Claim against attorneys for prescribing a medical malpractice claim

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The plaintiff sued a firm of attorneys for allowing his claim against the MEC for health to prescribe. His injuries arose out of him falling onto a bed of reeds and retaining a piece of reed in his body, which needed to be removed surgically. He claimed that the hospital staff were negligent in treating him. He could not prove negligence on the part of the hospital staff and therefore his claim against the attorneys failed as well.

The case is of Botha v Coetzee Venter Attorneys (601/2014) [2019] ZAECGHC 47 (25 April 2019) at *http://www.saflii.org/za/cases/ZAECGHC/2019/47.html*

The plaintiff claimed against a firm of attorneys, whom he alleged had allowed his claim of medical negligence against the MEC for Health, to prescribe.

In June 2008, the plaintiff fell from a low bridge into a bed of reeds and sustained a wound to his buttocks.

He was taken to Cradock provincial hospital, where his wound was stitched and he was discharged. However, he was still in pain and went to a different hospital two days later. It was found that pieces of reed remained in the wound (one as long as 12cm) and he had to undergo surgery to remove these foreign objects from his body. The reed had also caused acute sepsis which had to be treated.

The grounds of negligence on the part of the staff at Cradock Hospital mainly related to failure to properly inspect the wound, to establish whether a foreign object remained, to close the wound without removing the foreign object and their failure to act professionally and with the required level of skill and diligence. The plaintiff would

have claimed R40 754 for medical expenses and R300 000 as general damages; so he claimed these amounts from the defendants.

The defendant alleged that they had a mandate only to investigate the merits of the claim and on investigation the merits were poor. This was due to their finding that the plaintiff had been extremely inebriated when admitted to hospital, he refused to be admitted for proper observation, he demanded that the wound be sutured and that he be discharged, and that he refused further medical treatment. The defendants denied that staff at Cradock Hospital was negligent and that, because of his intoxication, the plaintiff did not afford the staff an opportunity to perform a proper assessment or observation.

The medical records do show that the plaintiff smelled of alcohol, was aggressive and abusive, very noisy and told staff just to put a dry dressing so that he can go home. He said that he did not need a doctor to be called and that he would go to his doctor the next morning. The nurse told him to get stitches to stop the bleeding , on his consent, stitches were inserted by the nurse and a dry dressing applied. The patient was then discharged and his walking proved satisfactory. The notes were taken by Mrs Lombard, the nurse who dealt with the plaintiff.

The plaintiff denied that he had been aggressive and insulting towards the staff. He did not dispute that he smelled of alcohol. He could not remember if he had said a dry dressing should be applied and that he wanted to go home, but he denied walking around and swearing. He said that there was nothing that he could remember about mentioning a doctor. He denied saying that he did not need a doctor to be called and that he would see his doctor the next morning. He claimed that the entry in the records was false. He also denied that the reason for his vague memory of events was because he was severely under the influence of alcohol.

The plaintiff regularly met the defendant, the attorney Mr Venter, at the local magistrate's court – where the plaintiff worked. He told the defendant that he wanted to sue the MEC for Health in relation to his reed injury, and left a file containing a statement and other documents at the defendant's office.

In the statement, he set out the claim and said that he "wished to institute a civil claim against the relevant institution". This latter sentence was his instruction to Mr Venter to institute a claim. Mr Venter confirmed receipt of the documents. The plaintiff was under the impression that the claim was accepted. He asked the defendant about the claim periodically, but never formally consulted or received correspondence regarding the matter. Three years later he suspected that his claim had prescribed, and instructed another attorney to sue Mr Venter.

The plaintiff's expert (a medical practitioner) argued that the level of care provided by the nurse (Mrs Lombard) was not commensurate wit such care. Because she had been informed that the plaintiff had fallen from a height onto reeds, she was obliged to conduct a proper and thorough assessment of the clinical situation – taking into account that retention of a foreign object may be a possibility. The profuse bleeding of the patient underscored the need for a thorough examination. They also argued that it was her duty to arrange for a follow-up exam of the patient. The plaintiff's argument that he consented to stitches being inserted, and that there was no record that he remained antagonistic during the suturing, indicates that there was no need to limit the wound assessment to a cursory examination followed by suturing. Further, his intoxication meant that the medical staff should have exercised increased care. The plaintiff's expert also said that many hospitals do not have doctors on duty at night but that nurses do call doctors out when needed, especially if the patient is a "high ranking" person such as the plaintiff (a police chief).

