

SOUTH AFRICA / JUDGMENT

Du Plessis v Member of the Executive Council for Health and Social Development for the North West Province (1069/21) [2024] ZANWHC 199 (22 July 2024)

[2024] ZANWHC 199

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

1069/21

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Source record

Last amended version 29

July 2024.

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE NO.: 1069/21

Reportable: YES /

NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between: MAGIEL
 CORNELIUS DU PLESSIS
 Plaintiff
 and
 THE
 MEMBER OF THE EXECUTIVE COUNCIL FOR
 HEALTH
 AND SOCIAL DEVELOPMENT FOR
 THE
 NORTH WEST PROVINCE
 Defendant

CORAM: PETERSEN ADJP
 Date

judgment reserved: 28 February 2024
 The judgment was handed
 down electronically by circulation to the parties'
 representatives via email. The date and time for
 hand-down is deemed
 to be 22 July 2024 at 14h00.
 ORDER
 The plaintiff's
 claim is dismissed with costs, such costs to include those costs
 consequent upon the employment of counsel.

JUDGMENT

PETERSEN ADJP

Introduction

- [1] The plaintiff, a 45-year-old employed male, was admitted to the Potchefstroom Hospital on 2 July 2018 following a diagnosis of chronic diarrhoea. The events giving rise to this action arose on 5 July 2018 and forms the basis of the action instituted against the defendant in his nominal capacity as the Member of the Executive Council for Health and Social development of the North West Province ('the MEC').
- [2] The plaintiff avers that the defendant in assuming responsibility for the rendering of medical services acting through its personnel owed the plaintiff a duty of care to perform any medical services rendered to him with the degree of care, skill and diligence required from a hospital and its personnel in similar circumstances. The plaintiff's claim is that the defendant is in breach of the agreement between the plaintiff and the defendant acting through its employees failed to exercise the degree of care and skill required from a hospital in similar circumstances in South Africa.

- [3] The issue of liability which encompasses the issues of negligence and causation was separated from the issue of quantum, in terms of Rule 33(4) of the Uniform Rules of the High Court.

Synopsis of the pleadings

- [4] The plaintiff's case predicated on the Particulars of Claim is as follows. On 5 July 2018, the plaintiff was to undergo a colonoscopy and gastroscopy at the Potchefstroom Hospital. An intravenous drip was to be inserted in his right arm, as he had removed the drip previously inserted in his arm. The plaintiff contends that in the process of the medical practitioner alternatively nursing staff inserting the intravenous drip, a portion of the drip broke off and remained in his 'bodily tissue'. This portion of the drip is referred to in the hospital records as a 'foreign body'. The medical practitioner alternatively nursing staff are alleged to have been unable to retrieve the foreign body.
- [5] The defendant in this regard pleads that when the incident occurred, the medical practitioner believed that a part of the intravenous drip remained in the body (arm) of the plaintiff. However, following necessary medical procedures and scans to investigate whether the foreign body was in the body of the plaintiff, nothing was found. The defendant further pleads that its medical staff took reasonable medical precautions and conducted an exploration through surgery, which revealed no foreign body. To that end, the defendant in an amended plea avers that the incident was managed timeously with reasonable skill and care.
- [6] The cause of action of the plaintiff, save for what is stated above, is essentially formulated at paragraphs 7 and 9 of the Particulars of Claim as follows:

"7.

On or about 5 July 2018 a medical practitioner and/or the nursing staff attempted to insert an intravenous drip in the Plaintiff's right arm, when a portion of the drip mechanism broke off inside the Plaintiff's arm. The attending medical practitioner alternatively the nursing staff attempted to retrieve the foreign body that broke off but was unable to do so.

...

9.

