

Clicks, carelessness and consequences: Navigating pharmacist negligence

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The legal framework governing claims of medical negligence is extensively documented within South African (SA) jurisprudence, with a predominant focus on the liability of medical practitioners. In contrast, the liability of pharmacists has received comparatively scant attention. This issue was recently highlighted by a case in which a woman from the Western Cape initiated legal action against Clicks, a leading health, beauty and wellness retailer and SA's largest retail pharmacy chain, alleging that the provision of incorrect medication nearly cost her life. At the time of writing, the case has yet to advance to trial. This article explores the legal and ethical dimensions of medical negligence attributed to pharmacists within the context of their professional duties. Additionally, it investigates how similar cases are adjudicated in foreign jurisdictions, with a specific focus on the US.

Keywords. dispensing error, ethical considerations, liability, patient safety, pharmacist negligence, professional duties.

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The prominence of litigation involving negligent pharmacists was recently underscored by a high-profile incident involving Clicks, a pre-eminent health, beauty and wellness retailer and South Africa's largest retail pharmacy chain. The issue centres around a lawsuit filed by an individual alleging that a pharmacist at Clicks' Edgemoor Shopping Centre branch in Cape Town dispensed incorrect medication, leading to a life-threatening situation.^[1] Specifically, the plaintiff contends that the pharmacist failed to verify the accuracy of the medication dispensed, resulting in her receiving Xarelto, an anticoagulant, instead of Xatral, which is typically prescribed following a routine haemorrhoidectomy. The erroneous medication caused significant bleeding, necessitating emergency medical intervention. Although the bleeding was ultimately controlled and the patient was discharged, she asserts that the incident has led to the development of post-traumatic stress disorder. This article explores the legal and ethical dimensions arising from this incident, without adjudicating the factual accuracy of the claims made by the parties involved. The discussion will commence with an examination of the legal criteria for establishing negligence, followed by an analysis of the respective responsibilities of the patient and the pharmacist. Subsequently, the focus will shift to the ethical considerations pertinent to the case, culminating in a comprehensive conclusion.

Legal principles governing cases of medical negligence

In any case involving allegations of medical negligence, negligence is characterised by a failure to anticipate potential harm to others. Specifically, it involves a scenario where the defendant did not foresee the possibility of bodily, mental or fatal injury occurring to another, despite a reasonable person in the defendant's position being able to foresee such harm and taking appropriate measures to prevent it.^[2]

The legal standard for determining negligence is articulated in the case of *Kruger v Coetzee*,^[3] which establishes that liability for negligence

arises if: (a) a reasonable person in the defendant's position would: (i) foresee the reasonable possibility of their conduct causing harm to another's person or property, resulting in patrimonial loss and (ii) would take reasonable precautions to prevent such harm; and (b) the defendant failed to take those precautions.

Additionally, the case of *R v Van der Merwe*^[4] introduces an elevated standard of care for professionals such as pharmacists. The judgment emphasises that professionals are expected to possess a level of skill commensurate with the ordinary standard in their field and to perform their duties with reasonable competence. A professional's conduct is thus assessed against the standard of a reasonable expert in their profession.^[4]

Applying these principles to the present incident involving the Clicks pharmacist at the Edgemoor Shopping Centre, Cape Town, the key questions are: Would a reasonable pharmacist have anticipated the risk of harm from dispensing the incorrect medication? Would a reasonable pharmacist have taken appropriate steps to prevent such an error, such as verifying the medication before dispensing? Did the defendant fail to take these precautionary steps?

If the answers to these questions are affirmative, then negligence on the part of the pharmacist would be established. It is important to note that this is an objective test, focusing on what a reasonable pharmacist would have done under similar circumstances, rather than the subjective intentions of the defendant. The court will likely rely on expert testimony to determine the appropriate standard of care, although it retains the authority to make the final determination.

Assuming the plaintiff's account is accurate, it appears that the pharmacist may have committed an error. However, an error alone does not constitute medical negligence. The error must be evaluated against the standard of care expected from a reasonable pharmacist. Based on the reported facts, it is plausible to conclude that a reasonable pharmacist would have foreseen the risk of harm from providing the

incorrect medication and should have implemented safeguards such as double-checking the prescription. The pharmacist's failure to do so suggests *prima facie* negligence, making the plaintiff's claim likely to succeed, subject to judicial determination of damages based on similar cases and the evidence presented.

