

Michael Jackson and the limits of patient autonomy

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Dr Conrad Murray was convicted of the involuntary manslaughter of Michael Jackson for negligently causing his death when complying with Jackson's request to give him the anaesthetic propofol at home. The case raises the issue of the relative nature of patient autonomy, because the other bioethical principles of beneficence, non-maleficence and justice or fairness must also be applied where appropriate. Doctors should not accede to requests from their patients to engage in unethical or illegal conduct, as such requests will be no defence to disciplinary or criminal charges. Such requests will also be no defence to civil actions if the harmful conduct by the doctor is the result of illegality, fraud or gross negligence. South African doctors faced with requests similar to those received by Dr Murray from Jackson will be judged by the standard of reasonably competent practitioners in the same situation. Doctors are well advised to refuse requests to circumvent good medical practice and instead to seek other remedies, even if it means limiting patient autonomy and losing their patients.

S Afr J BL 2012;5(1):11-14.

As is well known, Dr Conrad Murray was convicted of the involuntary manslaughter of Michael Jackson, the equivalent of culpable homicide in South Africa. Dr Murray was found guilty of negligently causing Jackson's death while complying with the singer's request to give him the surgical anaesthetic propofol at home to treat his insomnia. Murray admitted to giving Jackson propofol on a regular basis after the singer had repeatedly begged him to give him his 'milk' so that he could sleep. On the night of Jackson's death Murray had given him two other drugs, lorazepam and midazolam, the combination of which together with propofol ultimately led to the singer's death.¹

It is trite that there are many different ethical theories, such as virtue ethics, Kantian deontology, utilitarianism, communitarianism, liberal individualism, social contract theory, the ethics of care, casuistry, etc.² However, despite some criticism, principlism based on 'the four principles' is generally regarded as the most popular and widely used approach.³ This is because principlism is much easier to apply to practical situations than most of the other theories. Principlism refers to the principles of patient autonomy, non-maleficence, beneficence and justice or fairness.⁴ The most important of these is patient autonomy, although it is not absolute.⁵ Its application is relative, because even when patient autonomy applies, the other principles of beneficence, non-maleficence and justice or fairness should also be applied where appropriate. The principles are not mutually exclusive. For example, once a doctor respects a patient's decision and undertakes to adopt the treatment or procedure requested by the patient, the doctor must still act in the best interests of the patient (beneficence), must take care not to harm the patient (non-maleficence), and must treat the patient justly and fairly.

In South Africa, a doctor who negligently causes the death of a patient the practitioner will be guilty of culpable homicide.⁶ Evidence of unethical conduct by such a practitioner may or may not be evi-

dence of negligence, depending on whether or not the doctor acted as a reasonably competent doctor would have done in a similar situation.⁷ In the Jackson case, expert evidence indicated that Dr Murray had acted negligently because: (i) propofol is not an appropriate medication to treat insomnia; (ii) propofol should not be administered in a home setting; (iii) propofol should be closely monitored and only administered with proper medical and monitoring equipment; (iv) the doctor had no proper emergency equipment, such as an oximeter with an alarm, an ECG monitor and a defibrillator; (v) the doctor did not act properly when discovering that the singer was not breathing, because he had no automated blood pressure cuff or way to summon for help, and did not use the Ambu bag; and (vi) the doctor should not have attempted cardiopulmonary resuscitation (CPR) on the bed instead of the floor, and should have called emergency services before performing CPR on the singer.¹

Dr Murray's conviction for Michael Jackson's death raises a number of important issues regarding the limits to which medical practitioners should go to meet the demands of their patients. In particular, it raises the question of how far doctors should go, ethically and legally, to respect patient autonomy, and, whether or not they decide not to comply with their patient's wishes, any of the other ethical principles apply. Accordingly, this paper will consider the Jackson case in the context of what is meant by patient autonomy and when patient autonomy may be limited in South Africa.

What is meant by patient autonomy?

Ethically and legally patient autonomy means that the decisions of the patients must be (a) informed, (b) independent and (c) respected.

Informed decisions of patients

Informed decisions mean that patients are given full information regarding the nature, risks and benefits of the proposed medical

treatment or procedure before agreeing to it. Patients must be given choices regarding treatments or procedures and be able to choose which course of conduct they would like to follow. Each choice must be explained so that the patient understands their nature and consequences.