When the court asked the expert whether the patient's rank made a difference to the standard of care, the expert responded that "unfortunately it often does" – especially in a small community. However, this line of reasoning fell apart when it was put to the expert (and he agreed) that when a "prominent member of society" tells the medical professional not to call his doctor, they would comply. The expert tried to argue that in that case you would still let the patient's doctor know, and send him details of treatment because "when you deal with more prominent people in society your record keeping should be very accurate in order to make yourself less vulnerable". However, this was not accepted by the court. It was held that if the patient had seen his own doctor the next day (as he had said he would), the outcome would have been very different. Even if his doctor had attended at the hospital, and referred the plaintiff to a surgeon immediately, sepsis could not have been ruled out. The expert agreed that there was nothing that stopped the plaintiff from calling his own doctor or going to see him the next morning. However, he added: "In the circumstances, one would expect a reasonable person to go to his doctor; [but] a health-care worker cannot delegate his or her duty, and it is his/her decision to call out superior knowledge. One cannot expect a patient to make an informed decision about his own health." This reasoning also failed. Further, when asked what the nurse should have done when being browbeaten by a person of higher authority, the expert conceded that it was appropriate for her to give in, but then she should have recorded more explicitly that the patient left against her advice.

Requests by the patient's new attorneys to Mr Venter to deliver the contents of the plaintiff's file to them went unanswered. When the two attorneys met at court, Mr Venter told the new attorney that he would deliver the file before the end of the day, and confirmed that the matter had prescribed and that he had informed his insurers.

In considering whether or not the plaintiff would have succeeded in his claim against the MEC, the court found it necessary to make a finding on the probabilities concerning the plaintiff's conduct after he was received at Cradock Hospital. On his own version, the plaintiff did not remember much of what happened. He did not know who was treating him or what treatment had been administered at the time. He did not remember who had given the nurse the information recorded in the notes. His clear denials that he said that he wanted to go home, that he said he would see his doctor the next day, and that he was aggressive and abusive are therefore highly suspect, and point to a deliberately selective memory. Further, it is improbable that Mrs Lombard, not knowing at the time that there would be a claim in the future against the MEC, would falsify the records in order to avoid being accused of negligence. It is common cause that, in some respects, the record was accurate. Mrs Lombard's version, and her records, provided an account of the events that was found to be more probable than that of the plaintiff. Further, the fact that Mrs Lombard recorded that the plaintiff said he did not need a doctor, could only have been because she was the one to raise the need to call a doctor.

The expert evidence was therefore evaluated against the scenario that Mrs Lombard was dealing with an uncooperative and abusive patient. The court also held that it was difficult to extract from the plaintiff's expert evidence any unequivocal statement that the treatment administered to the plaintiff fell below the required degree of skill and care, given the particular circumstances. The expert continually qualified his statements, not least by applying to some extent different standards when the patient was a so-called prominent member of society. This clearly cannot be right but it did seem to play a part in his opinion.

The plaintiff's expert opinion that Mrs Lombard should have conducted a proper assessment of the clinical situation is watered down by the plaintiff's obstructive behaviour in resisting proper treatment. The plaintiff's consent to stitches did not make much difference. This was a last plea on the part of Mrs Lombard to help the

plaintiff, in spite of his behaviour. It did not necessarily mean that he would reconsider his decision not to have his doctor called and to go home.

The expert's evidence actually suggested that Mrs Lombard was not at fault by not overriding the plaintiff's wish to go home. Therefore, negligence on the part of Mrs Lombard was not established. Furthermore, there was no causation because the failure to call a doctor in the middle of the night did not amount to much – especially because the plaintiff said he would see his doctor the next morning. There was no reason not to believe that the plaintiff would fail to do so. The plaintiff's expert, himself, said that it was unreasonable for the plaintiff not to seek help from his doctor or to return to hospital.

Therefore, the cause of the consequences of the retention of the reed in the plaintiff's body was the plaintiff's failure to see his doctor later that morning, as he said he would. The plaintiff did not establish that he would have succeeded in a claim against the MEC, and therefore his claim against the attorneys was dismissed.

Takeaway

In dealing with damages relating to prescription, the original claim must have merit for the prescription claim against attorneys to succeed.

**Donald Dinnie/Aneesa Bodiat*, Medical Defence Medico-Legal Consultants