

Wilful blindness

SADJ November 2023, Vol. 78 No.10 p529-531

LM Sykes¹, AM Van Zyl²

“The most deadly poison of our time is indifference”

Saint Maximilian Kolbe

ABSTRACT

Practitioners who are aware of colleagues carrying out unprofessional activities, yet choose to turn a blind eye to the transgressions, may themselves be acting dishonestly and unethically. This paper explores both the legal and ethical concerns of “wilful blindness” on the part of those who observe potential wrongdoing among others within the dental fraternity, yet remain silent. It also covers the HPCSA regulations regarding the duty to report and the risks associated with being a “whistle-blower”.

Introduction

We are all aware of colleagues within the dental fraternity who are not behaving professionally, such as dentists doing specialised procedures for which they have not had adequate postgraduate training; technicians, therapists or oral hygienists performing work outside their scope of practice; clinicians making use of social media sites to advertise their practices; misleading advertisements and/or offers of “special deals”; colleagues posting identifiable before and after patient treatment photographs on public platforms; overservicing or overcharging; and many other practice-related transgressions. Yet for the most part the dental fraternity remains silent. Their “wilful blindness” intimates consent, and allows the perpetrators to continue with their wrongdoing without any fear of repercussions. This “deafening silence” is both an ethical and a legal concern. In this paper, the topic will be presented from a legal standpoint, and juxtaposed by ethical considerations (in italics), as well as in terms of the HPCSA rulings on the duty to report.

1. The Law and Ethics

A delict is a complex legal entity that is traditionally divided into key elements.

These are: 1. Conduct (the commission or omission of an act); 2. Wrongfulness (the act is unlawful or wrongful); 3. Fault (it was committed negligently or with a particular intent); 4. Causation and Liability (it results in or causes a harm); 5. Damage (harm or damage that ensues).¹ A delictual inquiry is a loss-allocation exercise, in which a person claims for damages caused by a harm. The harm itself may be a patrimonial loss or due to pain and suffering

associated with bodily injury. The usual remedy sought is for some form of compensation.¹⁻³

Each of these elements will be briefly discussed in terms of the South African Law, and how they relate to the dental practitioner who witnesses the delict. It will not cover the conduct of the wrongdoer.

1.1 Conduct may be in the form of a positive act (a commission), an omission or even a statement. It is usually wrongful if it causes harm to a person or property. The conduct of the professional who witnesses wrongdoing but remains silent, and thus allows the perpetrator to continue, is one of omission rather than a commission. If the courts were to evaluate their conduct they would need to determine if the act itself was wrongful, if the person in question had mental capacity to know this, and if their actions were voluntary.⁴ The degree of wrongfulness is often a question of “social policy” and requires those deliberating over it to “make a value judgement as to its social acceptability”. To do this they would consider the interests of both parties involved, as well as society in general, the possible consequences of the conduct and the implications of a decision in favour of any party involved. However, where the conduct is due to an omission or negligent statement, it is usually not considered wrongful even if some form of physical harm resulted. An omission will only be considered legally wrongful if there was a duty to act positively to prevent the harm. Even so, the courts will still consider possible defences such as “self-protection, necessity, justification, statutory authority or consent”.¹⁻⁴

While it may not be possible to rule an omission wrongful legally, at most it is usually considered negligence. However, ethically it may be felt that they did not show “adequate or consistent levels of care towards the patients” in question.⁵ To at least hold them accountable from a professional and moral standpoint one would have to consider their inactivity under the “objective reasonable person” rule and assess it in terms of two main criteria, foreseeability and preventability. The former refers to the “likelihood or extent of risk created by the conduct, and the gravity of the possible consequences”. In instances where the “likelihood of harm is relatively great, or the consequences are serious, the possibility of harm is foreseeable”. The opposite is also true in that it is difficult to foresee harm where the risks are small or the potential damages would not be serious.^{4,6}

