JUDICIAL RECOGNITION OF THE APPLICATION OF THE MAXIM *RES IPSA LOQUITUR* TO A CASE OF MEDICAL NEGLIGENCE

Lungile Ntsele v MEC for Health, Gauteng Provincial Government (unreported as yet, Case Number: 2009/52394 (GSJ) dated 24 October 2012)

1 Introduction

It is trite law, in context of medical negligence, that the onus of establishing civil liability on the doctor's part lies with the patient and liability must be established on a preponderance of probabilities (see in general Claassen and Verschoor *Medical Negligence in South Africa* (1991) 26; Hoffmann and Zeffertt *The South African Law of Evidence* (1992) 26; Schmidt *Bewysreg* (2000) 23ff; Scwikkard and Van der Merwe (eds) *Beginsels van die Bewysreg* (2005) 546–558; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 274ff; Strauss "Medical Law – South Africa" in Blanpain and Nys (eds) *International Encyclopaedia of Laws* (2006) par [178]; Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 619ff; Strauss "Geneesheer, Pasiënt en Reg: 'n Delikate Driehoek" 1987 *TSAR* 1; *compare* also *Lee v Schönnberg* (1877) 7 Buch 136; *Mitchell v Dixon* 1914 AD 519; *Webb v Isaac* 1915 EDL 273; *Coppen v Impey* 1916 CPD 309; *Dale v Hamilton* 1924 WLD 184; *Van Wyk v Lewis* 1924 AD 438; *Buls v Tsatsarolakis* 1976 (2) SA 891 (T); *Blyth v Van den Heever* 1980 (1) SA 191 (A); *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W); *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh* 1998 (3) SA 60 (SCA); and *Louwrens v Oldwage* 2006 (2) SA 161 (SCA). It is to be noted that, should the plaintiff be unable to prove his/her case on a preponderance of probabilities, judgment will be given in favour of the defendant; a court may, however, also order absolution from the instance. In delict, the plaintiff bears the onus to prove a wrongful act/omission on the part of the physician, as well as the element of fault (in the form of negligence) and that the act or omission caused him to suffer damages or personal injury – see Schmidt *Bewysreg* 39; Hoffmann and Zeffertt *The South African Law of Evidence* 496; *Botha v Van Niekerk* 1947 (1) SA 699 (T); and *Matthews v Young* 1922 AD 492. Where a defendant raises a special defence such as consent, contributory negligence or prescription, the onus of proof will be on the defendant – see Schmidt *Bewysreg* 41 and 132; Hoffmann and Zeffertt *The South African Law of Evidence* 530ff; *Mabaso v Felix* 1981 (3) SA 865 (A); and *Joubert v Combrinck* 1980 (3) SA 680 (T)).

Generally, however, the application of the maxim of *res ipsa loquitur* is treated by the courts as a particular form of inferential reason, requiring careful scrutiny and giving rise to an inference of negligence rather than a presumption of negligence. The South African courts thus far have been reluctant to apply the maxim to cases of medical negligence, despite persuasive legal arguments that have been put forward that the maxim should be applied in specific circumstances with regard to the proof of medical negligence. In this respect general principles for the effective application of the maxim in cases of medical negligence, are, *inter alia*, that principles of procedural equality and constitutional considerations dictate that the maxim be applied in cases of medical negligence (see Carstens "Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op Grond van Nalatigheid" (unpublished LLD thesis, University of Pretoria, 1996); Van den Heever "The Application of the Doctrine of *res ipsa loquitur* to Medical Negligence Actions" (unpublished LLD thesis, University of Pretoria, 2002); Van den Heever "*Res ipsa loquitur* and Medical Accidents: *quo vadis?*" 1998 *De Rebus* 57; Carstens and Pearmain *Foundational Principles of South African Medical Law* 857; Van den Heever and Carstens *Res ipsa loquitur and Medical Negligence* (2011) 9ff; *cf Pringle v Administrator Transvaal supra*). It is for this reason that the present judgment under discussion (in tandem with s 27 of the Constitution) is instructive, despite the majority judgment of the Appellate Division (as it was then) in 1924, in *Van Wyk v Lewis* (*supra*), where it was held that the maxim does not find application in cases of medical negligence.

