

MEDICINE AND THE LAW

'Covering doctors' standing in for unavailable colleagues: What is the legal position?

D J McQuoid-Mason, BComm, LLB, LLM, PhD

Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

Corresponding author: D J McQuoid-Mason (mcquoidm@ukzn.ac.za)

Covering doctors are those who stand in for colleagues when the latter are unable to deal with their patients. Covering doctors who begin to issue telephonic instructions to nurses or other healthcare practitioners regarding the treatment of the patients they are covering are in the same position as any other doctors treating patients. They cannot argue that the patients they are covering only become their patients once an emergency or crisis occurs or when they see the patients for the first time, and that prior to that their function is merely to monitor the patient's progress. They also cannot rely on telephone instructions for long periods of time when the patient's health may be in danger, without seeing the patient. However, if covering doctors are found to be negligent they can still escape liability if the plaintiff cannot prove a causal link between their negligence and the harm that resulted 'beyond a reasonable doubt'.

S Afr Med J 2018;108(1):19-21. DOI:10.7196/SAMJ.2018.v108i1.12749

A recent court case involving the duties of covering doctors who issue telephonic instructions to nurses, while standing in for colleagues who are unable to deal with their patients, involved the following facts:^[1]

A covering doctor is asked to look after a pregnant patient who is about to give birth to her first child, because her obstetrician-gynaecologist is not available. He is contacted telephonically by the midwife on duty and given information concerning the patient's condition and progress. There are some early indications that the birth may not be straightforward, but these do not manifest again until a few hours later. The covering doctor continues to receive telephonic information from the nurses and issues instructions to them without seeing the patient. The nurses negligently fail to inform the doctor of two further complications experienced by the patient. When he is informed that the patient is fully dilated the covering doctor arrives at the hospital, 11.5 hours after he first issued telephonic instructions to the nursing staff. He then discovers that the baby is in distress and needs to be delivered urgently. The nurses negligently cause further delays in the birth of the child. Eventually, the baby is born, but had been deprived of oxygen during labour and is later found to suffer from cerebral palsy.

The hospital accepts liability for the negligence of its nurses towards the patient and the child, but seeks a contribution towards the damages from the covering doctor as a joint wrongdoer. The covering doctor denies liability on the basis that he owed the patient no duty of care until he arrived at the hospital. Until then there was no doctor-patient relationship between them. He also argues that he was merely covering for the patient's obstetrician in the event of an emergency or imminent delivery. He further argues that he did not intervene earlier because he did not wish to interfere with the relationship between the patient and her obstetrician, as this would cause her anxiety. However, he concedes that if the patient had been his from the beginning he would have visited her much earlier to check her condition. Finally, the covering doctor argues that even if he was negligent, there was no causal link between

his negligence and the resulting harm to the baby. The court rejects the covering doctor's arguments that the doctor-patient relationship only came into effect when he arrived at the hospital. It also rejects the contention that he was only obliged to cover for an emergency or imminent delivery. The court finds that he had not exercised the requisite skill and care expected of a covering doctor in his position. As a result, he is guilty of negligence. However, the court finds that the hospital did not establish 'on a balance of probabilities' that the covering doctor's negligence caused the harm suffered by the baby, and the case against him was dismissed.^[1]

This case (the S case) raises the following questions: (i) When does a person become a patient? (ii) What are the duties of covering doctors? (iii) When can doctors use telephonic instructions without seeing a patient? (iv) What information has to be placed before the court to establish a causal link between a doctor's negligence and the harm to the patient?

When does a person become a patient?

It is well established that usually a person becomes a patient either through a contractual arrangement^[2] or as a result of the law of delict imposing a duty on doctors not to treat their patients negligently.^[1] In terms of contract, a doctor 'undertakes to treat a patient with the required skill and care, and a patient undertakes to pay their fees.'^[1] Under the law of delict, once a doctor begins to provide care to a person or instructs other healthcare personnel on how to treat such a person, the doctor is regarded as having entered in a doctor-patient relationship through mere operation of the law.^[2] In such instances, the law imposes a duty on doctors to treat patients with the same degree of skill and care as a reasonably competent practitioner in that field of practice – independent of any contractual relationship.^[2] Failure to exercise such skill and care amounts to negligence on the part of the doctor. As indicated, such a duty also exists when there is a contract between the doctor and the patient.

The law of delict imposes such a duty on doctors because it is not always possible for patients to enter into contracts with their doctors, and doctors are still required to treat such patients properly. For instance, where patients are unconscious, doctors are required to treat such patients with the necessary skill and care once they assume responsibility for treating them.^[1]

Doctors who fail to exercise the requisite skill and care can be sued either in contract or in delict because they have a contractual obligation not to be negligent, but also 'a legal duty, independent of the contract, not to be negligent'.^[1]

A person therefore becomes a patient when a doctor agrees to treat them or when a doctor begins treating them – either personally or by issuing instructions to healthcare providers concerning their treatment. The court in the S case therefore concluded that the covering doctor 'owed the patient a legal duty as a specialist obstetrician from the time that he was notified of her admission and started to manage her treatment, and he was negligent in not examining her earlier and verifying for himself that everything was in order'.^[1]

What are the duties of covering doctors?

