Lessons never learned.

The recent judgment of the Pretoria High Court in Venter and The MEC for Health, Gauteng would be unexceptional but for the two important lessons tucked away in the banality of the findings.

The lessons are not new ones. But forgotten. Which probably explains why the defendant took to trial a case involving the presence of a foreign object in the patient, the object was never identified, in circumstances where it has long been established that when a foreign object, for example a swab, is left behind in a patient that is the fault of the theatre nurses, or attendant surgeons, or both. Liability follows those persons and their employers for damages caused.

The defences in a nutshell seem to have been that the foreign object wasn't left behind in a facility operated by the defendant and that anyway the damage complained of wasn't caused by the foreign object.

The defendant had no direct evidence to lead and relied on the evidence of its expert specialist general surgeon and the onus on the plaintiff the establish its case on the balance of probabilities.

Lesson one.
You don't usually win a case without leading the necessary factual evidence. Few defences are successful without credible contradictory factual evidence.

The plaintiff's factual evidence was uncontradicted. No explanation was given by the MEC as to why it failed to call, any doctors or nursing staff involved in the relevant procedures. No factual witnesses testified for the MEC to contradict the plaintiff's version, explain the content of the hospital's medical notes, assist in the description of the foreign body, or ask what the circumstances under which the foreign body was introduced into the plaintiff's abdomen. The hospitals failure to procure the histology report was unexplained.

The plaintiff's evidence was found to be credible and reliable in most material respects and corroborated by the medical records. And consistent with her expert's evidence who stated that it was likely that the object was left inside her during the hysterectomy performed at the defendant's hospital.

Lesson two.
Successful expert evidence is always dependant on the underlying facts relied upon by that expert being correct. They were not.

Absent factual witnesses the defendant relied on the evidence of the department's expert in disputing that the object had been left behind at all or at the relevant hospital or if it had been that it had caused the damage complained of.

The problem was that the expert report was drawn without consulting the plaintiff. Or interviewing any of the doctors, interns or nursing staff at the hospital who treated the plaintiff or were involved in the hysterectomy. And subsequent laparoscopy and laparotomy.

The expert said he did not deem it necessary to interview the plaintiff and was being altruistic because she lived far away from his consulting rooms.

The expert in his master's thesis in Law “The medico-legal pitfalls of the expert witness” stated that in preparing a medico-legal report and examination of the plaintiff should occur.
He accepted that he had wrongly believed that an examination of the plaintiff would not contribute to his report. The expert opined that the main contributory cause of all the patients complaints was “her small bowel jejuno-ileal bypass operation”. The expert in drawing that conclusion assumed the information was correct. The plaintiff’s uncontradicted evidence was that she had never had bypass surgery of that nature. The expert conceded he was wrong in asserting that the bypass surgery took place. And that any views expressed in reliance on this incorrect information could not be defended.

These are basic age-old lessons. Forgotten (or ignored) at the defendant's peril.

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