
EDITORIAL

Doctor, patient and the law: A delicate triangle

The new South African Constitution of 1996 which took effect on 1 January 1997, with its Bill of Rights, had a drastic effect on the South African people, social systems, the administration of justice and the law in general, particularly medical law. The following rights enshrined in the Bill of Rights very soon manifested themselves in judgments of our courts: the right to life (section 11), the right to freedom and security of the person, which included *inter alia* the right to bodily and psychological integrity (section 12), the right to privacy (section 14), the right to have access to health-care services, including reproductive health care and the right not to be refused emergency medical treatment (section 27), the right of access to information (section 32) and the right of detained prisoners to medical treatment, including the right to communicate with medical practitioners of their own choice (section 35).

The constitution resulted in two distinctive trends as far as medical law was concerned:

- a massive amount of new legislation impacting on medical and health matters
- important new trends in court rulings on medical matters such as anti-retroviral treatment and patient confidentiality.

New legislation deals with matters ranging from termination of pregnancy, sterilisation, national health, mental patients, through to medical schemes. Overall there was a radical departure from the previous dispensation, and the functionality of the new laws is still untested in many respects. Quite apart from legislation intended to implement the new constitution we also saw the introduction of major policy shifts, some of which were highly controversial such as the composition and functioning of the Health Professions Council of South Africa (HPCSA), which will predictably lead to litigation initiated by aggrieved practitioners.

Then, of course, there are still important and highly controversial bills in the pipeline intended to bring about departmental control over the fee structures of medical practitioners and private hospitals. To gain some insight into the radical effect of the constitution as well as certain of the laws enacted by Parliament which manifested themselves in litigation pertaining to medical practitioners, one need no more than page through the monumental work by Carstens and Pearmain (*The Foundational Principles of South African Medical Law* – Lexis Nexis, 2007) which is printed in relatively small type and runs to no fewer than 1112 pages – issued with a CD-ROM containing a number of annexures of direct practical importance, such as proposed consent forms.

The purpose of this brief article is not to attempt the impossible, but to give a bird's eye view of all these developments. What is intended here is to focus briefly on a single aspect of medical law, namely current trends in civil litigation by patients against doctors for alleged malpractice. The term 'malpractice' goes beyond the narrower issues of alleged negligent diagnosis or treatment, and includes failure to adequately inform the patient of material risks involved in the proposed procedure and failing to take a proper informed consent.

Today more civil suits by patients against doctors or health-care facilities are launched than ever before. To some extent this may be attributed to population growth. But there are other major factors. The general level of education is rising. There is greater public awareness of the possibility of a patient suing the health-care provider for a loss or harm or a perceived loss or harm. There are activist groups. There are legal-aid centres and human-rights organisations at universities. Lawyers are entitled nowadays to advertise for plaintiffs on a contingency-fee basis.

An important factor is the unfortunate decline in the quality of health-care services rendered by public-sector hospitals – which is compounded by staff shortages, particularly because of doctors and nurses seeking greener and safer pastures elsewhere. At the same time the quantum of damages claimed by patients has risen dramatically, often exceeding the inflation figure. In the case of infants allegedly harmed during the delivery process the amounts claimed may be shockingly high – in a recent case the sum claimed was well beyond R20 million.

Yet our courts have a track record of being relatively conservative in trying malpractice cases. The onus of proof of malpractice rests on the shoulders of the plaintiff. If he or she succeeds in establishing negligence or absence of informed consent, courts will generally trim down the amount of damages awarded to realistic levels.

No official statistics are available. My impression is that for every 200 cases in which an aggrieved patient consults his attorney with a view to sue a doctor, no more than 10 will eventuate in summons being issued. Of these 10 cases no more than two or three will go to trial, the remaining cases being settled. Where, in fact, the odd case is tried to the bitter end, the majority will be decided in favour of the doctor. But the cost factor for the doctor, both in terms of money and stress, may be huge.

How does the doctor minimise his or her risk of litigation?

I would offer a few practical suggestions:

- Communicate sympathetically and patiently with aggrieved patients.
- Ensure that you are available at least to learn of and assess the patient's complaint, and try to solve the problem.
- If the patient seeks information prior to the procedure which is more than that pre-offered by you, give as much as he or she desires.
- Take a proper and formal written consent where any surgery or comparable modality of treatment is envisaged.
- Maintain contact, postoperatively, with the nursing staff to ensure that you are alerted immediately should there be indications of possible complications – and ensure that you, or a competent colleague, are available to attend to the patient if there is any suggestion of a potential catastrophe.
- Never hesitate to recommend to the patient that a second opinion should be obtained.
- Ensure, right from the outset, that the patient or the person responsible for financing the cost of the procedure(s) or treatment proposed be au fait with the financial implications.
- Maintain your medical protection or professional insurance at a safe level at all times.

No discussion of what I have termed 'the delicate triangle' is complete without some reference to the situation which arises when a patient lays a complaint against a doctor with the HPCSA. Our experience as lawyers is that doctors sometimes tend to take a casual view of such a complaint and assume that it will vanish into thin air. This is a dangerous assumption. The fact of the matter is that the HPCSA has over the years been under severe pressure from various quarters to take its job as guardian of the public interest seriously. The Council has set up a special section to act on complaints laid against doctors and where the facts warrant it, to take disciplinary action against practitioners reported to it.

An inquiry of this kind, nowadays euphemistically called a 'professional conduct inquiry', can be most embarrassing, time-consuming, unpleasant and costly for the practitioner. One inquiry in which I participated lasted more than 30 days; although that was of exceptional duration, the doctor's loss of working days in itself represents a huge loss. The fees of an experienced lawyer will be quite substantial. There is also the factor of negative press publicity to be considered. Last, but not least, if found guilty, a heavy penalty may be imposed on the doctor. Penalties range from a reprimand to the doctor's name being removed from the register in very serious cases. The HPCSA's power to impose heavy penalties was increased when amending legislation took effect in August 2008.

My advice to a practitioner who is informed by the Council of a complaint laid against him or her is not to respond to it on his or her own but to seek advice from an experienced lawyer immediately. Obviously, if you are insured you should contact your insurer or protection society without delay.

The types of conduct regarded by the HPCSA as unethical cover a very wide field. Practitioners should endeavour to keep themselves informed on these as best they can.

I have listed above a few practical 'rules of thumb' on how to avoid litigation. It goes without saying that these are of equal value in avoiding complaints of unethical conduct.

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