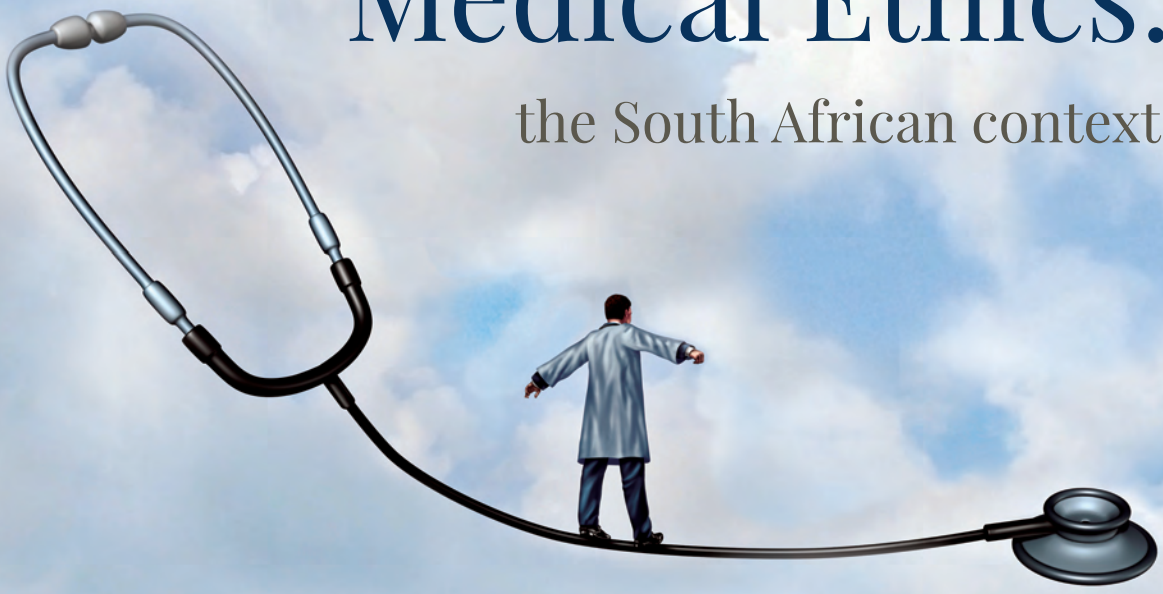
C. Jones, M. Kruger, J. van den Heever & A. van Niekerk (eds.). Challenges in Medical Ethics: the South African context. Stellenbosch: African Sun Media

# Challenges in Medical Ethics:

## the South African context



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# 1

# Law and Bioethics

Anita Kleinsmidt

"In civilized life, law floats in a sea of ethics" (Warren, 1962)

**Keywords:** conduct; confidentiality; dual loyalties; euthanasia; informed consent; intersection between law ethics; medical ethics; medical law; professional conduct; surrogacy

## 1.1 WHAT IS LAW AND WHAT IS ETHICS?

Although the answers may seem obvious, let us consider the questions of what law is, what ethics is, and which of the two takes precedence.

Laws consist of rules and guidelines which are enforced through social institutions to govern behaviour. Laws are made based on the moral values of a particular society. Laws represent the minimum standards of human behaviour expected in a society. Legal systems include penalties such as fines and imprisonment for breaches of the law, i.e., infringements of the law usually result in punishments of some kind. If, however, we agree with the normative content of a law, we would obey it even if there were no penalties. The same goes for disagreement with a law in the sense that we sometimes disobey laws when we disagree with them, even if there are penalties. This is aside from circumstances where we may disobey a law through necessity or if we believe that we can escape the consequences. We may ignore the costs of disobedience if a law is greatly at odds with our personal views on what is right (*SA History Online*, 2019).[1]

An ethical position results from a considered analysis or intellectual inquiry of whether an action is good or bad, inherently or in terms of its impact on others.

1 South Africa has a long history of protest against unjust laws, often with fatal consequences for protestors.



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Ethics and morality are often used interchangeably – morality describes the viewpoints held by a group or individual that certain behaviour is right or wrong. Ethics is often associated with professional practice, e.g., in health care, it has resulted in policies, guidelines, and codes of conduct (Hare, 2019).