DEFENDANT'S BREACH OF THE AGREEMENT AND LEGAL DUTY

The Defendant and the medical practitioners and/or the nursing staff, acting in the course and scope of their employment with the Defendant breached the agreement between the Plaintiff and the Defendant and breached the legal duty owed to the Plaintiff in that they were negligent in one or more or all of the following respects:

9.1 They failed to provide the necessary medical care and/or treatment with such professional skill, care and diligence as could reasonably be expected from medical practitioners and nursing staff;

9.2 They failed to insert the intravenous drip with the professional skill, care and diligence that could reasonably be expected from medical practitioners and nursing staff.

9.3 They inserted an intravenous drip which was faulty.

9.4 They failed to ensure that the intravenous drip that was inserted was in proper working order when by exercising of reasonable skill and care they could and should have done so;

9.5 They failed to prevent the foreign body from breaking off inside the Plaintiff's right arm when by the exercise of reasonable skill and care they could and should have done so."

[7] The defence of the MEC as set out in the Amended Plea and relevant to paragraphs 7 and 9 of the Particulars of Claim is as follows:

"AD PARAGRAPH 7 THEREOF

Save to admit that on the 5th of July 2018, the intravenous drip was inserted in the Plaintiff's right arm, the remainder of the paragraph are denied.

The Defendant pleads that when the incident occurred, the medical practitioner believed that part of the product was left in the arm of the Plaintiff.

Necessary medical procedures and scans were then conducted to investigate whether the foreign body was in the arm of the Plaintiff and nothing was found. The Defendant took further medical precautions and conducted an exploration and results showed that there was no foreign object found. The incident was managed timeously with reasonable skill and care.

AD PARAGRAPH 9 THEREOF

The allegations therein contained are denied and the Plaintiff is put to the proof thereof.

The Defendant pleads that the Plaintiff was booked for a colonoscopy. The Plaintiff was aware and informed of the risks and complications which may arise before and after the surgery. The Defendant further pleads that due diligence and care is taken to ensure proper working conditions of medical instruments. It was unknown that the intravenous drip was faulty and not the intention of the Defendant to utilize a faulty intravenous drip. The members of the Defendant were not negligent in providing medical care to the Plaintiff and the Plaintiff is put to the proof thereof."

[8] The plaintiff testified as the only witness in support of his case. In expounding on his case reference was made to and reliance placed on the hospital records, which were admitted as evidence by agreement. The contents and correctness of the hospital records were not placed in issue.

- [9] No evidence was adduced by the defendant, following at least two unsuccessful or dismissed applications for postponement of the action. Prior to dismissal of same the action had been postponed at the behest of the defendant on previous allocated trial dates.

The evidence

The plaintiff

- [10] The plaintiff, Mr du Plessis, testified that on 2 July 2018, he was referred by a local Clinic to Potchefstroom Hospital on a provisional diagnosis of diarrhoea. He was consequently admitted to the Potchefstroom Hospital. He confirmed that he signed a consent form for a gastroscopy and colonoscopy. To be performed. He informed the hospital personnel that he was allergic to intravenous drips. In evidence before this Court, he pointed to his left arm. According to the plaintiff the drip was then removed by the hospital staff.
- [11] On 5 July 2018, he was taken for surgery. He again informed the hospital staff that he was allergic to drips and that they should not insert it on his left arm. 'They' took his right arm at the wrist and when he showed them a 'muscle', 'they' wanted to insert the drip into the muscle. On a question whether it was problematic when the doctor inserted the drip, the plaintiff testified that the doctor tried to insert the drip and did not say anything further. He noticed the drip was gone and a nurse was taking a photo of a part of the drip.
- [12] When referred to the entry by Dr Breytenbach and asked if she was responsible for the procedure that day, the plaintiff confirmed same. Dr Breytenbach said nothing to the nursing staff, except to hold his hand at the wrist. The doctor left and returned with another doctor. On a question whether Dr Breytenbach said anything about the drip being faulty, the plaintiff testified that he heard the male doctor speak of operating immediately. A question directed at whether anything was said about the drip having expired, was objected to by the defendant, and not persisted in.
- [13] He was taken to theatre where an anaesthetic was administered, causing him to sleep. The hospital records record that he was in fact taken to surgery for an exploratory examination of the vein into which the drip was inserted. To this end a twelve to fifteen centimeter (12-15cm) healed scar on from the top of the right wrist and forearm was shown in court.
- [14] According to the plaintiff, when he regained consciousness, he was taken for scans "on his body" and "nothing was found like drips or so." He was subsequently discharged on 10 July 2018.
- [15] That concluded the case for the plaintiff. The relevant hospital and medical records admitted as evidence by agreement was relied on by the plaintiff with the sole purpose of corroborating his case. The hospital records, marked Exhibit A, are discussed below.
- [16] An application for absolution from the instance at the close of the case for the plaintiff was dismissed.

