IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO : 3401/2003

In the matter between :

JAN VAN DER WALT
Plaintiff

and

JOE DE BEER
Defendant

JUDGMENT DELIVERED THIS 14th DAY OF APRIL, 2005

FOXCROFT, J **:** On 28 April 1999, Plaintiff was seen by Defendant at the Leeuwendal Mediclinic. Defendant is an orthopaedic surgeon, practising exclusively in the area of shoulder problems. Plaintiff saw him in an attempt to discover the cause of a nagging pain in his right shoulder as well as in his back and chest. It was alleged in the Particulars of Claim, as amended, that it was a term of the agreement between Plaintiff and Defendant that Defendant would at all times in attempting to treat Plaintiff conduct himself with the professional

expertise reasonably to be expected of an orthopedic surgeon with a practice limited to shoulders.

In May 2000, an advanced carcinoma of the right upper lobe of the lung was diagnosed by Dr Peter Jansön on the basis, inter alia, of an x-ray photograph dated 28 April 1999. This carcinoma was removed on 22nd May 2000. It is alleged in the Particulars of Claim that the x-ray photograph dated 28 April 1999 was taken at the request of Defendant after Plaintiff had consulted him on that day. It is also alleged that Defendant was negligent *'ten spyte van die ooreenkoms vermeld in paragrawe 3 en 4 hierbo'* in the following respects as reflected in paragraph 7.1 of the Particulars of Claim as amended :

> *"7.1 Verweerder het versuim om 'n verslag van die radioloog en/of radioloë wat die radiologiese x-foto gedateer 28 April 1999 geneem het, te bekom of het versuim om te verseker dat hy 'n verslag van die gemelde radioloë ontvang ten spyte daarvan dat hy nie 'n deskundige is op die gebied van die borskas nie.*
>
> *7.2 Verweerder het versuim om die radiologiese x-foto gedateer 28 April 1999 wat in sy opdrag geneem is, korrek te interpreteer deurdat hy nie die skaduwee in die gebied van die regter bokwab wat op die gemelde x-foto voorgekom het, waargeneem het nie of deurdat hy nie die gemelde skaduwee as 'n abnormaliteit geïdentifiseer het nie."*

It was further alleged that as a result of this negligence, Plaintiff suffered a period of twelve months of pain and suffering as a result of the failure to diagnose the carcinoma in April 1999 and that he suffered anxiety and emotional tension as a result of the non-diagnosis of his problem. Plaintiff also alleged loss of amenities, capacity to work and unnecessary medical bills. He claimed the sum of R337 205,57 in respect of medical expenses and general damages.

It was recorded at the pre-trial conference that the parties had agreed that the quantum and merits of the matter would be separated and the trial proceeded on that basis.

What happened in this case was that Defendant, having sent Plaintiff for a chest x-ray, decided that Plaintiff did not manifest a shoulder problem as such. Defendant decided to refer Plaintiff to an orthopaedic surgeon specialising in spinal problems, Dr Jim Crozier.

The referring note to Dr Crozier (Exhibit 2) played an important role in the trial and was central to the comment by all the medical specialists who testified. The note is dated 28/4/99 and asks Dr Crozier to advise

on a 56 year old man with dual pathology,

> *"1. Has suffered a painful shoulder x 2½ years: diagnosis early.*
>
> *2. Tender T4 spine ċ pain & hyperflexion of neck and ↑ intra Thoracic pressure."*

The symbol '↑' was explained during the evidence to mean *'increased'*.

Against this second item is a note *"For your opinion"* written by Defendant, and after that appears *"CXR today NAD".* There is then reference to possible disc narrowing, a previous MVA in 1983 and a spinal injury treated by a chiropractor in Pretoria. After that are the important separate notes with question marks before each word :

> *"? Mitosis*
> *? Disc"*

The all important note *'CXR',* being an abbreviation for *'Chest x-ray'* and *'NAD'* meaning *'Nothing abnormal detected'* was fundamental to the Plaintiff's case that this alleged failure on the part of Defendant to diagnose what some of the doctors called *'an obvious abnormality in the lung'* was the cause of Plaintiff's woes. Dr Crozier did not testify so that it is not known, only presumed, that he also did not detect any

abnormality on the x-ray, if he ever looked at that x-ray at all.

