

CHAPTER 5

Relevant comparative law

5.1 Introduction

This chapter focuses on comparative law relating to violations of reproductive self-determination and discrimination in accessing SRH services. It looks at how courts in southern Africa and other jurisdictions have addressed cases relating to sexual and reproductive self-determination and discrimination in accessing SRH services.

For a discussion of why domestic courts should look to comparative law, please refer to Chapter 2.

Relevant cases discussed in this chapter include

- Adan v Davis (Canada)
- Attorney General v Dow (Botswana)
- Castell v de Greef (South Africa)
- Christian Lawyers' Association v National Minister of Health and Others (South Africa)
- Esterhuizen v Administrator, Transvaal (South Africa)
- Isaacs v Pandie (South Africa)
- LM and Others v Government of the Republic of Namibia (Namibia)
- Mmusi and Others v Ramantele and Another (Botswana)
- R v Morgentaler (Canada)
- Roe v Wade (United States of America)
- Stoffberg v Elliott (South Africa)
- Thornburgh v American College of Obstetricians and Gynaecologists (United States of America)

5.2 Coerced or Forced Medical Sexual and Reproductive Health Procedures

Basis of autonomy in medical setting

The constitutions of many countries in southern Africa recognise a range of fundamental rights relevant to protecting individuals from medical procedures and disclosures of private medical information unless informed consent is provided. Southern African constitutions recognise rights such as the rights to the security of the person, privacy, dignity, physical integrity and protection from cruel, inhuman or degrading treatment. In addition, the common and/or civil law in most countries has long recognised the right of an individual to *dignitas* or bodily and psychological integrity. This legal principle protects individuals from unwanted medical procedures, unless the necessary consent has been provided.³²⁸

Patient autonomy and self-determination have long been recognised in health law jurisprudence in the region. In South Africa in particular it has been recognised as far back as 1923 when the High Court emphasised that any interference with a person's body – such as a medical operation – which is not consented to is a violation of that person's rights to control his own body.³²⁹ The principle of consent to medical procedures has been reaffirmed in other cases such as *Esterhuizen v Administrator, Transvaal*.³³⁰

In other jurisdictions, the right over one's own body has been located in the rights to liberty, privacy, dignity and autonomy. For instance, in *Roe v Wade*,³³¹ the US Supreme Court held that a woman had the right to determine the fate of her own pregnancy under the right to liberty (linked to the right to privacy).³³² In a later case, *Thornburgh v American College of Obstetricians and Gynaecologists*,³³³ the US Supreme Court found that “few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy.”³³⁴

In Canada, the Supreme Court in *R v Morgentaler*³³⁵ held that a woman had a right to determine the fate of her own pregnancy under the right to the security of person. In the landmark 1994 South African decision of *Castell v de Greef*,³³⁶ the Supreme Court

³²⁸ Common law and statutory law sometimes allow for exceptions to the requirement of voluntary informed consent by an individual to medical testing and treatment. In these instances, medical testing and treatment without consent is lawful provided that the laws are reasonable limitations of rights, in line with constitutional principles.

³²⁹ See *Stoffberg v Elliot* 1923 CPD 128.

³³⁰ 1957 (3) SA 710 (T).

³³¹ 410 US 113 (1973) (35 L Ed 2d 147) available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZO.html (accessed 26 August 2013).

³³² *Id.*, 152 - 153.

³³³ (1986) 476 US 747 available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0476_0747_ZS.html (accessed 26 August 2013).

³³⁴ *Id.* at para 772.

³³⁵ (2) (1988) 44 DLR (4th) 385, 173-174 available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/288/index.do> (accessed 26 August 2013).

³³⁶ 1994 (4) SA 408 (C).

of Appeal recognised the individual’s “fundamental right[s] of... autonomy and self-determination”.³³⁷

More recently, in *Christian Lawyers’ Association v National Minister of Health and Others*,³³⁸ the South African Supreme Court of Appeal examined a women’s right to provide informed consent to an abortion, finding that the right to do so was a fundamental expression of the right to individual self-determination. The Court reiterated that this right to self-determination is reflected in South Africa’s Bill of Rights in various provisions, including the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and the right to security and control over the body, and the rights to dignity and privacy.³³⁹