Preventability is judged by considering if they could feasibly have done anything to prevent the harm, and the degree of burden suffered by the patient by their lack of intervention. It also considers what the costs to them personally would be if they did have to take any actions. If the burden to them personally of trying to prevent the harm outweighs the significance of the risk, they cannot be expected to take any actions to try to prevent it.^{3,4}

Authors' information

1. Leanne M Sykes, BSc, BDS, MDent, IRENSA, Dip Forensic Path, Dip ESMEA, FCD, Head of Department of Prosthodontics, University of Pretoria, South Africa
ORCID: 0000-0002-2002-6238
2. Albert M Van Zyl, BDS (UWC), PDD (Interceptive Orthodontics)

Corresponding author

Name: Prof LM Sykes
Email: Leanne.sykes@up.ac.za

Author's contribution

1. Leanne M Sykes – primary author – 80%
2. Albert Van Zyl – secondary author – 20%

1.2 Wrongfulness, in that the act must be objectively unreasonable, unlawful or wrongful. In this instance, the practitioner who is carrying out the unlawful or unethical act is behaving in a wrongful manner, but so too is the one who allows this to continue without trying to intervene in some way to prevent possible future harm.¹⁻⁴

*Wrongfulness in terms of ethics in this situation is mostly linked to the concept of non-maleficence which obligates practitioners to either refrain from causing harm, to attempt to remove harm or to prevent possible harm.*⁵

1.3 Fault refers to the blameworthiness of the action and whether it was committed negligently or intentionally. For a person to be at fault it needs to be proven that they were accountable for their actions, that they knew the act being witnessed was wrong and they knew their inactivity was wrong. The fault in this instance is one of omission, where they failed to do or say something about the wrongdoing. However, in terms of the SA law it is rare for them to be held liable as there is no legal duty to prevent harm. As mentioned, fault may be apportioned if the person was in any way duty bound by society to try to prevent the harm. Examples of such include “where the person has direct control over a potentially dangerous object, persons in public office, where there is a contractual assumption of responsibility, where there is a statutory duty and where the harm is foreseeable”.¹⁻⁴

Ethically a person can only be at fault if they have “the mental and emotional capacity to distinguish between right and wrong, and the ability to act in accordance with that insight and understanding”.⁴ Evaluating this is very subjective as it deals with an assessment of mental rather than physical attributes of the person being judged. These, in turn, may be influenced by extraneous outside circumstances such as emotional distress, “mental or physical illness, immaturity, intoxication or provocation”. Here we would consider whether the silence was due to apathy, or some form of unwillingness to get involved, or if there was an overt and conscious intention to see harm done. In the case of the latter the motive for that intention needs to be established.⁴ Perhaps the dentist wanted a harm to occur so that the guilty practitioner would run into trouble. However, they knowingly placed patients at risk to achieve this end goal, which is cowardly and ethically deplorable.

1.4 Causation must prove that the action resulted in harm. This needs to be both factual and legal in that the law needs to show that there is a direct causal connection between the conduct and the harm. It is almost impossible to prove that a person’s inactivity directly caused the harm sustained by someone else in situations where they were outside observers. Here the questions to ask would be if there was any form of direct connection between the two parties and, if so, if the harm was connected closely enough to them in any way.⁴

Liability is measured in terms of the degree of harm incurred, the wrongfulness of the conduct and the intention behind the action which resulted in the impairment. Not every damage or loss will incur liability especially if it is the result of carelessness rather than unquestionable fault. The law will only prescribe remedies if all of the above five elements are present. In terms of the law conduct is generally divided into either factual or legal causation. The former is determined by

the court’s ability to prove that the person’s silence caused the harm or loss. If so, is the harm linked sufficiently closely to confer legal liability, or is the association too remote? To determine causation “the court will apply a flexible test based on the principles of reasonableness, fairness and justice”. They can also not be held liable for their inactivity if they genuinely were unaware that their/the action being witnessed was wrong. The courts, too, may also consider a person who is under severe emotional distress to not be liable for their actions.¹⁻⁴

It becomes difficult to confer liability on a person who silently watches the wrongdoings of another practitioner, as no actual harm may yet (or ever) occur to the patients. Thus, the essential elements of delict will not be fulfilled. However, their inactivity is nonetheless unethical as they are aware of the wrongdoing but choose to not become involved in trying to stop it. This goes against the principles of non-maleficence. They could also be accused of negligence if their inactivity showed an inadequate standard of behaviour as expected by their profession.^{4,6} Here their conduct would be judged against a predetermined standard. This considers if they were aware that there was a foreseeable risk of harm for patients, and whether they took reasonable steps or precautions to try to prevent this from happening.