It was only when Dr Jansön examined the patient in his rooms a year later, using an x-ray machine capable of producing an image while the patient was being examined, that the obvious carcinoma was seen for the first time. The tumour had grown considerably in the year that had passed since the chest x-ray was taken at Defendant's request.

Dr Jansön testified that he only saw the old x-ray plates taken in 1999 after he had removed the tumour from Plaintiff, and he testified that there were signs on those plates of a tumour. In his words

> *"Daar was 'n skaduwee in die regter apeks, hoewel natuurlik kleiner as wat ek hom gesien het – wat ook aanduidend was van 'n moontlike maligne proses."*

Defendant's case was that he had decided not to treat the Plaintiff's pain, which he suspected might be caused by mitosis (cancer) or a disc problem, in accordance with his normal practice of only treating shoulders. He requested the x-ray of the chest in order to save time for the patient and referred him to Dr Crozier, at which time Plaintiff ceased to be his patient.

The evidence concerned the narrow question of the identification of the responsibility in relation to ensuring that the radiological report would come to the attention of the doctor attending the patient.

For Plaintiff, Professor Walters and Professor Scher testified as to the professional duties of orthopaedic surgeons and radiologists in this regard, and for Defendant, Professor Lotz and Dr Du Toit testified as to their understanding of medical duties and responsibilities in this situation. Plaintiff and Defendant both testified.

It is well-established that what is expected of a medical practitioner is the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which he belongs.

VAN WYK v LEWIS, 1924 AD 438 at 444.

In **MICHAEL AND ANOTHER v LINKSFIELD PARK CLINIC [PTY] LTD AND ANOTHER, 2001[3] SA 1188 [SCA] at 1200** it was said that

> *"However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the court itself to determine*

> *on the basis of the various, and often conflicting, expert opinions presented."*

In that matter none of the experts was asked or purported to express any collective or representative view of what was or was not accepted as reasonable in South African specialist anaesthetist practice in 1994. The Court went on to deal with the governing test for professional negligence as the standard of conduct of the reasonable practitioner in the particular professional field, but added against the letter 'G' that :

> *"...., that criterion is not always itself a helpful guide to finding the answer."*

In paragraph 36 the Court went on to say that what is required in the evaluation of evidence is to determine whether and to what extent the medical opinions advanced are founded on logical reasoning. The decision of the House of Lords in the medical negligence case of **BOLITHO v CITY AND HACKNEY HEALTH AUTHORITY [1998] AC 232** is referred to, and the speech of Lord Browne-Wilkinson is adopted in a summary provided by the Supreme Court of Appeal of that decision. It is said in paragraph 39 of the judgment that

> *"However, it will very seldom be right to conclude that views genuinely held by a competent expert are unreasonable. The assessment of medical risks and benefits remains a matter of clinical*

judgment which the court would not normally be able to make without expert evidence and it would be "wrong" to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant's conducts falls to be assessed."

An important factual question in the matter before me was the precise nature of any practice of the Defendant in regard to the obtaining of radiological reports after the taking of x-ray plates.

Professor Walters, an orthopaedic surgeon with extensive practical experience, first in the trauma area for about ten years and then specialising in hip and knee work, testified that he had been asked to look at an x-ray plate, Exhibit 1, which was handed to him in the courtroom. Professor Walters said that he could see an opacity in the upper part of the right upper lobe in the apex of the lung, and that the appearance to him was that of a solid or fluid material. When comparing the right with the left lung, a clear difference could be detected and he said that the conclusion which he had drawn from his observations of this x-ray plate was that

> *"It is solid material, its either a tumour or its an infection like tuberculosis. In either event its an abnormal pathological process at the apex of the lung."*

He added that a second common problem apart from tuberculosis on this presentation was that cancer of the lung of this kind and in this position is often referred to as a Pancoast tumour,

> *"a tumour which is invasive in that part of the body and it tends to affect the nerves as they pass through that part of the upper chest. These nerves pass through the shoulder and then down to the arm."*

It was put to Professor Walters that Professor Lotz would testify that it is not reasonable to expect a non-radiologist to have observed this abnormality appearing on the x-ray film dated 28 April 1999. Professor Walters disagreed. In his view, even for a *"non-radiologist, the lesion as observed on that x-ray, in my opinion, is very easily seen."*

Mr *Cloete,* who appeared for Defendant, pointed out in argument that while Professor Walters had given this evidence in chief at page 12 and

