



Informed consent & testing

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HIV & the law certificate course

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Joy Mining v NUM & another

Employer can test employees on authorisation by LC ito section 7(2) of the EEA 55 of 1998 which provides-

“Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined to be justifiable by the LC in terms of s50(4) of this Act”

Irving & Johnson

“I thus find that section 7 as a whole applies to compulsory testing and does not apply to voluntary testing. Provided testing is truly voluntary, I do not believe it matters whether the initiative for testing comes from the employer or employees.” (para36)

Irving & Johnson

It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided no public interests are involved (para 41)

What does HIV testing mean?

EEA defines “medical testing”

“includes any test, question, inquiry, or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition”

(Also see paras 10-11- Joy Mining case)

s 50(4) EEA

If LC declares medical testing justifiable, it may make any order that it considers appropriate in the circumstances, including imposing conditions relating to-
the provision of counselling;
confidentiality; period; and category or categories of jobs or employees

When is it justifiable to test employees?

See paras 14-16 of Joy Mining case

“It would seem that whether something is justifiable must be tested against certain norms and values eg standard of reasonableness, legality...”

Employers needed to put up measures to manage HIV (para 24- Joy) (para 4 of Irving & Johnson)

When is it justifiable to test employees?

S7(1)(b) - factors that must be considered: medical facts, employment conditions, social policy, inherent requirements of the job etc”

See factors listed at paras 22 to 30 (Joy Mining)

When is it justifiable to test employees?

Permissible testing- Clause 7 Code of Good Practice (para 18-Joy Mining)

Informed consent and pre-and post test counselling emphasised

(Note: in Joy Mining post-test counselling was not necessary because survey was anonymous)

Informed consent: (7.1.7 of Code)

Implies understanding what test is, why it is necessary, benefits, risks, alternatives and any possible social implications of the outcome

Joy Mining v NUM & another

Conditions for testing laid down: voluntary, anonymous, no personal details, no involvement of Co, safeguards against discrimination, consent, no condition for employment, promotion etc.

No prejudicial inferences for refusal

Employer not to know who tested

Exceptions

Employees who may not be tested for their HIV status are those employees who fall within the scope of the EEA (SANDF, NIA, Secret Service etc excluded)-

See section 4 (3) of EEA –This Act does not apply to...

Exceptions

“Emergency situations where the employee is incapable of consenting”
(para 20-Joy Mining)

C v MINISTER OF CORRECTIONAL SERVICES 1996 (4) SA 292 (T)

Plaintiff-with a group of prisoners standing in a row in a passage in a hospital when he had been informed, by K, a DCS medical, 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 was repeated to 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. Plaintiff was accordingly fully aware that the test was, *inter alia* , for the HI virus and that he had the right to refuse to be tested.

C v MINISTER OF CORRECTIONAL SERVICES 1996 (4) SA 292 (T)

Why did the plaintiff, who had tested positive for HIV, institute an action for damages on the grounds of alleged wrongful invasion of his right to privacy?

C v MINISTER OF CORRECTIONAL SERVICES 1996 (4) SA 292 (T)

DSC had specified what norms were applicable. This informed-consent policy provided that prisoners who had been involved in high-risk behaviour had to receive pre- and post-test counselling and the prisoner's informed consent had to be obtained prior to the HIV test being administered.

Informed consent defined

Held- consent if the person appreciated and understood what the object and purpose of the test was, what an HIV-positive result entailed and what the probability of AIDS occurring thereafter was. (At 301B.)

Norm for informed consent set by the department and, as a prisoner, plaintiff was entitled to right of informed consent as per policy

Informed consent defined

Consent is a defence to many acts which would otherwise be a delict. An obvious example is consent to surgery. In recent years the concept that consent must be 'informed consent' has found favour with our Courts: see *Castell v De Greef* 1994 (4) SA 408 (C) at 420I-421D and 425C-426G.

Informed consent defined

Members of the medical profession... developed a norm or recommended minimum requirement necessary for informed consent ... 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.

Lessons-C v MINISTER OF CORRECTIONAL SERVICES

1. First information about the test, its object and the right to refuse to submit to the test communicated to group of prisoners standing in a row in a passage. No privacy and little time to reflect.
2. No information on the right to refuse was communicated to each prisoner individually.

Lessons

3. What was repeated to each one of them in the consulting room was not said a trained counsellor; 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

CASTELL v DE GREEF 1994 (4) SA 408 (C)

For consent to operate as a defence the following requirements must, *inter alia* , be satisfied:

- (a) knowledge and awareness of nature and extent of harm or risk;
- (b) appreciation and understanding of nature and extent of harm or risk;

CASTELL v DE GREEF 1994 (4) SA 408 (C)

(c) the consenting party must have consented to the harm or assumed risk;

(d) the consent must be comprehensive, that is, extend to the entire transaction, inclusive of its consequences. (At 425H-I/J.)