1.5 Damage (harm or damage that ensues). These may be patrimonial which could include things such as medical fees, loss of income and the costs incurred by the patient to rectify the injury or impairment. The latter are termed special damages. Non-patrimonial damages include pain and suffering, disfigurement, loss of function and psychosocial injury – these are all referred to as general damages. It may also take the form of pure economic harm not connected to any actual physical hurt or injury. Nervous and psychiatric damages inflicted through a sensory input may not result in a visual physical injury, but rather a mental impact, and are still considered as damages. But for legal actions to be taken the damages need to be proven to have been “intentionally or negligently inflicted”.⁴ Once again, an objective reasonable person test may be used to determine: that “mental harm has arisen; it must not be a trivial emotional experience; there should have been some intention to shock (here a much stronger legal action will ensue) or it occurred from a negligent action; it must have been foreseeable; there must be some direct relationship between the injured party and the injurer, or the injurer had some special knowledge which could have affected their behaviour positively or negatively”.^{4,6}

Damages such as discomfort, pain and suffering, nervous of psychosocial injury, mental stress, inconvenience or sadness and depression are intangible, and subjectively experienced and assessed by an outsider. Their presence and extent of effect are difficult to assess and even more challenging to prove legally, and are seldom, if ever, compensated for in terms of financial settlements.⁴ However, they can have a profound negative impact on the sufferer’s life and wellbeing. While it may not be possible to prove that wilful blindness was intentional or negligent, the objective reasonable person test would shed light on the ethical acceptability of such inactivity.⁶ The problem is that it is impossible to assess the degree of another person’s mental anguish or emotional distress. A practitioner who consciously knows that there are imminent dangers for patients and does not intervene is wilfully malevolent and

could at the very least be charged with unprofessional and unethical behaviour.

2. The HPCSA Regulations

The HPCSA guidelines advocate that reporting misconduct by colleagues is an important aspect of maintaining professional standards and ensuring patient safety. To this end they provide guidelines of the processes to follow when reporting another practitioner. The first step is to familiarise oneself with the regulations to be sure that the practitioner is contravening set practices. The next would be to document the misconduct in as thorough a manner as possible, including any evidence to support the accusations. Thereafter the matter needs to be reported to the relevant authority within the council. The HPCSA does promise to provide appropriate protection for the reporting party to try to allay fears and encourage practitioners to not remain silent when they encounter illegal or unethical behaviour from colleagues.

Once the HPCSA receives a formal, written complaint they are mandated to investigate. Each case is dealt with on its own merits following a step-wise process as follows: (taken from the HPCSA Booklet no 2, Genetic Ethical Rules and Annexures).^{7,8}

- Within seven (7) working days of receiving a complaint, the registrar forwards the complaint to the healthcare professional concerned and requests a written explanation from him/her;
- A letter of complaint, together with the healthcare professional's explanation (if submitted), is referred to the Professional Board concerned for consideration;
- Should the board decide that there are grounds for complaint, a Professional Conduct Committee will hold a professional conduct enquiry, during which oral evidence is presented, often including independent, expert witnesses. (Note: Professional conduct enquiries are open to the public and the media, unless closed at the discretion of the chairperson);
- If the professional conduct enquiry finds the healthcare professional guilty of misconduct, the committee's decision is final, unless either party lodges an appeal.

