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Commercial • Conveyancing • Labour • Litigation • Recoveries

MEDICAL NEGLIGENCE

A “diagnosis” of the law

How, What, Why?

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Medicine and the Law

1. Medicine has brought amazing benefits to society
2. Doctors need society. Society needs doctors
3. Human nature of medical profession – its fallible.
No harm is intended, but happens
4. Medical errors have a huge impact on doctors & patients
5. In interests of doctors & patients – justice must be done !

HOW?



Statistics [Sunday Times]

1. 2000 doctors facing damages claims in SA
2. 80% of claims are in the Public Health Sector
Gauteng Health Dept facing R3.7B claims in 2013 [DA]
EC Health Dept paid R108M in claims [EP Herald]
3. 70% of claims are settled out of Court
4. 20% of claims are over R1M
5. Compares favourably with world stats & no of cases
6. SA Medical Association:
"Errors occur because doctors are overworked"
7. Dr/Pt ratio: World Health Org. -- 1:1500
SA -- 1:4000



Four potential legal processes

1. Inquest:

Unnatural death. Often in medical cases with long chain of events. Inquiry before Court. Who to charge?

2. Culpable Homicide:

Negligently causing death. "Guilty" or "Not guilty". Fine or jail

3. Civil Claim:

Claim for damages e.g. medical expenses, loss of income, cost of raising child, disfigurement, pain etc

4. HPCSA Disciplinary action:

Regulates professional standards. Before HPCSA Disciplinary Board of Doctors. Fine, Suspension or Striking off roll

5. Each process differs i.r.o objective, test for liability and sanction



Penicillin Case

1. Wisdom teeth extracted.
2. Patient said "*allergic to penicillin*". Dr used penicillin in error
3. Patient reacted. Patient charged the doctor
4. Patient in fact **not** allergic. Reaction was normal
5. HPCSA: *Guilty. Ethically wrong to give penicillin even if not actually allergic. Dr warned*
6. Civil Claim: *Dismissed. No damages caused by giving penicillin. Patient not actually allergic*
7. No Inquest or Culpable Homicide charges. No death



Fractured Ribs

1. Patient injured in MVA
2. Admitted to Hospital in rural town. Seen by doctor
3. Patient had no symptoms. Admitted for observation
4. Patient died overnight in Hospital. Fractured ribs not diagnosed. Could not breath properly
5. Inquest:

Unnatural death. Negligent act of Dr caused death. Dr should have seen Patient during the night or referred Patient to PE.



Fractured Ribs Cont

6. Culpable Homicide:

Dr charged. Pleaded guilty. Paid AOG fine. Minor negligence. In mitigation: No X-Ray facilities available. Long delay to get patient to PE

7. HPCSA:

Pleaded guilty. Failed to refer & to see patient in night. Warned. Dr conduct not entirely unreasonable. Symptoms unusually masked. Poor resources not Dr's fault.

8. Civil Claim:

Minimal damages. Patient not a breadwinner. No claim made



Children with congenital defects

1. Claims by parents **allowed** for “wrongful birth” i.e. damages to care for babies born with defects
E.g. Parents’ costs of extra care, special schools, equipment – allowed
2. Dr should have detected abnormal foetus and informed mother who could have terminated
3. If Dr did inform and mother chose to have baby, no claim. If Dr did not inform, claim



Children with congenital defects Cont

4. Claims by children **not allowed** for “wrongful life” i.e. damages to care for self after parent’s death.

E.g. Child’s own costs of extra care, maintenance - not allowed

5. Not duty of court to decide if child had a right to life or not. It is against the morals of society.

Would also open door for claims by such children against their own mothers for deciding to have them born. Dr’s would also be tempted to encourage terminations unlawfully for fear of claim by child against Dr



Test for “negligence”

1. Case of *Van Wyk vs Lewis* 1924

“A medical practitioner is not expected to bring to bear ...the highest possible degree of professional skill, but he is bound to employ reasonable skill and care. In deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs”

2. Measured against the “reasonable doctor”

3. Not the best, not the worst

4. In similar circumstances !!



Conclusion. Prevent claims

1. Have medical aid

Use private healthcare facilities

2. All procedures have risks. Find out

3. If in doubt, get a 2nd opinion



Conclusion. Claims

1. Patients have a right to claim
2. Avoid emotional/irrational decisions
Can be costly. Defamation.
3. Consider unusual symptoms/circumstances
4. Seek expert legal & medical advice
Contingency fee arrangements are good & bad
5. Have a clear objective
4 processes
6. Record what occurred & obtain and retain all relevant documents
7. Claims prescribe after 3 years



Conclusion. Claims Cont

8. Don't blame the Dr for everything
9. Avoid the USA trend of "defensive medical practice"
It becomes counter-productive and expensive



Disclaimer

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