The South African High Court in *Isaacs v Pandie*³⁴⁰ found that a forced sterilisation violated the rights to privacy, dignity, reputation and safety.³⁴¹

The South African Supreme Court of Appeal outlined the elements of informed consent in *Castell v de Greef*.³⁴² In that case, a woman sued a doctor for medical negligence after various complications occurred after she had surgery to remove breast tissue to reduce the risk of cancer. The patient claimed she had not been advised of the risk of complications of such procedures or that an alternative surgical procedure existed. In examining the right to informed consent, the Court clarified the subjective, patient-centred test for informed consent. The Court held that a health practitioner must disclose all information and risks about a procedure that a “reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it.”³⁴³ The Court found that informed consent requires not only information, but also understanding and consent. It requires a patient to:

- Know the nature and extent of the risk or harm that accompanies a procedure;
- Understand the nature and extent of the risk or harm;
- Agree in detail to the procedure under discussion; and
- Agree in detail to all parts of the risk or possible harm.³⁴⁴

The holding in *Castell v de Greef* is significant because a subjective, patient-centred test for informed consent is in line with fundamental rights to self-determination and individual autonomy.

³³⁷ *Id.*, 80 - 81.

³³⁸ 2004 (4) SA 31 (T).

³³⁹ *Id.*, 47.

³⁴⁰ [2012] ZAWCHC 47 (16 May 2012) available at <http://www.saflii.org/za/cases/ZAWCHC/2012/47.html> (accessed 26 August 2013).

³⁴¹ *Id.* at para 87.1.

³⁴² *Castell v de Greef supra* note 336.

³⁴³ *Id.*, 81.

³⁴⁴ *Id.*, 80.

Generally, when assessing whether informed consent is present, courts have looked at:

- The nature and extent of information provided to the patient;
- The manner in which this information was provided; and
- Various factors that may affect understanding of the information in providing informed consent including:
 - Whether an individual is able to understand the information provided;
 - The language in which the information is provided;
 - The time available to make a considered decision; and
 - The psychological state of the patient at the time of the decision.

In 2012, the Namibian High Court in *LM and Others v Government of the Republic of Namibia*,³⁴⁵ addressed the components of informed consent in a case involving the forced sterilisation of three HIV-positive women in public hospitals in Namibia. In reaching its decision that all three women were subjected to forced sterilisation, the Court noted that informed consent required much more than merely written consent. The Court held that for informed consent the patient must be provided with adequate and appropriate information in a language a woman understands given that most patients are lay people and not well-versed in medical matters. With particular regard to sterilisation, the Court held that the patient must be provided with information about the procedure as well as alternative options, including advantages and disadvantages of alternative methods of contraception.³⁴⁶

In applying the criteria for informed consent to the particular factual situations in *LM and Others v Government of the Republic of Namibia*, the High Court highlighted expert testimony which noted the problematic nature of including medical acronyms in consent forms. The Court further highlighted the importance of counselling regarding contraception to ensure informed decision-making prior to sterilisation.³⁴⁷

Further, the Court noted that consent obtained while a woman was in labour did not meet the criteria for informed consent, holding that consent could not be obtained in a hurried fashion.³⁴⁸

Similarly, the South African High Court in *Isaacs v Pandie* emphasised the need for a patient to have time to consider and understand information for there to be informed consent.³⁴⁹ In *Isaacs v Pandie*, the plaintiff, a woman in her thirties who was subjected to an unwanted sterilisation procedure following the birth of her fourth child, repeatedly told her physician that she did not want a sterilisation. Although she specifically noted

³⁴⁵ [2012] NAHC 211 available at <http://www.saflii.org.za/na/cases/NAHC/2012/211.html> (accessed 26 August 2013).

³⁴⁶ *Id* at para 70.

³⁴⁷ *Id* at para 68.

³⁴⁸ *Id*.