A healthcare professional found guilty of professional misconduct may be subject to the following penalties:

- A caution or a reprimand or both;
- A fine;
- Suspension for a specified period from practicing his/her profession;
- Removal of his/her name from the relevant register;
- A compulsory period of professional service or payment of the costs of the proceedings.^{7,8}

3. Discussion

The common adage "there are none so blind as those who do not wish to see" springs to mind when confronted by colleagues in the dental fraternity who witness wrongdoing within their profession, yet choose to ignore it. While there are few legal obligations for a clinician who witnesses the

wrongdoings of others in the profession to speak out, there are clearly a number of pertinent ethical and moral imperatives they need to consider. Silence due to apathy or indifference cannot be condoned. However, one needs to consider the risks associated with being a "whistle-blower". By exposing a colleague, they may put themselves at risk of being accused of defamation. This could open them up to costly and lengthy legal ramifications. Even the truth may be considered defamatory if it is divulged publicly. In addition, we are all aware that the dental fraternity in South Africa is a small community, and word could spread that the whistle-blower is a "malicious, self-appointed watchdog". It is generally far easier, less stressful and tempting to rather do nothing. However, based on the Freedom of Speech Act, a person "can opposed defamation with a right of opinion if it is sincere and based on facts". Thus, for the ethically-conscious observer who wishes to divulge a wrongdoing and the potential risks associated with this, there are a few guidelines that may help protect them legally. Fair comment is permissible if it is revealed upfront to be an opinion and based on an educated observation; predictions of adverse events must be justified by generally well-known or expected risk outcomes; the comments must be fair and revealed without malice; avoid revealing personal names or any form of identification publicly unless instructed to do so by a court of law; and disclosure should be in the patient's or public's best interest.

CONCLUSION

There is an unwritten (silent) understanding that "silence is consent". Thus practitioners who witness wrongdoing and yet turn a blind eye to it are in essence condoning, or at least allowing, the behaviour to continue. Ethical professionals should always strive to place the patient's best interest first and foremost and then be guided by the principles of beneficence, non-maleficence and justice. It helps also to remember the words of the Hippocrates and the Hippocratic Oath which all new graduates sign that states: "I will exercise my profession to the best of my knowledge and ability for the safety and welfare of all persons entrusted to my care and for the health and wellbeing of the community." In addition, we should "make a habit of two things: to help; or at least to do no harm". Hippocrates

REFERENCES

1. The South African law of delict. Accessed at: <https://www.saflii.org/content/terms.html>; Accessed on 27-08-2023
2. Elements of delict. Accessed at: <https://www.coursehero.com/file/p455doj/Elements-of-a-delictual-action-The-five-requirements-or-elements-necessary-for-delict/>; Accessed on 20-08-2023
3. Delict definition. Accessed at: https://en.wikipedia.org/wiki/South_African_law_of_delict; Accessed on 20-11-2023. Neethling J. "The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?" (2006) 123 SALJ 2045. Beauchamps TI, Childress JF. (2001) Principles of Biomedical Ethics. New York, Oxford University Press. Sykes LM, Evans WG, Dullabh HD. Part 14. Negligence versus Malpractice: The "Reasonable Man Rule". SADJ. Oct 2017. Vol.72 9, 430-432
7. HPCSA Guidelines, Booklet no 2. Genetic Ethical Rules and Annexures Pg 18-19. Accessed at: <http://www.hpcsa.co.za>; Accessed on 20-08-2023
8. "How to Lodge a Complaint" Accessed at: HPCSA E-Bulletin. HPCSA, HPCSA Corporate Affairs, 12 Sept. 2016, www.hpcsa-bogs.co.za/how-to-lodge-a-complaint/; Accessed on 28-08-2023
9. Hippocratic Oath. Accessed at the National Library of Medicine website: https://www.nlm.nih.gov/hmd/greek/greek_oath.html. Accessed on 27-08-2023
10. The war against indifference. Accessed at: <https://churchlifejournal.nd.edu/articles/st-maximilian-kolbe-and-the-war-against-indifference/>; Accessed on 10-11-2023