

## **Brand name medicines**

### **Your life, your liberty and your property**

#### **Background**

Three months ago the Health Department gazetted a proposal that could damage every South African's life, liberty and property. It appears from Gazette No. 17317 that prescribing by doctors will only be legal if the name of the medicine prescribed and physically written on the script is the approved international non-proprietary or chemical name (INN) for the medicine.

The use of proprietary or brand names on a script does not appear to be banned, nor is the addition of the manufacturer's own corporate identity on the script. However, in practice doctors are unlikely to add such additional information. So the ability of the doctor to predetermine the source of the drug by manufacturers would be weakened by law and removed in fact.

#### **The Impact on Liberty**

As an employer the Department of Health is of course fully entitled to instruct its own doctors, as employees, to obey whatever instructions it considers best. But where doctors are directly employed by patients, or indirectly employed by insurers or medical schemes, then government has no role, or rather should have no role. We are simply looking at a mutually beneficial exchange relationship between consenting adults. Government's only legitimate role would be providing the legal and institutional framework of normal contract. The practical banning of freely negotiated legal and moral contractual agreements is contrary to our constitution.

#### **The Impact on Property**

It is common cause among nearly all observers of the health care sector that unbranded (generic) manufacture, prescribing, dispensing, marketing and consumption should be encouraged where appropriate. Observers also oppose compulsion in the use of generic medicines. This does not mean that the use of brand names should be banned, nor does it mean that third parties should be able to substitute generic products for brands when patients and prescribers have already agreed, voluntarily, on a branded product for the relevant ailment. Equally, there is no objection to the substitution of a generic medicine for a brand, if, once more voluntarily, the patient (or agent, like a medical scheme) indicates that such substitution is acceptable or desirable. Many medical schemes have in recent years, only paid for the cost of the cheaper drug, leaving the patient to pay in the difference for a more expensive one. This practice encourages and permits the use of generics but does not compel it.

When the rights of contract are not so preserved then pharmaceutical firms will be at risk in a manner similar to the hamburger firm which produces 'Big Macs'. Macdonalds, of course, has now had confirmation that its trademark capital will not be put in jeopardy in South Africa. Degradation of intellectual capital decreases the attractiveness of South Africa as a market for investment. This is as true for pharmaceuticals as for hamburgers. As many millions of South Africans, through their insurance policies, pension funds and unit trusts, hold shares in local and international pharmaceutical firms, the value of their wealth and their property is at risk.

So too are the jobs of the 15 000 or so employees in the industry in this country.

Also the Health Department proposals could raise medicine prices by reducing competition. Barriers to entry to the industry would increase. A new company, previously unknown in the market place, which can currently introduce a new generic product and advertise its own brand to prescribers will find that its success now depends instead on its ability to access dispensers and reimbursers. This could in turn

depend on the time consuming process of having its product name added to medical scheme formularies or scale of benefit listings. Since these lists are only periodically updated a less expensive generic could find market entry difficult to achieve. Inevitably, the patient will have to fork up.

Similarly, new combination medicines, or new presentations or forms of existing medicines would prove harder to launch onto the market place. Once more, competition would be reduced and patients would be the victims.

The problem would be less severe for innovative, high technology medicines covered by patent protection. There, single source production would "simply result" in prescription by chemical name followed by dispensing of the only available brand. However, effective patent protection for intellectual property has steadily decreased over the years (due to increased periods of testing and development encroaching on patent lives). So this "simple result" would persist only for the brief period of the unexpired patent. Protection of intellectual property through branding is therefore an essential complement to patents.

### **The Impact on Life**

The creation of trademark protection, however, requires heavy educational promotion through investment in brand names in the crucial early years of a product's life so as to grab the attention of the market. If the pay-off to such promotional investment is curtailed by a requirement to prescribe by chemical name, the incentive to introduce innovations on to the South African market will be reduced. Only high priced, short pay-off products will be launched. The more marginal products which benefit only smaller numbers of patients with less common diseases will become less readily available. In short, there will be less allowance for the inevitable diversity of human beings.

It means that people will remain sick longer or die sooner as a consequence.

Even more starkly, a brand name is a guarantee of origin, quality and comprehensive duplication on each occasion of use. Identical chemicals are not comprehensively similar in their therapeutic impact. Different modes of delivery (capsule or tablet), differing release rates in the body (due to differing substances being used as the base within which the active chemical is delivered), and the carriers themselves can affect the body's reaction. This can be of crucial importance where patients are subject to diseases such as epilepsy or asthma.

The bottom line is that when an innovative drug loses patent protection it is important that the physician and the patient discuss the use of an alternative. When patients are stabilised on particular drugs, whether branded innovative products, or branded generic ones, it is not in their interests to be switched or forced to change from successful specific drugs. *De facto* and so forced prescribing of products with officially approved names removes that protection.

The Health Ministry's gazetted intentions may well be a world 'first' in legislation but second thoughts are required.

**Further Reading:**

Reekie WD (1994) *Prescribing the Price of Pharmaceuticals*, Institute of Economic Affairs, London and FMF, Johannesburg

Reekie WD (1996) *Medicine Prices and Innovation*, Institute of Economic Affairs, London and FMF, Johannesburg

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