

NATASHA BOSHOFF - 31 AUGUST 2024

# A 'DIAGNOSIS' OF THE LAW HOW, WHAT, WHY?



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**BIOKINETICS<sub>SA</sub>**  
LIFE THROUGH MOVEMENT

# BIOKINETICS AND THE LAW

- Bio's provide amazing benefits to society
- Bio's need society. Society needs Bio's
- Human nature of the profession. It's fallible. No harm is intended. It happens
- Errors have a huge impact on Bio's and patients
- In the interests of Bio's and patients that justice must be done!
- How?



# TRENDS

- Huge increase in claims
- USA trends, rights conscious society, social media & contingency fee legal arrangements
- DR/Pt ratio - World Health Org. 2.5:1000. SA <1:1000
- 2020/2021 Total claims paid in SA R6.5BN
- A study 2020 to date March 2024 R23.6BN



# POTENTIAL LEGAL PROCESSES

- Criminal Case
  - Molestation or Negligently causing injury. SAPS. Beyond all reasonable doubt. “Guilty” or “Not guilty”. Fine or jail
- Civil Claim
  - Claim for damages e.g. medical expenses, loss of income, disfigurement, pain. Attorney. Balance of probabilities. Money
- HPCSA Disciplinary Action
  - Professional standards. Before HPCSA Disciplinary Board of Bio’s/Professionals. Fine, Suspension or Striking off roll
- Each process differs i.r.o objective, test for liability and sanction



# PENICILLIN

- Wisdom teeth extracted.
- Patient said “allergic to penicillin”. Dr used penicillin in error nonetheless
- Patient reacted. Patient charged the doctor
- Patient in fact not allergic. Reaction was normal
- HPCSA: Guilty. Ethically wrong to give penicillin even if not actually allergic. Dr warned
- Civil Claim: Dismissed. No damages caused by giving penicillin. Patient not actually allergic
- Criminal: No charges, no injury



# FRACTURED RIBS

- Patient injured in MVA
- Admitted to Hospital in rural town. Seen by doctor
- Patient had no symptoms. Admitted for observation
- Patient died overnight in Hospital. Fractured ribs not diagnosed. Could not breath properly
- 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)

- 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
- HPCSA
  - Pleaded guilty. Failed to refer & to see patient in night. Dr conduct not entirely unreasonable. Symptoms unusually masked. Poor resources not Dr's fault. Dr warned
- Civil Claim
  - Minimal damages. Patient not a breadwinner. Claim was pursued but withdrawn



# SANCTIONS

- HPCSA
  - Unprofessional Conduct
  - Conduct regard to your profession, is unprofessional
- HPCSA
  - Advertising. Improper business practice
  - Wife & Bio advertised pamphlets & social media
  - R20K fine + online HPCSA courses 2 yrs





# SANCTIONS (CONT)

- Criminal
  - Bio. Fraud, Contrary to Act
  - Bogus Bio, not registered
  - 12 months jail
- Civil
  - Physio. Dry needle into lung
  - Claim R450K. Settled R100K



# TWO EXTREMES

- Fight!!
  - On principle / misguided ego
  - Regardless of poor merits
- Pay!!
  - Insurer's problem / Cop out
  - Regardless of good merits
- Neither is an option
  - Conduct each case on merit



# TEST FOR LIABILITY I.E. "NEGLIGENCE

- Case of Van Wyk vs Lewis 1924
  - We cannot determine in the abstract whether a medical professional has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the medical professional found himself when he conducted the particular treatment and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average medical professional placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care and judgment of the average medical professional in similar circumstances? If he falls short, he is negligent.



# TEST FOR LIABILITY I.E. "NEGLIGENCE (CONT)

- Above test confirmed again recently
  - Meyers v MEC Dept of Health EC [2020] SCA
- Measured against the "reasonable Bio"
- Not the best, not the worst
- In similar circumstances e.g. COVID, rural vs urban, available staff & resources!!



# COMMENTS / TIPS I.R.O. CLAIMS

- General & legal
  - Expect claims. It is part of modern society
  - Patients have a right to claim/complain ... BUT
  - Bio's have a right to defence.
    - Avoid emotional responses, can be costly e.g. defamation, contradictions
  - Insure for enough
    - More is better
  - Keep & retain records.
    - Practical approach & gut feel in unusual cases & patients. Rather safe than sorry



# COMMENTS / TIPS I.R.O. CLAIMS (CONT)

- General & legal
  - Civil claims for damages prescribe/lapse.
    - 3yrs (adults), 3yrs after majority (minors).
  - Other cases
    - Theoretically indefinite
  - Get legal advice



# COMMENTS / TIPS I.R.O. CLAIMS (CONT)

- Bio
  - Proper history. Communicate ++ colleagues, patients, get it in writing or confirm it in writing
  - Good admin & records. Referral letters are NB
  - Ask a colleague. Peer review is a valuable defence
  - If in doubt – refer a patient
  - Bio Pt relationship communication/explain/consent
  - Use familiar procedures
  - “Remain in your lane”. Stick to your field
  - Keep up to date. Technology & knowledge



# DISCLAIMER

- These slides contain general legal principles and are for information purposes only. The contents thereof should not be construed as legal advice. Prior to relying on any information in the slides, we recommend that you obtain legal advice. Should you have any questions, please feel free to contact our offices





# THANK YOU

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