

## An introduction to aspects of health law: bioethical principles, human rights and the law

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Bioethical principles,<sup>1</sup> human rights and the law are interlinked. Aspects of the principles of autonomy, beneficence, non-maleficence and justice are included in the South African Constitution<sup>2</sup> and the country's statutory and common law. A breach of these ethical principles and the Constitution may lead to an action for medical malpractice or professional negligence.

In this paper, I explore the link between bioethical principles, human rights and the law.

### Autonomy, human rights and the law

The principle of patient autonomy recognises the duty of health professionals to respect the freedom of patients to make decisions for themselves.<sup>1</sup> Autonomy is recognised in the Constitution in the provisions regarding the right to bodily and psychological integrity;<sup>3</sup> the right to privacy;<sup>4</sup> the right to life<sup>5</sup> (which includes the right of mentally competent patients not to live by refusing treatment);<sup>6</sup> the right to freedom of movement<sup>7</sup> (e.g. the right of mentally competent patients to voluntarily discharge themselves);<sup>8</sup> and the right to freedom of religion and belief<sup>9</sup> (e.g. respecting a mentally competent patient's right to refuse medical treatment for themselves on religious grounds – but not necessarily to refuse treatment for their children in life-threatening situations).<sup>10</sup> Given that informed consent and confidentiality are cornerstones of medical practice, I shall focus on the right to bodily and psychological integrity and the right to privacy.

### Bodily and psychological integrity

According to the Constitution, everyone has the right to bodily and psychological integrity, which includes the right: (i) to make decisions about reproduction; (ii) to security and control over their body; and (iii) not to be subjected to medical or scientific experiments without their consent.<sup>3</sup> An infringement of these rights (e.g. by treating a person without his consent) would not only be a breach of his constitutional rights but also a breach of the National Health Act.<sup>11</sup>

The National Health Act<sup>5</sup> provides that, as part of informed consent, every health care provider must inform a user or patient, in a language the user understands, of (i) the user's health status – except where it would be contrary to the best interests of the user; (ii) the range of diagnostic procedures and treatment options available to the user; (iii) the benefits, risks, costs and consequences generally associated with each option; and (iv) the user's right to refuse health services, including an explanation of the implications, risks and obligations of such refusal.<sup>12</sup>

According to the National Health Act,<sup>13</sup> patients may only be treated without consent in emergency situations where: (i) failure to treat the patient or a group of people which includes the patient, will result in a serious risk to public health (e.g. patients with extremely drug-resistant tuberculosis); or (ii) any delay in the provision of treatment may result in the patient's

death or irreversible damage to his health while he has not expressly or impliedly or by conduct refused the service (e.g. refusing a blood transfusion for religious reasons). The latter provision mirrors common law.<sup>14</sup>

In common law, treating a patient without informed consent would be unlawful and would constitute assault.<sup>15</sup> In terms of common law, informed consent means that the patient must have: (i) the capacity to consent; (ii) knowledge of the nature and extent of the harm or risk involved in the treatment or procedure; (iii) an appreciation and understanding of the nature of the harm or risk; (iv) voluntarily consented to accepting the harm or assuming the risk; and (v) given a comprehensive consent extending to the entire transaction and its consequences.<sup>6</sup>

The term 'risk' in common law refers to 'material risk', which means that: (i) a reasonable person in the patient's position, if warned about it, would attach significance to it; and (ii) the attending doctor should reasonably be aware that the patient, if warned, would attach significance to it.<sup>6</sup>

### Privacy and confidentiality

According to the Constitution, everyone has a right to privacy which includes not having the privacy of their communications infringed.<sup>4</sup> A breach of confidentiality by a medical practitioner or other health care professional is clearly an impairment of a patient's right not to have the privacy of his communications infringed. Likewise, obtaining information about a person without his consent would amount to an invasion of privacy. For example, the failure to obtain proper consent to test a person's blood after he had voluntarily given a blood sample, was held to be a violation of the person's constitutional right to privacy.<sup>16</sup>

