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The doctrine of informed consent was introduced into South African law in 1994 by the case of *Castell v De Greef* [1994] 4 All SA 63 (C). It was previously discussed in the 1976 matter of *Richter v Estate Hammann* 1976 (3) SA 226 (C), but was only introduced into South African law almost 20 years later. It would appear that South African law fell behind the rest of the world in this regard. The matter of *Castell v De Greef* was decided at the dawn of South Africa's new democracy and prior to the promulgation of the Constitution, yet the issue of informed consent has not had much opportunity to be unpacked and examined fully by our judiciary. With ever increasing medical malpractice claims in a very consumer-friendly legal arena, informed consent has the potential to form a large part of the complaints and claims brought against South Africa's medical professionals. In order for medical professionals to avoid liability and also to ensure that their insurance cover fully protects them from the claims that could be brought against them, the medical practitioner has to secure the proper informed consent from each patient.

What is "informed consent"?

Ordinarily, when one person intentionally physically harms another person, that perpetrator can be charged with assault and would open themselves up to a civil suit for damages. However, when a patient consults with a doctor and consents to that doctor performing a medical procedure on the patient, the doctor would use the defence of *volenti non fit injuria*. This defence is where the effected party consents to a specific harmful act. However, in order for this defence to be utilised, five elements must be complied with:

- The injured party must have had capacity when consenting.
- The injured party must have had full appreciation of the risk of harm.
- The consent must have been given freely and voluntarily.
- The consent cannot be given for illegal purposes (such as murder).
- The consent must not have been revoked.

Therefore, a doctor cannot ordinarily be sued for any surgeries or treatments performed based on *volenti non fit injuria*, and consent is an intrinsic element of this defence. Consent utilised for this defence, by its very nature, as can be seen above, is based on the patient's understanding of the risk of harm involved in the treatment. Therefore the term "informed consent" places emphasis on the patient's rights to be fully informed of any treatment or procedure offered to

him. Once the patient is provided with all the information regarding his condition, the possible treatments plans available to him, the risk involved in those treatments, the possible consequences and costs of those treatments, only then will the patient be able to make an informed decision as to whether or not he wishes to undergo the medical treatment or not. "Informed consent" places an additional legal burden on the treating doctor to ensure that his patient has been provided with, and understands, the necessary information in order to make an informed decision and therefore provide his consent.

The development of informed consent and South African legal climate

In the matter of *Castell v De Greef*, where a patient sued her plastic surgeon after her double mastectomy, it was held that the plastic surgeon had not disclosed the risks involved with the mastectomy, and had the patient known of the inherent risks of the procedure, she would not have undergone the procedure. Judge Ackermann, after reviewing international law on the matter, stated:

"...I am of the view that there is not only a justification, but indeed a necessity, for introducing a patient-orientated approach in this connection."

From this case, informed consent has been given the right legal platform from which to develop. Informed consent encompasses a number of those rights enshrined in our Bill of Rights, including the right to bodily integrity; the right to freedom of religion, belief and opinion; and the right of access to information. It is for this reason that the legislature has legislated on this issue. We find this in sections 6, 7 and 8 of the National Health Act 61 of 2003 (the Act). Section 6 of the Act indicates the type of information and the manner in which such information must be relayed to the patient. Section 7 specifically states that no health service may be provided to the patient unless informed consent is obtained, and section 8 states that a user (patient) has the right to participate in any decisions regarding his or her body.

The parameters of informed consent

Where does informed consent begin and end? In order to examine the scope of informed consent, a hypothetical example can be used. Patient A has been advised by his doctor, B, that A has cancer in his right kidney. The procedure is explained to A who consents to the procedure. When B operates on A, he finds that the cancer has also spread to A's spleen. Does B remove A's spleen, or does B finish removing A's kidney and close A up, wait for A to become fully conscious and then explain to A the implications of the cancer in his spleen. Only then, with A's consent, perform another operation and remove the cancer from A's spleen. While it would seem more cost-effective and simplified solution for B to remove A's cancerous spleen while A is being operated on, this would give rise to a medical malpractice claim against B. Should the removal of A's spleen have been discussed with A as a possible complication prior to the initial surgery?

Having regard to the current legal position, patient autonomy is paramount. Section 7 of the Act provides the patient with the right to participate in any decision regarding his or her body. Therefore, doctor B would have to close patient A up, wait for A to be fully conscious, and then disclose to A his condition and all the treatment options, and then allow A to determine which

treatment he will undergo, or whether he will refuse treatment. Doctor B cannot make a decision regarding A's body and treatment, as this would infringe A's rights as entrenched in the Bill of Rights and as established in the National Health Act.