Foreign jurisdictions

Section 39 of the Constitution^[5] provides authority for consulting foreign jurisdictions. It states that 'when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie and open and democratic society based on human dignity, equality, and freedom; (b) must consider international law; and (c) may consider foreign law'. It is to be noted that foreign law is not binding in SA; however, such principles may be persuasive in making a determination on a matter. It is against this backdrop that we will consider the negligence of pharmacists in other jurisdictions.

In the US, negligence is defined as a failure to exercise 'due care under the circumstances'.^[6] Given the potential severity of harm that can result from a pharmacist's error, the legal standard for pharmacists is notably high.^[6] Similar to the standard in SA, a pharmacist must act with the degree of care that a reasonably prudent person would exercise in the same situation.^[6]

However, the standard of care for professionals, including pharmacists, is tailored to their specialised knowledge and training. As a result of their advanced training, pharmacists are expected to possess an understanding of risks that may not be apparent to the average person.^[6] Their conduct must therefore be evaluated based on what a reasonable pharmacist, aware of such risks, would do.

In *Smith's Adm'x v Middleton*,^[7] the court addressed a situation where a clerk mistakenly dispensed morphine instead of calomel, leading to the death of a child. The court ruled that if the employer was found negligent in hiring an incompetent employee, the injured party was entitled to punitive damages.^[8]

In another case, *Dunlap v Oak Cliff Pharmacy*,^[9] the plaintiff was given bichloride of mercury instead of the requested antiseptic tablets. The plaintiff, unaware of the difference, used the incorrect medication and suffered severe consequences. The jury in this case found negligence based on the pharmacist's failure to verify the medication's suitability.

While these cases present different factual scenarios compared with the factual matrix discussed in this article, they underscore the consistent application of legal principles across jurisdictions. The fundamental test remains whether a reasonable pharmacist in the defendant's position would have acted differently. If the defendant's conduct falls below this standard, negligence can be established. Depending on the nature of the case, a negligent pharmacist may face criminal charges or civil liability.

Contributory negligence

The issue of contributory negligence arises in assessing whether a plaintiff's own actions may have contributed to their harm, potentially impacting the recovery of damages. In SA, this concept is governed by the Apportionment of Damages Act.^[10] Section 1 of the Act stipulates:

'Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having

regard to the degree in which the claimant was at fault in relation to the damage.'

Although the language of the legislature may seem complex, it fundamentally means that a plaintiff's right to damages is not nullified by their own negligence. Instead, the quantum of recoverable damages may be diminished in proportion to the plaintiff's degree of fault.

In the incident at hand, two primary considerations emerge: the potential for contributory negligence by the plaintiff and whether such negligence would warrant a reduction in the claim. Although there may not be direct legal precedents addressing this precise factual scenario, existing legal principles can be applied to evaluate the situation.

To assess whether the plaintiff (the woman who ingested Xarelto) exhibited contributory negligence, we must apply the reasonable person test. Specifically, we consider whether a reasonable person in her position would have anticipated the risk of receiving incorrect medication from the pharmacist. Additionally, we examine whether a reasonable person would have taken precautionary steps to mitigate this risk and whether the plaintiff failed to undertake such measures.

A reasonable interpretation suggests that a person without specialised medical knowledge would typically trust the pharmacist to accurately dispense the prescribed medication. While it is reasonable to rely on the pharmacist's professional competence, a counter-argument might be that a prudent individual would also verify the medication received. In this instance, the plaintiff did not undertake additional verification steps.

Despite the potential for differing interpretations, prevailing reasoning indicates that a reasonable person, lacking medical expertise, would depend on the pharmacist's dispensation. This perspective aligns with prevailing American case law, which similarly supports reliance on professional dispensing.

Consequently, it appears that the plaintiff was not negligent in this context, thereby obviating the need to assess whether the claim should be reduced under the Apportionment of Damages Act. The determination of damages will be made by the court, taking into account all relevant evidence presented.