2 The facts

The salient facts appear from the judgment of Mokgoatlheng J: The plaintiff instituted an action on behalf of her minor child (a newly born baby at the time of the incident), against the defendant for damages arising from the alleged negligent medical treatment accorded them by the defendant's employees during 1996 at Zola Clinic ("the clinic") and Baragwanath Hospital ("the hospital"). The plaintiff further claimed that the nursing staff at the clinic in the negligent breach of their duty of care, during the period of her ante-natal pregnancy care at the clinic failed to: (a) properly monitor her foetal growth; (b) monitor the foetal heart-beat rate; (c) measure and assess the size of her pelvis; (d) refer her to a hospital for antenatal sonar tests; and (e) on experiencing labour on 7 September 1996, she attended the clinic and whilst there, the nursing staff in the negligent breach of their duty of care failed to: (i) monitor her and the foetus condition properly; (ii) administer the Cato Togo Graph (CTG) on her and the foetus; (iii) ruptured her membranes under septic conditions; and (f) on 7 September 1996 the doctor and the nursing staff at the hospital in the negligent breach of their duty of care failed to: (i) examine and accord her treatment without unnecessary delay; (ii) monitor her and the foetus condition without unnecessary delay; (ii) monitor her labour contractions and the foetal heart-beat rate; and (iv) perform a caesarean section when it was expeditiously necessary in the birth of her baby. In addition, the plaintiff claimed that the defendant's employees did not execute their statutory duty as obliged pursuant to section 27 of the Constitution of the Republic of South Africa Act 108 of 1996 in that, they failed to provide reproductive health care to her and her baby with the reasonable skill and diligence prevailing in the medical profession, and as a

result the baby sustained peri-natal asphyxia which rendered him a dystonic spastic cerebral-palsy quadraplegic. It is to be noted that at the commencement of the trial, the parties requested the court to separate the issues of liability and quantum. An order in terms of Rule 33(4) of the High Court Rules was made, consequently, the court was only seized with the issue of causation and negligence (see par [1] to [4] of the judgment).

3 The judgment

It is to be noted that the somewhat protracted judgment (consisting of 126 paragraphs) was delivered on multiple levels with reference to the assessment of the evidence, the incidence of onus, the issue of causation, the plaintiff's case of *prima facie* negligence, the defendant's rebuttal, the circumstantial evidence, the application of *res ipsa loquitur*, the defendant's rebuttal obligation and the constitutional imperative. As a consequence, the present discussion also follows this sequence of the judgment and offers summaries of the judgment with the same headings. The focus, however, remains on the application of the maxim of *res ipsa loquitur*.

3 1 The evidence

The court first proceeded to analyse the evidentiary burden borne by the plaintiff and stated that for the plaintiff to succeed in her claim, the following had to be proved on a preponderance of probabilities: (a) the plaintiff has to establish a *prima facie* case of negligence against the defendant's employees, which in turn casts an evidential rebuttal burden on the defendant to destroy the probability of negligence by giving a reasonable explanation of what occurred without negligence being attributable to the defendant's employees; (b) alternatively, the plaintiff has to: "show that the factual injurious eventuality happened in a manner which when explained by implication carries a high probability of negligence regarding the defendant's employees' conduct"; and (c) if the *ev*idence shows: "the defendant did, and the plaintiff subjectively did not completely have within her grasp the means of knowing how the clinic and hospital staff administered treatment to her and her child, as all the crucial specific treatment facts are exclusively within the defendant's employees' knowledge, the court is permitted to draw an inference of negligence by applying the doctrine of *res ipsa loquitur*". In this regard the court referred to the book, Van den Heever and Carstens (*Res Ipsa Loquitur and Medical Negligence*) (see par [5] of the judgment) (emphasis as highlighted by the court).

