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Medical negligence and malpractice from a proceduralist paradigm

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Abstract---Medical malpractice in South Africa, has gained significant momentum over the years. Healthcare professionals have had to ensure that their practices are insured for indemnification for significant amounts, in lieu of medical malpractice claims. This has resulted in healthcare professionals over insuring for medical malpractice and negligence claims, to ensure that they get suitably allocated legal representatives as well as cover in certain instances for the quantum sued by the aggrieved party. The burden of proof is that the plaintiff bears the duty to discharge on a balance of probabilities. This means that the version that was presented is more probable than the Defendant's version, however, it does not end there, as the healthcare professional must have committed negligence, in that the reasonable medical practitioner would not have shown in the circumstances presented by the plaintiff. The paper navigates the procedural perspective of discharging the onus of proof in medical malpractice and negligence claims.

Keywords---medical, malpractice, negligence, proceduralist, law, cases.

Introduction

In South Africa, cases have illustrated that the main inquiry as set out in the cases of the Supreme Court of Appeal, that medical negligence also known as medical malpractice cases, fall on the civil test, of the plaintiff proving the case on a balance of probabilities, as invoked in the case of *Pillay v Krishna*. The locus classicus of negligence was heard in the supreme court of appeal, as with the passing of time, the supreme court of appeal, has clarified the inquiry to be met for the current medical negligence rests upon discharging the evidentiary burden of proof, especially when the defendant fails to present a case, otherwise if the defendant presents a case, then the consideration is on a balance of probabilities which version is more plausible than the other, and credibility of the evidence presented by the witnesses is weighed against the versions presented.

Method

The method employed is an analysis of cases as decided by the court, rules of court and law of evidence. This is a desktop study based on the analysis of the law. In South Africa, there is private health care services offered to the public as well as public health care services offered by the State. The differentiation is importance because of accountability of liability. For State accountability is to the Member of the Executive Council for the Department of Health, whereas in private, the juristic entity that the medical practice is registered together with the specialist in their personal capacity.

In terms of decided cases, here is a tabulated summary of injuries and quantum relating to medical negligence and malpractice:

Case Name and Year	Nature of injury	Quantum
Esterhuizen v Administrator Transvaal [1957] LNQD 4 (T)	Leg, left and right, amputation, hand, right, amputation	R1 229 700
Kerwin v Wynne-Jones [1957] LNQD 6 (R)	Foot, drop	R51 300
Rautenbach v Licences and General Insurance Co Ltd [1961] LNQD 16 (W)	Kidney, torn	R378 900
Madolo v Cemane and Whitby [1969] LNQD 14 (E)	Paraplegia	R776 700
Richter and Another v Estate Hammann [1976] LNQD 13 (C)	Bladder, incontinence, bowel, chronic constipation, leg, right, loss of power, foot, right, loss of power, coccyx, injured	R848 100
Blyth v Van Den Heever [1979] LNQD 1 (A)	Radius, right, fracture, Ulna, right, comminuted fracture	R607 300
Graham v Administrator Transvaal and others [1982] LNQD 9 (T)	Back, lower, burns, scarring, buttocks, upper, burns, scarring, leg, amputation	R181 500
Clinton-Parker v Administrator, Transvaal [1996] LNQD 3 (W)	Shock	R110 800
Gibson v Berkowitz and another [1996] LNQD 1 (W)	Vulva, perineum/perineal region and vagina, severe burns caused by negligent administration 100% of 3% glacial acetic acid, lower back, acid burns, emotional/psychological shock, psychological injury resulting from physical injury, post traumatic stress disorder with a major affective disorder in terms of major depressive disorder	R258 500

