REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 35178/10

8/9/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE DATE

In the matter:

MARK AMOS **PLAINTIFF**

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT **1ST DEFENDANT**

PREMIER, LIMPOPO PROVINCIAL GOVERNMENT **2ND DEFENDANT**

JUDGEMENT

KEKANA, AJ

1. The Plaintiff was involved in a quad bike accident on Sunday 12th August 2007. The Plaintiff attended at Tzaneen Medical Clinic for medical treatment. He was referred to the Letaba Provincial Hospital as the Plaintiff did not have a medical aid facility.

   The Plaintiff sustained an open fracture of the left radius and ulna as a result of the accident.

2. On the day of admission at Letaba Hospital, Dr Lourens attended to Plaintiff by performing a debridement of the wound, suturing some of the cuts and applying a backslab plaster of paris cast which covered half of the arm and the rest of the arm having been covered with bandages.

3. In his particulars of claim in paragraph 8, Plaintiff alleged the medical staff were negligent in their management of the Plaintiff in one, more or all the following respects:-

   "8.1 They failed to perform adequate radiological investigations on the Plaintiff's left forearm pre and post-operatively and thereby failed to adequately assess the true nature and extent of the Plaintiff's condition;

8.2 They failed to make an adequate diagnosis of the Plaintiff's condition and inter alia, failed to timeously diagnose pathology to the Plaintiff's left elbow and wrist;

8.1 They failed to adequately reduce the multiple fractures sustained to various anatomical areas of the Plaintiff's left forearm;

8.4 They incorrectly reduced the multiple fractures to the Plaintiff's left forearm, and failed to appreciate and correct the disturbed anatomy of the Plaintiff's left forearm;

8.5 They failed to adequately fixate the Plaintiff's forearm post-operatively;

8.6 They failed to procure the services of an orthopaedic surgeon timeously alternatively at all, in the circumstances where they could and should have done so;

8.7 They failed to refer the Plaintiff to an alternate, adequately equipped and staffed health care facility in circumstances where they could and should have done do;

8.8 They failed to assess, diagnose and surgically treat the Plaintiff with the degree of skill, and expertise with which they could and should have done so in the circumstances; and

8.9 They failed to procure the Plaintiff's informed consent to any of the surgical procedures performed on him".

4. It is trite law that in order to succeed in a delictual claim, a claimant would have to prove the following: causation, wrongfulness, fault and harm.

5. A successful delictual claim entails the proof of a causal link between the Defendant's actions or omissions, on the one hand, and the harm suffered by the Plaintiff on the other hand. Legal causation must be established on a balance of probabilities.

6. The Plaintiff called as his expert witness Professor Van der Jagt, an orthopaedic surgeon, who has been practising as such form 1993. Professor Van der Jagt consulted with the Plaintiff on 10th February 2011.

7. Professor Van der Jagt testified that his opinion is based on the facts and the data he ascertained from the clinical and medical records of the treatment and management of the Plaintiff's injuries from Letaba Hospital and investigations and

examination which included the radiological examination performed on 10th February 2011.

8. Professor Van der Jagt testified that Plaintiff sustained a dislocation of his elbow as well as a compounding fracture of the distal and of his left radius and ulna.

9. Professor Van der Jagt testified that, despite the surgical procedures performed on the Plaintiff, the Plaintiff was left with a chronically dislocated left elbow and a markedly restricted range of movement of that elbow and a chronic non-union of his distal radius fracture.

10. In his testimony, Professor Van der Jagt conceded that the k-wires can be used as a method of stabilising. However, he testified that given the severity of the injury sustained by the Plaintiff, which was compound in nature, the treating doctors should have used the plates and screws to stabilise the hand.

11. Defendant appointed Professor Vlok, to review the clinical records of Letaba Hospital. Professor Vlok did not examine the Plaintiff. The two experts, after discussing the medical and clinical records from Letaba Hospital, they prepared joint minutes, setting out areas and their views on the matter.

