative decree 2 February 2006, no. 40 (Modifications to the Civil Procedure Code in matters of cassation judgment in "nomofilattic" and arbitration function, according to art.1.2, of the Law 14 May 2005, no. 80), based on the temporary discipline established by article 27.2 - the appeal to the Court of Cassation for violation of law includes the possibility of alleging, furthermore, the vice of omission, insufficient or contradictory ground about a controversial and decisive fact for the decision, according to the current article 360 of Civil Procedure Code.
Hence, the proposed appeals must be scrutinized even where they affirm the irregularity contained at number 5 of the cited article 360 of Civil Procedure Code.

5. – The grounds adduced in the principal appeal and in the cross appeal, on account of their strict connection, can be examined together.

They ask the Court – besides the issue of whether the therapy administered to the body of E.E., consisting of artificial nutrition and hydration by means of nasogastric tube, can be qualified as a form of therapeutic obstinacy, on the alleged ground that it would be the case of invasive treatment, without any benefit or usefulness for the patient except the forced prolongation of life, objectively aimed to preserve a purely mechanical and biological functionality – also with the issue of whether and within which limits, in such a situation, that administration of treatment can be interrupted, if the request in the matter presented by the guardian corresponds to the opinions expressed in the past by E. on situations similar to that in which she then came to find herself, and more in general, to her convictions on the meaning of the human dignity.

This last issue is preliminary in logical order. Hence, it is best to begin from the examination of it.

6. – It must be stated beforehand that informed consent constitutes, generally, legitimization and one of the grounds of health treatment: without informed consent the intervention of the physician is surely illegal, even when it is in the interest of the patient; the practice of free and informed consent is a form of respect for the freedom of the individual and a means for the pursuit of his best interests.

The principle of informed consent – which expresses a moral choice in the way of conceiving of the doctor-patient relationship, in the sense that said relationship appears based first on the rights of the patient and upon his freedom of therapeutic self-determination and then on the duties of the physician – has a secure basis in the norms of the Constitution: in Article 2, which preserve and promote the fundamental rights of the person, of her identity and dignity;

In Article 13, which proclaims the inviolability of personal freedom, in which "lies the sphere of explication of the power of the person of making decisions about his own body" (Constitutional Court, ruling no. 471 of 1990); and in Article 32, which protects health as a fundamental right of the individual, as well as an interest of the society, and provides the possibility of compulsory health treatments, but they subject them to a statutory reserve, qualified by the necessary respect of the human person and further specified with the requirement that the legislator provide every possible preventive precaution, aimed to avoid the risk of complications.

In our legislation, the principle of informed consent as the basis of the doctor-patient relationship is affirmed by numerous statutory provisions, since the law instituting the National Health Service (Law 23 December 1978, n. 833), which, after having established, in Article 1, that "The protection of physical and psychic health must take place with respect for the dignity and of the freedom of the human being", states, in Article 33, the generally voluntary character of the examinations and health treatments.

Dealing with the supranational sources, the same principle finds recognition in the Convention of the Council of Europe on human rights and biomedicine, signed at Oviedo on April 4,1997, rendered executive with the law of authorization to the ratification 28 March 2001, no. 145, which, to Article 5 places the following "general rule" (according to the index of the norm): "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it".
The Charter of Fundamental Rights of the European Union, adopted in Nice on December 7, 2000, provides that the free and informed consent of the patient to the medical act must be considered not only under the profile of the lawfulness of the treatment, but also first of all as a true and proper fundamental right of the European citizen, regarding the more general right to the integrity of the person (Chapter I, Dignity; Article 3, Right to the integrity of the person).

In the code of medical ethics of 2006 it is repeated (Article 35) that "The physician must not undertake diagnostic and/ or therapeutic activities without the acquisition of the expressed and informed consent of the patient".

The principle of informed consent stands firm in the case law of this Court.

