

MEDICAL NEGLIGENCE AND THE *RES IPSA LOQUITUR* DOCTRINE IN THE ADMINISTRATION OF CANCER TREATMENT IN SOUTH AFRICA

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SUMMARY

Medical negligence is one of the leading socio-economic challenges faced by the health sector in South Africa and across the globe. This is attributed to the fact that millions of Rands are paid out by private and public hospitals to victims of medical malpractice on a daily basis, with dire consequences. For example, health establishments, particularly in the public sector, are unable to realise their duty to provide health care to millions of disadvantaged people as enshrined by section 27(1) of the Constitution¹ as funds meant to provide health care go instead towards the payment of medical malpractice claims. Furthermore, medical practitioners in private and public hospitals now practise defensive medicine in order to avoid being sued for medical malpractice and this results in compromised health care for patients. This contribution aims to prove that people living with cancer can be exposed to medical malpractice just like patients who suffer from any other chronic medical condition, and also to dispel the myths connected to cancer treatment and care from a medical and a social perspective. In addition to the above, the contribution exposes the importance of the *res ipsa loquitur* doctrine (the thing speaks for itself) in solving complex medical negligence cases, with the aim of ensuring that justice is served to all patients living with cancer or other health impairments.

1 INTRODUCTION

Cancer is a chronic medical condition that can affect human beings, and people living with this medical condition therefore seek medical intervention. Cancer treatment is a specialised field of medicine, and is dealt with by oncologists who are specialists in cancer treatment. Cancer can be defined as the process whereby cells in the body grow in an uncontrollable manner. Different forms of cancers may affect people – for example, breast cancer, liver cancer, pancreatic cancer and lung cancer, among others.² People can acquire cancer in different ways; for example, it can be hereditary, like

¹ S 27(1) of the Constitution of the Republic of South Africa, 1996 states that everyone has a right to access health care.

² Heney and Young *Rethinking Experiences of Childhood Cancer* (2005) 21.

breast cancer, or based on exposure to a harmful environment such as inhalation of smoke or gas in industrial areas, which can cause lung cancer.³ Against this brief background on cancer, it should be noted that, cancer patients depend on different support mechanisms for their survival. These include, among others, God (for those who are spiritual), while other patients rely on adequate health care services. This article explores, among other things, the role of oncologists in cancer treatment and also examines how medical negligence cases are dealt with in practice.

This article focuses on medical negligence and specifically on the history of medical negligence and how medical negligence is established and then links it to the position of the oncologist as the medical practitioner who administers cancer treatment. Furthermore, the legal principle of *res ipsa loquitur* doctrine (the thing speaks for itself) is considered with the aim of exposing or showing how this doctrine can assist courts to solve complex medical negligence cases – especially in instances where the medical practitioner cannot account for or verify what took place in a particular case. Whether this doctrine is of beneficial value in solving complex medical negligence cases like cancer treatment is a question of fact and is explored in this contribution.

2 DEFINITION OF MEDICAL NEGLIGENCE

Medical negligence is not just a legal term applicable to the medical profession, and nor is it confined simply to professional occupations; it also extends to allied health care industries like nursing and dentistry.⁴ As outlined by Carstens and Pearmain, professional negligence can be committed either intentionally or negligently and embraces all forms of negligence or misconduct on the part of a medical practitioner. However, the doctor-patient relationship is based on confidentiality and on fiduciary duties that are foundational; these also serve as a reflection on the broader health care sector. Medical negligence is a very broad concept that is applied to many different situations each day. In layman's terms, negligence refers to harm that a person suffers at the hands of another who should have taken steps to guard against the possibility of harm occurring.⁵ At this point, it is very important to note that, depending on the facts of each case and the degree of harm suffered by the patient, an error of judgement on the part of a medical practitioner does not necessarily constitute medical negligence.⁶ It is a factual issue to be decided by the court on the facts of each case and the degree of harm suffered by the patient. A medical practitioner relying on a defence of error in judgement will be absolved from liability if it can be shown that it was a reasonable error of professional judgement that another reasonably competent medical practitioner in the same profession and in the same circumstances would also have made. This is because when an oncologist makes an error in clinical judgement, this mistake will not constitute medical negligence where the misjudgment could reasonably

³ Heney and Young *Rethinking Experiences of Childhood Cancer* 21.

⁴ Scott *Cancer: The Facts* (1995) 3.

⁵ Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 606.

⁶ This was the view that was taken in the English case of *Whitehouse v Jordan* (1981) 1 All ER 267 (HL).

have been made by any oncologist under the same circumstances. In this case, the conventional negligence test will be applied with the view that only misjudgment that is obviously or exceptionally below the standard of care would be classified as negligence on the part of the oncologist.⁷ The kinds of mistake that constitute medical negligence are those where the conduct of the defendant medical practitioner is considered to have gone beyond the bounds of what is expected of a reasonably skilful and competent medical practitioner.⁸ The aforementioned view was emphasised in the English case of *Whitehouse v Jordan*.⁹ The court held that a surgeon's mere error in judgement does not constitute negligence. The court further held that, to say that a surgeon has committed an error in clinical judgement is wholly ambiguous and does not indicate whether or not he has been negligent.¹⁰ While some errors or clinical judgements may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgement may be so glaringly below the proper level of skill required as to make a finding of negligence inevitable.¹¹ Before exploring in detail the concept of medical negligence from a South African perspective, the focus shifts to the definition and discussion of the *res ipsa loquitur* doctrine owing to the link this doctrine shares with medical negligence.

3 THE CONCEPT OF MEDICAL NEGLIGENCE AS DEVELOPED IN SOUTH AFRICAN JURISPRUDENCE

In a medico-legal context, medical negligence refers to the failure of a medical practitioner to act in accordance with medical standards that have been set and are practised by any ordinary and reasonable medical practitioner in the same field. When a patient undergoing medical treatment suffers injury or dies owing to a lack of care and skill on the part of the medical practitioner, it can be said that the medical practitioner was negligent.¹² The injured party must prove certain elements in a claim for medical negligence. The plaintiff must prove the existence of a legal duty on the part of a medical practitioner, a breach of the alleged legal duty, and the damage caused by the breach of the legal duty.¹³ The standard of care and skill to measure medical negligence differs for a general practitioner and a specialist in the medical field respectively. The specialist is required to display a higher degree of care and skill within his or her field of speciality.

⁷ Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* (2011) 7.

⁸ Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* (LLD thesis, University of Pretoria) 2007 35.

⁹ *Whitehouse v Jordan supra* 267. See also *R v Meiring* 1927 AD 41, in which the reasonable standard of care was affirmed as a simple and standard practice with which medical practitioners must comply in order to avoid liability in the form of negligence.

¹⁰ *Whitehouse v Jordan supra* 267.

¹¹ *Whitehouse v Jordan supra* 268.

¹² Carstens and Pearmain *Foundational Principles of South African Medical Law* 606.

¹³ *Ibid.*

From the above, it is clear that the degree of care and skill expected to be displayed by a general practitioner is not similar to that expected of an expert such as an oncologist. In cases where the negligence of an oncologist needs to be determined, the test is not how an ordinary and reasonable doctor could have acted in the same circumstances, but rather how a reasonable oncologist could have acted to prevent the patient from sustaining injury or harm.¹⁴ Surgical negligence can take many different forms, including failure on the part of the oncologist to inform the patient prior to the surgery about the risks that are associated with the procedure in question.¹⁵

An oncologist can also be held liable where he or she deviates from the treatment that had been agreed upon with the patient. If the oncologist thinks it might be necessary to deviate from the agreed medical procedure, then he or she must first obtain consent from the patient or, if this is not possible, from one of the patient's family members.¹⁶ The aforementioned view was confirmed in the court case of *Esterhuizen v Administrator, Transvaal*.¹⁷ In this case, the court held that the medical practitioner was not allowed to deviate from the agreed treatment as the patient enjoyed autonomy when it came to making decisions regarding medical treatment.

