

MEDICINE AND THE LAW

May a sample be legally removed or an autopsy undertaken without an advance directive or proxy consent to determine whether a critical care patient at risk of COVID-19 infection has died as a result of the virus?

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It has recently been suggested that ethically and legally the obtaining of biological samples for research after death during the COVID-19 pandemic in South Africa justifies a waiver of consent followed by a deferred proxy consent. However, it is submitted that because deceased persons are not protected by the Constitution, and only partially protected by common law and statute law, such consent and the need for consent to autopsies may be dispensed with altogether under the common law doctrine of 'necessity'. It is pointed out that such information is in the public interest because it will inform critical care facilities on how to save lives of future patients and assist government in responding to the COVID-19 pandemic by adequate planning. It is also reasonably justifiable in the public interest to ascertain the COVID-19 status of deceased persons who may have been exposed to the virus, in order to protect their family, friends, healthcare practitioners, undertakers and staff members, and members of the public with whom they have been in contact. Finally, it is suggested that the law can be clarified by amending the Disaster Management COVID-19 regulations to do away with consent for such autopsies or tissue sample collections from deceased persons exposed to the risk of contracting the virus, subject to certain conditions.

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Moodley *et al.*^[1] recently suggested that 'the existing guidance in combination with [South African] legislation around notifiable diseases and obtaining biological samples for research after death provides some justification for a waiver of consent for the intended research, followed by deferred proxy consent at a later stage, as the most ethical route to follow'. They justify this on the basis that 'proxy consent in an [intensive care unit] setting with a highly contagious and life-threatening disease has the potential to cause harm to patients in distress and their families'.^[1] It is submitted, however, that given the disastrous consequences of the COVID-19 pandemic the consent requirement may be legally dispensed with altogether on the basis of the common law doctrine of 'necessity'.

Recent research indicates that 'natural deaths' in South Africa (SA) have increased by 59% during the COVID-19 pandemic,^[2] and this is consistent with anecdotal evidence I have received from a private hospital group that some doctors are not recording COVID-19 as an underlying cause on the second page of death certificates because of stigma. The second page contains demographic details about the deceased and the medical cause of death required for medicolegal and statistical purposes. The page must be sealed and attached to the first page for transmission to the Department of Home Affairs office in the district where the deceased died.^[3] The stigma attached to COVID-19 is similar to that during the HIV denialism era in SA.^[3] It is submitted that this stigma makes it difficult for critical care teams and others to plan future life-saving strategies in critical care facilities, and for government to obtain essential accurate information for planning future responses to the pandemic.

To determine whether it would be legally justified not to require advance directives or proxy consents to autopsies or tissue removal from relatives, it is necessary to consider the constitutional and

common law rights of deceased patients in the light of the common law defence of 'necessity'.^[4] It is submitted that the law can be clarified by amending the Disaster Management regulations^[5] to allow for the testing without consent of deceased critical care patients who were at risk of COVID-19 infection, to determine whether they have died as a result of the virus.

Constitutional and common law rights of deceased patients

In terms of the law, when a person dies their legal rights die with them,^[6] including protection under the Constitution. This is because legally the right to sue for a violation of their constitutional or common law rights vests in persons during their lifetime, and not in their next of kin or executors after their death.^[7] However, although they have no constitutional or common law right to bodily integrity, their bodily integrity is protected by the common law crime of interfering with a corpse.^[8]

Moodley *et al.*^[1] submit that the existing ethical and statutory legal position regarding consent to removal of tissue for research purposes is as follows:

- The National Health Act No. 61 of 2003 allows the Minister of Health to authorise removal of tissue for specific purposes, including medical research, or a medical practitioner in charge of clinical services in a hospital may authorise tissue removal for similar purposes, provided that the removal would not be contrary to 'a direction given by the deceased before his or her death' (section 67(1)(a)).^[9]
- The Disaster Management Act (No. 57 of 2002)^[10] COVID-19 regulations, which have declared COVID-19 a notifiable condition,^[11] provide that 'the head of a provincial department

must apply to the High Court for an order to conduct an autopsy on the body of a patient who has presumably died of a notifiable medical condition, in order to ascertain the exact cause of death, and only where this is in the interest of public health and is on special request by an interested person' (regulation 15).

