Forum

Exposure to the consumer court under the Consumer Protection Act – more litigation for the medical industry?

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The Consumer Protection Act introduces consumer courts as a means of achieving protection and speedy enforcement of consumers' rights. In the medical industry, this raises the concern that medical practitioners and hospitals may soon face increased litigation by consumers exercising their statutorily enshrined rights. However, the Consumer Protection Act provides only a limited basis for complaints to the consumer court, which is likely to result in continued reliance on the common law remedies by consumers seeking to recover damages. In this article, the limitations of the consumer court as well as general considerations under the Consumer Protection Act applicable to the medical industry are discussed.

The Consumer Protection Act 2008 ('the Act') comes into operation incrementally.

For the most part, the provisions of the Act directly affecting the consumer take effect on 30 October 2010. The effective date of those consumer protection provisions can be deferred for an additional 6 months on notice on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure the efficient and effective implementation of these provisions. Those parts of the Act dealing with interpretation, purpose and application, and establishment of national consumer protection institutions as well as provisions for making regulations come into effect on 30 April 2010.

The Act distinguishes a consumer court from a court. A consumer court is a national or provincial court or tribunal specifically established to protect consumers as opposed to the civil and criminal courts with which readers will be familiar.

The Act entitles a consumer to enforce any right in terms of the Act or in terms of a transaction or agreement governed by the consumer laws or otherwise to resolve any dispute with a supplier, where the supplier is not subject to the jurisdiction of any ombud. There is no ombud as contemplated by the Act in respect of hospitals, nurses and doctors. The application is made to the consumer court having jurisdiction.

The person seeking relief from a consumer court can be a person acting on their own behalf or an authorised person acting on behalf of another who cannot act in their own name, a person acting as a member of a group or class of affected persons, and also an accredited consumer protection group. A form of class action is therefore permitted.

Does the Act create or expose medical practitioners and hospitals to an avalanche of claims in the consumer court under the Act?

The short answer is no:

- The consumer court is quite frankly treated as a second-class citizen in terms of the Act, and any disputes submitted to the consumer court are always subject to the jurisdictional law establishing and governing each consumer court.
- While in terms of its broad definitions of consumer, services and suppliers, the Act encompasses the doctor/patient and hospital/patient relationship, in the context of the Act the practice of doctors, nurses and hospitals provides only a limited basis for any complaints to the consumer court, as in any court.

In limiting the power of the consumer court, the Act:

- in dealing with interpretation, enjoins a court, but not the consumer court, to consider the appropriate foreign or international law, conventions, declarations or protocols, relating to consumer protection (s2(2))
- enjoins only the court, but not the consumer court, to interpret any standard form, contract or other document to the benefit of the consumer (s4(4))
- provides that where any provision of the Act is ambiguous, the court, but not the consumer court, must prefer the meaning that best promotes the spirit and purposes of the Act and will best improve the realisation and enjoyment of consumer rights generally (s4(3))
- articulates the powers of the court, but not a consumer court, to ensure fair and just conduct, terms and conditions (s52).

The Act expressly provides that the remedies provided under the Act do not preclude a consumer (in our case a patient) from exercising any rights afforded in terms of the common law. Accordingly, the Act does not detract from a patient's rights to sue for damages for instance for negligence.

The Act supplements the common law remedy for breach of contract by affirming the right to the performance of services in a manner and quality that persons are generally entitled to expect (s54(1)). Failure to provide services in accordance with such standards entitles the consumer to require the supplier to either:

- remedy any defect in the quality of services performed (or goods supplied), or

- refund the consumer a reasonable portion of the price paid for the services performed (and goods supplied), having regard to the extent of the failure.

So, unless the medical profession is exempted (which is unlikely at present because it has no consumer protection regime of its own), in the event a surgeon does not provide surgery in a manner and quality that persons are generally entitled to expect, the patient may require that surgeon to remedy the defect or to refund that portion of the price paid, having regard to the extent of the failure.

Enforcement of that right and remedy would, of course, leave the patient out of pocket because it does not provide a mechanism for payment to all other service providers of the costs which the patient will incur in remedying the defects, for example further hospital, pathologist's, radiologist's and pharmacy fees, or for the refund of those fees.

Those are all damages the patient suffers. He will have to exercise his common law right to recover these damages.

There will be very limited circumstances where, in the medical context, having a supplier remedy a defect in the quality of services, or refunding a portion of the price paid for those services, compensates the patient adequately for all the losses suffered as a result of the failure to perform the services in a manner and quality that patients are generally entitled to expect.

In the circumstances it is the common law to which a patient will most frequently look to protect his interests in a medico-legal context.

No-fault liability

What does benefit a patient are the Act's no-fault product liability provisions (s61). Where harm, which includes death or injury to any natural person or illness in any natural person, is suffered as a result of the supply of any unsafe goods or product failure, defect or hazard, or inadequate instructions or warnings pertaining to the hazardous use of any goods, then the producer/importer/distributor or retailer as defined is liable therefor, irrespective whether there was any negligence on the part of any of those persons. There are very limited grounds for avoiding liability.

The provisions of the Act will be most useful for establishing liability of the manufacturers of medical products, such as pharmaceuticals.

The no-fault product liability provisions benefit the user of any goods even where there is no contractual relationship between that user and an entity such as the manufacturer.

That section also contemplates that a supplier of services who in conjunction with the performance of those services supplies, installs or provides access to any goods also attracts a no-fault liability for defective goods. That would, for example, nominally expose a surgeon who implants a defective pacemaker to liability.