The medical practitioner was held liable because his conduct was viewed as unlawful.¹⁸ The same conclusion was reached in the case of *Castell v De Greef*.¹⁹ The court held that the surgeon's failure to inform the patient about the risks of the procedure constituted negligence. The *Castell v De Greef* case is considered in more depth later in this contribution under the discussion of medical negligence on the part of an oncologist.

4 BACKGROUND AND DEFINITION OF RES IPSA LOQUITUR

The many technical aspects and formalities surrounding both the law and the medical profession often result in the plaintiff being unable to discharge his or her onus of proof in medical negligence cases; a need has therefore been identified for the plaintiff to obtain assistance in this regard. Besides the engagement of expert witnesses, the *res ipsa loquitur* doctrine was established to alleviate some of the burden on the plaintiff. This is a rule of evidence and does not form part of substantive law. It permits a supposition of probable cause based on circumstantial evidence. The doctrine was first introduced by Baron Pollock in 1863 after a barrel of flour fell out of a two-storey building onto a pedestrian walking in the street.²⁰ The defendant, who

¹⁴ A specialist like a surgeon is required in law to display a higher degree of care and skill in respect of matters that fall within his or her area of expertise than a general practitioner in a comparable situation. See Verschoor and Claassen *Medical Negligence in South Africa* (1992) 15.

¹⁵ Vij *Textbook of Forensic Medicine and Toxicology: Principles and Practices* (2009) 470.

¹⁶ Goyal and Sharma *Hospital Administration and Human Resource Management* (2013) 541.

¹⁷ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

¹⁸ *Esterhuizen v Administrator, Transvaal supra* 711.

¹⁹ *Castell v De Greef* 1994 (4) SA 408 (C).

²⁰ Please refer to both Van Dokkum "Res ipsa loquitur in Medical Malpractice Law" 1996 15 *Medicine and Law* 228 and Byrne v Boadle 2 Hurl and Colt 722, 159 Eng Rep 299 1863.

was the owner of the building could not offer any explanation as to the cause of the incident and was therefore found to be negligent on the basis of the *res ipsa loquitur* doctrine.²¹

The *res ipsa loquitur* doctrine means that the evidence speaks for itself.²² In the above case, the plaintiff showed that the existence of damage pointed to the negligence of the defendant. The plaintiff did not have to go to great lengths to prove the negligence of the defendant because the injuries sustained by the plaintiff were sufficient to prove this. Most plaintiffs who resort to the *res ipsa loquitur* doctrine are unsuccessful in their bid to be relieved of the onus of proving negligence on the part of the defendant.²³ This is because, as argued by Van den Heever and Carstens, how clearly such facts speak for themselves will depend on the particular circumstances of each case. Thus, the role and aim of *res ipsa loquitur* as argued by Van den Heever and Carstens can best be described as merely to make an inference where the action of the defendant is concerned. If the defendant fails to rebut the inference made by the plaintiff, then the plaintiff will have succeeded in proving his or her case, and the defendant will be found liable of negligence.²⁴ Owing to the important role of this doctrine in assisting the plaintiff with his or her claim, medical law scholars hold differing views as to what it exactly entails. It is important to outline these legal opinions for a comprehensive understanding of this doctrine.

In the first instance, Strauss defines this doctrine as follows:

"It is well known that this doctrine rests within the fundamental principle that mere proof by the plaintiff of an injurious result caused by an instrumentality which was in the exclusive control of the defendant medical practitioner or following the happening of an occurrence solely under the defendant's control [:] gives rise to a presumption of negligence on the part of the latter. The damage or injury must be of such a nature that it would ordinarily not occur except for negligence. The *res ipsa loquitur*: the thing speaks for itself, does not necessarily mean that the burden of proof has shifted to the defendant. [However, if] the defendant fails to [render] an acceptable or reasonable account of the events, the court might readily come to the conclusion that the defendant was negligent."²⁵

Van den Heever argues that this doctrine can best be described as follows:

"[This] doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception [,] or perhaps more accurately [,] a qualification of the general rule that negligence is not to be presumed but must be affirmatively proved. By virtue of this doctrine, the law recognises that an accident or injurious occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory

²¹ *Byrne v Boadle supra*.

²² Please see Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* 7 and Patel 2008 SAJBL 59 where the doctrine of *res ipsa loquitur* is explained in detail.

²³ Scott *Cancer: The Facts* 102.

²⁴ Please refer to both Van den Heever and Carstens *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* 9 and Mason and Laurie *Law and Medical Ethics* (2011) 295.

²⁵ Strauss "The Physician's Liability for Malpractice: A Fair Solution to the Problem of Proof" 1967 24 SALJ 419.

explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his [or] her part.”²⁶

It is apparent from the descriptions rendered by these two commentators that they share the common view that the defendant ought to be given an opportunity to advance an explanation about what occurred, and failure to do so will result in an inference being drawn that the defendant was negligent in the particular case. From the discussion above, it is clear that there is a link between medical negligence and the *res ipsa loquitur* doctrine with regard to the duty of care on the part of the defendant – in this case, the oncologist. It is clear that the defendant must be afforded the opportunity to state his or her side of the story in medical negligence cases before being held liable. This is in line with principles of natural justice. The practical application of, as well as debate around, the *res ipsa loquitur* doctrine is explored later on in the contribution. Attention now moves to the development of the concept of medical negligence from a South African perspective or position.

5 BACKGROUND TO MEDICAL NEGLIGENCE

5.1 History and development of medical negligence

Medical negligence has a long and complex history. Evidence of medical negligence can be traced back to ancient civilisations such as those in Egypt, Assyria, Babylon and Mesopotamia.²⁷ All these countries were united in their belief that a disease was punishment from the gods and therefore a supernatural phenomenon.

To restore people to normal health, the causes of a disease needed to be treated or known.²⁸

During these ancient times, medical practice was considered a noble profession and serious respect was bestowed on those who practised it.²⁹ If a surgeon or physician was negligent in performing certain procedures, the punishment would be very severe as life was considered to be precious and valuable and deserving of respect, and all efforts to preserve it needed to be made. The kinds of punishment that were meted out to negligent surgeons in those days included life imprisonment, and the negligent surgeon being handed over to the family of the injured patient so that they could exact their own form of punishment. In extreme cases, a surgeon's body parts were cut off.³⁰

²⁶ Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* 6. It is important to take into account that the author in his thesis stated the requirements for the application of the doctrine of *res ipsa loquitur*: he states first that the occurrence must be such a nature that it does not ordinarily happen unless someone is negligent; and secondly, the instrumentality must be within the exclusive jurisdiction or control of the defendant in order for this doctrine to find application.

²⁷ Swanepoel “The Development of the Interface Between Law, Medicine and Psychiatry: Medico-Legal Perspectives in History” 2009 12 *PER/PELJ* 2.

²⁸ Swanepoel 2009 *PER/PELJ* 3.

²⁹ Carstens and Pearmain *Foundational Principles of South African Medical Law* 608.

³⁰ Carstens and Pearmain *Foundational Principles of South African Medical Law* 609.