The outcome would differ if the facts were to change. During the same operation to remove A's right kidney, doctor B discovers that part of A's spleen has become so infected, that if left any longer, the infection could poison A's body and cause the rest of his organs to shut down. In this instance, B will be able to make the decision to remove the infected portion of A's spleen and use the defence of emergency for not first gaining A's consent. This is confirmed by the HPCSA's guidelines, which state that "In an emergency, where consent cannot be obtained, health care practitioners may provide medical treatment to anyone who needs it, provided the treatment is limited to what is immediately necessary to save life or avoid significant deterioration in the patient's health".

In exceptional circumstances (other than an emergency situation) a medical practitioner may decide to treat a patient's condition, which falls outside of the scope of informed consent, while the patient is unconscious. Should this occur, the treating doctor must inform the patient, as soon as he is conscious enough to understand and must be able to justify his or her decision if called upon to do so by the HPCSA. Therefore, although patient autonomy must be respected, where the patient's condition or life is in jeopardy, the medical practitioner is allowed to make the decision him or herself to ensure the patient's best interests are protected. Although informed consent has been entrenched by our law, very few cases have been decided on after those laws were enacted. Therefore, each case needs to be decided on its own facts.

Informed consent in South African case law

As discussed above, the first case to introduce informed consent into South African law was that of *Castell v De Greef*. The test that must be satisfied in order for informed consent to operate as a defence was established as follows:

- "(a) the consenting party 'must have had knowledge and been aware of the nature and extent of the harm or risk';
- (b) the consenting party 'must have appreciated and understood the nature and extent of the harm or risk';
- (c) the consenting party 'must have consented to the harm or assumed the risk';
- (d) the consent 'must be comprehensive, that is extend to the entire transaction, inclusive of all its consequences'."

However, in order for the patient's consent to be a full justification to avoid any wrongfulness, the treating doctor is obliged to disclose and discuss the material risks inherent to the treatment or procedure. In order to establish whether risks are material, Judge Ackermann provided a test, which reads as follows:

"...a risk being material if, in the circumstances of the particular case:

- (a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is; or
- (b) the medical practitioner is or should be reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it."

These tests, as established in *Castell v De Greef*, are to verify whether or not a patient gave the necessary informed consent and are used by the courts when they are called on, albeit infrequently, to determine the answer to that question.

The most recent case dealing with the issue is *Louwrens v Oldwage [2006] 1 All SA 197 (SCA)*. In the Cape High Court, where the matter was initially heard, it was established that the plaintiff sued the defendant on the grounds that the defendant had acted in breach of the obligation that arose between himself and the plaintiff. In 2000, the plaintiff consulted with the defendant, a vascular surgeon, for pain he experienced in his right leg and was diagnosed with a vascular disease after having received an angiogram. The defendant advised that the plaintiff should undergo femoro-femoral bypass procedure. After the procedure the plaintiff's pain did not subside and was diagnosed by a neurosurgeon as having a prolapsed disc. The plaintiff alleged that the defendant had not obtained his informed consent, as the defendant had not fully explained the risk of the procedure.

Furthermore, on the plaintiff's signed consent form, it was noted that the plaintiff consented to undergo a femoro-femoral by-pass operation whereas the defendant stated in evidence that the operation performed on the plaintiff was an iliac bi-femoral bypass. Judge Yekiso found that the defendant had failed to diagnose dual pathology and that he failed to obtain the plaintiff's informed consent. Therefore, the judge found the defendant had assaulted the plaintiff.

In the Supreme Court of Appeal, it was found that although the patient had consented to a "fem-fem bypass", as indicated on his consent form, and that he had undergone an iliac bi-femoral bypass, did not exclude the plaintiff's informed consent. The experts advised the court that the difference between the two procedures was of mere semantic value. The defendant had explained the procedure to the plaintiff and the procedure was done. It was also conceded that the iliac bi-femoral bypass was superior to that of the femoro-femoral bypass. The defendant was therefore successful in his appeal.

Conclusion

Although matters involving informed consent have not been seen by the South African courts on a regular basis, obtaining informed consent should be a high priority and routinely observed by the medical profession. In order to ensure their protection and ensure that they are not at risk, medical professionals need to adhere to the doctrine of informed consent. The HPCSA's has set out clear guidelines relating to informed consent and these should be adhered to in all instances.

While it is important for a medical practitioner to be thorough and to ensure that each patient understands the procedure, he must still be practical about the situation. Each case involving informed consent will be decided on its own merit, and as long as the medical practitioner is

vigilant and ensures that he understands his patient and that his patient understands what the practitioner is to do, then he is protected.

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