³⁴⁹ *Isaacs v Pandie supra* note 340 at paras 57 and 87.3.

in writing that she did not consent to sterilisation, it was still performed. The Court held that before a doctor starts any treatment, s/he must ensure that the patient has been given sufficient time and information. The information must be given in a way that the patient understands in order to enable them to make an informed decision.³⁵⁰

In both *LM and Others v Government of the Republic of Namibia* and *Isaacs v Pandie*, the courts held that the doctor bore the duty to obtain informed consent from the patient. The South African High Court in *Isaacs v Pandie* pointed to the health profession guidelines in South Africa, which “expressly state[s] that it is the responsibility of the doctor providing treatment to his/her patient to obtain consent” and that the treating doctor remains responsible for ensuring that, before s/he starts any treatment, the patient has been given sufficient time and information to make an informed decision and has given consent to the investigation or procedure.³⁵¹

Finally, in *Christian Lawyers’ Association v National Minister of Health and Others*, the South African Supreme Court of Appeal examined various aspects of the right to provide informed consent to an abortion, including the issue of capacity to consent. The findings of the Court with regard to capacity are relevant for women with disabilities. The Court found that the provisions of the Choice on Termination of Pregnancy Act, 1996, which allow pregnant women under the age of 18 who give their informed consent to terminate their pregnancies during the first 12 weeks of pregnancy without having to consult or obtain the consent of parents or guardians, undergo counselling, and wait for a prescribed period, are constitutional.³⁵² The Court held that the distinguishing line in the Choice Act between pregnant women who may access the option to terminate their pregnancies unassisted versus those who require assistance is the *actual capacity* of a particular pregnant woman to give informed consent, as determined on a case-by-case basis by the medical practitioner, depending on the emotional and intellectual maturity of the individual concerned.³⁵³

In all three cases cited above, the courts took special note of the particular harm women experience due to violations of their sexual and reproductive self-determination. In *Isaacs v Pandie*, for example, the Court took into account the mental and emotional state, pain, suffering and loss of amenities of life in awarding general damages.³⁵⁴ In the Canadian case of *Adan v Davis*,³⁵⁵ decided in the Ontario Court of Justice, General Division, the Court elaborated that informed consent encompassed two considerations. First, it is concerned with a patient’s ability to communicate with and to understand her physician. Second, the duty of disclosure encompasses what the physician knows or should know that the patient deems relevant to her decision and what the reasonable plaintiff in similar circumstances to the plaintiff will want to know before deciding whether to

³⁵⁰ *Id* at para 87.3.

³⁵¹ *Id* at para 68.

³⁵² *Christian Lawyers’ Association v National Minister of Health and Others supra* note 338, 49.

³⁵³ *Id*, 37.

³⁵⁴ *Isaacs v Pandie supra* note 340 at para 88.

³⁵⁵ [1998] O.J. No. 3030.

submit to treatment or surgery.³⁵⁶ The plaintiff was a Somali woman who was subjected to a sterilisation procedure without her knowledge or consent. The plaintiff spoke no English at the time of the procedure and her appointment with the doctor was conducted through an interpreter. Although the treating physician claimed that he had received a request from Adan for sterilisation, the plaintiff believed that she was only having an infection treated. The Court determined that even if the doctor had received a request from Adan for sterilisation, the requirements of informed consent were not met.

In the above case, the Court found that the standard of informed consent (the duty of disclosure) had not been met because the doctor failed to ensure that Adan understood the meaning of the procedure, which was a particularly relevant concern given the fact that she did not speak English, and because he failed to notify her that other contraception options were available. During the assessment of damages, the Court took into account the fact that the plaintiff's ability to have children was "fundamental to her status in her society," that it was of enormous significance to her culture, and that the procedure violated her religious beliefs.³⁵⁷

5.3 Discrimination in Access to Sexual and Reproductive Health Services

There is limited jurisprudence in the region on women's rights to equality and non-discrimination in the specific context of sexual and reproductive health services. However, there is relevant jurisprudence on women's rights to equality and non-discrimination in general as well as jurisprudence on the right to non-discrimination for people living with HIV and AIDS and people with disabilities. In this section we primarily consider cases relating to the equality rights of women. For a comprehensive discussion on comparative case law regarding discrimination against people living with HIV, please refer to SALC's litigation manual *Equal Rights for All: Litigating Cases of HIV-Related Discrimination*.³⁵⁸

Courts throughout the region have affirmed the importance of ensuring the equal rights of women and have supported the ending of discrimination against women. In *Attorney General v Dow*, the Botswana Court of Appeal held that though section 15 of the Botswana Constitution providing for the right to non-discrimination did not explicitly provide for sex as a prohibited grounds, an act which denied citizenship to children where their mother was Motswana but not their father violated the right to non-discrimination under the Constitution as well as the right to equality under article 3 which explicitly prohibits disparate treatment due to sex.³⁵⁹

More recently, the Botswana High Court followed the Court of Appeal ruling in *Dow* in striking down a customary law rule which denied women the right to inherit the

³⁵⁶ *Id* at para 40- 42.