When medical negligence was proved in those ancient times, money was not a dominant factor and ordinary people had few legal rights. However, a change was noted in the eighteenth and nineteenth centuries when cases of medical negligence were investigated in the United States of America and Great Britain.³¹ During this period, people were starting to acquire rights and were becoming more independent. More emphasis was also being placed on the surgeon-patient relationship. The view was that lawyers should be brought on board to institute legal actions in order to inflate their clients' (and their own) wealth; as ordinary citizens became more aware of their rights and how they were protected under the law, the number of medical negligence cases began to grow.³² In the modern world, medical practitioners, and in this case oncologists, need to be cautious in all their dealings with patients to avoid legal liability. This development has resulted in affording the aggrieved patient different avenues to seek relief for harm they may have suffered at the hands of a medical practitioner. Such relief includes instituting a civil claim for damages and lodging a criminal case for assault. Furthermore, the aggrieved party can resort to lodging a complaint with the Health Professions Council of South Africa (HPCSA) (the regulatory body) against the negligent medical practitioner with a view to having his or her name removed from the roll of medical practitioners.³³

5 2 Case law on the development of medical negligence

South Africa's medical law is peppered with medical negligence cases that contribute to the rich and fascinating history of this field. At least some of these cases deserve mention here. The landmark case of *Lee v Schönberg*,³⁴ is a classic example of medical negligence. The plaintiff in this case lost both his legs in an accident, and the defendant (a physician) was consulted. It is not known what the nature and extent of the injuries were or the type of treatment that was administered by the defendant. However, the plaintiff claimed that the defendant was negligent in carrying out his professional duties, and therefore claimed damages.³⁵ Since there were few relevant South African cases to refer to, the court had to rely on the precedent set by the English case, *Lanphier v Phipos*,³⁶ which had been decided in 1835. In this case, the judge made the following ruling in response to the charge of medical negligence:

"There can be no doubt that a medical practitioner, like any professional man, is called upon to bear a reasonable amount of skill and care in any case to which he has to attend, and where it is shown that he has not exercised such skill and care, he will be liable in damages."³⁷

³¹ Carstens and Pearmain *Foundational Principles of South African Medical Law* 608; Price "The Art of Medicine Towards a History of Medical Negligence" 2010 375 *The Lancet* 192.

³² Price 2010 *The Lancet* 193.

³³ Coetzee and Carstens "Medical Malpractice and Compensation in South Africa" 2011 86 *Chicago-Kent Law Review* 406. Please also refer to Mokoena *A Guide to Bail Applications* (2012) 27.

³⁴ *Lee v Schönberg* 1877 7 Buch 136.

³⁵ *Lee v Schönberg supra* 137.

³⁶ *Lanphier v Phipos* 1838 42 All ER 421.

³⁷ *Lanphier v Phipos supra* 421. These two cases (*Lee v Schönberg* and *Lanphier v Phipos*) form an important basis for the determination of medical negligence in South Africa and

Another well-known case in South Africa, which was reported in 1910, is the case of *Kovalsky v Krige*.³⁸ This case centred on the question of a surgeon's medical negligence. A nine-month-old baby had been circumcised for religious reasons, but the surgery led to complications. The child began to bleed excessively, and the surgeon had to come to his assistance.³⁹ The surgeon provided treatment but it was not appropriate in the circumstances because the child later developed gangrene in his private parts, which could not be reversed. A claim was instituted on behalf of the child against the surgeon for medical negligence, in which it was claimed that the surgeon had failed to demonstrate the necessary care and skill in treating the child, and had in fact abandoned the child because he had neither checked whether the initial bleeding had stopped nor followed up on the child's general well-being after the circumcision.⁴⁰

The court in considering this case referred to the earlier case of *Lee v Schönberg* discussed above, and the English case of *Lanphier v Phipos*. Both these cases served as precedents to the *Kovalsky* case. The court concluded that the surgeon was indeed negligent because he had failed to act in a way that a reasonable surgeon in the same circumstances should have acted.⁴¹ As a result of the *Kovalsky* case,⁴² the standard that is now used to determine medical negligence, or otherwise, of a medical practitioner is the reasonable standard of care or skill that another medical practitioner in the given field would demonstrate if he or she were confronted by the same circumstances.⁴³

About 38 years after the *Kovalsky* case,⁴⁴ the case of *R v Schoor* was reported.⁴⁵ This is one of the first reported criminal cases in South Africa on the topic. The facts briefly stated include the following: a young doctor, V, was an assistant to Dr R who had a medical practice. Dr R had another assistant E. E asked V to administer an injection of a new serum to some of the patients that E was also attending to. When V asked E what quantity he should give to the patient, E told him to administer 9 cc of the drug, which he was instructed to mix with water. V wrongly assumed that each pack contained 0.99g of the drug.⁴⁶ He had failed to read the labels on the drug and therefore administered an incorrect dosage, which led to the death of two patients. V was charged with culpable homicide and was found guilty because he failed to act in a way that a reasonable person or expert in the same position would have acted to protect the patient from harm.

In the case of *S v Mahlalela*,⁴⁷ a herbalist was charged with murder for the death of a child to whom he had given herbs that he had mixed with beer.

offer valuable precedents, which many court cases have referred to over the years. See Carstens and Pearmain *Foundational Principles of South African Medical Law* 619.

³⁸ *Kovalsky v Krige* 1910 20 CTR 822.

³⁹ *Ibid.*

⁴⁰ *Kovalsky v Krige supra* 823.

⁴¹ *Lanphier v Phipos supra* 422.

⁴² *Kovalsky v Krige supra* 823.

⁴³ *Kovalsky v Krige supra* 824.

⁴⁴ *Ibid.*

⁴⁵ *R v Schoor* 1948 (4) SA 349 (C).

⁴⁶ *R v Schoor supra* 351.

⁴⁷ *S v Mahlalela* 1966 (1) SA 226 (A).

The mixture turned out to be poisonous, and thus caused the death of the child. The court held that the defendant was an expert in the field of herbs and should have foreseen that the herbs might potentially be toxic and potentially lead to the death of an individual. The herbalist was therefore expected to have taken reasonable steps to avoid such an occurrence.⁴⁸ His failure to take such reasonable steps resulted in his conviction for culpable homicide.

In *S v Burger*,⁴⁹ the appellant was convicted for culpable homicide. In considering his appeal against the conviction, the Appellate Division (as it was known then) pointed out that, in order for a conviction of culpable homicide to stand, there must be negligent conduct on the part of the accused. The court went further to express that such negligent conduct may take the form of a surgeon failing to exercise the necessary care during a medical operation.⁵⁰ It was held that it is not necessary for a surgeon to perform to a very high standard of skill but rather to a reasonable standard, as a prudent practitioner in the same situation would have done. This view reflects the objective test to determine the negligence of a surgeon.⁵¹

More recent court cases are discussed in this article, but the above-mentioned court cases represent many years of deliberation regarding the subject of medical negligence in South Africa. In fact, one cannot speak about medical negligence in South Africa without making reference to these court cases. They also serve as important precedents when it comes to modern-day investigations into medical negligence.⁵²

6 TEST FOR MEDICAL NEGLIGENCE

6.1 Preventability and foreseeability

Negligence in a medical context means failure by a medical practitioner to act in a way that a reasonable practitioner in the same situation would have acted to prevent a particular event from taking place. The test for negligence therefore involves aspects of both preventability and foreseeability of harm.⁵³ In other words, a medical practitioner must see to it that harm does not occur by foreseeing harm before it takes place and by taking steps to prevent it, thereby protecting the patient from its ill effects.⁵⁴ This view was confirmed in the case of *Kruger v Coetzee*,⁵⁵ which sets out the general test for negligence. It was held that a defendant is liable for negligence in general if a reasonable person in the position of the defendant not only would have

⁴⁸ *S v Mahlalela supra* 227.

⁴⁹ *S v Burger* 1975 (4) SA 877 (A).

⁵⁰ *S v Burger supra* 879.

⁵¹ *Ibid.*

⁵² These are the cases that are central when it comes to medical negligence in the South African context as outlined in the text. One can argue that these cases are the backbone of medical negligence in South Africa. These are in addition to *Lee v Schönberg supra* 136, among other cases as discussed in this contribution.

⁵³ Gorney *Plastic and Reconstructive Surgery* (2010) 182.

⁵⁴ Swanepoel *Law, Psychiatry and Psychology: A Selection of Constitutional, Medico-Legal and Liability Issues* (LLD thesis, University of South Africa) 2009 318.