The case for the MEC

[17] As indicated above, two attempts by the MEC at securing a postponement of the action were dismissed. In essence, the delay occasioned by the MEC could not be countenanced considering the indulgences of lengthy postponements previously afforded the MEC. The defendant consequently did not present any evidence.

The hospital records

[18] The hospital records were admitted as Exhibit 'A'. The 'Admission, Discharge and Consent Form' indicates that the plaintiff was admitted on 2 July 2018 at 13h40; and discharged on 10 July 2018 at 13h00. At discharge of the plaintiff from hospital, the final diagnosis indicated a "Foreign body still in situ." The consent to a surgical procedure form signed by the plaintiff, reflects the procedure as a gastroscopy and colonoscopy with the possible complications and side effects as being bleeding, pecteratic, anaesthetic complications, death. Under anaesthetic

"conscious sedation" was recorded in manuscript.

[19] On 5 July 2018, a document (P19) reflects the following:

"OPERATION: Gastroscopy.

ABNORMALITY OR ALLERGY: Unknown.

BLOOD PRESSURE: 114/79 PULSE: 86 TEMP: 36.0 RESP: 20

SATS: 96%

URINE:

LAST INTAKE: 22h00

SPECIAL OPERTAIVE CARE:

SPECIAL INVESTIGATION REQUESTED:

REMARKS:

PRE-MEDICATION: Ativan 2mg Orally Stat 07h48 05/7/18 ."

[20] The first entry in the hospital records dated 5 July 2018, relevant to this matter, reads as follows:

"05/07/2017 Dr M Breytenbach

8:30 - > Attempted drip in a first attempt. Jelco tube broke of (sic) during placement (was an easy drip that went in after first attempt.) Tube broke ±2mm from plastic connector.

- > Could not retrieve plastic tube. Tourniquet kept.

* Patient had a functioning drip the evening before which he removed due to inconvenience. Surgery consulted.”

[21] The second entry on 5 July 2018, seemingly by a Dr Janssen, reads as follows:

“11:55 Called by Dr De Hill

Informed of incident

To contact interventichal (sic) radiology at Baragwanath as D/W vencular suregeon on call Dr du Toit

Called Bara > currently unavailable

Called again

> kept on hold 20 minutes

> Called Dr Rudi 0720244750 No answer

> Called Dr on call

>D/W Dr Murfin

Advise do X Rays of forearm and upper arm and rediscun.

13h48 In retrospect

- Foreign body visualized on Xray
- Contacted Bara
- D/W Consultant Dr Venter (Intraradiology)
- Advises a venogram
- Contacted CT = will find out if they are able to do the scan here and get back to us.”

[22] The third and fourth entries on 5 July 2018, by Dr Coetzee, read as follows:

“15h48: Venogram of R upper limb done.

To chase report and let Dr Janssen know ASAP.

18h30: CT – Report (Informal)

No foreign body anywhere in the Right upper limb venous system (innominate vein or SVC).

Pt reports no chest pain, SOB, Resp distress, neuro fallout.

P 4 hourly ECG as per Dr Mwila.”

(my underlining and emphasis)

[23] A CT Venogram of the right upper limb of the plaintiff performed on 5 July 2018 and reported on by Dr TC Sefanyetso of Dr V Mngomezulu Incorporated (Specialist Diagnostic Radiologists) on 6 July 2018 at 14h27:52 reads as follows:

“CT VENOGRAM RIGHT UPPER LIMB

The radial, ulna and interosseous veins are patent with no foreign bodies within them.