The court then proceeded to analyse the plaintiff's evidence in context of the undisputed and disputed facts. In particular, the court assessed the events surrounding the delivery and birth of the plaintiff's baby. The events during this stage were crucial to the plaintiff's case that negligence by the attending medical staff caused her baby to suffer from cerebral palsy (see par [6] to [13] of the judgment). To amplify the nature of the damages suffered by the plaintiff's baby, the court relied on the expert evidence of medical experts (notably Dr Heyns and Dr Lefakane, respectively) called during the trial. The court referred to the medico-legal report of Dr Heyns who confirmed that the long hours in labour caused pressure on the

umbilical cord and placenta; that the oxygen supply to the foetus and very importantly to the brain was reduced and or off completely, and this caused hypoxia. Dr Heyns further stated that in his opinion there was no question about negligence, because the labour process was poorly handled. A lot of time was wasted and critical warning signs were missed. The end result was a brain-damaged child with cerebral palsy and epileptic fits (see par [20] of the judgment). Dr Lefakane also stated that the cause of the baby's traumatic birth resulting in his being a cerebral-spastic quadraplegic was attributable to the fact that during the long labour process from the rupture of the membranes to the time he was delivered at noon, there were stages when his brain had insufficient amounts of oxygenated blood, and as a consequence, hypoxia and peri-natal asphyxia occurred. Crucial to the plaintiff's case was Dr Lefakane's evidence that the delivery of the baby at the hospital was negligently handled because the defendant's employees were dealing with a first-time pregnant plaintiff in a situation where her membranes were ruptured at the clinic to accelerate birth. As a result, the plaintiff was a red-flag emergency patient who needed prompt medical treatment (see par [31] to [33] of the judgment).

3 2 The incidence of onus

The court considered the incidence of the onus in this case and ruled that once the plaintiff had established a *prima facie* case of negligence, the defendant bore an evidential burden to disprove the probability of negligence by adducing cogent credible evidence showing that the defendant's employees accorded the plaintiff and her baby adequate treatment with the skill and diligence prevailing in the medical profession, and further, that the baby's cerebral palsy could not possibly have been reasonably foreseeable as a consequence arising from such treatment. The court further stated that the defendant bore the rebuttal burden of disproving causation by showing that baby's brain damage was not attributable to the defendant's employees' negligence, that if it had been caused by hypoxia and peri-natal asphyxia, the treatment accorded to the plaintiff by the defendant's employees' was certainly not the cause of such hypoxia and peri-natal asphyxia (see par [37] to [38] of the judgment).

3 3 The issue of causation

Regarding the element of causation, the court stated that plaintiff had to show that the defendant's employees breached their duty of care, and that on a balance of probabilities, such breach caused the baby's cerebral palsy. In essence the court found in this regard that the plaintiff's case was based on the essential proposition that the baby's peri-natal asphyxia was a consequence of the defendant's employees' breach of the duty of care, in having failed to monitor the foetal heart-beat rate to prevent the hypoxia which resulted in peri-natal asphyxia and cerebral palsy. In this regard the court referred to the case of *Naude NO v Transvaal Boot and Shoe Manufacturing Co* (1938 AD 379), where it was stated that, although the onus of proving negligence is on the plaintiff, the plaintiff did not have to adduce positive evidence to disprove every theoretical explanation which was ex-

clusively within the knowledge of the defendant, however unlikely, that might be devised to explain (the baby's cerebral palsy) in a way which would absolve the defendant and his employees of negligence. The court also referred in this regard to the case of *Monteoli v Woolworths (Pty) Ltd* (2000 (4) SA 735 (W)), where it was held (par [25] to [29]) that: "It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff. Sometimes, however, a plaintiff is not in position to produce evidence on a particular aspect. Less evidence will suffice to establish a *prima facie* case where the matter is particularly in the knowledge of the defendant. In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff" (see also par [39] to [42] of the judgment).