⁵⁵ *Kruger v Coetzee* 1966 (2) SA 428 (A).

foreseen the reasonable possibility of his conduct injuring another person but would also have taken reasonable steps to prevent such an occurrence, but the defendant failed to do so.⁵⁶ This case did not deal with a case involving a medical practitioner.

6 2 The objective test

The test for negligence is an objective test, which requires the determination of whether a reasonable person in the same position as the accused or defendant would act in the same way. Reference is made to both the defendant and the accused because negligence on the part of a medical practitioner could lead to both civil and criminal proceedings as already outlined above.⁵⁷ If the defendant or the accused can prove to the court that a reasonable person in the same situation could have acted in the same way that he or she did in the actual circumstances, then the defendant or accused will not be found to be negligent. The reasonable man is defined not as a perfect man, but as a man of average intelligence, knowledge, competence, care, skill and prudence.⁵⁸

The English case of *Lanphier v Phipos* first used the objective test to determine medical negligence in 1838.⁵⁹ Tindal CJ maintained that every person who enters into a learned profession undertakes to bring to the practice a reasonable degree of care and skill.⁶⁰ However, an attorney does not undertake to win all his or her cases, nor does a surgeon undertake to achieve a 100 per cent success rate in all his or her operations. Furthermore, neither of these two professionals undertake to use the highest possible degree of skill. After all, there are many others who have superior education to, and greater advantages than the defendant or accused.⁶¹ What the defendant or accused does undertake is to exercise a fair and reasonable level of skill when performing a medical procedure, and as such, what needs to be determined is whether the injury to a patient was occasioned by a lack of such skill on the part of the defendant or the accused.⁶²

Where medical practitioners are concerned, it is not necessary for the practitioner to have the highest level of knowledge or technology at his or her disposal in order to care for a patient,⁶³ nor is brilliance required. However, it is important for him or her to have a profound knowledge of the medical intervention before undertaking it. It is clear then that the test to determine the negligence of a physician is not the same as the test used to determine the negligence of an expert like an oncologist. The test to determine whether the oncologist was negligent in a particular case is

⁵⁶ *Kruger v Coetzee supra* 429.

⁵⁷ Slabbert *Medical Law in South Africa* (2011) 186.

⁵⁸ Hanna *Outdoor Pursuits Programming: Legal Liability and Risk Management* (1991) 24; Laster *Law as Culture* (2001) 209.

⁵⁹ *Lanphier v Phipos supra* 421.

⁶⁰ *Ibid.*

⁶¹ *Lanphier v Phipos supra* 422.

⁶² Verschoor and Claassen *Medical Negligence in South Africa* 13.

⁶³ Verschoor and Claassen *Medical Negligence in South Africa* 14 and Barnes *Health Care Law: Desktop Reference* (2001) 114.

whether another oncologist in the same position could have acted in the same way.⁶⁴

This test was confirmed in the 1924 case of *Van Wyk v Lewis*.⁶⁵ The court stated that a medical practitioner is not expected to bring the highest degree of professional expertise to the case to which he or she is assigned but is obliged to bring reasonable skill and care thereto. In deciding what is reasonable, the court will have to give consideration to the general level of skill and care that is exercised by members of the particular branch of medicine to which the medical practitioner belongs.⁶⁶ As with other cases, the *Lewis* case has come to serve as a precedent in our law when determining the professional standard that is required from a medical practitioner. In the 1953 case of *R v Van der Merwe*,⁶⁷ Roper J was of the view that when a general practitioner is tried, the test is not what a specialist must do to prevent harm because a general practitioner is not required to possess the same degree of skill, care, knowledge and experience as a specialist.⁶⁸

The test to determine medical negligence on the part of a specialist such as an oncologist is the famous *Bolam* test, which was developed by the courts in the United Kingdom.⁶⁹ According to this test, an oncologist is not guilty of negligence if he or she has acted in accordance with a practice accepted as proper by a responsible body of medical men or women skilled in that particular art.⁷⁰ The rationale for the test originated in the case of *Bolam v Friern Hospital Management Committee*.⁷¹ According to the court, a judge is not in a position to choose between the opinions of two expert witnesses in a case where such witnesses are in conflict with one another. The court was of the view that as long as there is a school of thought in place that determines that the conduct of the defendant or accused is reasonable, then the judge is bound to find the defendant or accused not guilty of negligence.⁷² The court also held that a practitioner is not negligent if he is acting in accordance with a certain practice merely because there is a body of opinion that would take the contrary view. At the same time, that does not mean that a medical practitioner can obstinately and pig-headedly carry on with the same old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.

⁶⁴ Barnes *Health Care Law: Desktop Reference* 116.

⁶⁵ *Van Wyk v Lewis* (1924) AD 438.

⁶⁶ *Van Wyk v Lewis supra* 439.

⁶⁷ *R v Van der Merwe* 1953 (2) PHH 124 (W).

⁶⁸ *R v Van der Merwe supra* 125.

⁶⁹ The *Bolam* test was adopted from the English tort law and is used to assess medical negligence. The *Bolam* test states that the law imposes a duty of care between a doctor and a patient, but the standard of care is a matter of medical judgement. Under this test, for the plaintiff to succeed with a medical negligence claim, he or she must prove the following: that there was a duty of care between the medical practitioner and the patient; and that this act or omission breached the said duty of care, which resulted in negligence. See Herring *Medical Law and Ethics* (2010) 106.

⁷⁰ Herring *Medical Law and Ethics* 107.

⁷¹ *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

⁷² *Ibid.*

7 PROOF OF MEDICAL NEGLIGENCE ON THE PART OF THE ONCOLOGIST

To prove that an oncologist was negligent, the plaintiff in a civil claim must show the following:

- a) The oncologist owed a duty of care to the patient. (A surgical oncologist owes a duty of care to the plaintiff when a reasonable surgical oncologist can foresee the possibility of injury resulting from surgery.)
- b) The duty of care was breached by the oncologist.
- c) The patient who is the plaintiff was injured due to the negligent breach by the defendant surgical oncologist. (The negligent conduct of the defendant surgical oncologist must be the actual cause of injuries sustained by the plaintiff.)⁷³

Based on the above formulation, it can be deduced that in the case of a defendant surgical oncologist who operates on a person living with cancer, negligence is present if a reasonable surgical oncologist owes a duty of care to the plaintiff in that a reasonable surgical oncologist would foresee the possibility of an injury resulting from the applied surgery. The applicable test is that a reasonable surgical oncologist in the same position as the defendant surgical oncologist would have foreseen that there would be risks in performing the surgery. Negligence is present where elements of foreseeability and preventability have been established and proved. If a patient who is a plaintiff was injured due to the negligent breach by the defendant surgical oncologist and the negligent conduct is the actual cause of injuries sustained by the plaintiff, then it can be said that the defendant surgical oncologist was negligent. Once the plaintiff has succeeded in proving all these elements, the court must find the defendant surgical oncologist liable. The plaintiff in such cases would be entitled to be compensated for all the loss that he or she has suffered due to the negligent conduct of the defendant surgical oncologist.⁷⁴ However, it is important to note that not all cases that involve medical negligence can be easily solved as has been discussed. If any difficulty is experienced, the doctrine of *res ipsa loquitur* must be applied, where necessary. This doctrine advocates for patients to get the justice they deserve, especially in cases where the defendant medical practitioner cannot account for his or her actions. A discussion on the application of the *res ipsa loquitur* doctrine in South Africa is therefore considered in the article.

8 APPLICATION OF THE *RES IPSA LOQUITUR* DOCTRINE IN CASE LAW

One of the first cases in which the *res ipsa loquitur* doctrine was applied is the English decision of *Cassidy v Ministry of Health*.⁷⁵ The plaintiff went to

⁷³ Otto "Medical Negligence" 2004 8 SAJR 20. A distinction is made between surgical oncologists and oncologists in general. The reason for this distinction is because surgical oncologists perform cancer surgery, while oncologists provide cancer treatment in general.