In the decisions of the III Civil Section, no. 10014 of January 25, 1994, and no. 364 of January 15, 1997, it is affirmed that from the self-legitimization of medical activity cannot be derived the conviction that the physician may, normally and except in some exceptional cases (when the patient is not able, because of his condition, to give consent or dissent, or, more generally, where there are the conditions of the state of necessity, provided by article 54 of the Penal Code), intervene without the consent or in spite of the dissent of the patient. More recently, the ruling no. 5444 of March 14, 2006 of the Section III of the Civil Court of Cassation, has clarified that "the fairness or lack thereof, of the treatment does not assume any importance with regard to the existence of the tort for violation of informed consent, being completely different to the ends of the formation of the negligence and of the injustice of the damage, which exists for the simple reason that the patient, because of the deficit of information, was not put in the condition to assent to the health treatment with a consciousness aware of its implications": the treatment administrated without a valid consent is in violation "as much of Article 32.2 of the Constitution, as it is of Article 13 of the Constitution and Article 33 of law no. 833 of 1978, because of the injury to the legal position of the patient regarding health and physical integrity". "The legitimacy *per se* of the medical activity – repeats Penal Cassation Section IV, on July 11, 2001 and on October 3, 2001 – requires for its validity and concrete lawfulness, in principle, the

manifestation of patient's consent, as a presupposition of lawfulness of medical-surgical treatment. Consent is tied to the moral freedom of the individual and to his self-determination, as well as to his physical freedom proclaimed as the right to the respect of his own corporeal integrity, which are all aspects of the personal freedom defined inviolable by Article 13 of the Constitution. From there it is derived that a physician does not have a general right to care. Faced with such a right, the will of the sick, who find themselves in a position of subjection in which the doctor could always intervene within the limit of his own conscience, would have no importance; on the contrary, it appears to be in accordance with the principles of our system - the recognition of the physician's faculty or the power of care-giving; these subjective situations derived from qualification to exercise the medical profession, generally need, however, the consent of the person who must subject himself to the health treatment to express themselves".

6.1. – Informed consent has not only the meaning of choosing among different possibilities of medical treatment, but it also means the possibility of eventually refusing the therapy and consciously deciding to interrupt it, in every phase of life, even in the terminal.

This conforms to the personalistic principle that animates our Constitution, which sees in the person an ethical value in itself; it forbids every exploitation of the same for some heteronymous and absorbing scope; it conceives social intervention in function of the person and his development and not vice versa; it looks at the limit of the "respect of the human being" in reference to the single individual, in whatever moment of his life and in the entirety of his person, according to the bundle of ethical, religious, cultural and philosophical convictions guiding his volitional determinations.

And it is also coherent with the new dimension that health has assumed. The latter is no longer considered as the absence of illness, but as a state of complete physical and psychic well-being, and therefore also involving, in relation to the perception that everyone has of themselves, also the interior aspects of life as felt and lived by the person in his experience.

The patient's right to therapeutic self-determination must not meet a limit when it leads to the sacrifice of life.

Although it has sometimes been indicated that an individual obligation to act for the benefit of his own health or a prohibition to refuse treatments or omit behavior thought to be advantageous or absolutely necessary for the maintenance or the reestablishment of his health, the Court holds that the health of the individual cannot be subjected to authoritative-coactive imposition. Against the refusal of treatment by the party concerned, there is space - in the context of the "therapeutic alliance" that unites patient and doctor in the search for what is good, respecting everyone's cultural paths - for a strategy of persuasion, because the aim of the legal system is also to offer the support of maximum and concrete solidarity in the situations of disability and suffering; but even before this there is the duty of verifying that said refusal is an informed, authentic and actual one. If refusal has such connotations it cannot be disregarded in the name of a duty to be cured as a principle of public order.

This principle comes also from the same Article 32 of the Constitution, according to which health treatments are compulsory only in the cases expressly provided for by the law, if the measure that imposes them is aimed at preventing the health of an individual causing damage to the health of others and that the intervention provided for is not damaging, but is instead useful to the health of the one undergoing it (Constitutional Court, ruling no. 258 of 1994 and no. 118 of 1996).

Only in these limits it is constitutionally correct to admit limitations to the individual right of health, which, like all the rights of freedom, implies the protection of its negative side: the right to choose to lose health, fall ill, not be cured, live the final phases of one's own existence according to one's own canons of human dignity, even to let oneself die.