3 4 The plaintiff's prima facie case of negligence

The court found that the defendant's employees had a duty of care to accord the plaintiff and her baby obstetric and paediatric care with the reasonable skill and diligence prevailing in the medical profession in order to ensure the safe delivery of the baby. The court then considered whether the plaintiff had established a *prima facie* case of negligence against the defendant's employees. In this regard the court ruled that the plaintiff's evidence stood uncontroverted, and that there was no evidence adduced by the defendant to the contrary (see par [43] to [53] of the judgment). Ultimately, in consideration of the expert medical testimony (notably that of Dr Heyns and Dr Lefakane), the court ruled that the plaintiff had, through circumstantial evidence, established a *prima facie* case that the treatment accorded to her and her baby on 7 September 1996, was not in accordance with the skill and diligence prevailing in the medical profession, and as a consequence of such negligent treatment, the baby suffered hypoxia and peri-natal asphyxia which resulted in cerebral palsy (see par [49] to [58] of the judgment).

3 5 The defendant's rebuttal burden

In view of the *prima facie* case established by the plaintiff against the defendant's employees, the court gave consideration to the question whether the defendant had adduced evidence in rebuttal to disprove the probability of negligence. In this regard, the court referred with approval to the case of *Naude NO v Transvaal Boot and Shoe Manufacturing Co* (1938 AD), where Tindall JA (392–393) stated:

> "Though the inference suggested by the nature of the accident does not shift the burden of disproving negligence on to the defendant, still it does call for some degree of proof in rebuttal of that inference. Where a plaintiff establishes a *prima facie* case which, unless rebutted, justifies a decisive inference, the nature of the answer which is called for from the defendant to enable him to escape such inference depends upon 'the nature of the case and the relative ability of the parties to contribute evidence on the issue' … The mere suggestion of a reasonable theory according to which the accident may have happened without negligence cannot be a sufficient answer. It seems to me clear that where admittedly, as in the present case, the nature of the occurrence itself creates a probability of negligence, it would be a negation of that premise if it were held that the defendant displaced the *prima*

facie evidence by merely proving a reasonable possibility that the accident could have happened without negligence" (see par [60] of the judgment).

In addition, the court also relied on the judgment of Stratford CJ, who in the same case stated (389–389):

> "(P)roof in some degree is required from the defendant to rebut the presumption arising from the fact that the occurrence speaks for itself … the burden of proof incumbent on a defendant … is simple and clear, he must produce evidence sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him. If he does that then – bearing in mind that the burden of proving his allegation is always on the plaintiff and never shifts – on the conclusion of the case the inference of negligence cannot properly be drawn. Put differently, his evidence must go to show a likelihood in some degree of the accident resulting from a cause other than his negligence" (see par [61] of the judgment).

Against the foregoing authority, the court assessed the expert medical testimony (Dr Marishane) tendered on behalf of the defendant in rebuttal of the plaintiff's case. In this regard the court pitted Dr Marishane's expert evidence against that of the medical experts on behalf of the plaintiff (Dr Heyns and Dr Lefakane). After a thorough analysis of the judicial criteria that should be applied to assess the credibility and scientific veracity of expert evidence (with reference to the cases of *Schneider NO v AA* 2010 (5) SA 203 (WCC); and *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 81), the court concluded that Dr Marishane's evidence raised significant problems regarding its impartiality and credibility, and as a consequence, his expertise could not be relied upon because it is unashamedly without any cogent scientific basis biased in favour of the defendant's case (see par [88] to [92] of the judgment).

3 6 Is the circumstantial evidence conclusive?

In answering this question the court was in agreement with counsel for the defence that the occurrence of the baby's cerebral palsy was indicative of circumstantial evidence which showed the existence of negligence on the defendant's employees' conduct justifying the court to draw an inference of negligence from the proved facts, if the inference of negligence is consistent with the proved facts and the proved facts exclude all other reasonable inferences that can be drawn. In this regard the court referred to and relied on the cases of *Caswell & Powell Duffryn Associated Collieries* ([1940] AC 152 169–170; and *AA Onderlinge Assosiasie Bpk v De Beer* (1982 (2) 603 (A) 614G). Ultimately, the court ruled that, in the absence of countervailing evidence to the contrary disproving the probability of negligence, the only logical and reasonable inference to be drawn from the defendant's employees' failure to proffer an exculpatory explanation is that, the defendant's employees were negligent in their failure to accord the plaintiff the treatment she was lawfully entitled to in conformity with the skill and diligence prevailing in the medical profession (see par [93] to [104] of the judgment).