⁷⁴ Kennedy and Grubb *Medical Law* (2000) 527.

⁷⁵ *Cassidy v Ministry of Health* [1951] 2 KB 343.

hospital to have an operation to correct a Dupuytren's contracture experienced in two fingers. The plaintiff left the hospital with four stiff fingers and a practically useless hand as a result of the surgery – an eventuality that would have been avoided if proper care had been exercised. The defendant surgeon was held liable for the plaintiff's injuries as a result of negligence.⁷⁶ In this case, the plaintiff was left injured instead of being healed after the surgery as a result of the negligence of the defendant surgeon.

In South Africa, the *res ipsa loquitur* doctrine was first applied in the case of *Gifford v Table Bay Dock and Breakwater Management Commission*.⁷⁷ This case involves a claim lodged by the plaintiff as master and captain of a vessel known as the *China*.⁷⁸ The plaintiff instituted legal proceedings against the defendant on the basis that the *China* was wrecked while under the care and control of the defendant. In this case, there was no actual evidence to indicate that the defendant was negligent in handling the vessel, and the court resolved this case through the application of the *res ipsa loquitur* doctrine. The court made reference to English law in order to award damages to the plaintiff for the loss suffered owing to the negligence of the defendant.⁷⁹

However, years later the position on the application of this doctrine in South African law seemed to have changed as it was rejected in two leading cases as a means of resolving medical negligence cases. In the famous case of *Van Wyk v Lewis*,⁸⁰ the patient underwent surgery, but the physician failed to remove a swab from the patient's body, leaving the patient in a great deal of pain. The court refused to find the surgeon liable, because the court was of the view that a swab left in the patient's body did not serve as evidence that the surgeon was negligent.⁸¹

Another case in which the *res ipsa loquitur* doctrine was rejected is the case of *Pringle v Administrator, Transvaal*.⁸² The plaintiff had undergone surgery as a result of lung problems that she had been experiencing. There were complications during the surgery that Dr S performed on the plaintiff, resulting in the plaintiff suffering brain damage, losing her eyesight and losing her ability to work. The complications were as a result of her losing excessive blood during the operation. The court found that Dr S was indeed negligent as he had torn the superior vena cava of the plaintiff.⁸³ Dr S was found liable for the injuries to the plaintiff on the basis of his conduct and the court confirmed the view expressed in the *Van Wyk* case that there was no room for the application of the *res ipsa loquitur* doctrine in this matter and rejected it as a means of proving medical negligence.⁸⁴

⁷⁶ *Cassidy v Ministry of Health* *supra* 344.

⁷⁷ *Gifford v Table Bay Dock and Breakwater Management Commission* 1874 Buch 926 118.

⁷⁸ *Ibid.*

⁷⁹ *Gifford v Table Bay Dock and Breakwater Management Commission* *supra* 119.

⁸⁰ *Van Wyk v Lewis* *supra* 438. The *res ipsa loquitur* doctrine has no absolute application in cases that involve negligence. In the case of a surgeon not acting in a certain way vis-à-vis a patient, it does not amount to negligence; in some cases, it can be a lifesaving move.

⁸¹ *Van Wyk v Lewis* *supra* 439.

⁸² *Pringle v Administrator, Transvaal* 1990 (2) SA 378 (W).

⁸³ *Pringle v Administrator, Transvaal* *supra* 380.

⁸⁴ *Pringle v Administrator, Transvaal* *supra* 381.

However, it is important to note that the South African position on excluding the application of the *res ipsa loquitur* doctrine in medical negligence cases was subjected to criticism by eminent writers Carstens and Van den Heever. This is because of the important role that is played by this doctrine in resolving complex medical malpractice cases or claims. The authors argued that despite the refusal by the courts to apply this doctrine, the door has not been entirely closed for the application of this doctrine in medical malpractice cases; they argued that it can only be applied in cases where there is a form of alleged negligence derived from something absolute, and where the occurrence could not reasonably have taken place without negligence.⁸⁵ Furthermore, the two authors place emphasis on the point that the doctrine can be excluded in cases where regard is given to the surrounding circumstances to establish the presence or absence of negligence.⁸⁶ This can be interpreted to mean that the decision whether or not to apply the *res ipsa loquitur* doctrine must be judged on the facts of each case and not be absolutely excluded in our law, as has been the case in the two cases discussed above.

The *res ipsa loquitur* doctrine is in line with the principles of procedural equality, in which each party is afforded an opportunity to state its side of the story in legal proceedings. The Constitution as the supreme law in the land allows for the application of this doctrine in medical negligence cases.⁸⁷ However, the position in South African law regarding the applicability of the *res ipsa loquitur* doctrine only became clear in the year 2009 when the first step towards the future position of this doctrine was taken in medical negligence cases – as well as later in the year 2014, when the High Court in *Lungile Ntsele v MEC for Health, Gauteng Provincial Government*⁸⁸ cemented the role and importance of this doctrine in resolving complex medical negligence cases.

The *Lungile Ntsele* case involved a plaintiff who was instituting legal proceedings on behalf of her minor child against the employees of the defendant health establishment.⁸⁹ The plaintiff brought a claim of negligence against a hospital whose employees, it was claimed, had caused the minor child of the plaintiff to suffer from cerebral palsy. In this case, the plaintiff sought *inter alia* an order for the separation of the issues of merit and damages and that such an order be granted by the court.⁹⁰ To succeed with her claim on behalf of her minor child, the plaintiff had to prove negligence on the part of the defendant as well as causation of the harm to her minor child. The plaintiff showed that the employees of the defendant were negligent as they did not exercise proper care in treating her child and the

⁸⁵ Van den Heever *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law* 65; Carstens and Pearmain *Foundational Principles of South African Medical Law* 27.

⁸⁶ *Ibid.*

⁸⁷ Carstens “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*” 2013 20 *Obiter* 349.

⁸⁸ *Lungile Ntsele v MEC for Health, Gauteng Provincial Government* (2009/52394) [2012] ZAGPJHC 208; [2013] 2 All SA 356 (GSJ).

⁸⁹ *Ibid.*

⁹⁰ *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 357.

plaintiff provided circumstantial evidence that satisfied the court.⁹¹ Based on the proven facts, an inference could be drawn that the negligence of the employees of the defendant was the factual cause of the injuries that were sustained by the plaintiff's child.

The effect of this inference was that the burden of proof shifted to the defendant to prove that its employees were in fact diligent and not negligent, but the defendant failed to prove this since it failed to call its employees to testify in court and the expert witness of the defendant was found to be biased.⁹² Furthermore, the defendant failed to provide the medical records of the plaintiff in court and did not give a valid reason for why this was the case. The court found that it would be unreasonable to allow the defendant to require the plaintiff to be precise and clear about what really happened to her 15 years previously.⁹³ The court drew an inference on the basis that since the defendant was unable to prove that its staff members were not the factual cause of the minor suffering from cerebral palsy, it would be in the interests of justice to apply the *res ipsa loquitur* doctrine. The defendant was held liable for damages that the plaintiff had suffered because of its employees' negligence.⁹⁴

This judgment is supported and welcomed as a breakthrough in a long-standing confusion in medical law. Carstens⁹⁵ affirms this by pointing out that the *res ipsa loquitur* doctrine was applied in line with section 27 of the Constitution, which deals with the right to access health care services.⁹⁶ Furthermore, this doctrine extends to the relationship between the patient and medical practitioner on the basis of the contract between the two parties. This affirms that the application of the *res ipsa loquitur* doctrine is in line with the provisions of the Constitution. Thus, the case of *Lungile Ntsele* is the first case to apply the *res ipsa loquitur* doctrine in a medical negligence case in the new constitutional dispensation in South Africa.

