

C v Minister of Correctional Services
1996 (4) SA 292 (T)

The High Court (South Africa) found that the Johannesburg Prison did not comply with the national strategy regulating HIV and AIDS in prisons. The prison's deviation from the norm of informed consent and the lack of pre-test counselling led the court to award damages to the plaintiff.

Excerpts

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Facts

During September 1993, and while the plaintiff was a prisoner in the custody of the defendant at the Johannesburg Prison, a blood sample was taken from the plaintiff which was later subjected to a test for the HIV virus. On the day in question the plaintiff was a member of a group of prisoners standing in a row in a passage in a hospital when he had been informed, together with the other prisoners, by K, a sergeant in the Department of Correctional Services employed as a medical health aid and as a nurse, that the blood test was for HIV and other transmissible sexual illnesses and that he had the right to refuse to undergo the test. This information was repeated to the plaintiff by K in the closed consulting room where the blood was taken, and in the presence of W, a prisoner assisting K with the drawing of blood. The plaintiff was accordingly fully aware that the test was, inter alia, for the HIV virus and that he had the right to refuse to be tested when he consented to undergo the test. The Department of Correctional Services had adopted the concept that informed consent was a prerequisite for testing prisoners and had specified what norms were applicable. This informed-consent policy as determined by the department had already been in operation by March 1993. In terms of those norms prisoners who had been involved in high-risk behaviour (prior to imprisonment the plaintiff had been involved in homosexual relationships which placed him in the high-risk category) had to receive pre- and post-test counselling by a competent member and the prisoner's informed consent had to be obtained prior to the HIV test being administered.

Pre-test counselling entailed informing the prisoner of the meaning of HIV infection; the manner of transmission of the disease; the nature of the test and that consent was required; the social, psychological and legal implications of the test; what was expected if the result of the test proved positive; and the prisoner had to be granted time to consider the information before consenting to the test being administered. In the event of a positive blood test post-test counselling required that psychologists, social workers and nursing staff be at hand to support the prisoner and to provide advice so that the result could be accepted. At the time that K took the blood sample of the plaintiff for the HIV test he had been unaware of the norm of informed consent adopted by his department. The plaintiff, who was subsequently advised that he had tested positive for HIV, instituted an action for damages in a Provincial Division against the defendant on the grounds of alleged wrongful invasion of his right to privacy.

Applicable law

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Members of the medical profession and others who have studied and worked with people who have tested HIV positive and with AIDS sufferers have developed a norm or recommended minimum requirement necessary for informed consent in respect

of a person who may undergo such a blood test. Because of the devastation which a positive result entails, the norm so developed contains as a requirement counselling both pre- and post-testing, the latter in the event of a positive result. These requirements have become almost universal in the Republic of South Africa.

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[T]he Department of Correctional Services has itself adopted the concept that informed consent is a prerequisite for testing prisoners and has specified what the norms are. They are in accord with the views and suggestions of all major contributors in this country. The official brochure and policy of the defendant's department is set out in a document appearing in the bundle bearing the title: 'Management Strategy: AIDS in Prisons.'

Paragraph 2.2 reads as follows:

'Possible HIV infected persons: Once a person has been exposed to HIV (by high-risk behaviour) he can contract the HIV infection. For a period of three weeks to six months, blood tests can be negative and this person will show no signs or symptoms of the disease. This is known as the window period. During this period an infected person can pass on the virus to another person. For this reason the person is considered to be HIV infected and must be treated in the same manner as a positive HIV infected person.'

Paragraph 5 provides:

'Pre- and post-test counselling to prisoners who are or were involved in high-risk behaviour prior to admission: All individuals who are identified as being involved in high-risk behaviour should be counselled. Pre- and post-test counselling is of the utmost importance and should be done by a competent member (see Counselling to Prisoners point 14). Informed consent must be obtained from a prisoner prior to an HIV antibody test being administered. If the prisoner refuses permission for the tests to be done, it must be brought under (*sic*) the attention of the medical officer.'