The question then arises: where does law come from and why do societies have laws? Natural law theorists believe that natural law arises from nature, irrespective of the society under consideration. Thus, natural law may or may not be present in the legal rules of a society, but exists nonetheless, independently of whether it was incorporated into written legal rules. The concept of natural law was discussed by Aristotle in ancient Greece (384-322 BCE). Some concepts that were 'natural' to the ancient Greeks would be unacceptable or unnatural to us today, e.g., slavery and the subordination of women to men. The Stoics described a type of law that was linked to reason in the mind, and from which one could discern the best way to live, or a type of code of conduct (Horowitz, 1974). Thomas Aquinas, one of the most well-known early natural law theorists, theorised about an "eternal law" emanating from his god. He distinguished between natural law and customary law, or law arising from our conventions. In South Africa, we are familiar with the concept of African customary law arising from local customs and traditions. For Aquinas, the law should have both directive and coercive force (Finnis, 2021).

When we consider the rules of how we ought to live and whether law or ethics should take primacy, the social contract theory of Thomas Hobbes (1588-1679) is relevant to these questions. Social contract theory is the notion that we allow ourselves to be governed by certain laws and give up certain freedoms in exchange for order and predictability in society. This sacrifice of certain of our rights for the sake of consistent laws and social order is the social contract that we have entered into with the state. According to Hobbes, without the social contract, our lives would be lived in a "state of nature" and be "solitary, poor, nasty, brutish and short" (Hobbes & Plamenatz, 1991). This is because absolute freedom would include the freedom to commit wrongs against other members of society, e.g., murder and theft, and would result in an anarchic society without rules. In terms of this theory, government and its laws are not natural but result from arrangements such as elections and democracy, constructed by people. There are developments and early critiques of natural law and of social contract theory by philosophers such as Locke, Rousseau, and Rawls for the interested reader (Fosl & Baggini, 2020).

In contrast, utilitarian theories posit that what a society should strive for is the greatest good for the greatest number of people. We tend to find utilitarian ethical theories applied in public health arguments around the rationing of scarce health



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resources, as occurred in the *Soobramoney* case, discussed below, about access to dialysis in a public hospital. Some social contract theorists stipulate that we do not in fact yield complete control to governments and laws – there are certain implied conditionalities in the social contract. There is an assumption when we yield control to the state, that its laws are consensual, just, protect certain of our rights, and that there should be processes to meet these ends (Barnett, 1998). These conditions are important when we consider that the system of apartheid in South Africa was underpinned by a comprehensive system of laws and procedures for voting, health care, education, property ownership, expropriation of property, job reservation, access to schools and universities, ability to reside and travel in certain areas, etc. To put it simply, what is legal is not necessarily ethical.

## 1.2 WHAT ARE RIGHTS?

When we consider law and bioethics, we inevitably look to the nature of rights. This is especially so in a constitutional democracy such as South Africa's. Some theorists state that we do not possess absolute rights. Rather, to have a right means to have a *claim* to be *protected* from certain *harms*, while other rights are claims to be *provided* with certain *benefits* (Wenar, 2021). The former are *negative* rights, the latter are *positive rights.*

Rights impose moral and legal constraints on collective social goals, e.g., a patient's right to refuse treatment trumps a doctor's ethical duty to act in the patient's best interests. Rights can clash with ethical theories but also with other rights. An example of a clash of rights might be where a patient has a right of access to health care, but a doctor has a right to freedom of religion which interferes with the patient's access (Amnesty International, 2017). The SA Constitution requires that where there are opposing rights, we must carry out a "weighing up of rights" or proportionality review to assess whether a limitation of any right in favour of another is lawful (Rautenbach, 2014).

### 1.2.1 Types of rights

Rights can be classified according to their form, their function, who has them, or why someone might have them. Below, we have a basic system set out by Hope, Savulescu and Hendrick (2003):

- Claim rights*:* the subject of the right has a claim against another, e.g., claim in contract for sale of house;
- Liberty rights: the protective perimeter of duties on others not to infringe those rights, e.g., property rights;



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- Powers rights: rights conferring powers to do things; and
- Immunities rights: rights conferring protection from others, e.g., the right to join a trade union against which the employer cannot object.

### 1.2.2 Human rights

In South Africa, given our political history, we often speak of human rights. Human rights are entitlements that people can claim relating to their basic needs because they are human. In the past, people were treated differently according to caste, religion, age, and gender. Bodily integrity was not respected – slavery persisted *de jure* until the late 1800s (Bales, 2004). Ideas about social equality and non-discrimination started to emerge in the 19th to 20th century. After World War II and Nazi atrocities, human rights were given international legal recognition. In 1948, the Universal Declaration of Human Rights was signed by all countries and enshrines human rights into international soft law.[2] Natural rights are negative rights, but human rights also include positive rights. Negative rights restrain conduct and positive rights place obligations on us to act in a certain way.

