**MEDICINE AND THE LAW**

**Obtaining informed consent for a sterilisation in the light of recent case law**

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The need to obtain informed consent prior to any sterilisation is a very well-established ethical and legal obligation. South African law, however, does not specifically state who is responsible for obtaining informed consent before performing a sterilisation. This has implications for the liability of a surgeon or gynaecologist in circumstances where the informed consent is defective. Due to the vagueness of the applicable law, a surgeon or gynaecologist might be held liable, even in situations where he/she did not obtain the consent and relied on a nurse or assistant to procure the relevant informed consent. This article explores the relevant statutory law and canvases two legal cases that came before the court regarding defective informed consent and the resultant liability for damages. We also make recommendations for proposed amendments to the current law to provide further clarity.

The ethical-legal obligation to obtain informed consent from patients before any medical procedure or operation is undertaken is a well-established principle in legislation and the common law. In this article, the authors, however, focus specifically on the unsettled issue of obtaining informed consent for a sterilisation (this article is based partially on the PhD thesis of C J Badul – refer to author contributions below). Informed consent is a positive right in terms of the right to bodily integrity and a defence for doctors facing civil claims for damages (volenti non fit injuria [there can be no injury to a person who has voluntarily consented]). Even though the ethical-legal framework for consent is well established, one of the unresolved complexities is the question of who bears the legal duty to obtain the consent or ensure that consent has been obtained for a sterilisation. This is a broad issue involving the potential liability of a surgeon for failing to personally obtain and record the consent of a patient, and it has come before the courts in relation to two sterilisation cases.

In Pandie v Isaacs the court grappled with this point, but failed to make a definitive finding on whether the surgeon or the nurse had to take responsibility to ensure that consent had been properly obtained and documented. However, in the Government of Namibia v LM and Others case, the court held that the duty lay with the medical practitioner to procure written informed consent. This article explores the relevant legislation, case law and guidelines with regard to sterilisation to ascertain on whom the duty rests to obtain informed consent.

**Consent to a sterilisation – the South African ethical-legal framework**

The Sterilisation Act No. 44 of 1998 (the Act) provides that the patient requesting the sterilisation must be >18 years of age and capable of consenting in writing to the procedure. The Act specifies that consent must be free from coercion and must be provided after an unambiguous explanation of the proposed procedure, including information on its permanency or reversibility. Finally, the Act states that the patient must be advised that their consent may be withdrawn at any time before the sterilisation is performed.

Although the Act is silent on who is responsible for providing this information and obtaining written consent, there are ethical guidelines dealing with this point, which have been issued by the Health Professions Council of South Africa (HPCSA).

The guidelines state that it is the duty of the healthcare practitioner to obtain the patient’s informed consent before any treatment is given. Nevertheless, the guidelines allow a practitioner to delegate the task of obtaining informed consent, provided the final responsibility remains with the healthcare practitioner. Furthermore, where a patient’s informed consent was obtained by a third party, the healthcare practitioner must nevertheless ascertain from the patient how well they understood the proposed procedure and its attendant risks. Ensuring that the signed copy of the consent form is in the file, is inadequate.

**Recent case law on consent to a sterilisation**

**Pandie v Isaacs**

Pandie v Isaacs related to a civil claim for damages by a woman who argued that she had been sterilised without her full and informed consent. Isaacs alleged that she was offered the opportunity to be sterilised when she undergoes her caesarean section, but declined. When she was admitted to hospital, she was presented with a pre-drafted consent form that was prepared based on her doctor’s admission letter. It indicated that she was to have a caesarean section and be sterilised. Isaacs refused to sign the consent form, indicating that she only wished to undergo a caesarean section and not a sterilisation. The nurse advised her to inform the surgeon of this change regarding the procedures, which she did not do. Isaacs only became aware that she had been sterilised when the theatre nurse held up a jar and showed her the severed portion of the fallopian tubes.

The court held that, in terms of the Act, written consent was required, which had not been obtained in this case. Nevertheless, obtaining written consent was, in practice, the function of the nurse and Dr Pandie could not be held liable for negligence for failing to confirm the contents of the consent document with Isaacs. The
court further held that in the event of the patient changing her mind, there would be a duty on the nurse to bring this to the attention of the gynaecologist. In coming to this conclusion, the court relied on expert evidence that it was not a common practice among surgeons to personally check written consent forms before operating.

**Government of Namibia v LM and Others**

In the *LM* case, 3 HIV-positive women claimed that they had been sterilised, without their voluntary consent, while undergoing caesarean sections in state hospitals in Namibia. The Namibian Supreme Court found that the written consent taken from the women did not mean that there was informed consent.[9] If practitioners are to rely on the *volenti non fit injuria* defence, they must be able to prove that all elements of the defence as set out in *Castell v de Greef* are present, including: disclosure of all material risks and voluntariness.[2] In this case, the court held that an obligation was placed on healthcare professionals to obtain consent from a patient: “... sterilisation allows time for informed and considered decisions ... health professionals are under an obligation to assess the patient and point out the risks involved in particular procedures so as to enable the patient to make an informed decision and give informed consent.”[10]

**Discussion**

Although the Act[6] is silent as to who ought to obtain informed consent from the patient wishing to be sterilised, we submit that the court in the *Pandie* case erred in suggesting that a surgeon may delegate this task to a nurse. We have five reasons for adopting this approach. Firstly, although the Act[6] does not specify where the legal obligation to obtain consent lies, the HPCSA guidelines are clear on this point. In *Jansen van Vuuren and Another NNO v Kruger*,[11] the then Appellate Division, when dealing with an HIV-positive patient’s right to confidentiality, held that patients have a right to expect that their medical practitioner complies with the professional guidelines. Given that the ethical guidelines require the surgeon to take responsibility for obtaining consent, regardless of whether they delegate part of this task, it was inappropriate of the court to suggest that liability could potentially be placed at the feet of the nurse. Secondly, in defending a civil claim, a surgeon is able to rely on the *volenti non fit injuria*. Thirdly, we recommend that hospitals develop standard operating procedures that ensure that there is space on the consent form for the surgeon to sign and make any notes they deem necessary regarding the consent procedure. This will ensure that the surgeon is aware of whether consent has been obtained in every case prior to the procedure being performed.

**Acknowledgements.** None.

**Author contributions.** This article is based in part on work contained in C J Badu-Y’s PhD thesis, ‘The coerced and forced sterilisation of women living with HIV in South Africa: A critical review of existing legal remedies’. The thesis is currently in the process of being examined (1 June 2018); A E Strode and P P Singh are C J Badu-Y’s supervisors.

**Funding.** None.

**Conflicts of interest.** None.

5. *Christian Lawyers’ Association v National Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T).

Accepted 31 January 2018.