13 of the Record, he modified his position under cross-examination [Record 46], where he said that there was no obligation for Defendant to detect the abnormality and that he was not blaming him for not detecting the abnormality on the x-ray. He was then asked :

> *"You're not saying he was negligent for not detecting it. --- Correct. Do you say Dr Crozier was negligent for not detecting it? --- No. You are however blaming Dr De Beer as I understand you correctly, for not making sure that he gets the radiological report in respect of that x-ray, is that so? --- I would like to make it clear to the Court that I'm not blaming anybody. I'm testifying here as to a principle l and the principle is that of responsibility, who accepts the responsibility and to my knowledge the responsibility appeared to have passed from the radiologist to the physician that requested the investigation and who saw the investigation before he referred it."*

This was not a view apparently shared by the radiologists who were later to testify, who seemed to be in agreement that the primary responsibility for providing a radiological report, remained always with the radiologist. I did not understand their evidence to have gone as far as to have supported Professor Walters' view that the radiologist's responsibility *"appeared to have passed from the radiologist to the physician that requested the investigation."*

The real question for decision was whether the doctor who sent the patient to have an x-ray photograph taken held a dual responsibility

with the radiologist to ensure that a report was provided to the patient's attending doctor.

Later in the cross-examination, at Record 71, Professor Walters conceded that

> *"If one looks at (Defendant) as an orthopaedic surgeon who specializes in shoulders then the failure to detect the abnormality is not unreasonable."*

It was put to Professor Walters that the Defendant's instructions were, and his testimony would be, that Plaintiff was specifically told by Defendant not to wait for a radiologist's report, but to bring the x-ray directly back to Defendant. When replying to this question, Professor Walters said :

> *"The responsibility for the report has to, must remain with somebody. If there is an instruction or a practice of requesting no report then in my view that responsibility is passed on to the person who then takes over the further management of the interpreting of the x-ray and then dealing with the consequences thereof. So if the report has, if the x-rays have been obtained and there has been an instruction to obtain no report then I believe its incumbent on the person who has received*

those x-rays."

It was put to Professor Walters in cross-examination that if the Court should find that Defendant did not instruct the radiologist not to give him a report, then his failure in that regard to obtain a report was not unreasonable or negligent. Professor Walters agreed (Record page 72, lines 5-8). A little later, when the question was cast in a slightly different form, Professor Walters agreed that the failure to interpret the x-ray could not be held against him, the answer was :

"Correct, as negligence yes."

Mr *Cloete* submitted that there was no evidence whatsoever on record that Defendant ever gave any instruction that he did not want a radiological report to be provided to him in respect of the x-ray photograph concerned. Indeed, Professor Scher, who was also to testify on Plaintiff's behalf, testified that the correct interpretation of the x-ray request form is that it did require a radiological report.

Ms *Anderssen,* who appeared for Plaintiff, submitted that Defendant had agreed in the pleadings that he had failed to request or obtain a report and yet put a contrary version during cross-examination of Plaintiff.

It is so that in paragraph 7.1 of Defendant's *Further Particulars for Trial* it is stated that

> *"Verweerder het nie 'n verslag van die radioloog en/of radioloë wat enige radiologiese x-foto's van Eiser op 28 April 1999 geneem het, aangevra of bekom nie."*

Later, in Defendant's list of questions and desired admissions in terms of Rule 37(4), Defendant placed on record that he did not admit

> *"dat daar nie 'n radiologiese verslag ten opsigte van die betrokke x-foto gegee is nie, en dat Verweerder nie erken dat Verweerder versoek het dat daar nie 'n radiologiese verslag ten opsigte van die betrokke x-foto gegee moet word nie."*

Defendant denied that his instructions had in any way changed, and his reply to Plaintiff's list of questions and desired admissions was as follows :

> *"Verweerder ontken dat hy sy instruksies aan sy regsverteenwoordigers verander het, of dat daar enige*

teenstrydigheid is tussen paragraaf 7.1 van sy Antwoord op Eiser se Versoek om Nadere Besonderhede vir doeleindes van voorbereiding vir verhoor, en paragraaf 2 van sy Lys van Navrae en Verlangde Erkennings ingevolge Reël 37(4).

