IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Case Number: 1098/2018

In the matter between:

R[…] V[…] V[…] D[…] B[…] **PLAINTIFF**

AND

THE MINISTER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, NORTH WEST PROVINCE **DEFENDANT**

JUDGMENT

STANTON, AJ

INTRODUCTION:-

[1] The plaintiff instituted an action for damages following hip replacement surgery performed on him on 24 June 2015 by members of the defendant.

[2] The action was set down for trial from 15 June 2020 to 18 June 2020, to be conducted *via* audio-visual hearing, but stood down to 18 June 2020 due to the power failures experienced in Mahikeng.

[3] On 18 June 2020, the legal representatives of the parties informed me that they do not intend to call witnesses and that the matter may be adjudicated on the pleadings. I accordingly instructed them to file heads of argument to enable me to determine the matter without hearing oral evidence.

ISSUES NOT IN DISPUTE:-

[4] The parties agreed on a separation of liability and quantum in terms of the provisions of Rule 33(4) of the Uniform Rules of Court.

[5] It is common cause that:-

5.1 The plaintiff was placed on a waiting list for a total right hip replacement operation ("the surgery") for a period of approximately one year and three months prior to the surgery, during which period he was treated conservatively;

5.2 On 24 June 2015, the plaintiff underwent the surgery;

5.3 On 26 June 2015 x-rays were taken;

5.4 According to the clinical records, the plaintiff was discharged on 29 June 2015 and walked out of the hospital in a good condition with one crutch;

5.5 On 17 September 2015, the plaintiff had regained a full range of motion without any difficulty and even had been cycling;

5.6 On 14 December 2015, the plaintiff attended Potchefstroom Hospital where he was prescribed voltaren and paracetamol;

5.7 On 04 March 2017, a right leg shortening of 3 to 4cm was noted together with loosening of the implant with migration;

5.8 The plaintiff underwent a revision of the right total hip replacement on 9 May 2017;

5.9 The defendant owed the plaintiff a duty of care; and

5.10 The members of the defendant were negligent in the treatment of the plaintiff, specifically in that they failed to diagnose and correct the badly inserted femoral neck.

ISSUES IN DISPUTE:-

[6] According to the defendant's plea:-

6.1 The plaintiff's severe osteoarthritis is a condition, which pre-existed before 04 February 2014;

6.2 The surgery had to be performed on the plaintiff for the severe osteoarthritis in his right hip;

6.3 The surgery did not cause the shortening of the plaintiff's right leg or his limping.

6.4 The surgery was not performed to correct the plaintiff's pre-existing shortened right leg or limping;

6.5 The defendant further pleaded that the right leg shortening of the plaintiff is not as a result of the procedure that had been performed on him on or about 24 June 2015;

6.6 The plaintiff underwent the second procedure during May 2017, which procedure corrected the subsidence of the femoral and the acetabular components and/or any early failure of the plaintiff's hip replacement, and

6.7 Any pain, discomfort and loss of amenities of life that could have resulted from the second procedure are too remote.

[7] The plaintiff avers that he was diagnosed with osteoarthritis in 2012. According to the defendant's orthopaedic surgeon, the plaintiff was only diagnosed with osteoarthritis in 2014.

[8] The issues for determination are accordingly harm, causation, and wrongfulness.

THE JOINT MINUTE OF THE ORTHOPEDIC SURGEONS:-

[9] The opinion of medical experts is central to the determination of the issues in dispute.

[10] In the joint minute between the orthopaedic surgeons of the plaintiff (Birrell and Naude) and the orthopaedic surgeon on behalf of the defendant (Ramokgopa), the experts agreed that during the replacement surgery, the femoral stem of the prosthesis was inserted far too deep into the femoral shaft. The experts for both parties agreed that this was unacceptable.

[11] According to the defendant's expert orthopedic surgeon, the doctors were negligent as they did not correct the badly inserted femoral neck immediately once they had examined the postoperative x-rays. The defendant's expert opinioned that the incorrect surgery should have been repaired straight away once the postoperative x-rays revealed the problem.

[12] Mr S Ogunrobi, counsel acting on behalf of the defendant, confirmed that the breach of a legal duty might be presumed from the joint minute of the orthopaedic surgeons. He conceded that the hospital records may be used without being tendered into evidence by virtue of the fact that same are public records. He, however, argued that the plaintiff faces insurmountable obstacles in not testifying or calling witnesses to prove his case.