An invasion of privacy would also be a contravention of the National Health Act.<sup>5</sup> According to this Act, all information concerning a user of health services, including information relating to his health status, treatment or stay in a health establishment, is confidential. Such information may not be disclosed unless: (i) the user consents to the disclosure in writing; (ii) a court order or any law requires the disclosure; or (iii) non-disclosure of the information would represent a serious threat to public health.<sup>17</sup>

According to common law, it would amount to an actionable invasion of privacy to obtain information about a patient's health status, or to make disclosures about a person's health status, without his consent. For example, a doctor was held liable for invasion of privacy where, without the patient's consent, he disclosed the patient's HIV status on a social occasion to health professionals who were not treating the patient.<sup>18</sup>

### Beneficence, human rights and the law

The principle of beneficence recognises the duty of health professionals to do good for their patients.<sup>1</sup> Beneficence is recognised in the provisions of the Constitution that state that everyone has a right to life<sup>19</sup> (e.g. patients should be provided

with life-saving treatment where this is necessary);<sup>20</sup> access to health care within available resources<sup>21</sup> (e.g. HIV-positive patients should be provided with access to proper medication if they cannot afford it), including reproductive health care<sup>9</sup> (e.g. the right to obtain a legal termination of pregnancy);<sup>22</sup> children have a right to basic health care services<sup>23</sup> (e.g. babies born of HIV-positive mothers should be provided with prophylactic treatment);<sup>24</sup> and that everyone has the right of access to information<sup>25</sup> (e.g. access to their health records).

## Access to health care

One of the objects of the National Health Act is to protect, respect, promote and fulfil the rights of the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care.<sup>25</sup> Thus the National Health Act<sup>5</sup> provides that, subject to any conditions prescribed by the Minister of Health, the state and clinics and community health centres funded by the state must provide: (a) pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services; (b) all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services; and (c) women who qualify for a termination of pregnancy under the Choice on Termination of Pregnancy Act,<sup>26</sup> with free termination of pregnancy services.<sup>27</sup>

## Positive duties in common law

A common law example of the beneficence principle is where the law imposes a duty on certain people to act positively because: (i) of their prior conduct (e.g. the duty on a theatre sister to ensure that all swabs used in an operation are accounted for);<sup>28</sup> (ii) they have created a dangerous situation (e.g. the duty on a doctor to rectify the situation where a patient has been harmed through the former's professional negligence);<sup>9</sup> (iii) a statute imposes a duty on them to act (e.g. the duty on certain people, including health professionals, to report abuse in terms of the Child Care Act<sup>29</sup> or Aged Person's Act);<sup>30</sup> (iv) a special relationship exists between them and the other person (e.g. the doctor-patient relationship, or the duty imposed on prison authorities to provide ill prisoners with medical attention);<sup>31</sup> and (v) society would be outraged if they did not act positively to prevent harm to a person in danger (e.g. a psychologist not warning a woman that her ex-partner intends to kill her,<sup>32</sup> or a health worker not warning a patient that his partner is HIV-positive when, after counselling, the latter refuses to warn or take steps to protect the patient from becoming infected).<sup>33</sup>

## Non-maleficence, human rights and the law

The principle of non-maleficence recognises the duty of health professionals not to harm their patients.<sup>1</sup> Non-maleficence is invoked in the constitutional provisions dealing with the right of everyone to an environment that is not harmful to health or well-being;<sup>34</sup> and the provision that nobody may be refused emergency medical treatment.<sup>35</sup> Other constitutional provisions that promote non-maleficence include the right of people not to be treated or punished in a cruel, inhuman or degrading manner<sup>36</sup> (e.g. patients left to lie on the floor, or babies crammed into cardboard boxes instead of cots); not to be subjected to

medical or scientific experiments without their informed consent<sup>37</sup> (e.g. patients must be informed that a health service is for experimental or research purposes);<sup>38</sup> or not to be denied the right to practise their religion or culture or to speak their language<sup>39</sup> (i.e. health care personnel must communicate with patients in a language they can understand).<sup>40</sup> The provisions dealing with the environment and the refusal of emergency treatment will now be specifically considered.