The ethical considerations

Medication errors are a significant contributor to patient harm,^[11-15] causing harm to one in every 30 patients.^[16] Medication errors are preventable mistakes related to prescribing, dispensing, administering or monitoring medications.^[11-15] Nearly a quarter of medication-related incidents are classified as severe or life-threatening.^[15] In pharmacy, medication errors typically involve dispensing the wrong medication, strength, dosage form, label or instructions to the patient.^[17-19]

Ensuring patient safety relies on pharmacists' commitment to ethical conduct, professionalism and vigilant error prevention. Pharmacy ethics involves adhering to moral principles and professional standards in pharmacy practice, which include respecting patients' rights to make informed decisions about their medications (autonomy), promoting patient well-being through safe and effective drug therapy (beneficence), avoiding harm to patients (non-maleficence) and ensuring equitable access to medications (justice).

The South African Pharmacy Council states that 'Pharmacists are required to be specialists in the knowledge of drug-related products'.^[20] A general function of the pharmacist is to provide 'pharmaceutical care by taking responsibility for the patient's medicine-related needs and being accountable for meeting these needs'.^[21] This includes

dispensing any medicine or scheduled substance on the prescription of a person authorised to prescribe medicine. The Regulations Relating to the Practice of Pharmacy define 'dispensing' to mean 'the interpretation and evaluation of a prescription, the selection, manipulation or compounding of the medicine, the labelling and supply of the medicine in an appropriate container according to the Medicines and Related Substances Control Act 101 of 1965 and the provision of information and instructions by a pharmacist to ensure the safe and effective use of medicine by the patient'.^[22] The Rules relating to the Code of Conduct for Pharmacists and Other Persons Registered in terms of the Pharmacy Act No 53 of 1974, outlines similar responsibilities of pharmacists regarding patient safety and medication errors.^[20] These include accurate dispensing, patient counselling, monitoring drug interactions, reporting adverse events, record keeping and maintaining high standards in pharmacy practice to safeguard patient well-being. The Code of Conduct recognises the professional responsibility of pharmacists to exercise control over all medicinal and related products that are purchased or supplied. It mandates that pharmacists 'exercise proper and/or reasonable care in respect of and control over medicines' and prioritise patient health and safety.^[20] In terms of the South African Health Products Regulatory Agency (SAHPRA) Guideline for Adverse Drug Reactions (ADRs) Reporting for Healthcare Professionals, all medication errors, regardless of whether they result in harm, must be reported to the agency.^[23]

Pharmacists have a duty to promote patient wellbeing. They must ensure accurate dispensing of medications, minimise the risk of errors and provide clear instructions to patients about their medications including dosage, side-effects and potential interactions. However, when medication errors occur, they may unintentionally cause harm. Medication errors can compromise patient autonomy. If a pharmacist dispenses the wrong medication, the patient's right to make informed decisions is violated. When a pharmacist dispenses the wrong medication causing adverse effects, the fundamental ethical question is whether the pharmacist fulfilled their duty of care to prevent harm. When pharmacists fall short of fulfilling their professional and ethical duties, they can be held liable.

The alleged conduct of the pharmacist in the scenario at hand is an example of a medication error in a pharmacy setting that resulted in severe or life-threatening patient harm, for which the pharmacist was held legally responsible. One of the main questions the court must consider when the matter is brought before it at trial is whether the pharmacist adhered to professional and ethical standards in fulfilling the requisite duty of care. This scenario not only highlights the central role that pharmacists play in ensuring patient safety but also the potential serious consequences of medication errors for both patients and pharmacists.

Conclusion

This article examined a recent high-profile incident involving allegations of pharmacist negligence that garnered significant media attention. The issue centres on a lawsuit filed against Clicks, in which a plaintiff claims that she was erroneously dispensed Xarelto instead of Xatral. The plaintiff asserts that this error led to severe and life-threatening bleeding.

The discussion underscored the distinction between the extensive documentation of medical negligence within the healthcare sector,

particularly concerning medical doctors, and the comparatively limited discourse on pharmacist-related negligence. The article delved into the legal standards for medical negligence, drawing comparisons between domestic and international jurisprudence, including relevant cases from the US.

Applying the established legal test for negligence, the analysis suggests that, based on the available information, Clicks is likely liable for the negligent act committed by their employee within the scope of employment. Additionally, the issue of contributory negligence was explored in the context of applicable legislation. The conclusion, following the application of the reasonable person standard, indicates that the patient did not exhibit negligence.

Pharmacists must recognise that deviations from the expected standard of care, as defined by reasonable experts in their field, could result in a viable claim of medical negligence. Pharmacists must adhere to the legal and professional standards required to prevent harm and uphold their duty of care.

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