3 7 The application of the doctrine of res ipsa loquitur

In consideration of the possible application of the said doctrine to the present case, the court, in the alternative, observed that the circumstantial matrix encapsulated the occurrence of an eventuality which carried a high probability of negligence regarding the defendant's employees' conduct, which justified the invocation of the doctrine of *res ipsa loquitur*. In this regard the court referred to the seminal case of *Van Wyk v Lewis* (*supra* 438), where it had been generally assumed that the maxim *res ipsa loquitur* was not applicable in medical negligence cases, because "A doctor is not held negligent simply because something goes wrong. It is not right to invoke against him the maxim of *res ipsa loquitur save in extreme cases*" (the court's emphasis) per Lord Denning in *Huck v Cole* (1993 4 Med LR 393). The court, however, scrutinized this judgment and came to the conclusion that the ratio enunciated in the judgment showed that the Appellate Division (as it then was) did not totally prohibit the application of the maxim in cases like the present where there were exceptional circumstances justifying such application (see *Van Wyk v Lewis supra* 445). The court further relied upon the dissenting judgment of Kotze JA who aligned himself to the same notion by observing that "not infrequently a plaintiff may produce evidence of certain facts which, unless rebutted, reasonably if not necessarily, indicate negligence, and in such cases the maxim *res ipsa loquitur* is often held to apply" (see *Van Wyk v Lewis supra* 452). The court once again, relying on the book by Van den Heever and Carstens (*Res Ipsa Loquitur and Medical Negligence*) stated that the doctrine must be invoked with caution and only where the defendant's employees were in absolute control over the patient, the treatment and all the instruments used, and where the injury results in a complete discord with the recognized therapeutic, objective treatment and technique involved, and suggests no other explanation possible. The doctrine constitutes nothing more than a particular species of circumstantial evidence. What is sought to be proved is negligence and the evidence of the occurrence itself because it carries a high degree of probability of negligence, it provides its own circumstantial evidence as to the exigency of the negligence in question and the facts upon which the inference is to be drawn and derived from (see par [111] of the judgment). The court was quick to emphasize that the application of the doctrine did not shift the plaintiff's burden to produce a *prima facie* factual inference, but might call for some degree of proof in rebuttal of that inference (see par [112] of the judgment).

3 8 The defendant's rebuttal obligation

In view of the foregoing application of the doctrine of *res ipsa loquitur*, the court ruled that there was an obligation on the defendant to explain how the baby's cerebral palsy occurred if the plaintiff and the baby were accorded the requisite treatment, because quite clearly the evidence raised a *prima facie* case of negligence against the defendant's employees. In addition, the court found that the defendant had not explained how the cerebral palsy attributable to peri-natal asphyxia could have occurred without his employees' negligence. After considering the particulars of the failure of the

defendants to adduce evidence in rebuttal, the court ruled that the absence of such exculpatory evidence to circumstances, justifiably called for the invocation of the maxim *res ipsa loquitur*, which entitled the plaintiff to have recourse to the evidential inference because the defendant's employees had within their grasp the knowledge how the incident occurred (see par [114] to [121] of the judgment).

3 9 The constitutional imperative and conclusion

In context of the constitutional imperative as per section 27, the court ruled that the state was obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these constitutional rights. In this sense the invocation of the *res ipsa loquitur* maxim would be applicable where the plaintiff had established a *prima facie* case of negligence and the defendant had failed to offer a reasonable exculpatory explanation in negation of the *prima facie* of the infringement of the plaintiff's. Section 27 constitutional right to access adequate reproductive health care (see par [123] to [124] of the judgment).

In conclusion, the court ruled that, because the defendant had failed to discharge the evidential burden disproving a causal connection between the negligence of his employees and the baby's cerebral palsy, the summation that the eventuality spoke for itself was unanswered (see par [126] of the judgment). Consequently the court ruled that the defendant was liable to compensate 100% of the plaintiff's proved damages and ordered the defendant to payment of all the costs.