## Environment not harmful to health and well-being

One of the objects of the National Health Act is to protect, respect, promote and fulfil the rights of the people of South Africa to an environment that is not harmful to their health or well-being.<sup>41</sup> In the health care environment, therefore, patients and health care personnel should not be exposed to situations which are harmful to their health or well-being. The National Health Act provides that health establishments must implement measures to minimise injury or damage to the persons and property of health care personnel working in such establishments, and must minimise disease transmission.<sup>42</sup> For example, hospitals should ensure that universal precautions are taken to protect their staff and the public from exposure to HIV infection, and make sure that when staff have been exposed to HIV (e.g. as a result of a needle-stick injury), prophylactic measures are taken to prevent seroconversion.

## Emergency medical treatment

The National Health Act,<sup>43</sup> like the Constitution,<sup>25</sup> stipulates that a health care provider, health worker or health establishment may not refuse a person emergency medical treatment; this applies to both the public and private sectors. For instance, if an indigent person who is not a member of a medical aid scheme is injured in a motor collision near a private hospital and requires emergency treatment, he would have to be stabilised by the private hospital before being sent to a public hospital. It would be unconstitutional for the private hospital to refuse the person emergency medical treatment on the basis of the person's inability to pay. Emergency medical treatment, however, refers to 'a dramatic sudden situation or event which is of a passing nature in terms of time' (e.g. a car collision or some other emergency matter) and not a chronic terminal illness such as kidney disease requiring dialysis.<sup>44</sup>

## Professional negligence

In common law, health professionals should not harm their patients through professional negligence,<sup>18</sup> for instance by failing to exercise reasonable skill and care<sup>45</sup> or omitting to warn a patient about certain symptoms.<sup>46</sup> Medical practitioners are judged by the standard of care that would be exercised by a practitioner reasonably in his branch of the profession.<sup>18</sup> The test is: how would a reasonably competent practitioner in that branch of the profession have acted in a similar situation?<sup>47</sup> In other words, would a reasonably competent practitioner in the position of the defendant have foreseen the likelihood of harm and, if so, would he have taken steps to prevent it from happening? If such a practitioner would have foreseen the likelihood of harm and taken steps to guard against it, and the defendant practitioner did not, the latter would be liable for negligence.<sup>48</sup> If the harm could not have been foreseen by a reasonably competent practitioner in the defendant's position, the latter would not be liable.<sup>49</sup>

A greater degree of skill is expected of a specialist than a general practitioner;<sup>18</sup> except in emergencies, a general practitioner will be negligent if he undertakes work that requires specialist skill which the practitioner concerned does not have.<sup>50</sup> The more complicated or dangerous the procedure, the greater the degree of skill and care required to be exercised by the medical practitioner concerned; failure to measure up to the required standard may result in professional and legal liability (e.g. using dangerous substances).<sup>51</sup> Courts will, however, take into account the resources available at the time. The health practitioner will be judged according to the standard that would be expected of a reasonably competent practitioner in the relevant branch of the profession faced with a similar shortage of resources.<sup>52</sup>

The degree of skill and care expected of a reasonably competent medical practitioner is a question of evidence,<sup>53</sup> but the courts will not rely on medical evidence alone to determine the risks involved.<sup>9</sup> Medical opinion not supported by logic will be disregarded by the courts, and professional opinion overlooking obvious risks will not be relied upon.<sup>54</sup> Courts – not the medical profession – will determine the standard of care to be exercised. Spurious defences may result in cost awards against the medical practitioner concerned.<sup>38</sup>

Courts have consistently refused to apply the '*Res ipsa loquitur*' (the facts speak for themselves) principle to medical negligence cases.<sup>18</sup> The principle allows the court to draw an inference of negligence if the plaintiff proves that the event that occurred does not usually occur unless somebody is negligent – a classic example is a swab left inside a patient's abdomen after an operation.<sup>18</sup> If the principle were to be applied in a swab case, the patient would merely have to prove that the swab was left in his or her abdomen, and the defendant surgeon or theatre sister would then have to give an explanation as to why they were not negligent. The courts, however, do not apply the dictum in such cases, and the burden is on the patient to prove that there was negligence on the part of the surgeon or theatre sister.<sup>18</sup> It has been suggested that the precept should apply to the medical profession because of the 'principles of procedural equity and constitutional considerations'.<sup>55</sup>