12. In their joint minutes, the experts agree that if the management of the Plaintiff's injuries were beyond the level of skill of the

treating doctors, the Plaintiff should have been referred to an appropriate tertiary facility. The experts agree that from the records and also relying on Professor Van der Jagt's examination, which they both concede was conducted some 4 years ago, that the Plaintiff has a residual chronic elbow fracture-dislocation as well as an established non-union of his distal radius on the same side.

13. Plaintiff's testimony was that he was never provided with sufficient information on the risks and complications that could be encountered during the procedures and the healing process.

14. Dr Du Preez, testified for the Defendant. He testified that he worked in Letaba Hospital's Orthopaedic Surgeon from 1980 to 2005. Dr Du Preez also testified that Dr Williams was employed full time as a Principal District Surgeon at Letaba Hospital. Dr Williams has since retired and he is now living in Australia.

15. Dr Du Preez stated that Plaintiff's injury was serious in that he sustained an open fracture of the radius and ulna and a dislocation of the elbow. Dr Du Preez further stated that Plaintiff's injuries were what is referred to as "a bag of bones" which is impossible to fix until you have stabilised it.

16. Dr Du Preez on the 15th August 2007 after consultation with Dr Williams, performed a close reduction procedure, using k-wires to immobilise the fracture. On the 16th August 2007, on examination of the Plaintiff, he noticed that the wrist was medially displaced.

17. Dr Du Preez advised Dr Williams of the outcomes of the surgery. On 22nd August 2007, he assisted Dr Williams when he performed corrective surgery. Dr Williams performed an open reduction of the ulna and daragh procedure, using the k-wires.

18. Dr Du Preez, stated under cross-examination that the plates and screws could not be used as the Plaintiff's wound was septic.

19. Dr Myburgh, is another doctor who treated Plaintiff whilst he was admitted at Letaba Hospital. Dr Myburgh testified that at the time the Plaintiff was operated, he was a general practitioner with only two years' experience as a medical doctor.

20. Dr Myburgh carried out the procedure to reduce the ulna and radius, after consultation with Dr Williams.

21. Dr Myburgh testified that he explained the risks associated with the procedure to be carried out to the Plaintiff. He also

stated that the standard consent form they use in hospital, does not have a part where such could be recorded.

22. Dr Myburgh collaborated Dr Du Preez's testimony that Plaintiff's wound was septic and therefore they used the k-wires. He further stated that Plaintiff was on a continued treatment of cloxacillin, which is an antibiotic.

23. Dr Myburgh consulted with Plaintiff again on 01st October 2007, and he found that the left elbow is still dislocated and there was non-union of the left wrist.

24. On the 15th October 2007, Dr Myburgh consulted with Plaintiff and replaced the backslab with a new one. Dr Myburgh stated under cross-examination that Plaintiff's fracture was bad and could not possibly be fixed, especially given the challenge of sepsis.

25. The question that I am called to adjudicate upon is firstly whether the medical doctors charged with the care of the Plaintiff ought to have reasonably foreseen a danger that his hand will be deformed. The second question is what steps would a reasonable medical doctor have taken to guard against this foreseeable harm.

26. Plaintiff's counsel in her argument referred the court to the case of **Goliath v MEC for Health, 2015 (2) A SA 97 (SCA).**

In this matter, the court stated that some incidents occur in circumstances where the evidence of the alleged negligence of the defendant is not easily available to be the plaintiff but is, or should be, to the defendant. The court stated that to hold a medical practitioner negligent simply because something went wrong would be impermissibly reasoning backwards from effect to cause. The court then dealt with the maxim of *res ipsa loq* and came to the conclusion that the maxim was not a magical formula but merely a permissible inference which the court may employ upon all the facts which appears to be justified. It is usually invoked 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. It was also stated that the defendant against whom the inference of negligence is sought to be drawn, may produce evidence in order to explain that the occurrence was unrelated to any negligence on their part.

27. Plaintiff's counsel argued that the inference that can be drawn in this matter is that on a balance of probabilities a patient with a badly broken arm does not leave a hospital with a deformed arm of which every single bone that was broken at the outset is still broken. She also argued that the contention by

Defendant that Plaintiff's accident caused the deformity can simply not be entertained.