### 1.2.3 Opposition to rights theories

Not all philosophers find the concept of rights to be useful in ethical analysis. Jeremy Bentham (1843), in a famous attack on natural rights, stated:

> Right … is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.

According to Bentham, rights come from law and legal rights are to be respected when they lead to the greatest happiness of the greatest number, which is the foundation of morals and legislation. He preferred the term "securities against misrule" to rights that he was concerned would give power and acceptability to those acting out their personal desires (Schofield, 2003).

Real rights are established through a legal system that should aim for the greatest good for the greatest number. In society, laws are made in the general interest. The ends or objectives that the legislator should seek to attain are *security*,

2 Soft law means that an international declaration or treaty is only legally binding when it has been adopted into the law of a country, or "domesticated". Soft law has weak binding force.



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*subsistence*, *abundance,* and *equality* (Bentham, 1843). Later critiques of human rights focus on their legitimacy in non-Western societies and on the imposition of Western power structures using the language of rights (Langford, 2018).

### 1.2.4 Interest-based theory of rights

Joseph Raz promotes perfectionist liberalism – an objective theory of the good life, or of human well-being and the belief that it is the business of the state to promote the good life of its citizens (Nussbaum, 2014). The theory is summarised below:

> My having a right to X means that I have an interest-based reason sufficient for imposing on others a duty to protect or promote my achieving X.
>
> To say that X is in a being's interest is to say that that being, on reflection, would thrive and flourish were it to have X.
>
> To say that X is in a being's interest is to say that that being, on reflection, would thrive and flourish were it to have X.

If the state is to promote the well-being of its citizens, it also has to intervene with citizens' actions that are not conducive to their well-being. Most perfectionist liberals try to avoid this by showing that paternalist state action is self-defeating, i.e., they try to show that the best way for the state to promote the well-being of its citizens is to restrain itself and let each individual strive for their good by themselves. Others hold that liberalism is compatible with some amount of paternalism.

## 1.3 SOURCES OF LAW

The law in South Africa emanates from several sources. These are the Constitution, Roman-Dutch law, English law, African customary law, academic writing by highly regarded legal authors, legislation (Acts and regulations), and the common law. The common law consists of legal precedents established by the courts in their judgements, as opposed to Acts that are created by Parliament. Roman-Dutch law consists of law principles created by 16th century Dutch jurists who wrote commentaries on Roman law. Roman-Dutch law was brought to the Cape Colony during the period of Dutch colonisation. Its influence remains in the law of persons, contract law, and the law of delict. Our common law system of precedent requires that judgments of higher courts, such as the Supreme Court of Appeal, must be followed by lower courts, such as High Courts in the provinces. In some instances, international law is also considered, as allowed by section 39(1)*(b)* of the Constitution.



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It is important to note that all laws must be consistent with our Constitution and its values. Any law or policy that is inconsistent with the Constitution is invalid in terms of its section 2. The Constitution was drafted following widespread consultation and public constitutional forums throughout South Africa. In contradistinction to South Africa's pre-1994 dispensation, the Constitution promotes the values of dignity, equality, transparency, just administrative action, etc. The current constitutional democracy in South Africa replaced the system of parliamentary sovereignty inherited from the United Kingdom. South Africa became a self-governing dominion of Britain in 1910 (*SA History Online*, 2020). The influence of British law is most obvious in our laws of procedure and evidence. The distinguishing feature of the system of parliamentary sovereignty was that as long as the proper procedure was followed in making laws, their content or long-term effects could not be called into question. This of course resulted in many ethical quandaries for judges who were expected to apply laws that they disagreed with (Dugard, 1984). The South African constitution recognises customary law in section 39(2), but all laws "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Thus, customary practices that are unfairly discriminatory, e.g., on the basis race or gender, would not be enforceable in South Africa.[3]

## 1.4 HOW LAWS ARE MADE

If a department, e.g., the Department of Health, decides that there is a need for legal regulation in a certain area of health, they will draft a bill and present it to Parliament. The bill will go through several consultative processes before it can be signed by the President of South Africa and become an Act. These processes include the publication of the bill for public comment, parliamentary portfolio committee hearings, and hearings by provincial legislatures. Statute law must be passed by both 'houses', the National Assembly, and the National Council of Provinces (NCOP). The state attorneys in the office of the President also assess whether new laws will pass constitutional muster, i.e., that they conform to the Constitution before the President signs them into law. Acts or statute law bills dealing with financial and revenue matters have a more complex process.[4] Even after the President has signed an Act, it must be promulgated in the *Government*

3 In the 2005 case of *Bhe v Magistrate, Khayelitsha*, the Constitutional Court held that the traditional system of excluding female heirs from intestate succession was incompatible with the equality and dignity sections of the Constitution.