The refusal of medical-surgery therapy, even when it leads to death, cannot be exchanged for the case of euthanasia, or rather for an action intended to shorten life, positively causing death, because such a refusal expresses an attitude of choice, from the ill person, that the illness follow its natural course. And, in any case, it must be repeated that the liability of the physician for omitting care exists only if the physician has the legal duty to administer or continue the therapy and it terminates when the duty ceases: such a duty, based on the consent of the ill, ceases – which is the legal duty of the doctor to respect the will of the patient to not be treated –after the patient refuses therapy.
Such an orientation, prevalent in the trends of scholars, including constitutionalists, is already present in the case law of this Court.

The ruling of the First Penal Section of May 29, 2002 and July 11, 2002 affirms that, "in the presence of an authentic and genuine determination" of the interested party in the sense of the refusal of the care, the physician "must stop, even if the omission of the therapeutic intervention might cause the danger of a worsened state of health of the infirm and even death." Clearly – it specifies in the cited judgment – it is a case of extremes, "that in practice seldom occurs, if only because those in peril of life or grave danger, due to the inevitable disturbance of the conscience generated by the illness, is rarely in a position of freely manifesting his intention": "but if this is not the case, the physician that fulfills his moral and professional duty of putting the patient in a position to make his choice and verifies the freedom of that choice, cannot be called upon to respond to anything, because facing an action manifesting the exercise of a true and proper right, his abstention from any opposite initiative becomes a duty; acting in a different way could mean committing a crime".

The solution, drawn from constitutional principles, concerning the refusal of care and the duty of the doctor to refrain from every diagnostic or therapeutic activity in the absence of the patient's consent, even if such an abstention can provoke death, finds confirmation in the provision of the code of medical deontology: according to the cited Article 35, "in the presence of documented refusal from the capable person," the physician must "in every case" "desist from consequent diagnostic and/or curative acts, because no medical treatment is allowed against the will of the person". Furthermore such a solution is legislatively established in other European systems. Relevant in this direction is Article 1111-10 of the French Code of Public Health, inserted in Law n. 2005-370 of April 22, 2005 concerning the rights of the sick person and the end of life, according to which "When a person, in an advanced or terminal phase of a grave and incurable ailment, whatever the cause might be, decides to limit or to stop all treatment, the doctor respects his will after having informed him of the consequences of his choice. The decision of the sick person is written in his medical record".

The configurability of a duty of the individual to health, which would involve a duty of the patient to not refuse care and therapy to allow for the maintenance of life, cannot be deduced from the ruling of the European Court of Human Rights decided on April 29, 2002, in the case Pretty v. United Kingdom. The Court of Strasburg establishes that Article 2 of the Convention for the Protection of the Human Rights and of the Fundamental Freedoms protects the right to life, without which the enjoyment of each of the other rights or freedoms contained in the Convention become useless; specifying that such a disposition, on the one hand, cannot, without distorting the term of the law, be interpreted in the sense that is attributed to the diametrically opposed right, that of a right to die, nor, on the other hand, can it

create a right of self-determination in the sense of attributing to an individual the faculty of choosing death rather than life. Such a principle – that this Court shares fully and makes its own –is utilized by the Court of Strasburg not to deny the admissibility of the refusal of care by the interested party, but to judge as not detrimental to the right to life, the criminally sanctioned prohibition of assisted suicide provided for by national English statutory law and the refusal, from the Director of Public Prosecutions, to guarantee immunity from the penal consequences to the husband of a paralyzed woman affected by a degenerative and incurable illness, desirous of dying, in the case in which he should lend her aid in committing suicide. Coherent with such a statement, the same ruling of the European Court underlined that, in the health field, the refusal of a particular treatment could inevitably lead to a fatal outcome; nevertheless the imposition of a medical treatment without the consent of an adult and mentally aware patient would interfere with the physical integrity of a person in a manner such as to be able to involve the rights protected by Article 8.1 of the Convention (right to private life); and that a person could expect to exercise the choice of dying by refusing to consent to a treatment potentially suitable for prolonging life.

Likewise, according to the ruling of June 26, 1997 of the Supreme Court of the United States, in the case V. et al. v. Q. et al., everyone, regardless of physical condition, is authorized, if competent, to refuse an undesired treatment given for the maintenance of life, while no one is permitted to lend assistance in suicide. The right of refusing health treatments is based on the premise of existence, not from a general and abstract right to accelerate death, but of the right to the integrity of the body and to not undergo undesired invasive interventions.