28. Plaintiff's counsel further argued that if one accepts Defendant's version that further operations could not be undertaken due to sepsis, then why was the Plaintiff discharged when the most effective treatment would have been an intravenous application of the medication and the risk of further damage to the radius and ulna that has not been adequately fixated was a real and imminent danger. She argued that, that in itself amounted to negligence.

29. Plaintiff's counsel submitted that on a balance of probabilities, the Plaintiff has discharged its burden of proof and the court should find in his favour.

30. Defendant's counsel in his argument stated that the Plaintiff and Professor van der Jagt appear to be making an assumption of negligence on the part of the Defendant's servant based on the outcome of the operation. To them the fact that the arm is deformed and has limited functionality denotes negligence. He submitted that amounted to reasoning backwards from effect to cause which is impermissible.

31. Defendant's counsel argued that the test is whether or not the conduct of the doctors who operated on the Plaintiff fell below

the standard of a reasonably competent practitioner in the field of orthopaedics.

32. Defendant's counsel submitted that the only cogent criticism which Professor van der Jagt could level at the manner in which the procedure was carried out, was the failure to insert plate screws instead of k-wires and the failure to refer Plaintiff to a tertiary facility.

33. Defendant's counsel also submitted that the dislocations on both the wrist and the elbow were attended to by firstly a close reduction and later open reduction. A backslab held the arm in place. He argued that all this procedures were done under the supervision of a specialist orthopaedic surgeon, Dr Williams.

34. Defendant's counsel argued that in order for the Plaintiff to succeed in discharging the onus which he bears, he has to point out that what the treating doctors did was sub-standard. He submitted that it has to be borne in mind that a medical practitioner is not expected to bring to bear upon a case entrusted upon him the highest possible degree of professional skill, but to employ reasonable skill and care.

35. Defendant's counsel conceded that the refusal of Plaintiff's treatment on 16th August 2007 does not appear to have played any adverse role in the outcome of the operation.

36. Defendant's counsel argument that at the end, the cause of deformity of the Plaintiff's arm is the accident. Plaintiff has failed to show what the interventions are which the doctor failed to implement.

37. The general rule is that he who asserts must prove. Thus in a case like this, Plaintiff must prove that the damage that he has sustained has been caused by the Defendant's negligence. The failure of a professional person to adhere to the general level of skills and diligence possession 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)**.

38. **In Rankisson & Son v Springfield Omnibus Services 1964 (1) SA 609 at 616 D**, the court held that the degree of persuasiveness required of the defendant will vary according to the general probability or improbability of his explanation. If he offers an explanation which, if true, would reflect an

occurrence very rarely and exceptionally encountered in the ordinary course of human experience, very much more would be required of him by way of supporting facts than if he offered an explanation which found a ready echo in the daily routine of life.

39. Plaintiff's case is centred on the evidence of Professor van der Jagt, an expert orthopaedic surgeon. The correct approach to the evaluation of medical evidence is the one laid down by the Supreme Court of Appeal in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another [2001] ZASCA; 2001 (3) SA 1188 (SCA) (Linksfield)** where it held that although it has often been said in South African cases that the governing test for professional negligence is the standard of conduct of the reasonable practitioner in the particular professional fields, that criterion is not always itself helpful to finding the answer. That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.

40. I have evaluated Professor van der Jagt's report and his evidence passes the reasonable and logical requirement for

the acceptance of expert evidence. Professor van der Jagt's finding were supported by the radiological investigations done on the Plaintiff's hand. Professor van der Jagt conceded that the k-wires can be used to stabilise the fracture in an open and closed reduction procedure. However, Professor van der Jagt opined that when the treating doctors discovered that the wound was septic, they should have opted for external fixation or even refer the Plaintiff to a tertiary facility. Professor van der Jagt also testified that according to his experience, tertiary facility in this instance, Pietersburg Hospital, would be more equipped to deal with the serious and compound fracture sustained by the Plaintiff.

41. On the other hand, I have evaluated the evidence of Dr Du Preez and Dr Myburgh. I found that both doctors were credible witnesses. I also found that Dr Du Preez and Dr Myburgh believed that the procedures and treatment they performed on the Plaintiff was good, especially because they consulted with a resident orthopaedic surgeon, Dr Williams, whom they held in high esteem. Both doctors conceded that when the first operation did not go well, they engaged Dr Williams, who performed the corrective surgery.