	with anxiety	
Dawkins v Administrator, Transvaal [1996] LNQD 4 (W)	Negligent swopping of babies, psychological, shock	R2 718 300
Benjamin v De Beer [1997] LNQD 1 (SCA)	Head, hemorrhage, heart, cardiac arrest	R305 900
Van Deventer v Premier of Gauteng [2004] LNQD 2 (T)	Leg, right, amputation	R695 400
Van der Merwe v Premier of Mpumalanga [2005] LNQD 3 (T)	Eye, retinopathy of prematurity, total blindness	R1 569 400
Rens v MEC for Health: Northern Cape Provincial Department of Health [2009] LNQD 16 (NCK)	Arm, left, amputation, Shoulder, left, amputation, humerus, left, fracture	R1 004 500
Raath v Nel [2012] LNQD 36 (SCA)	Whole body, bedsores	R289 600
Smith v MEC for Health, Province of KwaZulu Natal [2016] LNQD 36 (KZP)	Nose, epistaxis, stomach, gastritis, chest, pains	R394 500
AD and IB v MEC for Health and Social Development, Western Cape Provincial Government [2016] LNQD 1 (WCC)	Brain, damaged, athetoid cerebral palsy	R2 088 500
Joubert v Meyer [2017] LNQD 1 (GNP)	Abdominoplasty, complications with wound healing, chronic depression and post-traumatic anxiety, abdominal muscles, weakness caused by chronic depression and post-traumatic anxiety	R220 500
P obo P v Member of Executive Council for Health, Eastern Cape Province [2018] LNQD 9 (ECM)	Brain, hypoxic ischemic injury	R2 100 200
NK v MEC for Health, Gauteng [2018] LNQD 27 (SCA)	Brain, severe damage, hypoxic-ischemic, perinatal asphyxia	R1 890 200
Siwayi v MEC for Health, Eastern Cape Province [2018] LNQD 46 (ECG)	Emotional and psychological trauma	R262 500
Booyse and another (Son) v MEC for Health, Gauteng Province [2019] LNQD 46 (GP)	Brain, lack of oxygen, grade 3 hypoxic ischemic encephalopathy, seizures, severe spastic tetraplegia, birth	R1 650 000

	asphyxia	
Fekensi v Member of the Executive Council for the Department of Health [2020] LNQD 24 (ECB)	Knee, right, dislocation, distal, loss of superficial sensation, resulting in chronic arterial insufficiencies, leg, lower, right, lymphoedema, large infected area, dorsal, right ankle, chronic vascular insufficiency, hypaesthesia, lower leg, ankle, right, lymphoedema, large infected area, dorsal, right, ankle, fixed equinus position, foot, right, lymphoedema, large infected area, dorsal right ankle, skin hyper-pigmentation, significant degree of tissue necrosis	R95 000
MJ obo KJ v MEC for Health Gauteng Province [2020] LNQD 3 (GP)	Brain, acute profound hypoxic ischemic brain injury. Dyskinetic cerebral palsy, profound intellectual disability	R1 800 000
Kriel NO obo S v Member of the Executive Council for Health, Gauteng Provincial Government [2021] LNQD 2 (GJ)	Brain, partial prolonged intrapartum hypoxic ischemic injury of term brain, consequential asymmetric spastic quadriplegia	R2 000 000
MNK Kgoete and Another v MEC for Health, Gauteng Province [2022] LNQD 30 (GJ)	Emotional shock and trauma that manifests as a psychiatric lesion resulting from claimant's child suffering from cerebral palsy, mental retardation, spastic quadriplegia, microcephaly, severe developmental delay, permanent neurophysical and intellectual impairment	R350 000
Pieterse v MEC for Health Gauteng [2022] LNQD 10 (GJ)	Head, ear, left, reduced hearing, face, mouth, loss of sensation, eye, left, cloudy layer of scar tissue behind left eye lens implant causing blurred vision, face, eye, right, complete loss of sight, face, disfigurement, no eyelids, torso, chest, scarring and extremities, psychological, post-traumatic stress syndrome and major depressive disorder	R3 000 000

Source: "Medical Negligence" LexisNexis Online, South Africa

From the aforementioned table, from the quantum awarded, it shows that for the seriousness of the claim, necessitates more quantum for the post complications damages and costs that needs to be addressed. For permanent brain injuries of minors, it has future implications in terms of dependency on parents, guardian or custodian, to be taken care of permanently as well as future losses of income.