7. – The overall framework of the values in play herein described, essentially based upon the free availability of health by the party directly concerned (non compos mentis), presents itself in a different way when the adult is not able to manifest his own will because of his state of total incapacity and he had not, before falling into such a condition, when he was in full possession of his mental faculties, specifically indicated through declarations of will made earlier, as to which therapies he would have wanted to receive and which he would have intensely refused in the case that he would come to find himself in a state of unconsciousness.

Even in such a situation, even faced with the current lack of a specific legislative regulation, the primary and absolute value of the rights involved requires their immediate protection and imposes upon the judge the delicate work of reconstruction of the rule of judgment in the context of the constitutional principles (see Constitutional Court, ruling no. 347 of 1998, point no. 4 of the legal reasoning).

7.1. – It is clear from the acts of the case that E.E. finds herself in the situation indicated, lying in a persistent and permanent vegetative state following a grave traumatic brain injury suffered following a road accident (that occurred when she was twenty years old), and had not predisposed, when she was in possession of the capacity of understanding and of expressing will, any advance declaration on treatment.

This clinical condition has persisted unchanged since January 1992.

By reason of her condition, E., even if able to breathe spontaneously, and even conserving cardiovascular, gastrointestinal and renal functions, is radically incapable of having cognitive and emotive experiences, and of having any contact with the external environment: her reflexes of the trunk and spine persist, but there is no sign of psychic activity or of participation in the environment, nor is

there any capacity of voluntary behavioral response to external sensorial stimuli (visual, auditory, tactile); her only motor reflex activity consists of a redistribution of muscular tone.

The physical survival of E., which is in a stable state but not progressing, is secured by the artificial nutrition and hydration by means of a nasogastric tube.

E. has been declared incompetent and the father has been appointed guardian.

7.2. – In case of patient's incapacity, medical dutifulness finds its own legitimate grounds in the constitutional principles inspired by solidarity, which allow and impose the carrying out of those urgent interventions that result in the best therapeutic interest of the patient.

Nevertheless, even in such cases, once the urgency of the intervention deriving from the state of necessity is passed, the personal claim, which is the basis of the principle of informed consent and the principle of equal treatment amongst individuals, regardless of their state of capacity, requires that a dualism be created between the individuals in the elaboration of the medical decision: between the physician who must inform about the diagnosis and therapeutic possibilities, and the patient who, through a legal representative, can accept or refuse the proposed treatments.

Central, in this direction, is the disposition of Article 357 of the Civil Code, which – read in connection with Article 424 of Civil Code –, provides that "The guardian has the care of the person" of the incompetent, thus investing the guardian with the legitimate position of an interlocutor with the physicians in deciding health treatments to administer to the ward. The powers of care of the disabled also belong to the person appointed support administrator (Articles 404 et seq. of the Civil Code, introduced by Law 9th of January 2004, no. 6), because the decree of appointment has to contain the indication of the acts that the administrator is authorized perform in the protection of the interests also of a personal nature for the beneficiary (Article 405.4 of the Civil Code).

Confirming such an interpretation of the norms of the code we can recall ruling no. 5652 of December 18, 1989, of this Section, which established that, in the context of legal incompetence, the incapacity of providing for one's own interests, according to Article 414 of the Civil Code, is to be considered also from the perspective of protecting non economic interests, since the possibility exists, of an absolute necessity to substitute the will of the subject with that of the person appointed as guardian even in absence of assets to protect. In the same ruling it was stated that this occurs — in the case of the person "whose survival is put in danger by his refusal (caused by psychic illness) of external interventions of assistance such as the admission in a safe and healthy place or also admission in hospital" for health treatments. Here the recourse to interdiction (at that time the only institution) is justified in view of the need to appoint a person to express the will with regard to the proposed treatment. Continuing in the same direction, we recall the first applications of the inferior courts on this matter regarding the close institution of the support administrator, sometimes used in the medical field, to second the exercise of autonomy and to allow the manifestation of an authentic will where the condition of cognitive decay would impede the expression of a truly conscious consent.

In particular, some statutes contain significant dispositions on legal representation in matters of care and health treatments.