[13] Mr S Ogunrobi submitted that the joint expert report is no more than opinion evidence, which the court is entitled to reject. In support of his argument, Mr Ogunrobi relied on the following statement in the matter of ***Bee v Road Accident Fund***:-[1]

"In my view these pronouncements indicate that if an expert witness cannot convince the court of the reliability of the opinion and his report the opinion will not be admitted. The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision. The court, in such instance, will be entitled to test the reliability of the joint opinion, and if the

[1] 2018 (4) SA 366 (SCA) HELD AT PARAS [30] & [31].

court finds the joint opinion to be unreliable, the court will be entitled to reject the joint operation. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts, incorrect assumptions or is unconvincing.

The court cannot base its decision on unreliable evidence. There is no valid reason why a court should be precluded from considering and taking into account reliable evidence placed before it. For the court to ignore reliable and credible evidence tendered, in my view, defeats the end of justice."

[14] Mr SJ Myburgh, counsel on behalf of the plaintiff, argued that the contents of the joint minutes constitutes the evidence of the opinions expressed and the facts underpinning such.

[15] Sutherland J succinctly sets out the position regarding the effect of join expert agreements in the matter of ***Thomas v BD Sarens (Pty) Ltd,*** as follows*:-* [2]

"Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference."

[16] The Court in ***Jacobs v The Road Accident Fund*[3]*,*** with reference to the majority in ***Bee v Road Accident Fund,*[4]**confirmed that where experts in the same field reach an agreement, it differs from the position where experts differ on their respective opinions. In cases

[2] [2012] ZAGPJHC 161 (12 SEPTEMBER 2012) AT PARAGRAPHS 13.

[3] 2018 (4) SA 366 (SCA) AT PARAGRAPHS 30 AND 31.

[4] [2019] JOL 44807 (FB) AT PARAGRAPH [29].

where they differ in opinion, *"a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning. This is conversely not the position where they are in agreement*."

[17] I am satisfied that the experts in the joint minute reached an agreement on various issues. In my view, by having reached an agreement, they put the dispute beyond the need for adjudication. The opinions expressed in the joint minute as well as their respective expert reports no longer constitute trialable issues, but evidence.

NEGLIGENCE:-

[18] The classic test for negligence was formulated by Holmes JA in ***Kruger v Coetzee***[5] as follows:-

"For the purposes of liability culpa arises if –

a) a diligens paterfamilias in the position of the Defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if

[5] 1966(2) SA 428 (AD) AT 430 E-G.

so, what steps would be reasonable, must always depend upon the particular circumstances of each case."

[19] In the matter of ***Oppelt v Department of Health,*** [6] the Constitutional Court endorsed the test formulated in Kruger as follows:-

"The key point is that negligence must be evaluated considering all the circumstances and, because the test is defendant – specific ("in the position of the defendant"), the standard is upgraded for medical professionals. The question, for them, is whether a reasonable medical professional would have foreseen the damage and taken steps to avoid it. In Mitchell v Dixon the then 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 skill and care; and he is liable for the consequences if he does not."*

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, skill and 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, we must also ask : was the medical professional's approach consonant with a reasonable and responsible body of medical opinion? This test always depends on the facts. With a medical specialist, the standard is that of the reasonable specialist."

[20] Mr S Ogunronbi submitted that the plaintiff did not plead negligence in respect of the second surgery performed on 10 May 2017.

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[6] 2016 (1) SA 325 (CC) PARAGRAPH 60.

[21] In view of the defendant's concession that the breach of duty may be presumed from the joint minute, I find that defendant was negligent *in casu*.

HARM AND CAUSATION:-

[22] The defendant denies that the negligence resulted in harm to the plaintiff. According to the defendant, the plaintiff has not shown any harm at all.

[23] Mr S Ogunronbi submitted that the plaintiff failed to discharge his onus in respect of causation. He contends that the onus of adducing evidence cannot be displaced simply on the basis of drawing inferences from the expert reports.

[24] Mr S Ogunronbi argued that the joint minute did not address the severe osteoarthritis of the plaintiff, a condition which pre-existed before 4 February 2014 when the plaintiff underwent the surgery and, that on account of the severe osteoarthritis, the right hip of the Plaintiff had caused the right leg of the Plaintiff to be shortened by about 3-4cm or more. In addition, he submitted that the plaintiff failed to address the supervening event of the second hip replacement surgery performed in 2017.

[25] Mr SJ Myburgh argued that the defendant's expert orthopaedic surgeon summarised the available clinical records, but does not mention the alleged shortening of the Plaintiff's right leg preceding the operation on 24 June 2015. His contention was that on a reading of the defendant's expert report, the first mention of a possible leg shortening is contained in the clinical records of 15 April 2016, which is well after the negligence occurred.

[26] The defendant conceded that the plaintiff had a pre-existing shortened right leg, but that this was as a result of osteoarthritis. However, none of the experts make any reference to the shortening of the plaintiff's right leg preceding the operation on 24 June 2015 due to osteoarthritis. This contention of the defendant is accordingly not supported by either the expert reports or the clinical records. According to the defendant's expert, and from reviewing of the notes, the shortening had progressed to more than 3cm in 2016. Dr. Ramokgopa stated that, if the x-rays were done earlier, then the revision surgery would also have been at an earlier stage, preventing prolonged pain and suffering.