4 This flow chart is a useful source describing law-making: https://www.parliament.gov.za/how-law-made



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*Gazette* to become operational. Some Acts become operational in stages as government proceeds to set up systems for implementation.

In some instances, the South African Law Reform Commission may recommend new laws in light of a situation or a prevailing ethical problem. The Commission's report and proposals on euthanasia are good examples of such recommendations, although their suggestions were not implemented (SALC Project 86, 1998). Some Acts have their origin in Green Papers. In this process, an issue is identified by a government department and a discussion document, the Green Paper, is published for public comment and input by interested parties. This may lead to a White Paper on government policy, again published for public comment. In some cases, this process results in a bill which then follows the required parliamentary process for draft legislation.[5]

## 1.5 EXAMPLE OF AN UNPROCEDURAL LEGISLATIVE PROCESS

Since 1994, the legislative process in South Africa has been characterised by transparency and public consultation as required by the Constitution. In the 2006 case of *Doctors for Life v Speaker of the National Assembly*, Doctors for Life, the applicants, successfully challenged the validity of the Choice on Termination of Pregnancy Act (and certain other health-related legislation) because the NCOP had not invited written submissions and conducted public hearings as it was supposed to on four bills including the Choice Act (*DFL v Speaker*). The National Assembly had, however, followed the correct procedure. The Constitutional Court ruled that the invalidity of the Act was suspended for 18 months for Parliament to remedy the procedural defect by following the correct procedure and holding public hearings at provincial legislatures.

The issue of abortion is an interesting one, illustrating the intersection between ethics and law. The laws and policies of South Africa promote reproductive rights and access to abortion. Opponents of abortion initially attacked access by questioning the legal status of the foetus. When this was unsuccessful, they moved their focus to procedural matters such as NCOP consultation and they later attempted, also unsuccessfully, to insert other procedural requirements such as compulsory counselling and ultrasound. In the case of foetal legal status, the Court would not be drawn to pronounce on the ethics of abortion but instead analysed the arguments in relation to the provisions of the Constitution.

5 See https://pmg.org.za/page/legislative-process for a detailed description of this process.



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## 1.6 CRIMINAL AND CIVIL LAW IN THE MEDICAL PROFESSION

There are several branches of the law. In this section, we consider two – criminal and civil law, in the context of the medical profession.

Criminal law is a branch of public law where the state takes action against an individual, following a police investigation. The state must prove that the accused person is guilty "beyond reasonable doubt" and the accused must attempt to raise doubt about their 'guilt' to escape conviction. The use of criminal proceedings in medicine has increased and become a controversial issue, with the Medical Protection Society (MPS) calling for the state to desist from launching criminal proceedings against doctors (Howarth, 2021; Ladher, 2018). Note that in medical negligence matters, a doctor can in theory be called upon to defend themselves at three levels simultaneously: civil proceedings, criminal proceedings, and disciplinary hearings at the Health Professions Council of South Africa (HPCSA), the regulatory body for health professionals. Howarth of the MPS recommends that criminal proceedings only be brought in cases where "there was clear recklessness" and "the clinician does what no other clinician would do under the circumstances" (Howarth, 2021).

Currently, criminal charges can be brought against a medical practitioner when they have been negligent even though not reckless, i.e., they should have foreseen the harm that would result from their conduct or failure to act as they should, but they did not foresee the consequences, and harm ensued. There have been a number of recent cases of criminal charges being brought against doctors (*MedicalBrief*, 2021). These include charges against a paediatric surgeon and an anaesthetist following the death of a child after routine laparoscopy and against an obstetrician after the death during delivery of the pregnant woman (Lerm & Stellenberg, 2022). This is a conspicuous development in criminal law, as medical negligence matters have unfortunately been very common in the civil law environment, with burgeoning medical negligence claims against the state totalling R111.5bn in March 2020 (Bateman, 2021; Pienaar, 2016; Planting, 2021).

In medical ethics and law, civil actions usually occur around medical negligence actions. While criminal law involves action by the state against a person, civil actions involve one person, the plaintiff/applicant, bringing an action against another person, the defendant/respondent. The plaintiff must prove their case on a balance of probabilities. This is an easier standard to meet than in criminal matters, where the case must be proved "beyond a reasonable doubt". In civil



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matters, plaintiffs can claim damages, which may be for intangible harm such as pain, suffering, and the loss of amenities of life, e.g., the ability to enjoy certain hobbies. Compensation can also be for loss or damages which can be computed, known as patrimonial loss, such as for lost earnings due to the harm caused and medical expenses, past and future (Oosthuizen & Carstens, 2015).

