State’s right of recovery against its Doctors

October 8, 2019

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Part 1*

As a general rule an employer, such as a private hospital or, the Province, in the case of a state health facility, is liable for the wrongful and negligent or intentional conduct of its employees committed in the course and scope of their employment. This is known as “vicarious liability”. Nevertheless, an employee does not cease to be liable in their own right to the patient or their dependents because of their employer’s vicarious liability.

In most medical negligence cases related to public hospitals, the patient cites the MEC for Health of the relevant Province as the main defendant and claims an award of damages against the MEC. The specific doctor or other healthcare professionals involved are sometimes also cited as defendants, but it is expected that any award granted by the court will be paid by the

province's department of health. This has led to huge liabilities in relation to medical malpractice claims for the relevant departments of health. In an effort to curb the expense and probably also to deter the negligent conduct of its doctors, Gauteng Personnel Circular Minute 43 of 2019 explores the ways in which the government can recover damages awards from the healthcare professionals at fault.

The employer, who is liable as a result of harmful conduct committed by the employee, is bound together with the employee to compensate the person who suffers damages as a result of the employee's wrongful and negligent (or intentional) conduct. However, in most medical malpractice cases, the state pays the award and the medical practitioner is shielded from liability.

It does not avail the employer to protest that it had specifically forbidden the employee to do the particular conduct complained of or directed the employee "not to be negligent."

A distinction must be made between instructions which generally define the course and scope of employment, and instructions relating to the specific conduct of the employee acting in the course and scope of the employment. An employee appointed to perform one function is not acting within the course and scope of their authority when they perform an entirely different function. A negligent or intentional breach by the employee of the employer's instructions would found the basis of recovery action by the employer against the employee, where such disobedience results in the liability of the employer to a third party.

At common law, the employer can sue the employee for damage caused by the negligent conduct of that employee. An employer has that remedy in respect of its employees for their negligent or intentional conduct, but that is not absolute and does not amount to an unqualified duty by the employee to indemnify the employer. There is at least an implied term in the employment contract between the employer and the employee that the employee will use reasonable care.

In *Jones v Manchester Corporation* [1952] 2 All ER 125 CA, the English Court of Appeal dealt with a matter in which the second defendant was a physician, qualified for five months, employed by the third defendant, a hospital, for duties including the administration of anaesthetics at the hospital. In the course of surgery and anaesthetic, the patient died. There was a claim put forward by the widow of the patient, for damages as a result of the alleged negligence of both the doctor and the hospital.

The court held that the employer is not entitled to an indemnity from an employee if:

- the employer has contributed to the damage done by the employee; or
- bears some responsibility for it; or
- the negligence of some other and senior employee has contributed to that damage.

On the facts, the court held that the hospital, via the hospital board, had been negligent in leaving the administration of a dangerous anaesthetic to an inexperienced doctor without adequate supervision; and that a hospital employee, a senior surgeon, had also been negligent. The anaesthetist was not entitled to a complete indemnity, since she had also been guilty of a substantial degree of negligence. The court apportioned contributions between the hospital and anaesthetist at one-fifth, and four-fifths, respectively. The court said that the hospital was entitled to accept that the anaesthetist had the knowledge and skill of a newly qualified doctor, and would exercise that skill.

In the circumstances there was also an implied undertaking by the hospital that they would provide some reasonably competent person to work with her or to guide her in case of difficulty. One of the judges, in a rather patronising and sexist comment, said :

“I think to put a weapon like a barbiturate within the reach of a girl who has only been qualified for five months and expect her to handle it accurately, with sufficient knowledge and experience – to watch the way a patient has to be watched – is simply asking for trouble. I cannot help it if it is common practice.”

In another English judgment of *Gregory v Ford* 1951 ALL ER 121, an employer sought an indemnity from its employee who had negligently driven a vehicle, causing injury to the plaintiff, for which the employer was vicariously liable. Both the employer and employee had been sued by the plaintiff.

The court held that there was an implied term in the contract of service that the employee shall not be required to do an unlawful act. In the case, driving a vehicle that was not properly insured for third-party liability under the relevant legislation was an unlawful act, and the employee was entitled to recover its damages being the amount which the employee was liable to pay the plaintiff. The court said that whilst the accident was also caused by the negligence of the employee, the fact that the damages fell on the employer was not due to the employer's negligence but a breach of the duty under the relevant road traffic legislation. Therefore, the claim by the employer to be indemnified by the employee failed.

The recently issued circular of the Gauteng Department of Health, Personnel Circular Minute 43 of 2019, reiterates the Province's vicarious liability for the negligent conduct of its doctors acting in the course and scope of their employment – but also highlights the duty of those doctors as employees to the Province and the circumstances in which the Province may be able to recover damages that the Province is liable for to third parties, from its doctors.

Regulation 12.2.1 of the Public Finance Management Act 1999, as read with Section 76(1)(h) of the Act (the current version is as published under Government Notice GN R874 on 15 November 2013), reads:

12.2 Claims against the state
through acts or omissions [Section 76(1)(h) of the PFMA]

12.2.1 An institution must accept
liability for any loss or damage suffered by another person, which arose from an act or omission of an official as a claim against the state and does not recover compensation from an official, provided the official shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and –

(a) intentionally exceeded his or her powers;

(b) made use of alcohol or drugs;

(c) did not act in the course and scope of his or her employment;

(d) acted recklessly or intentionally;

(e) without prior consultation with the State Attorney, made an admission that was detrimental to the state; or

(f) failed to comply with or ignored standing instructions, of which he or she was aware or could reasonably have been aware, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a state vehicle; and

(g) …

12.2.3 Where an official has forfeited his or her cover in terms of paragraph 12.2.1, the amount paid by the institution for the loss, damage or claim arising from an act or omission must be recovered from the official concerned …

12.7 Losses or damages through acts committed or omitted by officials [Sections 76(1)(b) and 76(4)(a) of the PFMA]

12.7.1 Losses or damages suffered by an institution because of an act committed or omitted by an official, must be recovered from such an official if that official is liable in law.

12.7.2 The accounting officer must determine the amount of the loss or damage and, in writing, request that official to pay the amount within 30 days or in reasonable instalments. If the official fails to comply with the request, the matter must be handed to the State Attorney for the recovery of the loss or damage.

12.7.3 A claim against an official must be waived if the conditions in paragraph 12.2.1(a) to (g) are not applicable.

12.7.4 If in doubt, the accounting officer of the institution must consult the State Attorney on questions of law in the implementation of paragraphs 12.7.1 and 12.7.3.

In this light, recovery against the employee doctor is only permitted in the circumstances set out in regulation 12.2.1(a) to (f).

(*To be continued*)

*Part 2: In the interest of length, Part 2 to be posted on *Med Brief Africa,* Friday 11 October 2019

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