Two years after the *Ntsele* judgment, a landmark case on the *res ipsa loquitur* doctrine followed in *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape*,⁹⁷ where the Supreme Court of Appeal confirmed the importance of this doctrine in our law. This case is discussed in detail below in order to show how our jurisprudence is shaped when it comes to the importance and role of the *res ipsa loquitur* doctrine: the discussion includes the reasons as well as the criticisms that are levelled against previous court cases by authors such as Carstens and Van den Heever.

The case of *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape*⁹⁸ arose as a result of the negligent conduct of an employee of the respondent, a health institution. The employee performed an operation

⁹¹ *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 358.

⁹² *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 359.

⁹³ *Ibid.*

⁹⁴ *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 360.

⁹⁵ Carstens 2013 *Obiter* 349.

⁹⁶ *Lungile Ntsele v MEC for Health, Gauteng Provincial Government supra* 361.

⁹⁷ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* (085/2014) [2014] ZASCA 182.

⁹⁸ *Ibid.*

on the appellant and left a swab inside the patient's body after the procedure was completed. Later on, the appellant experienced pain and returned to the hospital for further examination. At the hospital, she was told that there was nothing wrong with her and she was discharged without being told to come back to the hospital for further treatment or examination in order to ascertain what might be wrong with her.⁹⁹

Upon her return home, she was still in great pain and decided not to go back to the respondent health establishment for treatment and examination.¹⁰⁰ Instead, she decided to go to another hospital to check what might be wrong with her. In the second hospital, it was confirmed that a swab had been left inside her during the surgery she underwent in the care of the respondent, which was the main reason she was experiencing great pain in her abdomen, and she had to undergo laparotomy surgery. The appellant therefore decided to sue the respondent for negligence as proper care was not afforded to her during the operation.¹⁰¹ She claimed that the medical practitioner as well as the nursing staff should have exercised care in that that they should have made sure that all the operating equipment used during the surgery was in place before closing her up at the end of the surgery, because that is how a reasonable medical practitioner would have acted in order to prevent harm.¹⁰²

Furthermore, the appellant in this case argued that she had incurred financial loss because of the corrective surgery that she had to undergo in order to correct the mistake of the respondent doctor, and claimed damages to this effect. However, the respondent in this case, the Department of Health, objected to the claims of the appellant on the basis that she had received good care and that there was no form of negligence displayed by the employees of the respondent in administering treatment to the appellant. They further argued that the standard expected of a reasonable medical practitioner was applied in this case. The court *a quo* dismissed the claim of the appellant, who was the plaintiff, on the basis that the plaintiff had failed to discharge her onus of proof on a balance of probabilities that the conduct of the medical practitioner and nursing staff who were involved in performing surgery was in actual fact negligent.¹⁰³

However, the court *a quo* granted the appellant leave to appeal its decision on the basis that it is bound by the decision of *Van Wyk*, in which the application of the *res ipsa loquitur* doctrine was rejected by the court.¹⁰⁴ The court further reasoned that revising the application of the *res ipsa loquitur* doctrine would be in the interests of justice, as argued by scholars like Carstens and Van den Heever above. Had the court applied the *res ipsa loquitur* doctrine in this case, the decision of the court could have been different owing to the fact that if the defendant was unable to provide a reasonable explanation for the issue at hand, then the court could have ruled in favour of the appellant.

⁹⁹ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* 183.

¹⁰⁰ *Ibid.*

¹⁰¹ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* 184.

¹⁰² *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape* 185.

¹⁰³ *Ibid.*

¹⁰⁴ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* 186.

On appeal, the appeal court attached much weight to the evidence of both the appellant and her doctor who performed the corrective surgery as to the possibility of when the swab was left inside the body of the appellant. Furthermore, what weighed against the respondent's case was that the respondent did not adduce evidence that could rebut the version of the appellant and her doctor to show that she had received reasonable care while in hospital.¹⁰⁵ There was also no explanation as to why the respondent did not testify in court through its medical staff in order to challenge the testimony of the appellant. The court held that a reasonable inference could be drawn that the respondent avoided calling in its employees to testify as they might have revealed unfavourable facts about what happened on the day of the operation, which could have been detrimental to its case. After having weighed all the evidence and circumstances of the case, the court found that the appellant had indeed discharged her onus of proof on a balance of probabilities. The appeal of the appellant was successful, and the application of the *res ipsa loquitur* doctrine resulted in the appellant receiving an amount of R250 000 in damages for the loss that she suffered as a result of the negligence of the respondent.¹⁰⁶ What this case has shown is that once the plaintiff has made out a *prima facie* case and the defendant fails to rebut the evidence, the defendant runs the risk of judgment being granted against the defendant.

These two cases have brought about legal certainty and clarity about the application of the *res ipsa loquitur* doctrine in our law. It is clear that this remedy now forms part of our law, which was the position before the case of *Van Wyk* and there is no longer any confusion about the role of this doctrine. This clarification was much needed since this remedy is an important tool in our law as outlined in the above cases – particularly in resolving complex medical negligence cases where the defendant is unable to provide reasonable explanations about the actual cause of injury that a plaintiff has suffered owing to alleged negligence.

9 MEDICAL NEGLIGENCE IN THE CONTEXT OF CANCER

9.1 Medical negligence in the form of incompetent surgical procedure

One of the leading medical negligence cases with regard to cancer in South Africa is *Castell v De Greef*.¹⁰⁷ The plaintiff was admitted to hospital for a mastectomy and the surgery was performed by the defendant, a plastic surgeon. The operation involved the plaintiff undergoing a couple of operations on her breasts to remove lumps that were linked to breast cancer, which was a condition that ran in her family. The plaintiff originally consulted her doctor about the problems she was having with her breasts and was referred to the defendant surgeon by her doctor.¹⁰⁸ When the

¹⁰⁵ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* par 7.

¹⁰⁶ *Cecilia Goliath v Member of the Executive Council for Health Eastern Cape supra* par 21.

¹⁰⁷ *Castell v De Greef supra*.

¹⁰⁸ *Castell v De Greef supra* 409.

defendant had examined the plaintiff, he recommended that she undergo a mastectomy to arrive at a diagnosis. After discussing the matter with the defendant surgeon and her husband, the plaintiff decided to go ahead with the surgery.

Immediately after the surgery, everything seemed to be in order. However, two hours later, complications were evident when the plaintiff's breast turned black and she experienced pain.¹⁰⁹ Her state of health deteriorated further after she was discharged from hospital, and she experienced pain in the area that was treated during surgery, as well as a discharge that had a very unpleasant odour. The plaintiff returned to the defendant surgeon in connection with these complications and he prescribed painkillers while also recommending corrective surgery. The second surgery was not performed by the defendant surgeon himself but by another surgeon working at the same hospital. After the corrective surgery, the plaintiff recovered and instituted a civil claim for the expenses she had to incur in having to have this additional procedure.¹¹⁰ The plaintiff also instituted a specific action against the defendant surgeon for the pain, suffering and embarrassment she had to endure, on the grounds that he had been negligent by failing to act in a way that a reasonable individual in the same profession would have acted.

In the court *a quo*, the presiding officer, Scott J, stated that a surgeon does not have to perform to the highest possible standards but ought to adhere to a standard of care that reasonable people in the same profession would adhere to.¹¹¹ The fact that complications arise in surgery does not mean that care has not been exercised by the surgeon. For purposes of this case, expert witnesses were called in to give their testimonies and all of them said that it was not inappropriate for the plaintiff to have had this type of surgery. However, they agreed that if the surgeon had made use of the pedicle flap, the complications could have been prevented. The argument that the defendant did not warn the plaintiff about the risks was rejected by the court on grounds that not all risks could be foreseen by the surgeon and the patient herself should have been cautious about agreeing to the procedure.¹¹²

In the court *a quo*, the plaintiff's claim was dismissed with costs in favour of the defendant surgeon. However, on appeal, Ackermann J was of the view that the defendant was negligent in not taking steps to prevent the infection from setting in.¹¹³ The surgeon only took corrective action 12 days after the occurrence. Ackermann J found it appropriate to compensate the plaintiff for the pain, suffering and embarrassment she had suffered as a result of the operation. The appeal was accordingly successful.¹¹⁴

¹⁰⁹ *Ibid.*

¹¹⁰ *Castell v De Greef supra* 410.