In South Africa, obstetricians in private practice are struggling with unaffordable costs for professional indemnity insurance of around R1m per annum per practitioner (Erasmus, 2017). The reason for this exorbitant amount is that claims for high-severity injuries during the birth process, e.g., birth asphyxiation leading to brain damage lead to claims for lifelong medical care, specialised physiotherapy, occupational therapy, future pain and suffering, adaptive devices, and specialised education (Planting, 2021). This has of course led to an exit from the profession and situations where there are no practising obstetricians in private practice in small towns (Howarth & Carstens, 2014).

## 1.7 ETHICAL PRINCIPLES BECOME LAW AND POLICY

We have seen that ethical theories and legal systems have different origins but that laws are based upon certain ethical or value positions that we hold in society and that we want enforced, with sanctions for breaches of those legalised ethical boundaries. This applies squarely to the field of medical ethics. The ethical values of informed consent, confidentiality, and aspects of medical professionalism are examples of ethical principles which have become part of South African law.

### 1.7.1 The doctor-patient relationship

The age-old concept of the doctor-patient relationship is an instance of ethical requirements finding their place in law. There is an implied contract between the doctor or the provincial hospital authority and the patient. The doctor has a duty of care: to diagnose and treat according to generally accepted medical procedures in the patient's best interests. This ethical and legal duty will be limited in certain respects: by the availability of resources as well as the fact that patients can refuse care against their best interests. In private institutions, the contract is written, explicit, and signed. In terms of section 27(3) of the Constitution, no one may be refused emergency medical treatment. This means that even private health facilities must stabilise and provide emergency care, even to indigent patients. Once the patient's condition has been stabilised, they may move the patient to a public hospital.



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### 1.7.2 Doctors' professional conduct

What is the difference between unprofessional conduct and negligence? Unprofessional conduct is not necessarily negligent, e.g., being rude to a patient may be unprofessional but it is not negligence. Negligence is conduct that the reasonable doctor would not have carried out. If there was a risk that the reasonable doctor would have foreseen and taken steps to avoid, but another doctor did not, that doctor was negligent. If that conduct caused damages of some kind to the patient, there are grounds for a medical negligence claim. Patients may choose to bring civil claims for medical negligence while they also lodge complaints of unethical or unprofessional conduct with the HPCSA. These complaints will first be assessed by the HPCSA's ombudsman, before being investigated by the HPCSA's relevant Professional Board for that area of medical practice.

### 1.7.3 Informed consent

This ethical concept is central to the health professional-patient relationship. Informed consent is based upon the ethical principle of respect for autonomy, in contradistinction to the 'doctor knows best' approach of earlier paternalistic times in medicine. Informed consent was first raised in medical case law in the United States in 1905 (*Mohr v Williams*). In South Africa, in 1926 already, the courts considered the importance of respect for patient autonomy (*Stoffberg v Elliot*). The common law principles relied upon were later set out in the Constitution and in the National Health Act. The patient can consent expressly or tacitly. Informed consent is now a central tenet of medical law. Section 6 of the National Health Act and section 12(2) of the Constitution both mandate informed consent which consists of providing information on

- the health status (unless this is not in the patient's best interests);
- the range of procedures and treatments available;
- the benefits, risks, and consequences of the procedures and treatments; and
- the right to refuse implications and risks.

In terms of section 7 of the National Health Act, there are exceptions to the requirement of informed consent. These are

- ***failure to treat will result in a serious risk to public health;***
- if the user is unable to give consent but consent has been given by a proxy; and
- lack of treatment will result in death or irreversible damage and there has been no prior refusal.



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In many areas of biomedical ethics, there are corresponding areas of law, policies, and guidelines.

**TABLE 1.1** Corresponding areas of law, policies, and guidelines in biomedical ethics

| Ethical issue | South African law |
|---|---|
| Circumcision of children | ▪ Children's Act 38 of 2005: section 12 |
| Confidentiality | ▪ National Health Act 61 of 2003: section 14<br>▪ The Constitution: section 14 |
| Euthanasia | ▪ The crime of murder: Schedule 3 to the Criminal Procedure Act 51 of 1977 |
| Informed consent | ▪ National Health Act 61 of 2003: section 7<br>▪ The Constitution: section 12 |
| Professionalism | ▪ HPCSA Ethical Guidelines for Good Practice in the Health Care Professions |
| Research ethics | ▪ National Health Act 61 of 2003: section 11<br>▪ Department of Health Guidelines: Ethics in Health Research |
| Stem cell use | ▪ National Health Act 61 of 2003: sections 56, 57, and 68 |
| Surrogacy | ▪ Children's Act 38 of 2005: chapter 19 |
| Termination of pregnancy | ▪ Choice on Termination of Pregnancy Act 92 of 1996<br>▪ Department of Health National Guideline for the Implementation of the CTOP Act |