## Vicarious liability

Vicarious liability means that a person is liable for another person's wrongful act even though the first person is not at fault. Whether or not medical practitioners are vicariously liable for the acts or omissions of their assistants depends upon whether the latter are under their control regarding the manner in which they carry out their work.<sup>56</sup> In other words, the liability of practitioners will depend upon whether they tell their assistants what to do and how to do it. Where doctors employ their own assistants, they will be liable for any wrongs committed by such assistants during the course and scope of their employment. However, where assistants are employed by a health care establishment, doctors will only be vicariously liable if the assistants fall under their control. Thus, courts have held that theatre sisters<sup>18</sup> and anaesthetists<sup>57</sup> do not fall under the control of surgeons in theatre, and the latter cannot be held liable for their wrongful acts.

## Justice, human rights and the law

The principle of justice recognises the duty of health professionals to treat their patients equally and fairly. Justice and fair-

ness are enshrined in the constitutional principles of equality and non-discrimination<sup>58</sup> (e.g. patients of different racial, social or economic classes should be treated equally); the right to dignity,<sup>59</sup> and the right to lawful, reasonable and procedurally fair administrative action<sup>60</sup> (e.g. patients should be given written reasons for administrative decisions that deny them access to particular treatment).<sup>61</sup> Let us now consider the provisions regarding equality and non-discrimination and dignity in more detail.

## Equality and non-discrimination

The Constitution lists the categories of persons who will be presumed to have been unfairly discriminated against once they can prove discrimination.<sup>62</sup> In all other cases, the persons being discriminated against will have to prove that the discrimination is unfair. The listed categories are persons discriminated against on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>63</sup> A person who feels unfairly discriminated against may bring a civil action for damages.

The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>64</sup> lists the same categories of persons as are listed in the Constitution as 'prohibited grounds' for discrimination.<sup>65</sup> The Act goes further and states that 'prohibited grounds' also include any other grounds where discrimination on that ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; and (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on one of the listed grounds.<sup>66</sup> If discrimination did take place on one of the listed grounds or the additional grounds, there will be a presumption of unfairness.<sup>67</sup> The Act lists in a schedule examples of unfair practices in the health sector, such as unfairly denying or refusing any person access to health care facilities; failing to make health care facilities available to any person; and refusing to provide reasonable health services to the elderly.<sup>68</sup> A person who feels unfairly discriminated against may bring an action for redress in an equality court.<sup>69</sup>

The National Health Act provides that health care personnel may not be unfairly discriminated against on account of their health status.<sup>70</sup> However, the head of the health establishment concerned may, in accordance with any guidelines determined by the Minister of Health, impose conditions on the service that may be rendered by a health care provider or health worker on the basis of his or her health status.<sup>71</sup>

## Dignity

The right to dignity is protected in the Constitution<sup>72</sup> and is one of its core values.<sup>73</sup> The Constitution is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>74</sup> Therefore, a person whose dignity has been impaired may sue for a breach of their constitutional right to dignity.

In common law, a violation of a person's right to dignity is actionable; for instance, where a person has been subjected to insulting language<sup>75</sup> or insulting gestures;<sup>76</sup> unlawfully threatened with ejection from premises;<sup>77</sup> or compelled to expose their naked body to others.<sup>78</sup> In such instances, the injured person may sue the wrongdoer for damages, and in serious cases may also lay criminal charges.<sup>61,62</sup> For example, medical practitioners or

other health professionals who insult patients, unlawfully refuse to treat them and threaten to have them ejected from a hospital or surgery, or who humiliate patients by unjustifiably exposing their bodies or parts of their bodies to the view of others, may face disciplinary action or civil or criminal legal proceedings.

## Conclusion

Doctors should always follow the ethical principles of patient autonomy, non-maleficence, beneficence and justice; by doing so, they will be complying with the ethical rules of the Health Professions Council of South Africa, the Constitution, the National Health Act, other legislation, and common law. Ethical medical practice will protect doctors from both disciplinary action and the legal consequences of medical malpractice. Ethical practice across the medical profession also may have a beneficial effect on the premiums that doctors pay for professional indemnity.

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