In South Africa this means patients must give an informed consent, i.e. they must: (i) have knowledge of the nature and extent of the harm or risk involved in the health care service; (ii) appreciate and understand the nature of the harm or risk; (iii) have consented to the harm or have assumed the risk; and (iv) have agreed to accept all the consequences of the health service.⁸ They must also be informed of all material risks, i.e.: (i) risks to which a reasonable person in the position of the patient, if warned of the risk, would attach significance; and (ii) risks to which the doctor should have been reasonably aware that the patient, if warned of the risk, would attach significance.⁹ In addition, the National Health Act⁹ states that patients must be provided with the range of diagnostic procedures and treatment options available to them, and the benefits, risks, costs and consequences generally associated with each option.¹⁰

Was Michael Jackson's decision informed?

Evidence from Michael Jackson's personal nurse at Dr Murray's trial indicated that Jackson had developed an interest in intravenous sleep medication.¹ However, there was no indication of how much information Jackson was given by Dr Murray, because the latter did not give evidence. Although Jackson had had discussions with his primary physician and personal nurse about intravenous sleep medication,¹ no evidence was led regarding the extent of his knowledge of the treatment and its consequences, and whether these were ever explained to him by Dr Murray. The fact that Jackson had told his nurse that propofol could be administered at home if he was 'monitored' seems to indicate that he realised the importance of such monitoring. It is not recorded, however, whether Jackson had said something similar to Dr Murray. What is clear is that Dr Murray had not ordered proper emergency equipment, such as an oximeter with an alarm, an ECG monitor and a defibrillator.¹ This indicates that either: (i) Dr Murray did not know what was required for monitoring a patient on propofol, in which case he would not have given proper information to Jackson; or (ii) Dr Murray knew what was required, but negligently failed to order the necessary monitoring and emergency equipment, in which case he would have failed to comply with Jackson's request for monitoring.

Independent decisions of patients

Independent decisions of patients mean that patients have the capacity to make decisions and are not subject to physical or psychological pressures that unduly influence their decisions. For instance, in South Africa the decisions must not be made under duress or undue influence because the patient's will has been so weakened that he or she cannot make a rational decision.¹¹ It also means that patients must not be prohibited by law from making decisions. The patient making an independent decision must there-

fore not be a child who is not old and mature enough to consent legally to the treatment or procedure,¹² or a person who is mentally unable to appreciate the nature and effect of the planned treatment or procedure.¹³

Did Michael Jackson make an independent decision?

The evidence from Dr Murray's statement to the police after his arrest for Michael Jackson's death was that Jackson had requested that he order propofol for him and give it to him on a nightly basis, and that the singer had 'begged' for the drug to help him sleep on the day he died. In addition to propofol, Dr Murray had also given him lorazepam and midazolam. Jackson was obviously under considerable psychological pressure at the time, from sleep deprivation and the stress of rehearsing and anticipating a 50-concert world tour. Although there was tape-recorded evidence of Jackson slurring his words a few days prior to his death, there was no evidence that he was not in a fit state to give informed consent regarding the use of propofol and the other drugs to make him sleep. At the trial it was mentioned that Jackson had specifically requested his nurse to find a doctor who would obtain propofol for him.¹ Therefore, although Jackson may have been desperate for treatment for his insomnia, in the light of his discussions with his primary doctor and nurse it could be argued that he had made an independent decision to use propofol to make him sleep.

Respect for the decisions of patients

Respect for the decisions of patients means that once patients make an informed and independent decision on the type of treatment or procedure they wish to follow, their decision is respected even though it might harm them. For instance, a patient is entitled to undergo treatment that is likely to reduce their life expectancy,¹⁴ or to refuse certain treatment even though it might result in their death. In South Africa the National Health Act⁸ provides that healthcare providers must inform patients of their right to refuse health services and explain the implications, risks and obligations of such refusal.¹⁵

Were Michael Jackson's decisions respected?

The evidence in the trial indicates that Jackson had suffered from chronic insomnia for years, and that his insomnia had increased when he began rehearsing for his strenuous concert tour. He had previously tried various sleep-inducing drugs, such as Tylenol PM and Xanax, without success. He had also tried valium, lidocaine, lorazepam and midazolam, traces of which were found in his body after his death.¹ As previously mentioned, the primary physician who had treated Jackson since the 1990s said that the singer had become interested in intravenous sleep medication, and Jackson's nurse gave evidence that he had told her that propofol was the only medication that helped him fall asleep. At the time the nurse had told him that 'No doctor will do this at your house', but Jackson had replied 'No, I can do it if I am monitored', and asked her to find someone who would help him.¹ He subsequently employed Dr Murray, a cardiologist, full time at \$150 000 a month, to help him overcome his insomnia, and asked him to obtain propofol and to administer it to him on a nightly basis. After some hesitation Dr

Murray agreed to do so.¹ Dr Murray went further and used a number of aliases in place of Jackson's name on prescriptions so that he could order 'extraordinary' quantities of propofol.¹ In this sense Dr Murray respected Michael Jackson's decision to use propofol to help him sleep at night, but what he was doing was unethical and illegal.