Covering doctors are those who stand in for colleagues when the latter are unable to deal with their patients, and have the same duties as ordinary doctors.^[1] Once covering doctors begin to issue telephonic instructions to nurses or other healthcare practitioners regarding the treatment of the patients they are covering, they are in the same position as any other doctors treating patients.^[1] They cannot argue that the patients they are covering only become their patients once an emergency or crisis occurs or when they see the patients for the first time. Covering doctors also cannot maintain that prior to such emergency or crisis their function is merely to monitor the patient's progress – as was alleged in the S case. This is especially so when the covering doctor knows, or should know, that at the time the original treating doctor is unable to manage the patient.^[1]

In the S case the court pointed out that '[t]he process of labour is inherently dangerous and calls for expert monitoring and management of both mother and foetus'. It rejected 'the implication' that 'during the process of labour there was no obstetrician who had the responsibility of managing the patient and her unborn child', and that the covering doctor 'was not obliged or willing to do anything until an emergency developed or the delivery was imminent'.^[1] The court also rejected the argument that although the covering doctor would normally go and see his patient within 3 or 4 hours of admission, he refrained from doing so in order not to interfere with the original treating doctor's relationship with his patient as it might 'cause anxiety on her part'. It also rejected the doctor's contention that he did not interfere because 'he did not want there to be a discrepancy between his management of the patient' and that of the original treating doctor.^[1] The court pointed out that 'no reasonable obstetrician will leave the patient entirely in the hands of the nursing staff until the baby is about to be born', and held that the covering doctor was negligent in this respect.^[1]

When can doctors use telephonic instructions without seeing a patient?

It has been suggested elsewhere that it may not be appropriate to issue telephonic instructions where the patient is not previously known to the doctor or when the assessment may be helped by examination of the patient.^[3] Generally, doctors are expected to examine their patients before issuing telephonic instructions to

nurses. In emergencies, however, or when they are aware of the health status of their patients, doctors may be justified in issuing telephonic instructions to nurses without examining the patient.^[3]

In the S case, the covering doctor issued telephonic instructions to the nursing staff without seeing the patient for over 11 hours. Expert witnesses stated that as it was a first pregnancy the covering doctor should have gone to the hospital 'within an hour or so after this call and verify for himself that everything was in order'. It was also necessary for him 'to satisfy himself that the information given to him by the nursing staff was correct'. An 'early visit to see the patient would have alerted [the covering doctor] to the high head, which made her a high risk patient which required a frequent and vigilant observation'.^[1]

The court stated that 'an obstetrician who has not seen a patient who was admitted eight and a half hours earlier, cannot sit at home and judge the situation simply on what the nursing staff reports telephonically about the CTG [cardiotocograph] readings'. The covering doctor accepted this and conceded that 'if the patient had been his he would have gone to check for himself'. He did not do so because he regarded the patient as the original treating doctor's patient.^[1] As a result, the covering doctor's conduct 'was a serious lapse which fell short of the degree of care and expertise that was expected of him as a specialist obstetrician', and he was found liable for negligence.^[1]

Doctors are expected to examine their patients before issuing telephonic instructions to nurses – except in emergencies or when they know the patient's health history.^[3] In such situations the court will decide whether the doctor concerned acted reasonably. The test used by the court is whether the doctor exercised the same degree of skill and care as a reasonably competent practitioner in their branch of the profession.^[3] In the S case, the court found that the covering doctor's conduct 'fell short of the degree of care and expertise that was expected of him as a specialist obstetrician'.^[1]

What information has to be placed before the court to establish a causal link between a doctor's negligence and the harm to the patient?

In the S case, the court was faced with a situation where the expert witnesses could not say whether the baby would have escaped birth damage had it been delivered 2 hours earlier – although in a joint minute they stated that they thought that the damage may have occurred an hour or shortly before the covering doctor arrived to visit the patient. However, no reasons were given for their conclusion regarding the timing. One of the witnesses conceded that 'it is almost impossible to estimate how long it takes' because it 'depends on the degree of hypoxia'.^[1] The judge pointed out that 'a court cannot simply accept the say-so of an expert who expresses an opinion on a matter within his field of expertise' and 'will have regard to whether the opinion appears to be reasonable and logical and what the reasons for it are'.^[4] 'In this case the opinion expressed in the joint minute ... was not supported by reasons and appears to be no more than an estimate'.^[1] Therefore the plaintiffs had not proved 'on a balance of probabilities' that if the covering doctor had gone to see the patient when a reasonable obstetrician would have, the baby would not have suffered from cerebral palsy.^[1]

Conclusion

The S case discusses for the first time what is expected of a covering doctor in terms of managing a patient for another doctor, and leads to the following conclusions:

- Covering doctors should treat the patient they are covering in the same manner as they would treat their own patient.
- Covering doctors become legally responsible for such a patient from the moment they agree to manage the patient's treatment.
- Covering doctors cannot argue that the patient they are covering only becomes their patient when they see the patient for the first time.
- Covering doctors cannot argue that their function is merely to monitor the patient's progress and that the person only becomes their patient once an emergency or crisis occurs.
- Covering doctors cannot judge the patient's condition solely on what the nursing staff report telephonically.
- Even if the court finds that a covering doctor's conduct was wrongful and negligent, the doctor will only be liable for damages if the plaintiff proves 'on a balance of probabilities' that the doctor's act or omission caused the harm that resulted.

Acknowledgements. None.

Author contributions. Sole author.

Funding. None.

Conflicts of interest. None.

1. S v Life Healthcare Group (Pty) Ltd (10227/2014) [2017] ZAKZDHC 12 (20 March 2017). <http://www.saflii.org/za/cases/ZAKDHC/2017/12.html> (accessed 12 July 2017).
2. Correia v Berwind 1986 (4) SA 60 (ZH).
3. McQuoid-Mason D. When may doctors give nurses telephonic instructions? S Afr Med J 2016;106(8):787-788. <https://doi.org/10.7196/SAMJ.2016.v106i8.10830>
4. See also Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA).

Accepted 25 August 2017.