Editorial

Medical law and litigation

The Johannesburg offices of Deneys Reitz Inc. hosted a Medical Law Seminar in June this year. Several interesting papers were presented, some of which are published in the Forum section of this issue of *SAJBL*. That the law should be perceived as a tool towards the pursuance of justice for patients echoed throughout the seminar, both during presentations and the ensuing discussions. The notion of doctors as soft targets at the mercy of litigation-eager patients and legal practitioners did not feature in any way during the day's proceedings.

Donald Dinnie explained the much-talked about Consumer Protection Act and its implications with regard to litigation in medical practice. He looked at the question of whether the Act would create or expose medical practitioners and hospitals to an 'avalanche' of claims in the consumer court. It is interesting to note that in his opinion this is unlikely to be the case. He did stress, however, that the Act supplements the common law remedy for breach of contract and does not detract from a patient's rights to sue for damages in the case of negligence. In addition, patients benefit from the Act's no-fault product liability provisions. In the event of harm being suffered as a result of the supply of any unsafe goods, product failure or inadequate instructions or warnings pertaining to the hazardous use of any goods, the producer/importer/distributor or retailer (the medical practitioner) is liable, irrespective of whether there was any negligence on the part of any of those persons. The Act will be useful for establishing liability of manufacturers of medical products, such as devices and pharmaceuticals. The no-fault product liability provisions will benefit the patient even where there is no contractual relationship between that patient and an entity such as the manufacturer.

Sandra Sithole explained the South African legal situation with regard to 'wrongful birth' and 'wrongful life' claims, using the Supreme Court of Appeal case of *Stewart v Botha (340/2007) [2008] ZASCA 84*. The term 'wrongful life' was first used in 1963 in a decision by the Illinois Appeal Court when a normal, illegitimate child instituted an action against his father for his status as an illegitimate child. The court, taking into regard public policy, dismissed the claim.[1] Wrongful life claims are also brought about by disabled *children* against medical practitioners who negligently fail to determine before the plaintiff's (child's) birth the defect causing the disability, thereby depriving the parents of the opportunity to prevent the birth. This differs from 'wrongful birth' claims which are brought about by *parents* against practitioners for negligently not detecting disability in the fetus during the pregnancy. The claim by parents is that they would have prevented the birth of the child had they been adequately informed of the defect. On the other hand, 'wrongful conception' or 'wrongful pregnancy' actions are instituted by parents of normal children against practitioners, pharmacists and manufacturers of contraception following the birth of a child as a result of failed contraception (which includes sterilisation).[2] The courts have not used public policy to dismiss claims of 'wrongful birth' and 'wrongful conception', and decisions have in the main been favourable to the parents' claims.

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And in case you were wondering about the status of the case of the three medical practitioners in KwaZulu-Natal accused of organ trafficking a few years ago, Sandile Khoza's presentation on the human organ trade not only makes the facts of the case clear, but also clarifies the current situation regarding the charges. In addition, he aptly describes the legal situation on the issue of organ transplants and trafficking in the context of the Human Tissue Act No. 65 of 1983 and Chapter 8 (which has not as yet been promulgated) of the National Health Act No. 61 of 2003.

Recent legislative changes, the Bill of Rights of the South African Constitution, and increased knowledge and understanding of medical law and their rights in this regard by consumers of health care are some of the reasons why medical law has become significantly more complex of late. In addition, advances in science and technology, while greatly welcome and to the patient's benefit, are not without an associated increase in risks, hence the variety of new legal grounds on which negligence claims can be based. It is imperative that medical practitioners update their knowledge of medical law, keep abreast of current changes, and conduct their practice by employing high standards of ethical and technical skills. Doing so will assist in avoiding litigation, which is always unsettling and the source of much preventable anxiety and stress.

1. *Zepeda v Zepeda* (1963) 41 Ill App 2d 240, 190 NE 2d 849, as cited in Claasan NJB, Verschoor T. *Medical Negligence in South Africa*. Pretoria: DIGMA Publications, 1992: 79.
2. Claasan NJB, Verschoor T. *Medical Negligence in South Africa*. Pretoria: DIGMA Publications, 1992: 79-94.