## 1.8 FROM ETHICAL PRACTICE TO LAW: LEGAL CASES INVOLVING THE INTERSECTION BETWEEN ETHICAL PRINCIPLES AND THE LAW

In the summaries that follow, we illustrate the ethical values involved in various cases, where doctors, patients, and the state resorted to legal action to enforce moral principles embedded in the law.

- ***Traub v Administrator Transvaal, 1989: Duty to employer v duty to the patient***

This matter dealt with the right to be heard and the principle of legitimate expectation. The facts were that the provincial director of hospital services in the Transvaal (Gauteng) refused to appoint or re-appoint six qualified medical professionals as senior house officers. These doctors were refused employment by the director, despite recommendations by their Head of Department, because they had signed a letter exposing the conditions in medical wards at Baragwanath Hospital. There were insufficient beds, patients were sleeping on the floor, there was "horrendous overcrowding", and insufficient nurses were allocated to the wards. The doctors had refused to sign an apology as demanded by the



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provincial administrator. Most of the doctors had signed the apology to avoid personal victimisation. The six doctors had not been given a hearing before being refused employment. Given that this was a departure from the usual process where a HOD's recommendation was acted upon, the doctors had a legitimate expectation of a fair hearing before a decision on the appointments was taken. The decision of the administrator was overturned, and the administrator also lost their appeal.

This is a case of a dilemma known as dual loyalties: where there is a conflict of interest between the doctor's accountability to two or more different entities. In this case, the doctors were under ethical and professional duties to care for their patients and to report abuse but also needed to progress professionally. Another example is the threat of disciplinary action against Dr Tim de Maayer, who wrote an open letter to the Department of Health describing the dire and often fatal effects on children of the poor management at Rahima Moosa Hospital in Gauteng province (McQuoid-Mason, 2022).

- ***Jansen v Kruger, 1993: Doctor's duty of confidentiality to patient***

In the case of *Jansen v Kruger*, we find the court deliberating on the doctor's duty of confidentiality to patients, especially patients with HIV. Medical confidentiality is an age-old concept, mentioned already around 3-5 BCE and later included in the Hippocratic Oath: "[W]hatsoever I shall see or hear in the course of my profession as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets" (Hippocratic Oath). The basis of this principle is that in order for a health practitioner to properly treat a patient, that patient must be able to freely disclose their symptoms without fear of disclosure. This is especially so in the case of diseases carrying social stigma such as sexually transmitted illnesses. In this case, in a small town, the doctor disclosed the patient's HIV status to a GP and to a dentist while playing golf. The patient had specifically asked the doctor not to tell anyone and the doctor had agreed to respect his privacy. Word spread quickly, and the patient soon discovered that his HIV status was being discussed in the social circles in the town. He launched a lawsuit that was unsuccessful in the High Court. He passed away, but his deceased estate continued with the matter and was successful upon appeal.

- ***Soobramooney v Minister of Health, 1998: Allocation of scarce lifesaving resources***

Mr S was a 41-year-old man with diabetes, ischaemic heart disease, cerebravascular disease, and in the final stages of chronic renal failure. He sought renal dialysis



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to prolong his life, but hospitals can only dialyse limited patients and they have to ration the dialysis equipment for patients who are eligible for kidney transplants. Mr S did not qualify under their criteria but sued them on the basis of his right to emergency care, section 27(3) of the Constitution. Why did he not use section 27(1) of the Constitution, the "access to healthcare services" section? Section 27(1) is subject to the "progressive realisation" clause, i.e., there is a recognition that South Africa does not have sufficient health resources to meet the needs of patients but must work towards progressively building itself up in order to meet those needs. Section 27(3), which he tried to use, is an entitlement to immediate emergency care, but the Court found that chronic dialysis is not emergency care. His legal team used the emergency care section because it is not subject to progressive realisation. The Constitutional Court agreed with the utilitarian analysis used by the hospital for allocation of scarce resources. The Court found that the hospital had a rational plan to maximise the utility of its dialysis machines. The plan excluded access to people like Mr S, who would need dialysis indefinitely. They only dialysed those who had reasonable prospects of recovery, i.e., the principle of the greatest good for the greatest number was applied. In this matter, the principles of beneficence and non-maleficence clash with justice and utility.[6]