[27] It is trite that the plaintiff must allege and prove the casual connection between the negligent act relied upon and the damages suffered.

[28] The test to be applied to the question of causation is the well known "but-for test" as formulated in ***International Shipping Co (Pty) Ltd v Bentley.***[7]

[29] In ***ZA v Smith***[8] the Supreme Court of Appeal reiterated what the enquiry entails as follows:-

"What [the but=for test] essentially lays down is the enquiry – in this case of an omission – as to whether, bur for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday life experiences. In applying this common sense, practical test, a

[7] 1990 (1) SA 680 (A) AT 700E-J.

[8] 2015 (4) SA 574 (SCA) PARAGRAPH 30.

plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish to casual link with certainty."

[30] Nugent JA in ***Minister of Safety and Security v Van Duivenboden***[9] *said the following*:

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics".

[30] In considering legal causation, the test applied in such an enquiry is trite and settled. It is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus inerveniens*, legal policy, reasonability, fairness and justice all come into consideration.[10]

[31] This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a judicial problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.

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[9] 2002 (6) SA 431 (SCA).

[10] FLANAGAN V MINISTER OF SAFETY AND SECURITY ZASCA 96 (1 JUNE 2018) [30]; DELPHISURE GROUP INSURANCE BROKERS CAPE (PTY) LTD AND OTHERS V DIPPENAAR 2010 (5) SA 499 (SCA) AT PARAGRAPH 25.

[32] In my view, the fact that the second revision surgery was performed without negligence, does not cure or remedy the harm suffered by the plaintiff before this surgery. It also does not cure the fact that the plaintiff will require and additional hip replacement in his lifetime.

[33] I also agree with Mr SJ Myburgh's submission that the second revision surgery was properly addressed by the experts who opined on the negligence of the defendant and that it can be accepted that the second surgery, to some extent, remedied some of the harm the plaintiff would have suffered had such surgery not been performed. This is however a matter of quantification of damages.

[34] I can reach no other conclusion than that the plaintiff suffered the shortening of his right leg as a result of severe subsidence of the femoral stem.

WRONGFULNESS:-

[35] In order to establish liability in delict, the defendant's conduct must have been wrongful. This is a conclusion of law that a court draws from the facts before it.[11] Wrongfulness is a distinct and separate enquiry for delictual liability and is a requirement quite apart from the negligence of the defendant's conduct. The wrongfulness issue is logically anterior to the fault enquiry and only when it is established that the defendant acted wrongfully, does the question arise as to whether the objectively wrongful conduct can be imputed to the defendant.[12] Fault does not presuppose the existence of wrongfulness and is irrelevant unless wrongfulness is established. Put otherwise,

[11] INDAC ELECTRONICS (PTY) LTD V VOLKSKAS BANK 1992(1) SA 783 (A) AT 797.

[12] MINISTER OF SAFETY AND SECURITY V VAN DUIVENBODEN 2002 (6) SA 431 (SCA) AT PARAGRAPH 12.

negligence is unlawful and actionable only if it occurs in circumstances that the law recognises as making it unlawful. In broad terms conduct is wrongful if it infringes a legally recognized right of the plaintiff or constitutes a breach of a legal duty owed by the defendant to the plaintiff.[13]

[36] Mr S Ogunronbi, with reference to the matter of ***Mashongwa v PRASA***,[14] argued that the joint expert report does not establish wrongfulness or liability.

[37] The criterion of wrongfulness ultimately depend on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct.[15]

[38] Molemela AJ in the matter of ***Oppelt v Head : Health, Department of Health Provincial Administration : Western Cape*** [16] stated that:-

"In the face of an admitted legal duty of care, the applicant needed to show only that the legal duty was breached"

[39] The enquiry as to whether defendant has contravened the duty is objective. The imposition of a legal duty depends on the particular circumstances of the case. In *casu,* the existence of the legal duty (which is admitted) and its breach (the harm caused against the legal

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[13] LAWSA SECOND EDITION VOLUME 8 PART 1 PARAGRAPHS 59 AND 60.

[14] 2016 (3) SA 428 (CC).

[15] LE ROUX AND OTHERS V DEY (FREEDOM OF EXPRESSION INSTITUTE AND RESTORATIVE JUSTICE CENTRE AS AMICUS CURIAE 2011 (3) SA 274 (CC) AT PARAGRAPH 122.

[16] *SUPRA* PARAGRAPH 53.

duty) would render defendant's conduct wrongful. The breach of that legal duty is implicit with the finding that harm was caused.