According to Article 4 of the legislative decree no. 211 of the 24th of June 2003 (implementation of directive 2001/20/EC relating to the implementation of good clinical practice in the conduct of clinical

trials on medicinal products for human use), clinical trials on incapacitated adults who have not given or have not refused their informed consent before the incapacity arose, is possible on the condition, among other things, that "the informed consent was obtained from the legal representative": a consent – continues the regulation – that "must represent the presumed will of the subject."

Again, Article 13 of the law on social protection of maternity and on the voluntary interruption of pregnancy (Law no. 194 of May 22, 1978), regulating the case of the woman interdicted for mental incapacity, states: that the request of voluntary interruption of the pregnancy, before the first ninety days as after this period, can be presented, other than from the woman personally, also from the guardian; that in the case of request advanced by the ward, the opinion of the guardian must be heard; that the request formulated from the guardian must be confirmed by the woman.

More directly – and with an article that, concerning all health treatments, shows the character of the general rule – Article 6 of the cited Oviedo Convention – indexed under Protection of persons not able to consent – provides that "Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law", specifying that "an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit". And – as the explanatory report to the Convention states – when it utilizes the expression "similar reasons", the cited Article 6 refers to the situations, such as comatose states in which the patient is incapable of formulating his wishes or of communicating them.

Now, it is known that, although the Parliament has authorized the ratification with the Law no. 145 of the 28th of March 2001, the Oviedo Convention has not yet been ratified by Italy. But from that it doesn't follow that the Convention is deprived of any effect in our legal system. In fact, an agreement that is valid in the international context, but which has not yet been executed within the State, can be assigned – even more so after the statute authorizing ratification – an auxiliary function on the interpretative plane: it will have to yield if faced with a contrary national norm, but can and must be utilized in the interpretation of national statutes in order to give to these an interpretation conforming to convention. Furthermore, the Constitutional Court, in admitting the requests of referendum on some provisions of the law no. 40 of the February 19, 2004, concerning medically assisted procreation, has specified that the eventual gap consequent to the referendum would not be put in conflict with the principles laid down by the Oviedo Convention of April 4, 1997, transposed in our legal system with Law no. 145 of the 28th of March 2001 (Constitutional Court, rulings no. 46, 47, 48 and 49 of 2005): implicitly confirming that the principles from it are already part of the system today and that it cannot rescind from them.

7.3. – Having ascertained that the guardian's duties of care for the person consist in providing informed consent to the medical treatment to be administered to the person in the state of incapacity, we have to establish the limits of the intervention of the legal representative.

Such limits are linked to the fact that health is a highly personal right which – as this Court has specified in the order no. 8291 of the 20th of April 2005 – includes the freedom of refusing care and "presupposes the recourse to evaluations of life and death that find their foundation in conceptions of ethical or religious nature, and even though an extra-juridical one, so exquisitely subjective".

In the opinion of the Court, the highly personal nature of the right to health of the incompetent person, requires that the institution of legal representation does not transfer to the guardian, who is vested with functions in the realm of personal law, an unconditional power to provide for the health of the person in a state of total and permanent unconsciousness. In consenting to medical treatment or in dissenting from the imposition of the same upon the ward, the representation of the guardian is subjected to a two-fold order of constraints: he must, in the first instance, act in the exclusive interest of the incompetent person; and, in search of the best interest, must decide not "in the place" of the incapacitated person nor "for" the incapacitated, but "with" the incapacitated person: then, reconstructing the presumed will of the unconscious patient, who was already adult before falling into such a state, he must take into consideration the wishes expressed by him before the loss of consciousness, or inferring that will from his personality, from his lifestyle, from his inclinations, from his guiding values and of his ethical, religious, cultural and philosophical convictions.

Both constraints to the representative power of the guardian have, as has been seen, a precise normative reference: the first in Article 6 of the Oviedo Convention, that imposes to correlate the "direct benefit" of the interested party and the therapeutic choice effected by the representative; the other, in Article 5 of legislative decree no. 211 of 2003, according to which the consent of the legal representative to clinical trials must correspond to the presumed will of the incompetent adult.

There is no doubt that the choice of the guardian must be a guarantee to the incapacitated subject, and therefore aimed, objectively, at preserving him and at protecting his life.

But, at the same time, the guardian may not neglect the idea of dignity of the person, as manifested by the same person, before falling into a state of incapacity, when faced with problems of life and death.