When may patient autonomy be limited?

Patient autonomy is the most important of the four bioethical principles, but its application is relative rather than absolute. It may therefore be limited if patients request their doctors to conduct unethical or illegal treatments or procedures. Such treatments or procedures may result in doctors being disciplined by their professional bodies,¹⁶ and the fact that they were done at the request of their patients will not be a good defence. Where such conduct amounts to a crime the doctor concerned may be convicted, and it will be no defence to state that the treatment or procedure was at the insistence of the patient. It may also not be a defence to a civil claim for damages if the doctor's conduct is clearly unlawful and the patient consented to illegal, fraudulent or grossly negligent conduct by the doctor.^{17,18} Such consent would be regarded as invalid and against public policy. In summary, patient autonomy does not extend to doctors acting unethically or breaking the law at the request of their patients. This limitation on patient autonomy can be justified by applying the other principles of beneficence, non-maleficence and justice or fairness where they are relevant. The limitation is justified because it prevents a patient becoming an accessory to illegal or fraudulent conduct. Furthermore, by acting in the best interests of a patient, by not harming the patient and by treating the patient justly or fairly, doctors may be able to mitigate the patient's concern that their autonomy has not been respected.

Should Dr Murray have limited Michael Jackson's autonomy by refusing his request for propofol to be administered at his home?

The expert evidence in Dr Murray's trial was that propofol is usually used in surgeries or to help dying hospice patients and was not an appropriate medication to treat insomnia. One witness suggested that it was 'gross negligence' to administer propofol outside of an intensive care unit and 'beyond unethical to manage a someone with insomnia with propofol'.¹ In any event patients treated with propofol have to be treated precisely and monitored continuously with an ECG monitor, a pulse oximeter and capnometer that contain alarms that detect changes quickly – something that Dr Murray failed to do and that led to Michael Jackson's death.¹ It could be argued that in these circumstances, even though Jackson was desperate for relief from insomnia, Dr Murray should have refused to prescribe and administer propofol at Jackson's home on the basis that it would have been negligent and unethical for him to do so because: (i) it was inappropriate medication for insomnia; and (ii) it was too dangerous to use in a home setting. Dr Murray should therefore have limited Michael Jackson's autonomy by refusing his request and exploring other avenues to address his sleep depriva-

tion. By doing so he would have acted in Jackson's best interests, would have not harmed him, and would have treated him in accordance with good medical practice which he should apply to all his patients.

The test in South African law would have been whether Dr Murray acted in the same manner as a reasonably competent doctor would have done in similar circumstances. In other words: (i) would a reasonably competent doctor in Dr Murray's position have acceded to Jackson's request for propofol to be administered in his home for insomnia; and (ii) if so, did Dr Murray act the way a reasonable doctor would have done regarding the monitoring of his patient? The answer to the second question is clearly in the negative, as he failed to provide proper monitoring. The answer to the first question is also likely to be in the negative, given that propofol is inappropriate for treating insomnia and too dangerous to administer at home. Therefore, a South African doctor faced with a similar request to that received by Dr Murray should refuse to accede to a request for propofol for use at home as treatment for insomnia and should seek other remedies, even if it means losing the custom of the patient.

Although patient autonomy may be limited because a patient's request is unethical or illegal, it does not mean that the patient's autonomy is completely eliminated. This is because if doctors are going to engage in any other treatment or procedure, they must still obtain informed consent from their patients.¹⁰ Where patients cannot give legal consent and somebody else gives consent on their behalf, the former must still be consulted if they are capable of understanding the nature and consequences of the procedure to be adopted.¹⁹ In addition, doctors must still apply the other principles of beneficence, non-maleficence and fairness or justice where these are appropriate.

Did Dr Murray apply the other principles of beneficence, non-maleficence and fairness or justice to Michael Jackson?

As has been mentioned, in addition to patient autonomy, the other principles of beneficence, non-maleficence and justice or fairness must also be applied when dealing with patients. The question arises whether these were applied by Dr Murray in Michael Jackson's case.