ANALYSIS:-

[40] It is common cause that, when the plaintiff underwent hip surgery on 24 June 2015, the femoral stem of the prosthesis was inserted far too deep into the femoral shaft and that the incorrect surgery should have been repaired straight away. This was not done.

[41] Further subsidence clearly occurred in the period after the surgery, which subsidence the defendant's expert described as severe. This subsidence resulted in a progressive leg shortening that would require the plaintiff to receive built up shoes.

[42] In my view, the clinical records confirm that the plaintiff returned to hospital complaining of pain. According to the defendant's expert, and had the revision surgery been performed earlier, prolonged pain and suffering would have been prevented.

[43] The plaintiff evidently suffered harm as a result of the defendant's negligence.

[44] The defendant's expert orthopaedic surgeon specifically stated that, had the revision surgery been performed earlier, prolonged pain and suffering would have been prevented.

[45] On the application of the "but-for" test, had it not been for the defendant's negligence, the plaintiff would not have suffered a progressive shortening of his right leg, would not have had to endure the pain and suffering associated with the failed hip replacement and would not require additional hip replacement surgery in future.

[46] It is common cause that the defendant owed the plaintiff a duty of care and that as a result of the negligence, the defendant breached such a duty. In view of the judicial authority, I find that the defendant's breach of duty *in casu* was wrongful.

[47] The plaintiff has proven, in addition to the duty of care and negligence been common cause, the elements of harm, causation and wrongfulness.

ORDER:-

Consequently, I make the following orders:-

1. The issue of liability is separated from the issue of quantum in terms of the provisions of Rule 33(4) of the Uniform Rules of Court, and the issue of quantum is postponed *sine die;*

2. The defendant shall pay 100% (ONE HUNDRED PERCENT) of the plaintiff's agreed or proven damages, which damages flow from the defendant's failure to diagnose and repair, on 26 June 2015, the femoral stem that was inserted too deep into the femoral shaft of the plaintiff.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs of suit, to date, on the High Court scale, such costs to include (but not necessarily be limited to) the following:-

3.1 The costs attendant upon the obtaining of the medico-legal reports and/or addendum reports and/or joint minutes, if any, as well as qualifying and/or reservation fees, if any, of the following expert witnesses:-

3.1.1 Drs Birrell and Naude;

3.1.2 Dr Collin;

3.1.3 Dr Roper; and

3.1.4 The costs of any radiological or other special medical investigation used by any of the aforementioned experts;

3.2 The qualifying, reservation and preparation costs, if any, as allowed by the taxing master, of the experts or whom the Plaintiff gave notice in terms of Rule 36(9)(a) and (b), including but not limited to Dr Birrell;

3.3 The costs attended upon the appointment of senior-junior counsel including the reasonable fees for preparation of the heads of argument as well as his full day fee from 15 June 2020, 17 June 2020 and 18 June 2020, as well as reasonable preparation;

3.4 The costs to date of this order, which shall, subject to the discretion of the taxing master, further include the costs of the attorneys which include necessary travelling costs and expenses [time and kilometers], preparation for trial and attendance at court [which shall include all costs previously reserved]. It will also include the reasonable costs of consulting with the plaintiff to consider the offer, the costs incurred to accept the offer and make the offer an order of court;

3.5 The reasonable costs incurred by and on behalf of the plaintiff in as well as the costs consequent to attending the medico-legal examinations of both parties;

3.6 The costs consequent to the plaintiff's trial bundles and witness bundles, including the costs of 6 [six] copies thereof;

3.7 The costs of holding all pre-trial conferences, as well as round table meetings between legal representatives for both the plaintiff and the defendant, including senior-junior counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials;

3.8 The costs of and consequent of the holding of all expert meetings between the medico-legal experts appointed by the plaintiff;

4. The defendant shall pay interest on the plaintiff's taxed or agreed costs of suit at the prescribed statutory rate calculated from 31 (THIRTY ONE) days after agreement in respect thereof, or from the date of affixing of the taxing master's allocator, to date of payment.

5. Any payment to be made in terms of this order shall be made into the following account:-

NAME	:	Maree & Maree Attorneys
BANK	:	FNB
TYPE	:	Trust
ACC NUMBER	:	623 […]
BRANCH CODE	:	260 849
REF	:	A[…]

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A STANTON
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION: MAHIKENG

APPEARANCES

DATE OF HEARING : 27 JUNE 2020

DATE OF JUDGMENT	:	17 SEPTEMBER 2020
COUNSEL FOR PLAINTIFF	:	ADV SJ MYBURGH
COUNSEL FOR DEFENDANT	:	ADV S OGUNROBI

ATTORNEYS:-

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