The subsection in any event fails at the first hurdle in imposing liability on such a supplier because of the inconsistent use of terminology in the section. The section only contemplates no-fault liability of a producer/importer/distributor/retailer and not a supplier. Presumably the legislature intended such a supplier to be treated as a retailer under this section and an amendment will be necessary.

In any event, in terms of the limited exclusions from liability there is no liability if it is unreasonable to expect a distributor or retailer to have discovered the unsafe product characteristic failure or hazard having regard to their role in marketing the particular product to the patient.

It is in any event apparent from the typical wording of provincial consumer legislation such as the Consumer Affairs (Unfair Business Practices) Act 7 of 1996, which is the relevant legislation for Gauteng, that the jurisdiction of the consumer court (in the case of Gauteng, styled as the Consumer Affairs Court) does not extend to product liability claims.*

Unfair business practices

The provincial consumer courts have jurisdiction in terms of unfair business practices, which are directly or indirectly likely to unfairly affect a consumer. Business and business practice contemplate agreements and undertakings in connection with a business and a scheme, practice and method of trading or advertising or act or omission in connection with the business.

The consumer court may provide an order prohibiting unfair business practice. The court can in effect terminate the contract. Where money was accepted from the consumer in the course of the unfair business practice, if it is necessary to limit or prevent financial loss to the consumer, the consumer court may order the repayment of that money to the affected consumer with interest.

There is no provision for payment of damages for breach of a contract or for damages for the type of harm contemplated under s61 of the Act.

A patient has the right to cancel any advance booking reservation or order for services to be supplied. The doctor or hospital that makes such a commitment and accepts the reservation may require payment of a reasonable deposit in advance and impose a reasonable charge for cancellation of the reservation. That fee cannot be imposed if the patient cannot honour the booking reservation because of death or hospitalisation.

The cancellation charge is unreasonable if it exceeds a fair amount in the circumstances having regard to the nature of the services that were reserved or booked, the length of the notice of cancellation, the potential for the doctor or hospital acting diligently to find an alternative patient, and the general practice of the relevant industry (see s17).

Accordingly, in the case of a pre-arranged procedure there is scope for requiring a deposit and charging a reasonable cancellation fee.

The corollary of that is that where a doctor or hospital makes a commitment or accepts a reservation to provide services on a specified date and time, and then because of incapacity cannot supply the services or similar services of the same or better quality, class or nature, the hospital or doctor would have to:

- refund to the patient the amount paid, if any, together with interest until the date of the reimbursement, and
- also compensate the patient for costs directly incidental to the doctor or hospital's breach of the contract.

*Notwithstanding that that legislation refers to the court as an administrative body, the creation of the court may itself be subject to constitutional challenge because constitutionally only the national parliament may create a court and not a provincial legislature. To date the constitutionality of the provincial consumer courts has not been challenged.

It is a defence to such claims if the doctor or hospital supplied or offered to supply or procure another person to provide the patient with comparable services of the relevant kind to satisfy the patient's request and the patient accepted the offer or unreasonably refused the offer. Of course, it might be very difficult to argue that a refusal is unreasonable where a doctor/patient relationship is of critical importance and the patient for whatever reason does not have confidence in the alternative doctor recommended.

The penalty contemplated is also not applicable if the incapacity is due to circumstances beyond the doctor's or hospital's control and they took reasonable steps to inform the patient of the shortage as soon as it was practical to do so in the circumstances.

The shortage would not be due to circumstances beyond the hospital's or doctor's control if the shortage results partially, completely or indirectly from a failure on the part of the hospital or doctor to adequately and diligently carry out any ordinary or routine matter pertaining to their business.

However, in the case of emergencies or a nurses' strike, for example, which is not the result of the hospital's failure to adequately and diligently carry out any ordinary or routine matter relating to its business and which closes the hospital theatre, that would be lack of capacity due to circumstances beyond the hospital's control, provided the patient was notified timeously. There would be no liability for any penalty contemplated. The hospital would, however, be required to refund any amount paid in respect of the reservation (see s47).

Theoretically there is scope for a patient to attack a contract, for example on the basis that the price is unfair, unreasonable or unjust (as contemplated by s48). In practice that would probably be difficult to do where the prices charged are in accordance with the prescribed ethical tariffs, or negotiated with medical aids and/or reflect the Reference Price List as contemplated by the National Health Act.

A hospital or doctor cannot make any transaction or agreement subject to a term or condition if its general purpose or effect is to defeat the purpose and policy of the Act, waive or deprive a consumer of rights in terms of the Act, avoid a supplier's obligations or duty in terms of the Act, or set aside or override the effect of any provision of the Act.

In the context of disclaimer and indemnity clauses, the provisions of s49 create various formal hurdles, including specific notice, to the successful reliance on disclaimer and indemnities. Except in the case of clauses that purport to exclude liability or indemnify in respect of gross negligence, there is, however, no general prohibition on the use of such clauses.

Disciplinary procedures against medical practitioners, including nurses, remain to be dealt with under the relevant legislation dealing with nurses and medical practitioners and do not affect the remedies provided by the Act. The disciplinary committees established by the Nursing Act and the Health Professions Act of 1974 do not permit the imposition of any compensation award to the complainant.

Conclusion

In the circumstances, medical practitioners and hospitals will see very limited increase in litigation before any provincial consumer courts, if any. That is a factor of the nature of the jurisdiction and powers of those courts, and the limited rights and remedies which the Act affords patients in the doctor/patient and hospital/patient relationship.

Medical malpractice and product liability claims remain to be dealt with by the Magistrate's and High Courts. The no-fault product liability provisions of the Act will expose manufacturers in particular to increased risk of liability.