4 Assessment

Although this judgment was delivered on multiple levels, the focus of the present assessment will be mainly on the application of the maxim of *res ipsa loquitur*. In this regard it is to be noted that this judgment heralds in a significant departure from the judgment in *Van Wyk v Lewis* (*supra*), in that it recognized that there was room for the application of the maxim to cases of medical negligence. This stance, even in the alternative, fully endorsed the view that a patient (or her baby) who suffered serious or extreme damages at the hands of health-care practitioners and/or providers of health-care services, may invoke the maxim to establish, by way of inferential reasoning, a *prima facie* case of negligence calling for an exculpatory explanation by the defendant/s. It is apparent from the logical progression in the *ratio decidendi* of the judgment, that the presiding judge was mindful that the maxim only warranted invocation if "the circumstantial matrix encapsulated the occurrence of an eventuality which carried a high probability of [medical] negligence regarding the defendant's employees". The court, after close scrutiny of the judgment in *Van Wyk v Lewis supra* (contra the application of the maxim), quite correctly ruled that the Appellate Division (as it then was), did not totally prohibit the application of the maxim in cases like the present where there were exceptional circumstances justifying such application (see *Van Wyk v Lewis supra* 445). In the assessment as to the question whether the court was justified to invoke the application of the maxim, in the

alternative, it is instructive to juxtapose this section of the judgment against prevailing applicable case law and legal opinion on the matter.

The prevailing applicable case law and legal opinion indicate that the general application of the doctrine of *res ipsa loquitur* has evolved with regard to the following issues: (a) the requirements for the application of the doctrine; (b) the nature of the doctrine; (c) the effect of the doctrine on the *onus* of proof; and (d) the nature of the defendant's explanation in rebuttal (compare Van den Heever and Carstens *Res ipsa loquitur and Medical Negligence* 33ff). An analysis of the present judgment under discussion is indicative of the fact that the court considered all these issues, as is evident from the multiple and similar levels on which the case was decided. The specific requirements for the application of the maxim, in context of medical negligence, include the following pointers: (a) the occurrence must be one which in common experience does not ordinarily happen without negligence (see *Mitchell v Maison Lisbon* 1937 TPD 13; *Stacey v Kent* 1995 (3) SA 344 (E) 352); (b) an occurrence justifying a finding of *res ipsa loquitur* will be one which is indicative of a high probability of negligence (see Cooper *Delictual Liability in Motor Law* (1996) 100); (c) the doctrine can only find application if the facts upon which the inference is drawn are derived from the occurrence alone (see *Groenewald v Conradie* 1965 (1) SA 184 (A) 187); (d) the presence or absence of negligence must depend on a so-called absolute. As soon as the court is required to consider all the surrounding circumstances of the case the doctrine cannot find application (see *Van Wyk v Lewis supra* 438; *Allott v Patterson and Jackson* 136 SR 226; and *Pringle v Administrator Transvaal supra* 384); and (e) an inference of negligence is only permissible while the cause remains unknown (see *Administrator Natal v Stanley Motors* 1960 (1) SA 690 (A) 700). In addition, it is to be noted that the instrumentality which causes the injury must be within the exclusive control of the defendant or of someone for whom the responsibility or right to control exists (see *S v Kramer* 1987 (1) SA 887 (W) 895; and *Stacey v Kent supra* 352).

Pivotal to the application of the maxim to the salient facts of the case, in the alternative by the court, was the judicial consideration of the nature of the defendant/s explanation in rebuttal. It is submitted that this aspect of the judgment was quite correctly emphasized by the court, as the *prima facie* factual inference which the application of the doctrine establishes will, more often than not, call for some degree of proof in rebuttal of that inference. In general, applicable case law and legal opinion indicate that the explanation must comply with the following principles: (a) in cases where the taking of a precaution by the defendant is the initial and essential factor in the explanation of the occurrence, and the explanation is accessible to the defendant and not the plaintiff, the defendant must produce evidence sufficient to displace the inference that the precaution was not taken. The nature of the defendant's reply is therefore dependent on the relative ability of the parties to contribute evidence on the issue; (b) the court's inquiry should not be two-staged, that is, whether firstly a *prima facie* case has been established. Secondly, whether the defendant has met such case but rather has the plaintiff, having regard to all the evidence tendered at the trial, discharged the *onus* of proving, on a balance of probabilities, the negligence which he has averred against the defendant; (c) the degree of persuasive-