7.4. – This attention to the peculiar circumstances of the concrete case and, most of all, to the convictions expressed by the person concerned when she was in the condition of capacity, is constant, both in the diversity of the arguments followed and in the rulings adopted in other legal systems by the Courts in controversies regarding the suspension of care (and also that of artificial nutrition and hydration) for the sick in a permanent vegetative state, in situations without living wills.

In the leading case In re Quinlan, the Supreme Court of New Jersey, in the judgment of March 31, 1976, adopted the doctrine – followed by the same Court in the decision of June 24, 1987, In re Nancy Ellen Jobes – of the substituted judgment test, based on the fact that this approach is intended to ensure that whoever decides in place of the concerned party takes on, as much as possible, the decision that the incapacitated patient would have taken if capable. When the wishes of a capable person are not clearly expressed, whoever decides in her place must adopt a line of thinking according to the personal system of the life of the patient: the substitute must consider the previous declarations of the patient on the subject and her reactions when faced with medical problems, as well as all aspects of the personality of the patient familiar to the substitute, obviously with particular attention to her philosophical, theological and ethical values, in order to identify the type of medical treatment that the patient would choose.

In the judgment of June 25, 1990 in the C. case, the Supreme Court of the United States rules that the Constitution of the United States does not prohibit the State of Missouri from establishing "a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent".

In the decision of March 17, 2003, the Bundesgerichtshof – after having premised that if a patient is not capable of giving consent and his illness has set out a mortal irreversible course, he needs to be spared acts that prolong his life when such treatments are contrary to his will expressed previously under a form of the so-called disposition of the patient (in consideration of the fact that the dignity of the human being includes respect of his right to self-determination, exercised in the situation of capacity to express his consent, also in the moment when they are no longer in a state of making conscious decisions) – asserts that, whenever it is impossible to verify such a clear will of the patient, the admissibility of such measures can be evaluated according to the presumed will of the patient, which therefore must be, case by case, identified also on the basis of the decisions of the same patient himself regarding his life, values and convictions.

In the B. case, the House of Lords on February 4,1993, using a different test of best interest, reaches the conclusion (stated in detail in the opinion of Lord Goff of Chieveley) by which, in the absence of authentically curative treatments, and given the impossibility of recovering consciousness, it is contrary to the best interest of the patient to protract his life by using artificial nutrition and hydration, deemed as unjustified invasive treatments of the corporeal sphere.

7.5. – Whoever lives in a permanent vegetative state is, to all effects, a person in the full sense, who must be respected and whose fundamental rights must be protected, starting with the right to life and the right to health care, because of their condition of extreme weakness and not being able to provide for oneself autonomously.

The extreme tragedy of such a pathological state – which is part of the biography of the sick and which detracts nothing from his dignity as a human being – does not justify in any way a weakening of the care and supportive actions that the Health Care System must continue to offer and that the sick, as every other person belonging to human society, has the right to expect even up to the occurrence of death. The society must place at the disposal of those who need it and ask for it, all the best care and protection that medical science is able to provide, in order to face the struggle to remain alive, regardless of how precarious life is and how much hope there is of recovering cognitive functions. This principle is asserted as much by the idea of a universal equality among human beings as by the equally universal duty of solidarity with regard to those who, among them, are the most fragile persons.

But – for everyone who believes that it is in his own best interest to be kept artificially alive as long as possible, even if lacking consciousness – there is another who, tying indissolubly his own dignity, to a life of experience and that to consciousness, believes that it is absolutely contrary to his own convictions to survive indefinitely in a condition of life deprived of a perception of the external world.

A State, such as ours, organized according to fundamental choices written into our constitutional Charter based on pluralism of values, and placing the principle of self-determination and the freedom of choice at the center of the patient-doctor relationship, must also respect also the latter choice.

The legal system gives to the individual who, before falling into the state of total and absolute unconsciousness, typical of the permanent vegetative state, had manifested, in express form or even through his own convictions, his own lifestyle and the guiding values, the unacceptability of the idea of a body destined, thanks to medical therapies, to outlive the brain, the possibility to make his voice heard regarding the deactivation of this treatment through a legal representative.