Did Dr Murray apply the principle of beneficence to Michael Jackson? Jackson suffered from chronic insomnia and wanted Dr Murray to relieve it by prescribing and administering propofol at home. Did the administration of propofol do good for Jackson? Maybe it did in the short term, because he was able to sleep better, but in the longer term it did not, as the manner in which it was administered ultimately led to his death. Similarly, once faced with the crisis regarding Jackson's lack of breathing Dr Murray also did not do good for him because he tried to revive him with CPR on the bed instead of the floor, and failed to call the emergency ambulance services immediately.¹ In short, Dr Murray did not apply the principle of beneficence to his treatment of Jackson and as a result the singer died.

Did Dr Murray apply the principle of non-maleficence to Michael Jackson? Clearly Dr Murray did not wish to harm Jackson, as Jackson was paying him a fortune to look after his health. However, the manner in which Dr Murray used the propofol, not ensuring proper monitoring, as had been alluded to by Jackson in his discussions with his nurse concerning its use, clearly violated the non-maleficence principle, even if Dr Murray did not intend to do so. The same applies to the administration of the other drugs, such as lorezapam, which is highly addictive and not appropriate treatment for insomnia.¹ Dr Murray's negligent failure to use proper monitoring equipment and inappropriate drug treatment clearly harmed Michael Jackson by causing his death.

Did Dr Murray apply the principle of justice or fairness to Michael Jackson? Justice in the sense of distributive justice is not relevant here, as Jackson could well afford to pay Dr Murray for his services. However, it is likely that Dr Murray did not treat Jackson like any other patient, because he was being paid large sums of money to provide him with medical care. Had Jackson been an ordinary patient, it is highly unlikely that Dr Murray would have jeopardised his medical career by agreeing to treat him at home with propofol and using fraudulent prescriptions to secure large quantities of the drug.

Conclusion

Dr Conrad Murray was convicted of negligently causing the death of Michael Jackson when complying with singer's request to give him the anaesthetic propofol to treat his insomnia at home. Although Dr Murray had respected Jackson's autonomy as a patient and Jackson had made an independent choice regarding the use of propofol, it is not clear whether he was informed of the risks inherent in the manner in which he was being treated by Dr Murray. The case raises the issue of the relative rather than absolute nature of patient autonomy, because the other bioethical principles of beneficence, non-maleficence and justice or fairness must

still be applied where appropriate. Doctors should not accede to requests from their patients, no matter how rich and famous, to engage in unethical or illegal conduct, as consent by their patients will be no defence against disciplinary or criminal charges. Such consent may also be no defence in a civil case if the harmful conduct by the doctor is the result of illegality, fraud or gross negligence. South African doctors faced with requests similar to those received by Dr Murray from Michael Jackson will be judged by the standard of a reasonably competent practitioner in the same situation. Doctors in their position are well advised to refuse requests to circumvent good medical practice, and to seek other remedies even if it means limiting patient autonomy and losing their patients. However, they must still apply the other principles of beneficence, non-maleficence and fairness or justice where relevant.

References

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3. See generally, Moodley K, ed. *Medical Ethics, Law and Human Rights*. Pretoria: Van Schaik, 2011:19-30.
4. Beauchamp TL, Childress JF. *Principles of Biomedical Ethics*. 3rd ed. Oxford: Oxford University Press, 1994:67-113 (patient autonomy), 120-184 (non-maleficence), 194-249 (beneficence), 256-302 (justice).
5. Mason JK, Laurie GT. *Mason and McCall Smith's Law and Medical Ethics*. Oxford: Oxford University Press, 2011:8.
6. *S v Mkwetshana* 1965 (2) SA 493 (N).
7. *Van Wyk v Lewis* 1924 AD 438.
8. *Castell v De Greef* 1994 (4) SA 408 (C).
9. National Health Act 61 of 2003.
10. Section 7(3) read with section 6(1) of the National Health Act 61 of 2003.
11. Cf. *Preller v Jordaan* 1956 (1) SA 483 (A).
12. Section 129(4)-(9) of the Children's Act 38 of 2005.
13. See, for instance, section 7(1)(b) of the National Health Act 61 of 2003.
14. Mason JK, Laurie GT. *Mason and McCall Smith's Law and Medical Ethics*. Oxford: Oxford University Press, 2011:579-580.
15. Section 6(1)(d) of the National Health Act 61 of 2003.
16. See for instance, in South Africa, section 3 of the Health Professions Act No. 56 of 1974.
17. Cf. *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 131.
18. Section 51(c) of the Consumer Protection Act 68 of 2008.
19. Section 8(2)(a) of the National Health Act 61 of 2003.