- ***Christian Lawyers Association v Minister of Health, 1998: Constitutionality of abortion law***

Despite abortion being widely recorded and practised in the ancient world, the morality of abortion is still one of the few intractable issues in ethical discourse (Peterson, 2012). In the 1800s in the US and parts of Europe, abortion went from being a woman's private matter to becoming a criminal offence. Until 1869, the Roman Catholic Church had allowed abortion before "quickening".[7] In South Africa, the Choice on Termination of Pregnancy Act was enacted in 1998 and, consequently, maternal deaths from sepsis were reduced by 91% (Jewkes & Rees, 2005). Since the Choice Act was implemented, it has faced several challenges from parties that are ethically opposed to it. Initially, these challenges were to the substance of its rights, and later, when the constitutional issues were clarified,

6 This illustrates a significant problem with the principlist approach to ethics where clashes between different principles often result in defaulting to a doctor-knows-best position. In this case, as in many resource-constraint ethical dilemmas, the court used a utilitarian analysis. For more on the lack of action-guidance in principlism, see Lewis and Schuklenk (2021) and Lee (2010).

7 In 1591, Pope Gregory XIV determined that "quickening or ensoulment" took place at 166 days of pregnancy. In 1869, Pope Pius IX stipulated excommunication for abortion at any stage (Noonan, 1965).



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on procedural issues aimed at reducing access to abortion. An example, in 1998, was a case where the Christian Lawyers Association of South Africa brought an application against the Minister of Health to have the Choice Act struck down in its entirety. Their arguments were that the foetus has the right to life in terms of section 11 of the Constitution from the moment of conception and the Choice Act is therefore unconstitutional. The Court stated that it is not "the function of this Court to decide the matter on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation of section 11". The Court agreed with the Canadian Supreme Court that "[m]etaphysical arguments may be relevant but they are not the primary focus of the enquiry".[8] Instead, the Court analysed the meaning of the words "child" and "everyone", the legislative history of the Constitution, and anomalies which might result, to decide whether the phrase "everyone has a right to life" applied to a foetus. It found that it did not. Thus, the Court did not debate the ethics of abortion, but analysed whether the right to life in the Constitution was applicable before birth.

- ***Naude & Von Mollendorff v MEC Health, Mpumalanga, 2008: Provision of antiretrovirals in the age of AIDS denialism***

In the cases of Dr Malcom Naudé and Dr Thys von Mollendorff, there was a clash between their ethical duties to treat their patients with the best treatment available at the public hospital where they worked, and the instructions of the MEC for Health, Sibongile Manana (Bateman, 2008). The MEC had instructed that no doctors were to administer antiretrovirals as prophylaxis to rape survivors to prevent HIV infection. At the time, an NGO at the hospital was providing the medication free of charge, together with post-trauma counselling and care packages. Antiretroviral prophylaxis had already been scientifically proven to reduce HIV infection if administered within 72 hours of the rape. Manana even refused to make exceptions for child rape survivors (*Naude v MEC Health*). However, at the same hospital, staff who experienced needlestick injuries were allowed to follow a protocol of antiretroviral prophylaxis to reduce HIV infection. Von Mollendorff, who was the medical superintendent at the time, refused to prohibit the doctors at his hospital from providing effective prophylaxis to rape survivors. Both Naudé and Von Mollendorff were dismissed. Both doctors received substantial financial settlements after years of torturous legal battles in which one of the courts described their actions as that of "a deep-seated belief in the doctor-patient relationship" and "professional conscience and ethics" against the MEC's "irrational policy" and "dictatorial and tyrannical management style" (*Naude v MEC Health*).

8 Quoting the Canadian Supreme Court in *Tremblay v Daigle* (1989) 62 DLR (SC).



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- ***Theron v Department Correctional Services, 2007: Professional duty to prisoner patients v duty to employer***

Doctors providing medical care to prisoners have for long been exposed to ethical dilemmas rising out of dual loyalties conflicts. Not all doctors or professional medical organisations put their duties to patients before the interests of their employers. In the Steve Biko case, it was clear that the doctors had placed their allegiance to their employer, the police services, above their professional ethical duties to their patient who died after being assaulted by the police.