The Basilic and cephalic veins are patent and also demonstrating no foreign bodies within them.

The brachial, axillary, subclavian and innominate veins demonstrate no foreign bodies and are patent.

SVC is patent with no foreign bodies.

The visualized arterial system is normal.

Bones are normal.

The visualized cervical spine and lungs are normal.

Comment:

Normal venogram of the right upper limb.

No foreign bodies seen.”

[24] A document “OPERATION NOTES & POST-OP CARE” was completed by Dr Peter De Hill. By logical deduction from the evidence of the plaintiff, he appears to be the doctor contacted by Dr Breytenbach on 5 July 2018 following the incident. This document accords with the evidence of the plaintiff that he was taken for surgery immediately, and in relevant part reads as follows:

“1...

Pre-op diagnosis: lost IV jelco into vein Right arm.

Post-op diagnosis: post exploration jelco not found – likely migrated.

2. Surgery team:

Surgeon: de Hill

Assistant: Lazarus

3. Anaesthesia:

Anaesthetist: du Preez Assistant: Tshitofu

Type of Anaesthesia: General Anaesthetic

4. Approach: Right arm radial aspect of wrist up to mid forearm.

5. Findings:

- Jelco point identified on wrist.
- Vein identified and followed up to mid arm but Jelco not identified.

6. Procedures:

Patient cleaned and sterilely draped. Tourniquet applied right arm above previously applied tourniquet. Distal one removed. Initial horizontal incision at entry site, Vein identified and distally secured. Followed up into midarm with 2 incision. Vein (unclear) off and clamped proximally. Vein opened and (page copy covered), no jelco identified. Vein (unclear) and ligated. Closed (page copy covered)”

[25] On 6 July 2018 at 10h14, Dr Janssen requested a CT Pulmonary Angiogram, which was to include veins of the right arm. Consequently, on 6 July 2018, a further CT Venogram of the right upper limb of the plaintiff was performed, including a CT Pulmonary Angiogram. On 9 July 2018 at 08h36:17 Dr TC Sefanyetso of Dr V Mngomezulu Incorporated (Specialist Diagnostic Radiologists) commented on both scans of 6 July 2018 as follows:

No foreign bodies seen.

CT PULMONARY ANGIOGRAM

The pulmonary trunk is normal in diameter measuring 26.8mm.

There are no filling defects within the pulmonary trunk and main pulmonary artery.

No filling defects in the lobar, segmental and subsegmental pulmonary arteries bilaterally.

No cardiomegaly or pericardial effusion.

No filling defects in the aortic arch, descending thoracic aorta and abdominal aorta.

No filling defects in the right subclavian vein or superior vena cava.

No filling defects in the inferior vena cava.

No consolidation or pleural effusion.

No pulmonary nodules or masses.

Visualised intra abdominal structures are normal.

Normal CT pulmonary angiogram.

No filling defects in the pulmonary arterial system.

Normal angiogram of the thoracic and abdominal aorta.”

[26] According to entries from 7 July 2018 to 10 July 2018, the medical staff at Potchefstroom Hospital appear to have been waiting for the CT Scan reports of 6 July 2018. The said reports as aforesaid at the time of discharge of the plaintiff on 10 July 2018 appear not to have been available to the medical staff. All the entries from 7 July 2018 to 10 July 2018, including the diagnosis upon discharge that the foreign body was still in situ, therefore still referenced the broken Jelco tube as a foreign body being present in the plaintiff's right arm, notwithstanding the surgical note of Dr de Hill.

The approach to evidence in medical negligence cases generally

[27] The genesis of our jurisprudence on the legal test applicable in the determination of the issue of medical negligence referred to on a precedential basis in our authorities is found in *Mitchell v Dixon* 1914 AD 519 at 525 where the Appellate Division stated that:

‘a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill but he is bound to employ reasonable skill and care.’