ness required by the defendant will vary according to the general probability or improbability of the explanation. If the explanation is regarded as rare and exceptional in the ordinary course of human experience much more would be required by way of supporting facts. If the explanation is regarded as an everyday occurrence the court should always guard against the possibility that the explanation was tendered "glibly" because of the very frequency of the occurrence which it seeks to describe; (d) where the defendant tenders evidence seeking to explain that the occurrence was unrelated to any negligence on his part, probability and credibility are considerations which the court will employ to test the explanation; and, (e) it has been held that the defendant runs the risk of judgment being granted against him unless he tells the remainder of the story although there is no *onus* on him to prove his explanation (see the discussion by Van den Heever and Carstens *Res ipsa loquitur and Medical Negligence* 35ff; see in general *Mitchell v Dixon supra* 519; and *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A)). The judgment can in this regard, with respect, not be faulted, and is in accordance with the foregoing extrapolated principles. In addition it is to be noted that constitutional principles such as procedural equality, policy and other considerations (such as the fiduciary nature of the doctor-patient relationship) support the extension of the application of the doctrine to medical negligence cases in South Africa (see Strauss and Strydom *Die Suid Afrikaanse Geneeskundige Reg* 111ff; and Lerm *A Critical Analysis of Exclusionary Clauses in Medical Contracts* (unpublished LLD thesis, University of Pretoria, 2008) 134). In this regard, the court quite correctly invoked the application of the maxim in context of the constitutional obligation the defendant/s owed to the plaintiff and her baby in terms of section 27 of the Constitution (see Van den Heever and Carstens *Res ipsa loquitur and Medical Negligence* 149ff). In this regard the judgment is to be welcomed as the first judgment where the maxim was invoked on a constitutional level in context of medical negligence.

In conclusion, it can be stated that, although South African courts have consistently followed the approach adopted by the majority in *Van Wyk v Lewis* (*supra*), it is submitted that this judgment can no longer be supported as a general blanket denial of the doctrine's application to medical negligence cases especially in view of the fact that it seems that the court based its most important finding in the judgment on a material misdirection in respect of the expert medical evidence tendered at the trial. The paternalistic notion that all medical procedures fall outside the common knowledge or ordinary experience of the reasonable man is not only outdated but untenable. In certain instances of medical accidents it is totally unnecessary to have regard to the surrounding circumstances as such an occurrence itself is almost conclusive proof of negligence, for example, the erroneous amputation of a healthy limb. The decision in *Pringle v Administrator Transvaal* (*supra*) provides authority for the proposition that the doctrine could be introduced in a medical negligence action if the negligence could be derived from a so-called absolute without any dependence on the surrounding circumstances. Although the court in the present case did not rely on the decision in *Pringle v Administrator Transvaal* (*supra*), it is submitted that the facts in the present case under discussion are indicative of an "absolute" – that is where the long labour process brought about by

poor and negligent medical management caused the birth of a brain-damaged child with cerebral palsy and epileptic fits. It seems that there is little justification for the fact that, in South Africa, the victim for example of an aircraft or motor accident should be able to make use of the doctrine to alleviate his or her evidential burden whereas the victim of a medical accident is constantly faced with an unjustified and inequitable denial of its application. In the wake of an alarming increase of medical negligence concerning obstetrics, paediatrics and neonatologists in hospitals in South Africa, this judgment is to be welcomed (see press release by the Medical Protection Society "MPS claims experience in South African" October 2011 *MPS* 1–2; also compare Pepper and Nöthling-Slabbert "Is South Africa on the Verge of a Medical Malpractice Litigation Storm?" 2011 *SAJBL* 29; and Coetzee and Carstens "Medical Malpractice and Compensation in South Africa" 2011 *Chicago-Kent LR* 1263ff).

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