¹¹¹ *Castell v De Greef supra* 411.

¹¹² *Castell v De Greef supra* 412.

¹¹³ *Ibid.*

¹¹⁴ *Castell v De Greef supra* 413.

9 2 Medical negligence in the form of incorrect drug treatment

Another relevant case dealing with medical negligence is *P v Pretorius*.¹¹⁵ It involved the alleged negligence of a general practitioner who was the defendant. In this case, an oncologist diagnosed the plaintiff with cancer and suggested chemotherapy as treatment, but the plaintiff opted instead for Insulin Potentiation Therapy (IPT) treatment offered by a general practitioner as an alternative method since he was uncomfortable with undergoing chemotherapy.¹¹⁶ The plaintiff underwent IPT treatment, which he then suspended after three months and continued later. Consequently, the patient went into remission. The court found that the defendant had performed a comprehensive and proper examination and that he had properly ascertained the medical history of the plaintiff; he had also acted in accordance with the results of the pathology report of the plaintiff. The court found further that the defendant had explained the nature of IPT to the plaintiff and had also referred the latter to a patient who had been successfully treated using IPT.¹¹⁷ The court held that the fact that the plaintiff was not cured by the treatment that the defendant administered did not in itself justify an inference that the latter had been negligent and had not acted with the necessary diligence and skill expected from practitioners practising in his branch of speciality.¹¹⁸ The court emphasised that in order to analyse the defendant's treatment of the plaintiff properly, it would be useful to have regard to the general skill and diligence possessed and exercised by practitioners having the same expertise as the defendant; and yet *in casu* this evidence was not produced by the plaintiff. On the evidence, the court could not come to a finding of negligence because the plaintiff could not show that the defendant had been negligent on a balance of probabilities. Therefore, the plaintiff's claim was dismissed with costs.¹¹⁹ This case clearly reveals how medical negligence is proved by means of an objective test on the standard of reasonableness, and how the mere fact that a patient is not healed cannot bring about an inference of negligence.

9 3 Medical negligence in the form of misdiagnosis

The pandemic of cancer is a global problem. This article therefore makes brief reference to the United Kingdom (UK) and the United States of America (US), which have developed means to protect people living with cancer. The focus shifts to the UK and US with the aim of probing these legal systems and determining their approach when it comes to the protection of employees living with cancer. Again, the historical and the legal influence of English law in South African law warrants a comparison with these two countries. The position of the US is legally relevant to this context as a result of the progress it has made in recognising that employees living with cancer

¹¹⁵ *P v Pretorius* (74157/2013) [2016] ZAGPPHC 602.

¹¹⁶ *P v Pretorius supra* par 7.

¹¹⁷ *P v Pretorius supra* par 86.

¹¹⁸ *P v Pretorius supra* par 88.

¹¹⁹ *P v Pretorius supra* par 90–91.

must be protected against unfair discrimination in the workplace.¹²⁰ The American position is considered in an attempt to draw a comprehensive comparative analysis. The progress that the US has made in advocating for the specialised legal protection of employees living with cancer is relevant to supporting this investigation.

In cancer incidents, most malpractice claims arise from misdiagnosis of patients, which is a major problem all over the world.¹²¹ For example in America, delayed diagnosis or misdiagnosis of breast cancer is the major reason for medical malpractice claims in the area of cancer. This is evident from the 3 500 cases heard by courts annually based on misdiagnosis or late diagnosis of breast cancer.¹²² This is cause for concern and proper care on the part of oncologists is required in order to prevent the increase of misdiagnosis cases. Misdiagnosis or delayed diagnosis means that an oncologist failed to act in a way a reasonable person in the same position would have acted, to see or know whether the patient does or does not have cancer.¹²³ Failure to diagnose breast cancer is one of the leading causes of medical malpractice claims in the UK. As a result, there lies a great responsibility on the part of lawyers to carefully select a case in order to win it. This simply means that for a lawyer to win a case relating to breast cancer, it is important that the lawyer have an understanding of the origin and clinical aspects of breast cancer to be able to make a comprehensive analysis of the facts at hand.

However, it is important to note that having a legal practitioner acquire background knowledge about cancer does not substitute for the role that should be played in the proceedings by medical experts, such as an oncologist or radiologist.¹²⁴ Negligence or a misdiagnosis of a person living with cancer has a devastating effect on the patient, to the extent that the patient has to undergo treatment such as chemotherapy, which leads to the deterioration of health, pain and suffering, medical expenses and loss of income in case of a patient who is rendered incapable of working.¹²⁵ An important aspect that needs to be taken into consideration by both patients and lawyers when it comes to misdiagnosis is that failure to diagnose or an erroneous diagnosis is not actionable unless the patient is in a position to prove that it has resulted in injury.¹²⁶ There must be a link or causation

¹²⁰ Americans with Disabilities Amendment Act (ADAA of 2008).

¹²¹ Jaslow "Most Common Medical Malpractice Claims for Missed Cancer, Heart Attacks" (19 July 2013) <http://www.cbsnews.com/news/most-common-medical-malpractice-claims-for-missed-cancer-heart-attacks/> (accessed 2014-01-07).

¹²² Kern "The Delayed Diagnosis of Breast Cancer: Medico-Legal Implications and Risk Prevention for Surgeons" 2008 12 *The Breast* 148–149. Furthermore, it is important to consider that there is a significant increase when it comes to litigation with respect to breast care delivery by medical practitioners – oncologists in this context. This has resulted in insurers paying out large sums of money and causes oncologists to practise defensive medicine with the aim of averting litigation, which is not in the interests of both medical practitioners and patients.

¹²³ Cranor *Toxic Torts: Science, Law and the Possibility of Justice* (2006) 365.

¹²⁴ Freider, Elerin and Hillerich "Selecting and Presenting a Failure to Diagnose Breast Cancer Case" 2001 20 *AM J Trial Advoc* 254.

¹²⁵ Freider *et al* 2001 *AM J Trial Advoc* 254.

¹²⁶ In *Barnett v Chelsea and Kensington Hospital Management Committee* (1986) 1 ALL ER 1068, the plaintiff was the wife of the deceased and brought a claim of negligence against the defendant on the basis of misdiagnosis which she claimed resulted in the death of the

between the misdiagnosis and the harm that the patient has suffered for a claim of misdiagnosis to succeed. This view is supported by reason that misdiagnosis or failure to diagnose does not amount to negligence in all cases; courts are willing to accept that no human being, including a medical practitioner, is infallible and thus this reality must be accepted as a part of life.¹²⁷

This was the position of Herlinda Garcia, a 54-year-old American woman, who was misdiagnosed with breast cancer by her oncologist.¹²⁸ After she had gone for a gruelling period of seven months of chemotherapy treatment, she went to see another doctor to treat her anxiety; she got the shock of her life when she was told by the second doctor that she did not have cancer at all. The first oncologist was held liable for negligence and ordered to pay her \$367 500 for all the loss she had suffered as a result of the negligence.¹²⁹

It is important to take into account that misdiagnosis is a broad concept that can result in underdosing, overdosing, prescribing the wrong drug, choosing the wrong dose frequency, omitting a drug or dose and neglecting to add premedication or supportive care medication.¹³⁰ This shows that misdiagnosis in cancer can take different forms and can result in dire consequences for patients. This is evident in the fact that such medical errors are claiming the lives of 7 000 people annually,¹³¹ all of which could be prevented if medical practitioners were to exercise the required degree of care and skill when they exercise their duties.