According to this Court, the functionality of the power of representation, necessarily aimed at the protection of the right to life of the ward, permits the interruption of treatments only in extreme cases: when the condition of the vegetative state is, based on a rigorous clinical verification, irreversible and there is no medical foundation, according to the scientific standards recognized at the international level, that assumes that the person might have even the least possibility of some, even if faint, recovery of consciousness and of returning to a life consisting also of perception of the external world; and only when such a condition – taking into account the will expressed by the interested party before falling into such a state or from his values and convictions – is incompatible with the representation of himself upon which he constructed his life up until that moment and is contrary to his way of understanding the dignity of the person.

On the other hand, the search for the presumed will of the person in a state of unconsciousness – reconstructed, based on clear, unequivocal and convincing elements of evidence, not only in light of previous wishes and declarations from the interested party, but also upon the basis of his lifestyle and way of life, of his sense of integrity and of his critical interests and experience – ensures that the choice is not an expression of the representative‘s judgment on the quality of life, even if he belongs to the same familiar circle of the represented party, and that it is not in any way conditioned by the particular seriousness of the situation, but is aimed, exclusively, at giving substance and coherence to the complete identity of the patient and to his way of conceiving of the very idea of person’s dignity, before falling into a state of unconsciousness.. The guardian therefore has the duty of completing this comprehensive identity of the patient’s life, reconstructing the hypothetical decision that he himself would have taken if he had been made competent; and, in this duty, human more than juridical, he must not ignore the sick person’s own past, in order to allow his authentic and most genuine voice emerge and represent it to the judge.

From the above it is derived that, in a chronic situation of objective irreversibility of the clinical condition of absolute loss of consciousness, the interruption of the medical treatment that keeps him alive artificially would be able to be carried out, as an extreme gesture of respect for the autonomy of the sick person in a permanent vegetative state, upon request brought by the guardian who represents him, when that condition, in the absence of sentiment and experience, of contact and of consciousness – only prompted by the will expressed before falling into such a state and taking into consideration the values and the exact convictions of the person in a state of incapacity – reveals itself, in the lack of any prospect whatsoever of the pathology receding, to be harmful to his way of understanding the dignity and the suffering in life.

7.6. – There is no doubt that artificial hydration and nutrition by means of a nasogastric tube constitutes a health treatment. They, in fact, integrate a treatment that underlies scientific knowledge, that is made by doctors, even if it is then followed by non doctors, and consists in the administration of preparations such as chemical compounds implicating technological procedure.

Such a qualification is, furthermore, corroborated by the international scientific community; it finds support in case laws (C. and B. cases); it is in line, finally, with constitutional case law, which includes the drawing of blood –also a “medical practice of ordinary administration” – among the measures of “restrictions to the personal freedom when coactive execution becomes necessary because the person undergoing the expert examination has not consented spontaneously to the drawing” (decision no. 238 of 1996).

8. – Differently from what is shown to be believed by the appellants, the judge cannot be requested to order the detachment of the nasogastric tube : such a claim is not possible when faced with health treatment, such as that of the case at hand, which, in itself, does not objectively constitute a form of therapeutic obstinacy, and on the contrary represents, a proportional defense aimed at the maintenance of life, without which, in the imminence of death, the organism is no longer able to assimilate the substances provided or a state of intolerance clinically proven to be connected to the particular form of nutrition occurs.

On the contrary, the intervention of the judge expresses a form of control over the legitimacy of the choice in the interest of the ward; and, as a result of a judgment effected according to the horizontal logic of reasonableness, which postulates an indispensable reference to the circumstances of the concrete case, it expresses itself in the authorizing or not of the choice performed by the guardian.

On the basis of the considerations above, the decision of the judge, given the involvement in the case of the right to life as supreme good, can be favorable to authorization only (a) when the condition of vegetative state is, on the grounds of a rigorous clinical verification, irreversible and there is no medical foundation whatsoever, according to the scientific standards recognized at the international level, that allows the supposition that the person would have at least the minimum possibility of any, even if it is faint, recovery of the consciousness and returning to a perception of the external world; and (b) on the condition that such a request be truly expressive, based on clear, concordant and convincing elements of evidence, from the voice of the represented person, drawn from his personality, from his lifestyle and from his convictions, corresponding to his way of understanding before falling into a state of unconsciousness, of the very idea of the person's dignity.

