

Does time heal the wound?

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Insurance Law Newsflash

The Constitutional Court (CC) was called upon to determine the meaning of *deemed knowledge* in terms of section 12(3) of the Prescription Act, 1969 (the Prescription Act) in respect of a medical negligence claim in *Loni v MEC for Health, Eastern Cape [2018] ZACC 2* delivered on 22 February 2018.

In 2016, the CC had analysed and pronounced on this issue in *Links v MEC for Health, Northern Cape Province 2016 (4) SA 414 (CC)*. Essentially in *Loni*, the court was required to either re-affirm or augment the principles enunciated in *Links* having regard to the personal circumstances of Mr Loni.

The facts:

1. On 6 August 1999, Mr Loni was admitted in hospital after sustaining a gunshot wound in his left buttock that shattered his left femur. The bullet was lodged in his body. Upon arrival at the hospital, he was given an injection for pain and x-rays were taken.
2. On 10 August 1999, an operation was performed to insert a plate and screws on his femur. Strangely, he was discharged from hospital with painkillers and crutches without the bullet being removed. He was also given his medical file so that if the painkillers or the wound cleaning items ran out, he could visit the nearest clinic.
3. In January/February 2000, he went to the hospital. He was examined by a doctor who took x-rays and told him to use one crutch instead of the two. After some time, the gunshot entry wound healed. However, the operation took longer to heal. The wound became infected and while at home he noticed a yarn in the wound. He was unable to remove it and returned to hospital. The pin was removed and the wound eventually closed a month later.
4. During December 2000, while Mr Loni was at an initiation school, his left leg became swollen and he removed the bullet himself. He returned to the hospital and he was informed that his leg was fine. At some stage, he developed a limp.
5. In 2008, Mr Loni secured employment and approached doctors in private practice to establish the reason for his limp and the constant pain in his leg. He was informed that he was disabled.
6. In November 2011, Dr Olivier, an orthopaedic surgeon considered Mr Loni's hospital file and advised him that his condition was attributable to medical negligence.
7. The summons was served on 20 June 2012 on the MEC for Health. The MEC raised the

defence of prescription. Mr Loni denied that his claim had prescribed as alleged. He submitted that before he met Dr Olivier, he was unaware that he had a claim for damages against the MEC. He averred that he only acquired that knowledge in November 2011 when Dr Olivier advised him that the medical staff at the hospital had been negligent.

According to section 12(3) of the Prescription Act, "a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

In arriving at its judgment, the CC considered the judgment of *Links*, where the court held that, "however, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises".

In this regard, *Links* was distinguishable to the facts of this matter. In *Links*, the plaintiff required expert medical opinion to establish that the treatment that he had received had been negligent and to draw the causative link between the harm suffered and the negligent treatment.

In applying the principles enunciated in *Links* to the facts before it, the court held as follows, "the applicant (Loni) should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately

seek further advice in 2011".

In addition, the court held that, "it is clear, that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of this treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration".

The CC in this case re-affirmed the principles enunciated in *Links* in terms of test to be applied to the meaning of *deemed knowledge* in terms of section 12(3) of the Prescription Act.

So what does this mean for professional negligence matters? The assessment of prescription for all professional negligence matters should equally apply as those applied in *Links*. As the old law *maxim* goes, every matter is to be determined on its own facts or circumstances. So, does time heal the wound? Legally, it depends on the circumstances of each case. As for Mr Loni, sadly it did not.

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