'n Afskrif van die x-straal aanvraagvorm ten opsigte van onder andere die x-foto gedateer 28 April 1999 word hierby aangeheg. Verweerder het nie daarin uitdruklik 'n radiologiese verslag aangevra nie, en hy het ook nie op enige latere stadium 'n radiologiese verslag ten opsigte van die betrokke foto aangevra of bekom nie. Verweerder het egter ook nie in die x-straal aanvraagvorm hierby aangeheg, of op enige ander wyse, versoek dat daar nie 'n radiologiese verslag ten opsigte van die betrokke x-foto gegee moet word. Hoewel Verweerder destyds nie self 'n radiologiese verslag ten opsigte van die betrokke x-foto ontvang het nie, dra hy nie kennis of daar wel destyds 'n radiologiese verslag ten opsigte van die betrokke x-foto gegee is nie, en daarom erken hy nie dat daar nie wel 'n radiologiese verslag ten opsigte van die betrokke x-foto gegee is nie."
(Page 39 of Annexure 'C')

Defendant's evidence was later to accord with this account in the pleadings.

Professor Scher testified that the responsibility of the referring doctor is to ensure that he receives a report so that it can be acted on, and remained of the opinion throughout cross-examination that the

responsibility lies also with the doctor calling for the radiological film to ensure that the film is reported on, especially where that film had been removed from the premises of the radiologist at the request of the doctor. He criticised Defendant for his failure to follow up on the obtaining of the report.

The evidence of Professor Lotz, also a professor in radiology, which was to follow later in the trial was that he did not believe that Defendant had any responsibility with regard to obtaining a radiologist's report since this was the sole responsibility of the radiologist. Professor Lotz had been in private practice for many years and he insisted that the sole responsibility was with the radiologist who was required by law to give a report and to store that report for five years. In his view, there was no exception to the rule that a radiologist should provide a report since, in his words,

> *"An x-ray without a radiologist's report is a time bomb, is a waiting time bomb. There is no exclusion on that rule."*
> (Record, p.219 lines 9 – 12)

In regard to the question of the so-called dual responsibility adverted to

by Professor Scher, Professor Lotz's answer was that

> *"If this patient stayed with Dr De Beer there would have been a gap somewhere in Dr De Beer's practice. We can't close this because we're waiting for an x-ray. But this patient was sent away. If he is sent out of your practice what can you do?"*

The question was repeated as to whether there was indeed a dual responsibility, and Professor Lotz was quite clear in his answer that he did not agree with that concept since the radiologist gets paid for the work. (Record 233).

Professors Scher and Lotz agreed that it was not prudent for Dr De Beer to have tried to interpret the x-ray which he saw without a radiological report. Professor Lotz also said that the fact that Dr De Beer did express an opinion did not make him blameworthy because he did not have the experience.

It was also noteworthy that Professor Walters, who testified on Plaintiff's behalf, had not shared the view that doctors should not express opinions. In his view doctors expressed opinions at all times, and these were often helpful.

A good deal of time and effort was spent during the trial trying to paint a picture of a confused Dr Crozier not himself looking at the chest x-ray because he had been misled by Defendant's one line statement of *'CXR today NAD'.* This was not a theory deposed to at all by Dr Crozier, nor was it supported by any of the other practitioners. The prevailing view, in my understanding, was that when a doctor is sent a patient by another one, he or she commences his or her own examination and observations.

Dr Du Toit, an orthopaedic surgeon, also testified on behalf of Defendant that Defendant was not negligent in not noticing the abnormality on the x-ray plate. Dr Du Toit was obviously influenced by the fact that he himself had not noticed this abnormality. What is more, Plaintiff admitted showing the chest x-ray to Dr Crozier and also to a Dr N D Fisher-Jeffes, a neuro-surgeon. None of these gentlemen detected the abnormality either.

Mr *Cloete* submitted that while Professor Scher had stuck obstinately (*'hardnekkig')* to his opinion that the Defendant was negligent in not

obtaining a radiological report, he conceded that the radiologist bore the primary responsibility to report and, more importantly, conceded that Professor Lotz's view that "*it can be safely assumed by a referring clinician that the radiologist shall ensure that an expert opinion in the form of a written report is made available",* was correct. He was then asked,

> *"Why did Dr De Beer not assume that the radiologist was (a) going to write a report, because we know no reports were written. Could he assume that the report was going to be written? --- Yes, he could assume that."*
> (Record, p.145)

Mr *Cloete* went on to submit that during re-examination of Professor Scher, it appeared that he was not providing the answers which were expected. He repeated that a referring doctor can safely assume that the radiologist will ensure that an expert opinion is provided in the form of a report. Mr *Cloete* submitted that this concession was not reconcilable with Professor Scher's opinion that the Defendant was negligent in not himself ensuring that a radiological report was eventually received.