Liability on the basis of misdiagnosis of persons living with cancer is also applicable in American and English law, which further recognises liability for the late diagnosis of cancer and improper administration of cancer treatment to the patient. This is because a doctor owes a duty of care to the patient and, when treating a patient, must act in a reasonable way in the same way that another doctor in the same position could have acted.¹³² The South African legal system is influenced by the English model, and these rules or principles are also applicable in South Africa. Although in South Africa, a lot of cases of death caused by cancer are related to late diagnosis of the

deceased. However, the claim of the plaintiff was dismissed on the basis that the cause of death of the deceased was not misdiagnosis on the part of the defendant, but in actual fact the deceased would have died soon because of his critical medical condition. There was no link between the misdiagnosis and the death of the deceased, hence the application was dismissed.

¹²⁷ Dutton *The Practitioner's Guide to Medical Malpractice in South African Law* (2015) 104. The view that courts are willing to accept that all human beings are fallible, and that that includes medical practitioners who are not exempted from this reality, was confirmed in the court case of *Crivon v Barnet Group Hospital Management Committee* 1959 *The Times* (19 November) 56 in the English court.

¹²⁸ Castillo "Woman Gets Chemo Only to Find Out She Never Had Cancer" (17 July 2013) <http://www.cbsnews.com/news/woman-gets-chemo-only-to-find-out-she-never-had-cancer/> (accessed 2014-01-07).

¹²⁹ Castillo <http://www.cbsnews.com/news/woman-gets-chemo-only-to-find-out-she-never-had-cancer/>.

¹³⁰ Swanepoel "Medication Errors in Oncology: A Literature Review" 2013 80 *SAfr Pharm J* 48.

¹³¹ Swanepoel 2013 *SAfr Pharm J* 49.

¹³² Breakstone "Delayed Diagnosis of Cancer" (undated) <http://www.bwglaw.com/lawyer-attorney-1368134.html> (accessed 2015-01-08).

disease by the medical practitioner.¹³³ In cancer cases, it is clear, as outlined above, that the *res ipsa loquitur* doctrine, which champions for social justice can find application especially in cases where the oncologist failed to act in a way that a reasonable oncologist in the same position could have acted. Furthermore, when the oncologist fails to furnish reasons for his or her conduct to rebut a claim of negligence, then it can be deduced that the *res ipsa loquitur* doctrine will find application and the oncologist will be held liable based on this doctrine.

9 3 1 *Example of South African case law on negligent misdiagnosis*

A case of interest in relation to cancer negligence is *Esterhuizen v Administrator Transvaal*.¹³⁴ This case involved a 10-year-old child who was diagnosed with Kaposi's sarcoma cancer. The child was initially treated with superficial radiation therapy with the consent of her parent. However, following the recurrence of the cancer, she was subjected to radical radiation therapy, which resulted in severe burns on her body and the amputation of her limbs. The parent of the child brought an action for damages as a result of the negligence of the medical practitioner and on the basis that the parent of the child did not provide consent for the medical intervention in question.¹³⁵ The court held that while the superficial radiation therapy was duly performed with the consent of the parent of the child, the second procedure, which resulted in extensive burns on the child, was performed without the consent of the parent.

The defendant medical practitioner raised the defence of implied consent, in the sense that owing to the prior consent given by the parent of the child to the first medical intervention, it meant that it was no longer necessary for the parent to give consent for the second medical procedure and that he was acting in the best interests of the child.¹³⁶ The court rejected this defence. The court reasoned that owing to the fact that radical radiation therapy is different from the prior superficial radiation therapy, it was necessary for the parent of the child to be informed about the dangers inherent in the new treatment before such implied consent could be considered as valid. The court ruled in favour of the plaintiff who was the parent of the child and found that the medical practitioner in question was negligent, in the sense that he failed to act in a way that a reasonable practitioner in the same situation which he was exposed to could have acted in order to prevent harm or loss from taking place.¹³⁷ In this case, it can be argued that the court would have applied the *res ipsa loquitur* doctrine if the medical practitioner failed to provide reasons for his conduct towards the negligence claims levelled

¹³³ Omenah and Buckle "Factors Influencing Time to Diagnosis and Initiation of Treatment of Endemic Burkitt Lymphoma Among Children in Uganda and Western Kenya: A Cross Sectional Survey" 2013 15 *BioMed* 2–4.

¹³⁴ *Esterhuizen v Administrator Transvaal* 1957 (3) SA 710 (T).

¹³⁵ *Esterhuizen v Administrator Transvaal supra* 711.

¹³⁶ *Esterhuizen v Administrator Transvaal supra* 712.

¹³⁷ *Esterhuizen v Administrator Transvaal supra* 713.

against him. This would in effect mean that failure to speak or defend himself would have been an indication of his negligence. It can be asserted that the *res ipsa loquitur* doctrine goes hand in hand with the *audi alteram partem* rule (hear the other side of the story), which is central in ensuring that justice is achieved on all levels.

9 3 2 *An example from American case law*

In the case of *McRae v Group Health Plan*,¹³⁸ Mr McRae was the patient and a misdiagnosis on the part of the defendant surgeon changed his life. Mr McRae went to the medical practitioner for a routine check-up; during the process, he alerted the practitioner about the skin lesion on his left leg, and, after conducting a shave biopsy, the defendant practitioner confirmed that the lesion was benign. Three years later, owing to the pain the patient was suffering, the defendant had to re-evaluate his biopsy and informed Mr McRae of a misdiagnosis on his part and that Mr McRae was in actual fact suffering from melanoma cancer. The cancer had already developed to an extent that it was too late to treat it and as a result of this, Mr McRae later died because of the cancer.¹³⁹ Mrs McRae brought this claim against the defendant on the basis of misdiagnosis on the part of the defendant. The defendant raised the defence that the claim had prescribed as four years had gone by since the cause of action arose. The court dismissed the claim of the plaintiff on the basis of prescription, but there was no question or dispute that the defendant medical practitioner was indeed negligent on the basis of misdiagnosis.¹⁴⁰

10 CONCLUSION

With so many variables at stake when setting out to determine negligence, it is important for a plaintiff to have a strong legal team and, if necessary, expert testimony. Medical practitioners, in turn, need to take the necessary precautions to ensure that patient disappointments do not escalate into full-blown court cases that could put practitioners' reputations at risk and expose them to the unpleasant and expensive ramifications of civil and criminal claims. This is especially so when unnecessary litigation with an aim to get financial compensation is becoming a problem in South Africa, as already outlined. Medical negligence claims are avoidable, especially in instances where there is foreseeability and preventability of damage. Failure by a medical practitioner – in this context, an oncologist – to act in a way a reasonable oncologist in the same position could have acted means that the medical practitioner would be liable. This point can be taken a step forward: the failure by a medical practitioner to explain or rebut allegations of negligence levelled against him or her means that an inference can be drawn of the medical practitioner's negligence on the basis of the doctrine of *res ipsa loquitur*. It is worth noting that a failure to discharge this obligation

¹³⁸ *McRae v Group Health Plan* 753 NW 2d 711 714–15 (Minn.2008).

¹³⁹ *McRae v Group Health Plan* 755 NW 2d 711 714–15.

¹⁴⁰ *McRae v Group Health Plan* 756 NW 2d 711 714–15.

could cause the defendant practitioner to run the risk of being rendered liable. All this means that a medical practitioner must be in a position to fully account for his or her actions when dealing with a patient in the interests of fairness and justice. One of the many ways of minimising the risk of not placing a defence before the court is to keep proper patient records, particularly in the event of being sued. Furthermore, it has been a requirement of the National Health Act 61 of 2003, as well as the requirement of good practice required by the HPCSA.