



Government of the Republic of Namibia v. LM, et al.

(SA 49/2012) [2014] NASC 19

Country: Namibia

Region: Africa

Year: 2014

Court: Supreme Court

Health Topics: Health care and health services, Health information, HIV/AIDS, Hospitals, Informed consent, Sexual and reproductive health

Human Rights: Right to bodily integrity, Right to family life, Right to privacy

Facts

Three Namibian women who were all pregnant and HIV-positive were sterilized at State hospitals after giving birth. The women claimed they were sterilized without their informed consent, and that they were sterilized due to their HIV-positive status. The first woman said that her doctor (through her nurse) told her that all HIV-positive women must have their uteri removed before he would perform a caesarian section whilst she was pregnant. She signed consent forms, and only later did she learn what she consented to. The doctor and nurse argued that standing policy was not to sterilize anyone unless the patient herself requested it. The second woman had a similar story, saying that the nurse conditioned her caesarian section on her signing the consent forms. The third woman had complications with her eighth pregnancy, possibly due to her advanced age. She attempted to obtain an abortion, but she was too far along in her pregnancy to receive one. When the baby was due, she went to the hospital again, and the nurse gave her forms to sign during her contractions. All discussion was in English, a language the third woman did not speak. She claims she did not even know she was going to be given a caesarian section.

The medical professionals mostly did not have personal recollection of the respondents but were all adamant that sterilization is only done on the request of the patient and that informed consent was obtained in all cases. However, there were gaps in the notes that made it impossible to confirm whether these discussions occurred. All three women had inconsistencies in their stories, including about which doctors they met with, what they were told, what they were told to do.

The high court had found that the appellants had not met their burden to prove that the women had given their informed consent for the sterilization procedures but rejected the claim that the women had been discriminated against based on their HIV status.

Decision and Reasoning

The Court affirmed the high court's judgment finding that there was not informed consent prior to the sterilizations but that the sterilizations were not done due to discrimination on the basis of the women's HIV status.

First, the Supreme Court dismissed the relevance of most of the women's testimonies due to inconsistencies. For instance, one woman said in her evidence-in-chief that she had learned in school the difference between reversible and irreversible sterilization, but then on cross examination said she was not aware until after she was sterilized. As a result, it based its determination almost exclusively on the government's witnesses.

The Court found that the doctors' actions verged on medical paternalism. The Court noted how the doctors, especially for the third patient, seemed to have decided independently what would be best for the women. The Court noted that this is a direct violation of informed consent and wholly inappropriate for the serious decision of deciding whether to undergo sterilization. For the first woman, the Court determined that informed consent was impossible under the circumstances of being informed only after eight hours of labor. Even though it accepted the statements of the doctors and nurses, it was uncontested that the first woman went to hospital to give birth. She never contemplated that she might be sterilized, and to try and get informed consent for something she did not contemplate during the stress of pregnancy complications was improper. However, the Court distinguished the caesarian section, noting that she should have contemplated that she might get a caesarian section if complications arose.

For the second woman, the Court found that the doctors failed to fully inform the woman of the permanence of the procedure, making the informed consent insufficient. Moreover, whilst she may have consented to be sterilized at some point in the future, she went to the hospital on the occasion of her sterilization to give birth, not to be sterilized. To have her sign the consent forms during labor was then improper.

For the third woman, the Court came to the same conclusion. However, it noted that the fact that her procedure was reversible and her age advanced were relevant to the calculation of damages.

Decision Excerpts

“The possibility that she may undergo a sterilisation procedure in those circumstances [of being in labor for eight hours] could not be said, by any stretch of imagination, to have been within her contemplation as a reasonable or natural consequence of the delivery.” (Para. 90)

“Although the second respondent had evidently opted for sterilisation at some time in the future, she still had the opportunity to change her mind and her consent should not have been obtained at the height of labour when it was difficult to make a rational and informed decision.” (Para. 93)

“[I]t is crucial to determine whether the respondents had the intellectual and emotional capacity to give their informed consent in the light of the peculiar circumstances in which they found themselves when signing the consent forms.” (Para. 100)

“It can be accepted that the state of mind of the respondents at the time they signed the forms was not only affected by the labour pains but by other complications as well. The first respondent was diagnosed with CPD, the second respondent’s foetus was in a breech position, and the third respondent was in a prolonged first stage of labour. Both sides agree that as a consequence of these complications, the respondents had to undergo emergency operations and it is not seriously disputed that they were in varying degrees of pain at the time they signed the consent forms.” (Para. 102)

“There can be no place in this day and age for medical paternalism when it comes to the important moment of deciding whether or not to undergo a sterilization procedure. The principles of individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law.⁴ These principles require that in deciding whether or not to undergo an elective procedure, the patient must have the final word. Unlike some life-saving procedures that require intervention on a moment’s notice, sterilisation allows time for informed and considered decisions. It is true, as already mentioned, that 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. They may also make recommendations as to the management and/or treatment of a patient’s condition based on their professional assessment. However, the final decision of whether or not to consent to a particular procedure rests entirely with the patient. I emphasise that the term ‘procedure’ referred to here must not be understood as including emergency operations or procedures that doctors are obliged to perform on patients even without their consent if legal or medical grounds have been established.” (Para. 106)