In the case of Dr Paul Theron, the situation was reversed. He was severely penalised for reporting on the poor medical conditions at Pollsmoor Prison in 2007. The Inspecting Judge for Prisons is tasked with visiting and reporting on prison conditions, therefore, prisoner health care fell squarely within the remit of the Inspectorate. Dr Theron correctly believed that it was his ethical duty to inform the Inspectorate of sick or wounded prisoners being denied adequate health care. The Minister of Correctional Services launched a defamation suit against the doctor, and he was also suspended from work (ODAC [Open Democracy Advice Centre], 2015). Even when the Labour Court ordered his reinstatement, the prison guards barred his entry. Dr Theron was never reinstated at Pollsmoor Prison but transferred elsewhere. Despite the existence of the "whistleblower" law, the Protected Disclosures Act 26 of 2000, the doctor in this matter found himself being penalised by a large government department with deep pockets for acting according to his ethical conscience and his professional duty to his patients.

- ***Stransham-Ford v Minister of Justice, 2015: Physician-assisted suicide***

Euthanasia, like abortion, is one of the few ethical issues that are intractable to resolution through analysis and discussion. Euthanasia is illegal in South Africa despite progressive recommendations for legal change by the SA Law Reform Commission in 1998 (SALC Project 86, 1998). Proponents of euthanasia or physician-assisted suicide are concerned with alleviating human suffering caused by terminal illness and promoting dignity and autonomy in the dying process.[9] Opponents of euthanasia cite concerns around pressure on the poor and elderly, devaluation of human life, rifts in the doctor-patient relationship, and reduction in palliative care.

9 There are countries which allow assisted suicide in the absence of terminal illness. The procedural safeguards differ from country to country and usually involve requirements such as citizenship, mandatory waiting periods, diagnosis, repeated requests within certain time periods, assessment by independent doctors, physical or psychological suffering, etc.



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In the Stransham-Ford case, we find a clash between the ethical position of the applicant, Advocate Stransham-Ford on euthanasia, and the criminal law in South Africa. Stransham-Ford had terminal stage-4 cancer and although he had tried palliative care, alternative remedies, and mainstream medicine, he continued to suffer in the final weeks of his life (McQuoid-Mason, 2017). He applied to the High Court which gave a ruling that his doctor would be allowed to assist him to commit suicide and the doctor's conduct would not be unlawful. Unbeknown to the judge and Stransham-Ford's lawyers, he had died a few hours before the ruling. When the judge gave reasons for his judgment four days later, he knew of Stransham-Ford's death but stood by his order. However, this judgment was overturned upon an appeal brought by the Ministers of Justice and Health, the HPCSA, and the National Director of Prosecutions. Two of the various reasons given were that (i) Stransham-Ford's death removed the cause of action and (ii) the issues of physician-assisted suicide and euthanasia were best left to the legislature, Parliament.

There has been a litany of cases in South Africa dealing with voluntary active euthanasia and assisted suicide with light sentences handed down for what is technically the crime of murder, as judges are forced to apply the criminal law as it stands, while at the same time having compassion for the suffering of the parties involved.[10]

- ***EJ v Haupt, 2022: Surrogacy arrangements***

In a surrogacy pregnancy, the pregnant woman is usually not genetically related to the foetus conceived by artificial insemination. This method of conception can be used by infertile or homosexual couples to have children that are genetically related to one of them. In some instances, the ova of the surrogate mother are used. Technological advances in reproductive technology have led to ethical and legal debates around parental rights and the 'appeal to nature' fallacy. This fallacy states that the fact that something happens naturally has normative value. In the case of surrogacy or in vitro fertilisation, the argument would be that the conception process is unnatural and therefore unethical or bad. This fallacy is easy to debunk with examples of harmful things which occur in nature, e.g., viruses and natural disasters. Other ethical debates arise around commercialisation of pregnancy, payment of large sums of money, and potential exploitation of vulnerable women.

10 For example, in *S v De Bellocq* 1975 (3) SA 538 (T) 539D, the sentence was for her to be discharged on her own recognisance until recalled. In *S v Hartmann* 1975 (3) SA 532 (C), the sentence was a year's imprisonment of which all but the period until the rising of the court was suspended for one year. Both these were murder convictions.



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It has occurred, albeit rarely, that the surrogate mother refuses to relinquish the baby to the commissioning parents. In *EJ v Haupt*, a same-sex female couple applied to Court for a declarator that section 40 of the Children's Act applied to same-sex couples. The Court granted the order that the sperm donor will have no rights or responsibilities towards the child and that both the mothers will have full parental rights from birth.

## 1.9 SUMMARY OF KEY POINTS

- Ethics forms the foundation of professional medical practice.
- Many ethical principles have become part of medical law in acts, guidelines; and the common law.
- Ethical principles may clash with each other and with the law.
- It is important to know and understand the ethical principles and laws relevant to one's area of medical practice.



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