[28] In *Van Wyk v Lewis* 1924 AD 438 at 444, the Appellate Division explained the notion of what “reasonable” entails as being relevant to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. In this matter, the central issue is the reasonable skill and care required of members of the branch of the profession to which the practitioners who treated the plaintiff belong. The medical personnel were medical doctors and/or nursing staff, having regard to the entries in the hospital records of 5 July 2018, who do not appear to have been specialists.

[29] As remarked in *Goliath v MEC for Health, Eastern Cape* 2 015

(2) SA 97 (SCA), the pleadings and argument in the case frequently refers to the refrain ‘duty and care’. ‘Duty’ is often also referred to as ‘skill’. Ponnann JA, writing for a unanimous Court stated as follows in this regard:

“[7] It is important at the outset to emphasise that in law (as I suppose in most disciplines) terminology is important, because the use of incorrect terminology usually conduces to conceptual confusion. In both the pleadings and argument in this case one frequently encountered the refrain ‘duty of care’. In McIntosh v Premier, KwaZulu Natal and Another 2008

(6) SA 1 (SCA) ([2008] 4 All SA 72) para 12 Scott JA observed:

‘The second inquiry is whether there was fault, in this case negligence. As is apparent from the much quoted dictum of Holmes JA in *Kruger v Coetzee* 1966

(2) SA 428 (A) at 430E – F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be

simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word duty, and sometimes even the expression “legal duty”, in this context, must not be confused with the concept of “legal duty” in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression “duty of care” is similarly a source of confusion. In English law “duty of care” is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, duty of care in English law straddles both elements of wrongfulness and negligence.’

[8] The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant’s

negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (*Van Wyk v Lewis* 1924 AD 438 at 444). A surgeon is in no different a position to any other professional person (*Lillicrap, B Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985

(1) SA 475 (A) at 488C). It has been pointed out that a ‘medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care’ (*Mitchell v Dixon* 1914 AD 519 at 525). As Scott J put it in *Castell v De Greef* 1993 (3) SA 501 (C) at 512A – B, ‘(t)he test remains always whether the practitioner exercised reasonable skill and care or, in other

words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field’ (cited with

approval in *Buthelezi v Ndaba* 2013

(5) SA 437 (SCA) para 15).

[9] In *Buthelezi* (para 16) Brand JA, after referring to *Van Wyk v Lewis* as the locus classicus on medical malpractice, pointed out that the maxim *res ipsa loquitur* ‘could rarely, if ever, find application in cases based on alleged medical negligence’. Significantly, my learned colleague was astute not to say that it could never find application to a case based on medical negligence. The evident reluctance of our courts to apply the maxim is because, as Lord Denning MR observed in *Hucks v Cole* E [1968] 118 New LJ 469 ([1993] 4 Med LR 393) – ‘with the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong.’ For, to hold a doctor negligent simply because something had gone wrong would be to impermissibly reason backwards from effect to cause (*MediClinic Ltd v Vermeulen* 2015

(1) SA 241 (SCA) ([2014] ZASCA 150) para 27).

[10] Broadly stated, *res ipsa loquitur* (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a *prima facie* case against him. The maxim is no magic formula (*Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573E). It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (*Zeffertt & Paizes The South African Law of Evidence* 2 ed at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself (see *Groenewald v Conradie*; *Groenewald en Andere v Auto Protection Insurance Co Ltd* 1965 (1) SA 184 (A) at 187F) — where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading (*Madyosi v SA Eagle Insurance Co Ltd* [1990] ZASCA 65; 1990

(3) SA 442 (A) at 445F) — it being trite that the onus resting upon a plaintiff never shifts (*Arthur v Bezuidenhout and Mieny* at 573C). Nothing about its invocation or application, I dare say, sufficient to support an inference that a defendant was negligent and thereby to establish a *prima facie* case against him. Nothing about its invocation or application, I dare say, is intended to displace common sense. In the words of Lord Shaw in *Ballard v Northern British Railway Co* 60 Sc LR 441, ‘the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working’ (cited with approval in *Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 and *Arthur v Bezuidenhout and Mieny* at 573F – G).