- The National Department of Health research ethics guidelines^[12] regarding the collection of biological material for research after death allow for proxy consent when a patient or donor is unable to consent (paragraph 3.3.6) or in the absence of a will or written statement of a deceased person.

I agree with this interpretation of the statutory law and that the current ethical and legal provisions justify the use of a 'waiver' and 'deferred proxy consent', but submit that during a disastrous health pandemic such as COVID-19 the requirement of consent can be legally dispensed with in terms of the common law. This is because deceased persons have no constitutionally protected rights, and the common law defence of 'necessity' is sufficient to justify the doing away with the consent of deceased patients or their proxies on the grounds of public interest, where deceased critical care patients appear to have been at risk of COVID-19 infection.

The common law defence of necessity

It is submitted that not requiring the consent of the deceased or a proxy is legally justifiable on the basis of 'necessity', given that the COVID-19 pandemic has been declared a national disaster. It is a reasonably justifiable move to save the lives of future COVID-19 patients in critical care, as well as the families of such deceased patients, their friends, healthcare practitioners, undertakers and staff, and members of the public who have been in contact with them. Traditionally, the common law defence of 'necessity' allows the rights of innocent persons to be violated to prevent others or their property from being subjected to serious harm.^[4] It is submitted that the defence of 'necessity' also allows a person to breach a statutory duty (e.g. to contravene a statutory speed limit in order to drive a dying patient to hospital in time to save their life) – provided it is reasonably justifiable.

Recommended amendment to the Disaster Management COVID-19 regulations

The simplest method of clarifying legally whether, during the COVID-19 pandemic, consent may be dispensed with before an autopsy may be held, a swab done or tissue removed from deceased persons who have been at risk of COVID-19 exposure, would be for the Minister of Cooperative Government and Traditional Affairs to amend the Disaster Management COVID-19 regulations.^[5]

The regulations should be amended to allow for autopsies to be done and swab and tissue samples to be taken from deceased patients without consent, where there is a reasonable suspicion that such patients may have contracted the COVID-19 virus or have been exposed to the risk of COVID-19 infection. The regulations could provide that the information obtained in such situations may be used for the following purposes:

- For research into the number of critical care deaths arising from COVID-19 and to assist healthcare practitioners in devising methods of saving the lives of future patients
- To establish accurate records of the extent of the COVID-19 pandemic in the country in order to assist government in providing an appropriate response and planning sufficient healthcare facilities

- To ensure that doctors issue accurate death certificates that do not conceal the fact on the second page that a patient has died from COVID-19
- To provide penalties for failing to mention in a death certificate on the second page that a patient has died from COVID-19
- To provide that such COVID-19 deaths be reported to the National Department of Health for statistical purposes for future planning of health services and for inclusion in the Department's COVID-19 Tracing Database, where the information will be kept confidential.

It is worth noting that taking a nasal or throat swab from a deceased person without consent in order to protect the public interest is such a minor violation of bodily integrity that the law is likely to regard it as '*de minimis*' and not worthy of the attention of the courts.^[13]

Conclusions

Given the seriousness of the consequences of the COVID-19 pandemic, it is submitted that the common law defence of necessity may be used to dispense with the need for consent to the conducting of autopsies on, and removal of tissue samples from, deceased critical care patients who may have been exposed to the risk of COVID-19 infection.

The provisions in the Disaster Management COVID-19 regulations should be amended to clarify the law by allowing for the conducting of autopsies on, and removal of tissue samples from, deceased critical care patients without consent, where such patients may have been exposed to the risk of COVID-19 infection. The amendments mentioned above will not be unconstitutional, as deceased persons are not protected by the Constitution. They will also be consistent with the common law defence of necessity, and reasonably justified in order to protect the rights of the deceased's family and friends, healthcare practitioners who treated the deceased, undertakers and their staff, and members of the public who may have come into contact with them. As a result all such persons will have to be traced, and some may need to be isolated, quarantined and treated in terms of the existing provisions in the regulations.

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