Whether it is truly irreconcilable is, in my view, not necessary for me to

decide on the facts of this case. It is notionally possible for a referring doctor to assume that a report will be received. At the same time it may notionally be the duty of the referring doctor to follow up if his assumption was incorrect. On the facts of this case, by the time that necessity to follow up might have arisen, the patient had long since been referred to Dr Crozier and then on to other doctors. Defendant had at least provided Plaintiff with the x-ray photograph which could have been followed up by any of the subsequent doctors. The concession certainly watered down Professor Scher's opinion, in my view. I have no reason to doubt the view of Professor Lotz, who insisted that the duty to report rests with the radiologist alone and that the referring doctor has no corresponding duty.

Professor Lotz's view was shared by Dr Du Toit, who said that

> *"Aan die einde van die dag glo ek werklik dat die radioloog het 'n groot verantwoordelikheid om daardie verslag te verskaf. Uiteindelik lê die verantwoordelikheid by hom. Watter sisteem hy in sy kantoor het om te verseker dat hy daardie x-strale sien is werklik iets wat hy self moet uitsorteer."*

When this answer was followed up with the question whether on the facts of the present case any responsibility rested on the first doctor, who had obtained the x-ray photograph without any report, to return it to the radiologist, he did not agree. Dr Du Toit added that he did not

think that a radiologist can shift the onus from his practice to the orthopaedic surgeon to make sure that reports are properly delivered. (Record, 273-274)

In his evidence, Defendant explained that he had referred to *'T4 spine'* in his referring note to Dr Crozier because the patient

> *"het 'n T4, dit is toraks 4, die werwels in die ruggraat, het pyn in die borskas. En daarom was ek nie seker kom dit van die long self of uit die torakale werwels nie."* (Record, 213)

When questioned as to whether it would not have been better to have sent the patient directly to Dr Jansön, Defendant explained that it was often not possible to say whether pain of this kind represented a lung problem. He added :

> *"As hierdie primer in die torakale werwels was, en dit is een van die twee moontlikhede, dan was die pasiënt onmiddellik by die regte persoon."*

When asked whether the problem would not have been immediately solved if a lung specialist had seen Plaintiff, Dr Jansön said :

> *"Korrek, maar dit is nie moontlik om dit reg van die begin af – en daardie twee werk so nou saam, die twee probleme, dat 'n mens sou verwag dat, jy weet hulle is so buurmanne in hulle patologie, dit is twee dokters, wat hulle baie saamwerk en dit is gewoonlik nie 'n problem nie."*

It was not even suggested by Plaintiff or any of the doctors giving evidence that Defendant had chosen the wrong specialist to whom to refer the Plaintiff. The explanation which he gave, and to which I have just referred, clearly bears out the Defendant's decision to refer to a doctor more expert in the field than he was, and can certainly not be criticised as illogical. Just as diagnosis must be judged in the light of pertinent facts at the time.

> *"The difficulty of making a diagnosis will often excuse a defendant, and* ***a fortiori*** *where other doctors have in fact made the same mistake with the patient. The diagnosis must be judged in the light of the pertinent facts at the time the practitioner rendered his professional opinion; he cannot be expected to possess the sharper vision and higher wisdom of hindsight."*
>
> (MICHAEL JONES, *Medical Negligence*, 3rd Ed 2003 at para 4-015).

I am satisfied on the evidence that Plaintiff has not discharged the onus of demonstrating on a balance of probabilities that Defendant was in any way negligent in his handling of Plaintiff. I certainly cannot prefer

the evidence of Professor Scher over that of Professor Lotz that the sole responsibility to provide radiological reports rests with the radiologist. In the light of the evidence of Professor Walters, who conceded that it was not negligent for Defendant to fail to notice the shadow in the area of the upper lobe of the right lung as indicating an abnormality, Plaintiff has also not discharged the onus of showing negligent misinterpretation of the x-ray by Defendant.

Accordingly, Plaintiff's claims are dismissed with costs, and judgment is entered for the Defendant, such costs to include the qualifying costs of the expert witnesses Rossouw, Lotz and Du Toit.

J G FOXCROFT

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