[11] In *Sardi and Others v Standard and General Insurance Co Ltd* 1977

(3) SA 776 (A) at 780C – Holmes JA made plain that it is inappropriate to resort to piecemeal processes of reasoning and to split up the enquiry regarding proof of negligence into two stages. He emphasised that there is only one enquiry, namely whether the plaintiff, having regard to all of the evidence in the case, has discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant. In that regard the learned judge of appeal stated:

‘As INNES, C.J. pertinently insisted in *Van Wyk v Lewis*, 1924 A.D. 438 at p. 445, lines 8 – 9, “It is really a question of inference. It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility; see *Rankisson & Son v Springfield Omnibus Services (Pty.) Ltd.*, 1964 (1) SA 609 (N) at p. 616D. At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of F probability, just as the Court would do in any other case concerning negligence. In this final analysis, the

Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b), deciding whether this has been rebutted by the defendant's explanation. See *R. v Sacco*, 1958 (2) SA 349 (N) at p. 352; *Grootfontein Dairy v Nel*, 1945 (2) P.H. 15 (A.D.); *Arthur v Bezuidenhout and Mieny*, G 1962 (2) SA 566 (AD) at pp. 574 – 576.'

[12] Thus in every case, including one where the maxim *res ipsa loquitur* is applicable, the enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence (*Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others* 1982 (4) SA 890 (A) at 897H – 898A). That being so, and given what Holmes JA described as the 'evolved mystique of the maxim', the time may well have come for us to heed the call of Lord Justice Hobhouse to jettison it from our legal lexicon. In that regard he stated in *Ratcliffe v Plymouth and Torbay Health Authority I* [1998] EWCA Civ 2000 (11 February 1998):

'In my judgment the leading cases already give sufficient guidance to litigators and judges about the proper approach to the drawing of inferences and if I were to say anything further it would be confined to suggesting that the expression *res ipsa loquitur* should be dropped from the litigator's vocabulary and replaced by the phrase a *prima facie* case. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a *prima facie* case is being made out. Where expert and factual evidence has been called on both sides at a trial its usefulness will normally have long since been exhausted.'

[13] Medical negligence cases do sometimes involve questions of factual complexity and difficulty and may require the evaluation of technical and conflicting expert evidence. But the trial procedure, which is essentially the same as in other cases, is designed to deal with those and thus no special difficulty ought to be involved in determining them. In this case the matter must be approached on the basis that at the conclusion of the hysterectomy, one of the swabs was overlooked and remained in Ms Goliath's abdomen. For in no other way could it have found its way into her body. The compensation demanded is in respect of an injury alleged to have been sustained by reason of the negligence on the part of the attending medical staff in the employ of the MEC. The MEC's liability therefore depends on whether the injury sustained was due to negligence on the part of his employees in allowing the swab to be left in Ms Goliath's abdomen.

[14] In addition to Ms Goliath, Dr Muller, who performed the laparotomy, when the swab was removed, testified. No witnesses were called on behalf of the MEC.

[15] In supporting the conclusion reached by the high court, counsel for the MEC set much store by *G Van Wyk v Lewis*, which it was suggested was on all fours with this case. But, as Innes CJ stressed in *Van Wyk v Lewis* at 445, each case ultimately depends upon its own facts. In that, Kotze JA was at one with the Chief Justice when he observed (at

453) ‘the question of negligence or no negligence must be ascertained from a consideration of all the facts viewed as a whole’. So too was Wessels JA when he stated (at 461 – 462):

‘We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar I circumstances would have acted, or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he falls short he is negligent.’”

Discussion

[30] This matter as described in Goliath, based only on the occurrence itself, “...is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself — ... where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading ... — it being trite that the onus resting upon a plaintiff never shifts...” The only evidence adduced in this action was that of the plaintiff and the hospital records into which is incorporated the specialist radiological reports.

