



**THE ALLIED HEALTH PROFESSIONS COUNCIL OF
SOUTH AFRICA**

**THE CONSUMER PROTECTION ACT, ACT 68 OF 2008:
IMPLICATIONS FOR ALLIED HEALTH
PRACTITIONERS**

**PRESENTED BY
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**PATIENTS AS CONSUMERS OF HEALTH CARE IN
SOUTH AFRICA: THE ETHICAL AND LEGAL
CONSIDERATIONS**

Rowe and Moodley *BMC Medical Ethics* 2013, 14:15

<http://www.biomedcentral.com/1472-6939/14/15>

[accessed in January 2014]

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ACT 68 OF 2008 FOR EDUCATIONAL PURPOSES FOR
REGISTERED AHPCSA PRACTITIONERS AND
THERAPISTS

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT

- ❑ The new South African Consumer Protection Act (CPA) and its regulations came into effect on 1 April 2011.

 - ❑ According to Section 5(3), a regulatory authority may apply to the Minister of Trade and Industry for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation; or any treaty, international law, convention or protocol ¹
- Republic of South Africa, Department of Trade and Industry: Consumer Protection Act No 68 of 2008. Pretoria: Government Printer; 2008.
- ¹ *Republic of South Africa, Department of Trade and Industry: Consumer Protection Act No 68 of 2008. Pretoria: Government Printer; 2008.*

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- All patients are considered as ‘consumers’ from a legal perspective. This means patients also enjoy the rights of the consumer:
- **the right to equality in marketing; the right to privacy; the right to choose; the right to disclosure of information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; the right to fair value, good quality and safety; and the right to hold the supplier accountable**¹.
- Part F of the CPA describes the right to fair and honest dealings.
- ¹ *Republic of South Africa, Department of Trade and Industry: Consumer Protection Act No 68 of 2008. Pretoria: Government Printer; 2008.*

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ Section 40 prohibits the use of coercion or other such means to convince a consumer or patient to accept a particular product or service.
- ❑ This will truly encourage the notion of patient autonomy and choice.
- ❑ Allowing the patient to make the decision and obtaining informed consent is vital because consumers have the right to choose.
- ❑ The consent should be truly 'informed' and this should be ensured by communication and documentation (including the informed consent form) in plain language easily understandable to the consumer.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ All agreements and policies such as a billing policy in private practice need to have fair terms and conditions as stipulated in the Act.
 - ❑ The paying patient should also be informed of prices up front ²
 - ❑ An important new development of the CPA is that it creates strict or no-fault liability for harm caused by goods.
- ² Klink E: *Law in practice: CPA - knowing the rights of your patients.*
<http://www.medicalchronicle.co.za/law-in-practice-cpa-knowing-the-rights-of-your-patients/> (accessed 23 February 2013).

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ Section 61 explains that the producer or importer, distributor or retailer of any goods is liable for any harm caused by supplying unsafe goods; a product failure, defect or hazard in any goods; or inadequate instructions or warnings provided to the consumer about possible hazards.
- ❑ This is irrespective of whether harm resulted from any negligence¹.
- ❑ In the medical context, goods could imply medications, implantations, and medical equipment.
- ² *Klink E: Law in practice: CPA - knowing the rights of your patients.* <http://www.medicalchronicle.co.za/law-in-practice-cpa-knowing-the-rights-of-your-patients/> (accessed 23 February 2013).

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ This has medico-legal implications for litigation, particularly in the private sector.
- ❑ Previously, medical malpractice suits were based on the common law principles of negligence.
- ❑ The injured patient had to prove that the doctor acted negligently in his provision of care, and that this negligence resulted in injury.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ This required that four legal elements be proven:
 1. A professional duty owed to the patient (duty to care);
 2. Breach of such duty;
 3. Injury caused by the breach;
 4. Resulting damages.

- ❑ These common law principles conform to the provisions of the National Health Act.

- ❑ However, the new CPA deviates from the common law and National Health Act.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ Doctors can now not only be sued for negligence that resulted in harm to the patient, but also for supplying the patient with a faulty product that led to harm or loss ³.
- ❑ With the patient being considered a ‘consumer’ in terms of the CPA, the doctor becomes a ‘supplier’ or ‘retailer’ as part of the health care supply chain.
- ❑ Section 61(3) of the CPA makes it clear that if, in a particular case, more than one person is liable, all the involved parties are jointly and severally liable ¹

- ¹ Republic of South Africa, Department of Trade and Industry: Consumer Protection Act No 68 of 2008. Pretoria: Government Printer; 2008.
- ³ Howarth G, Davidow R: **Don't be consumed by new Act**. Medical Protection Casebook 2010, **18**(3):12-13.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ This means that the patient can sue anyone in the supply chain.
- ❑ The doctor is placed in a difficult position because he or she is usually the only member of the supply chain who can be identified by the patient.
- ❑ The doctor is thus the easiest person to sue.
- ❑ Previously if a doctor was sued, common law dictated that the complainant had to prove negligence on the part of the doctor in order for his case to be successful.

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- ❑ Now, however, due to the strict liability provisions in the CPA, this is no longer necessary.
- ❑ The only thing that will need to be established is the causal relationship between the harm suffered by the complainant and the product provided by the health-care practitioner on a balance of probabilities ^{4 5}.

⁴ Slabbert MN, Pepper MS: ***The Consumer Protection Act: No-fault liability of health care providers.*** SAMJ 2011, 101(11):800-801.

⁵ Gordon A: ***The perceived strict liability in terms of the Section 61 of the Consumer Protection Act.*** Pathology Forum 2013, 4(1):21-24.

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- ❑ The importance of clear instructions and warnings to patients as well as drawing the patient's attention to any unusual or serious risks and obtaining written consent cannot be over-emphasised if the doctor is to avoid litigation.
- ❑ Additionally, South African common law recognises the offence of injuria – the unlawful infliction of bodily harm or violation of physical integrity.
- ❑ Lack of consent therefore equates to assault ⁶.

■ ⁶ Dhali A, Gardner J, Guidozi Y, Howarth G, Vorster M: **Medicine and the Law: vaginal deliveries – is there a need for documented consent?** SAMJ 2011, 10(1):20-22.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ **Informed consent** is not only a legal, but also an ethical imperative.
- ❑ Section 54 of the CPA ('Consumer's rights to demand quality service') affirms that the consumer has the right to the performance of services in a manner and quality that persons are generally entitled to expect, taking into account any specific conditions agreed upon before or during the performance.
- ❑ Due to the 'Implied warranty of quality' (Section 56), if the doctor does not fulfil these requirements, it may result in his having to fix the defect or refund the patient a reasonable share of the price paid.

THE PATIENT AS A CONSUMER IN THE CURRENT LEGAL ENVIRONMENT CONT.

- ❑ Section 47 of the CPA prohibits **over-booking** ¹.
- ❑ Another avenue to assure quality of service is via the proposed Office of Health Standards Compliance.
- ❑ According to Donald Dinnie, a medico-legal attorney, the proposed amendments to the National Health Act will give patients at public health establishments a suitable means to complain and seek improvement of problem areas such as long waiting times, medication availability, safety and security, nursing attitude, values of staff, and infection prevention and control [personal communications].
- ❑ The Consumer Protection Act complements the proposed amendments.
- ¹ *Republic of South Africa, Department of Trade and Industry: Consumer Protection Act No 68 of 2008. Pretoria: Government Printer; 2008.*



THANK YOU