³⁵⁷ *Id* at para 34.

³⁵⁸ "Equal Rights for All: Litigating Cases of HIV-Related Discrimination" *supra* note 93.

³⁵⁹ *Attorney General v Dow supra* note 44.

family home. In *Ramantele v Mmusi and Another*,³⁶⁰ the Court found that section 15(4) (d) under the Botswana Constitution which exempts all personal law matters, including inheritance, from the general prohibition against discrimination to be subjected to two limitations: that the discrimination under personal law be either in the public interest or not prejudice the rights and freedom of others.³⁶¹

Similarly, in *Prinsloo v Van der Linde and Another*,³⁶² the South African Constitutional Court in determining whether discrimination has an unfair impact on persons, examined whether the persons discriminated against were members of a group of people that have been victims of past patterns of discrimination.³⁶³

In the Namibian case of *Myburgh v Commercial Bank of Namibia*,³⁶⁴ the Supreme Court likewise found that women can claim to have been part of a prior disadvantaged group, in special need of protection from discrimination.³⁶⁵

In the South African case of the *Minister of Health and Others v Treatment Action Campaign and Others*,³⁶⁶ the South African Constitutional Court considered, among other issues, the accessibility of nevirapine – a drug used to prevent mother-to-child transmission of HIV. At the time, South Africa only provided nevirapine at two research and training sites per province. The drug was also available in the private health system. A violation of section 9 of the South African Constitution guaranteeing the right to equality was alleged on the basis that the policy of the government discriminated against poor women by allowing nevirapine to be available in the private health care system and not allowing it to be widely available in the public health care system. The Court did not specifically deal with this aspect but noted its concern that the lack of accessibility would primarily affect the poor as follows:

In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.³⁶⁷

³⁶⁰ CACGB-104-12 available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> (accessed 5 September 2013).

³⁶¹ *Id* at paras 66-72.

³⁶² 1997 (3) SA 1012 (18 April 1997) available at <http://www.saflii.org/za/cases/ZACC/1997/5.html> (accessed 26 August 2013).

³⁶³ *Id*.

³⁶⁴ [2000] NASC available at <http://www.saflii.org/za/na/cases/NASC/2000/3.html> (accessed 26 August 2013).

³⁶⁵ *Id*, 18.

³⁶⁶ 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) available at <http://www.saflii.org/za/cases/ZACC/2002/15.html> (accessed 26 August 2013).

³⁶⁷ *Id* at para 70.

Brotherton v Electoral Commission of Zambia is one of the few cases in the region dealing with discrimination on the basis of disability.³⁶⁸ In this case, the Zambian High Court found that the voting stations in Zambia failed to provide accessibility for people with disabilities and that this constituted discrimination on the basis of disability.³⁶⁹ It noted that people *without* disabilities were able to easily access the registration process whereas people *with* disabilities had difficulties; since people with disabilities were treated less favourably than people without, the Court reasoned there was discrimination.³⁷⁰

Courts in southern Africa have yet to assess whether discrimination in women's ability to access sexual and reproductive health services violate the rights to equality and non-discrimination. However, it is clear that the prohibition on discrimination against women, WLHIV and women with disabilities could apply equally to laws, policies and practices that prevent women from accessing sexual and reproductive health services.

5.4 Conclusion

Courts throughout the world have found that the right to informed consent is critical to sexual and reproductive self-determination. The right has been located in common law and a number of fundamental constitutional rights, including the right to liberty, privacy, dignity and autonomy, among others. As a critical component of informed consent, courts have held that the doctor has a duty to ensure the patient has adequate and appropriate information in a language she understands. Finally, courts have uniformly struck down laws and practices that discriminate against women and though they haven't specifically addressed discrimination in women's ability to access sexual and reproductive health services, it is likely that laws, policies and practices that prevent women from accessing such services would be prohibited.

³⁶⁸ 2011 HP/0818 available at <http://www.zambialii.org/zm/judgment/high-court/2011/32> (accessed 26 August 2013).

³⁶⁹ *Id.*, J17.

³⁷⁰ *Id.*