Whenever one or the other condition is lacking, the judge must deny the authorization, then giving the unconditional prevalence to the right to life, independently of the level of health, autonomy and capacity to understand and to express the will of the concerned person, from the perception that others could have of the quality of life itself, as well as from mere utilitarian logic of costs and benefits.

9. – Within the limits just underlined, the appealed decree does not escape the censures of the appellants.

It has omitted to reconstruct the presumed will of E. and to give importance to the wishes previously expressed by her, to her personality, to her lifestyle and to her most intimate convictions.

Under this point of view, the Court of Milan – faced with the discovery, in which it was confirmed, through witnesses, that E. in regards to a situation similar to that in which she would come to later find herself, had manifested the opinion that it would have been preferable for her to die than to live artificially in a coma – limited itself to observe that those convictions, manifested in a distant time, when E. was still in full health, could not be considered as a manifestation of a suitable will comparable to a dissent in the present regarding treatments administered upon her body.

But the judges of the appeal did not verify whatsoever whether such declarations – whose credibility have moreover no doubt -, held the Court unfit to formulate a living will themselves, were valid in any case to define, together with the other results of the discovery, the personality of E. and her way of conceiving of the very idea of dignity of the person, before falling into a state of unconsciousness, in light of her values and ethical, religious, cultural and philosophic convictions shaping her volitional

decisions; and therefore they omitted verifying whether the request to interrupt the treatment formulated by the father, as guardian, reflected the orientations of the life of the daughter.

Such a verification will have to be effected by the judge on remand, taking in consideration all the elements that emerged from the discovery and the convergent positions assumed by the parties in the trial (guardian and guardian ad litem) in the reconstruction of the personality of the girl.

10. – Having absorbed the examination of the issue of constitutional legitimacy, the appeals are granted, according to the reasoning and within the limits indicated in it.

From there ensues the cassation of the appealed decree and the remand of the case to a different Section of the Court of Appeals of Milan.

Said Court will rule conforming itself to the following rule of law:

"Where the sick person lies for many years (in this case, more than fifteen) in a permanent vegetative state, with consequent radical incapacity to relate to the external world, and is kept artificially alive by means of a nasogastric tube that provides alimentation and hydration to her, upon request of the guardian who represents her, and in the cross-question discussion with the guardian ad litem, the judge can authorize the deactivation of such a health defense (except in the application of the measures suggested by science and medical practice in the interest of the patient), only in the presence of the following presuppositions: (a) when the condition of vegetative state is, on the grounds of a rigorous clinical verification, irreversible and there is no medical foundation whatsoever, according to the scientific standards recognized at the international level, that allows the supposition that the person would have at least the minimum possibility of any, even if it is faint, recovery of the consciousness and returning to a perception of the external world; and (b) on the condition that such a request be truly expressive, based on clear, concordant and convincing elements of evidence, from the voice of the represented person, drawn from his personality, from his lifestyle and from his convictions, corresponding to his way of understanding, before falling into a state of unconsciousness, of the very idea of the person's dignity. Whenever one or the other condition is lacking, the judge must deny the authorization, then giving the unconditional prevalence to the right to life, independently from the perception that others could have of the quality of life itself , of the level of health, autonomy and capacity to understand and to express the will of the concerned person,".

11. – In line with the presuppositions of Article 52.2 of the legislative decree no. 196 of June 30, 2003 (Code regarding the protection of personal data), in order to protect the rights and the dignity of the persons involved it must be set forth, in case of reproduction of the present ruling in any form, for the purpose of juridical information in juridical reviews, electronic media or by means of networks of electronic communication, the omission of the indications of the personal details and of other given data identifying the interested parties reported in the decision.

FOR THESE REASONS

The Court, having joined the appeals, grants them in accordance with the limits of the above reasoning; reverse the appealed decree and remands the case to a different Section of the Court of Appeals of Milan.

It provides that, in case of diffusion of the present ruling in any form whatsoever for the purpose of juridical information in juridical reviews, electronic media or by means of networks of electronic communication, the indications of the personal details and of other given data identifying the interested parties reported in the decision be omitted.

So held in Rome, by the Council Chamber of the First Civil Section of the Supreme Court of Cassation on October 4, 2007.
Filed in the Chancery on October 16, 2007.