42. In **Mitchell v Dixon 1914 AD 519 at 525**, the Appellate Division noted that this standard does not expect the impossible of medical personnel: "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 skills and care; and he is liable for the consequences if he does not".

43. The key point is that negligence must be evaluated in light of all the circumstances. This means that we must not ask what would exceptionally competent and exceptionally knowledgeable doctors have done, we must ask what can be expected of the ordinary or average doctor in view of the general level of knowledge, ability, experience skills, diligence possessed and exercised by the profession, bearing in mind that a doctor is a human being and not a machine and that no human being is infallible. Practically what we must ask is was the medical professional's approach consonant with a reasonable badly of medical opinion? With a medical specialist, the standard is that of the reasonable specialist.

44. Having regard to the evidence led by the Defendant, it is very clear in my mind that Dr Du Preez and Dr Myburgh employed the reasonable professional skill given their level of knowledge, ability and experience. It is also clear in my mind that they referred the Plaintiff to Dr Williams, an orthopaedic surgeon, who is a specialist in that field.

45. Professor van der Jagt and Professor Vlok, who I regard as the peers of Dr Williams, questioned the status and the level of expertise of the various doctors who treated Plaintiff. They are also agreed that if the management of the Plaintiff's injuries were beyond the level of skill of treating doctors, the Plaintiff should have been referred to an appropriate tertiary facility.

46. Dr Du Preez and Myburgh, including the hospital records, testified that the patient continued to be treated as an outpatient. Dr Myburgh's testimony is that on the 01st October 2007, almost two months after the operation, Plaintiff's elbow was still dislocated and a non-union was visible on his left wrist.

47. On the 15th October 2007, Plaintiff was seen again at Letaba Hospital and on his own accord, he requested a new backslab. Dr William was still a resident orthopaedic surgeon and there is no record that he managed the Plaintiff, even though Dr Du Preez and Dr Myburgh stated that Plaintiff's fracture was serious.

48. The question is to be asked is whether the approach by Dr Williams, a specialist orthopaedic surgeon is consonant with a reasonable body of medical opinion. Dr Williams failed to evaluate comparative risk and benefits of the treatment he recommended. In the circumstances Dr Williams did not take any reasonable precautionary steps that he knew should and could have been taken.

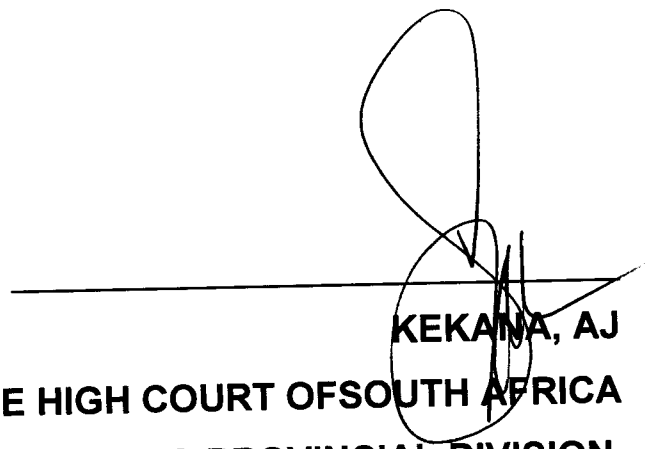
49. The Plaintiff had to prove negligence on a balance of probabilities. He had to show that the doctor treating him should probably have acted differently according to the reasonableness standards set out.

50. On a balance of probabilities, the Plaintiff has succeeded to discharge its burden of proof.

51. In the result, I make the following order:-

a. Defendant to pay Plaintiff's proven damages;

b. Defendant to pay Plaintiff's costs of suit on party and party scale, including the qualifying fees of Professor van der Jagt.



KEKANA, AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG PROVINCIAL DIVISION,

PRETORIA

Attorneys for the Applicant/ Plaintiff: Levin Tatanis Incorporated

Attorneys for the Respondent/ Defendant: The State Attorney