The relevant paragraph, or as it is here called 'point 14', reads as follows:

'14. Counselling to Prisoners

14.1 Pre-test: potentially HIV infected persons

A prisoner may experience anxiety if he believes he may be HIV infected. The purpose of pre-test counselling is to ensure that the prisoner is aware of: what HIV infection means, and is prepared for the progress of the infection; the manner of transmission of the disease and that high-risk behaviour must be avoided; the nature of the test and that his consent is required before the test can be administered; the social, psychological and legal implications of the test; and what is to be expected should the result of the test prove positive.

- The prisoner must be persuaded to avoid high-risk behaviour should the test be negative. The prisoner must also receive information to avoid the spreading of the disease if he is HIV infected.

- With the above information the prisoner could more readily give his permission for the test to be administered. However, the prisoner must be granted time to consider the information before he gives his permission for the test to be administered.

- Should the blood tests return a positive result the prisoner may be less shocked if he received pre-test counselling.

14.2 Post-test counselling: negative blood test result

Should the blood test return a negative result, the prisoner will most likely feel relieved and happy. This is a crucial time during which to inform the prisoner:

- that he must understand that prior to the test he was engaged in high-risk behaviour, and that his behaviour has to change;

- that a second test will have to be administered after three months to ensure that the result remains negative. The virus can be inactive for three months while tests are negative. This is known as the window period. During this time spreading of the infection can take place while the infected person is not aware of his infection.

- That he may need the help of a psychologist or social worker to help him/her to change his behaviour.

14.3 Post-test counselling: positive blood test results

Comprehensive counselling to prisoners who are informed that their blood tests have proved positive is vitally important. Whereas some prisoners will be relieved to know that they are HIV-infected, others will be shocked to realise that they are infected. Psychologists, social workers and nursing staff should be at hand to support the prisoner and to provide advice so that the result can be accepted.

Counselling must therefore be geared towards:

- helping the prisoner to accept the result;

- giving the prisoner guidance as regards breaking the news to relatives;

- giving advice as to the persons to whom the prisoner should disclose his condition;

- conveying the implications of any further pregnancies;

- convincing the prisoner that he can carry on with a normal life, as they are only HIV-infected and do not as yet have AIDS; signs and symptoms can take up to 10 years to manifest themselves; and

- convincing the prisoner to avoid high-risk behaviour, thus preventing the further spreading of the disease.'

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This then is the norm for informed consent adopted by the department itself.

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Application of law to facts

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Informed consent, as determined by the department itself, was already in operation in March 1993, five and a half months before the plaintiff was tested. No reason has been advanced why the Johannesburg Prison was not made aware of these norms before 1994 or, if they were, why Sergeant Kinnear was not made aware thereof. The fact is that Sergeant Kinnear did not apply them. ... The norm was laid down by the department and, as a prisoner, the plaintiff was entitled to the right of informed consent as determined by the department which controlled his incarceration in prison. It was not granted to him and it is obvious to what extent the consent obtained fell short of the informed consent laid down by the department itself.

Counsel for the defendant submitted that the deviation from the norm laid down by the department was minimal and not wrongful. That, however, depends on the circumstances and I refer to the following facts:

1. The first information about the test, its object and the right to refuse to submit to the test was communicated to the plaintiff as a member of a group of prisoners standing in a row in a passage. There was no privacy and little time to reflect.

2. No information on the right to refuse was communicated to each prisoner individually prior to his entering the consulting room.

3. What was repeated to each one of them in the consulting room was not said by anyone trained in counselling; it was also not said to each of them privately but in the presence of a co-prisoner, De Waal.

4. No reasonable time for consideration and reflection was accorded to each prisoner in the consulting room before he was asked whether he consented to the test.

Finding

In these circumstances the deviation from the accepted norm of informed consent, including the fact that there was no precounselling, was of such a degree that the deviation, in my view, was material and wrongful.

Remedy

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Had he received the pretest counselling postulated for informed consent, the emotional blow would, on the probabilities, have been diminished. That must be weighed against the fact that, as an intelligent person, he did *de facto* consent when he was told what the test was for and that he had a choice whether to subject himself to that test or not. Also to be weighed are the circumstances under which the plaintiff was asked to consent, to which I have referred.

I also take into account that, according to Lieutenant Warren, post-test counselling appears to have been successful.

Counsel for the plaintiff, in my view, correctly conceded that the plaintiff is entitled to not much more than nominal damages if the defence version of the facts is true.

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In all the circumstances I consider an award of R1 000 adequate.