[31] It is trite from the authorities cited above that the onus rests on the plaintiff, to prove negligence on the part of the medical staff, on a balance of probabilities. Adv Guldenpfennig in argument impressed on this Court to find negligence on the part of the medical staff based on the legal maxim *res ipsa loquitur*. In other words, that the evidence that the “Jelco” portion of an intravenous drip allegedly broke off in the right arm of the plaintiff, speaks for itself to the negligence of the attending medical staff. As made plain in Goliath *supra*, a submission to this effect is not sustainable: “The evident reluctance of our courts to apply the maxim is because, as Lord Denning MR observed in *Hucks v Cole* E [1968] 118 New LJ 469 ([1993] 4 Med LR 393) — ‘with the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong.’ For, to hold a doctor negligent simply because

something had gone wrong would be to impermissibly reason backwards from effect to cause.”

[32] The evidence of the plaintiff, singularly, did nothing to advance the cause of action posited in the Particulars of Claim. In other words, his evidence constituting *facta probantia* did nothing to speak to the *facta probanda* (the allegations in the Particulars of Claim.) If anything, the evidence of the plaintiff supports, even in the absence of expert evidence, the case for medical care administered with skill and care. When the medical staff suspected that the Jelco part of the intravenous drip, which was inserted without problem, broke off, a Tourniquet was used, clearly to prevent any movement of the Jelco intravenously.

- [33] The attending doctor, Dr Breytenbach, immediately called for assistance from Dr de Hill, a surgeon, and a decision was taken to take the plaintiff to surgery. The notes of Dr de Hill reflects that no Jelco from the intravenous drip was found in the arm of the plaintiff.
- [34] The medical staff went further and sought expert opinion from specialists at Chris Hani Baragwanath Hospital in Gauteng. The plaintiff was consequently referred for CT scans to trace the foreign body, on 5 July 2018 and again on 6 July 2018. The reports from Dr TC Sefanyetso of Dr V Mngomezulu Incorporated (Specialist Diagnostic Radiologists) on 6 and 9 July 2018, based on the CT Venogram of the right upper limb of the plaintiff on 5 and 6 July 2018 and a CT Pulmonary Angiogram on 6 July 2018 emphatically shows no presence of any foreign body in the plaintiff.
- [35] All steps taken by the medical staff at Potchefstroom Hospital, upon suspecting that the Jelco part of the intravenous drip had broken off, speaks to medical care diligently provided to the plaintiff, rather than negligence of any degree.
- [36] As stated in *Chapeikin and Another v Mini* (103/2015) [2016] ZASCA 105 (14 July 2016) and *Goliath* respectively:

“In the end, not only the cause of the damage remained unidentified but also its timing. The fact that harm had been occasioned was not, on its own, proof that the medical staff had caused it, or that they had done so negligently, or even that it had resulted in the brain injury.”

‘... to hold a doctor negligent simply because something had gone wrong, would be to impermissibly reason backwards from effect to cause.’

Conclusion

- [37] The case for the plaintiff is predicated on the strength of the Jelco part of a drip remaining in situ in his ‘bodily tissue’. The hospital records with the surgery performed by Dr de Hill found no presence of any part of an intravenous drip in the identified vein of the right arm of the plaintiff. The two CT Venograms and a Pulmonary Angiogram found no presence of any intravenous drip. The body of medical evidence, save for the discharge note encapsulated in the hospital reports, does in fact speak for itself. It militates against the cause of action relied on by the plaintiff as adumbrated above.
- [38] Accordingly, I cannot find that the plaintiff has proven, on a balance of probabilities, any negligence on the part of the medical staff at Potchefstroom Hospital. The plaintiff’s claim therefore stands to be dismissed.

Costs

- [39] Costs ordinarily follow the result. I can find no basis to order otherwise. The plaintiff employed counsel in the prosecution of his claim and there is accordingly no basis not to include the costs of counsel in the award of costs.

Order

[40] In the premise, the following order is made:

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE

HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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