Discussion

Pleading medical negligence in pleadings, is important as often pleadings are badly drafted because of the manner, in which the plaintiff pleads their case, as is evident from case law, as pleading one's case and leading evidence culminates to successful suits. When one documents a typical professional consultation with a specialist, there is no written documentation that is signed in South Africa. One fills out their personal medical history and questions relevant for the specialist to take into consideration, in assisting to pronounce upon a medical diagnosis, after doing the requisite medical examination and in certain instances requisite blood tests.

In the locus classicus case of *Van Wyk v Lewis*, which dealt with medical negligence of a surgeon that left the surgical swab in a patient. There are various checks and balances to ensure that this abnormally is prevented. The surgical nurse is clothed with the duty to count the surgical swabs before closing the wound and double checking that all the swabs were accounted for, though there is still a reasonable responsibility on the surgeon to double check in the open wound that there are no swabs left behind in the patient. If the specialist decides that surgery is necessary for the healing of the patient from a particular medical condition, then once again, there is no written contract between the parties as a general, even if certain specialists require indemnities to be signed regarding any risk that may arise, due to the operation being high risk, it does not necessary absolve the specialist from medical negligence or medical malpractice. An inquiry into the conduct of the specialist relating to whether all surgical protocols and reasonable conduct of a specialist were fulfilled is the necessary factual probanda and probantia presented to the court. (Schwikkard & Van der Merwe, 2016) The factual probanda is the facts leading to the cause of action, in particular the facts leading to the medical negligence or medical malpractice, and the failure to follow surgical conduct and protocol of a reasonable surgeon. The facta probantia, is the evidence led to prove the facts presented, by the specialist giving oral testimony relating to the chain of events that led to the cause and effect where applicable. The defendant would have a rebuttal expert witnesses, to rebut the testimony based on similar experience, however in terms of case law as presented, rebuttal expert witnesses are not used when the Member of the Executive Council for the Department of Health is sued. Whereas, in private cases, relating to specialists, the use of rebuttal expert witnesses becomes necessary to answer to the plaintiff's case presented.

In the case of *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape (085/2014) [2014] ZASCA 182 (25 November 2014)* the facts of the case related to a surgical swab being left in the patient, and the inquiry was whether the maxim *res ipsa loquitur* is applicable, which is an assumption of the "thing" from the set out of facts, however the law in South Africa, has

recognized that this assumption is not a legal presumption, and that one needs to rely on the civil test of proving one's case on a balance of probabilities. If on the version that the plaintiff produced, there is sufficient discharge of the onus of proof, and the defendant, fails to answer to the case, then the defendant risks that on a balance of probabilities there would be negative aspersions and inferences, relating to the plea of the Defendant's case.

From the aforementioned, it is inappropriate to plead a partially written, and a partially oral contract, as the risks of surgical operations are a known fact, the patient is aware of the risks. However, this by no means circumvents medical negligence cases, because a specialist, must always adhere to surgical conduct and protocols of a reasonable specialist with adequate experience and training. A specialist doctor does not enter written contracts with the patient, it is an engagement of professional services rendered, in the same way that a lawyer renders professional services, and requisite fees either need to be paid upfront or an undertaking will be given from the patient that the shortfall will be covered by the patient and/or surety of the medical expenses.

Conclusion

It is important for health practitioners and lawyers drafting the pleadings to understand the nuances of both presenting medical negligence as a plaintiff and to defend the case as a defendant, relating in particular to what needs to be proved. The sequence of events relating to the negligence of the specialist or healthcare professional needs to be properly pleaded in the particulars of claim of the plaintiff's case. Both the plaintiff and defendant are required to be meticulous in their pleadings to give themselves a fair opportunity at presenting their evidence at trial. The proceduralist paradigm shift is essential to winning or losing a medical malpractice or negligence suit.

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