

CHAPTER 1

1.1 GENERAL INTRODUCTION

One of the most important features of a medical negligence action as with any other legal action, is the obligation on the parties of establishing and proving the facts which support their respective cases. The principle that the plaintiff bears the burden of proof in medical negligence cases is applied universally ¹. The plaintiff in a medical negligence action is faced with particular evidential difficulties which include an investigation of ascertaining exactly what was done in the course of the medical intervention, securing expert medical evidence which will allege and substantiate sub-standard medical care, proving a causative link between the treatment and

¹ See for example: **Van Wyk v Lewis 1924 AD 438**; **Holmes v Board of Hospital Trustees of the City of London (1977) 8 DLR (3d) 67**; **Anderson v Moore 275 NW2d 842 849 (Neb 1979)**; **Hotson v East Berkshire AHA [1987] 2 All ER 909 (HL)**; Giesen *International Medical Malpractice Law* (1988) 513; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 26; Jones *Medical Negligence* (1994) 95; Harney *Medical Malpractice* (1994) 419.

the injury and sometimes overcoming the traditional notion which is still nurtured in some courts that “the doctor can do no wrong”². With regard to this particular kind of litigation Jones says that:

“The process of identifying individual fault through the tort of negligence tends to overlook the wider issues involved in dealing with medical accidents. While on the one hand it may be acknowledged that some accidents are inevitable, and indeed that some accidents through carelessness will always occur, on the other hand the tort-action is not well-suited to identifying those accidents attributable to “organizational errors,” or methods of delivering health care which equate costcutting with efficiency, and result in overworked staff, inadequate safety measures, and an emphasis on the quantity at the expense of the quality of health care provision. An action for medical negligence must focus on the particular accident. One of the strengths of the forensic process is the ability to dissect events in fine detail, although that cannot always achieve that elusive goal “the truth”. But by focussing on the particular, tort cannot hope to address the broader question of how accidents might be prevented, apart from the notion that the threat of an action for negligence has some value in deterring careless conduct”³.

To prove the facts upon which the plaintiff’s cause of action is based he or she can produce direct- or circumstantial evidence, or a combination of such evidence. In the case of direct evidence the plaintiff is able to produce evidence of specific acts of negligence. In the case of circumstantial

² Lewis *Medical Negligence: A Practical Guide* (1992) 262. In this regard he says: “But there are other reasons why it is hard to prove medical negligence. One reason is, or at any rate has been, the anti-patient prejudice of the courts...one would think that the plaintiff was virtually guilty of *lèse majesté* in bringing the action”.

³ Jones 1-2. evidence a fact or facts are inferred from the facts the plaintiff tenders as evidence ⁴.

Some accidents occur under circumstances where evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is or should be, to the defendant. The doctrine of *res ipsa loquitur* is generally considered to be no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient to justify the conclusion that the defendant was probably negligent and in the absence of an explanation by the defendant to the contrary, that such negligence caused the injury to the plaintiff. In this regard various commentators have endeavoured to define and expound the doctrine. Strauss for example describes it as follows:

“As is well known, the doctrine rests on the fundamental principle that mere proof by a plaintiff of an injurious result caused by an instrumentality which was in the exclusive control of the defendant, or following upon 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. Then *res ipsa loquitur*: ‘the thing speaks for itself’. This does not necessarily mean that the burden of proof has shifted to the defendant. But should the

⁴ Hoffmann and Zeffertt *The South African Law of Evidence* (1988) 588ff.

defendant fail to give an acceptable (ie reasonable) explanation for the events, the court might readily come to the conclusion that the defendant was negligent”⁵.

Giesen opines that it is:

“...a type of circumstantial evidence, based on logical reasoning, whereby certain facts may be inferred from the existence of or ordinary occurrence of other facts. Since it is a matter of ordinary observation and experience that an event sometimes tells its own story, the maxim is based on common sense and its purpose is to enable justice to be done, when the facts bearing on causation and the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant”⁶.

Claassen and Verschoor also explain the effect of the application of the doctrine as follows:

“The maxim is based on the fundamental principle that mere evidence of the detrimental occurrence and the fact that it was caused by an object under the exclusive control of the defendant, constitutes a *prima facie* factual presumption that the defendant had been negligent. The very occurrence of the detrimental incident “speaks for itself” because it is more consistent with negligence on the defendant’s part than with any other cause. The damage or *injuria* must be of such kind that it would normally not have taken place in the absence of negligence. This does not necessarily imply that the onus has shifted from the plaintiff to the defendant; but if the defendant does not succeed to give an acceptable explanation for the incident, the court may find that he was negligent”⁷.

In a similar vein Jones describes the utility of the doctrine as follows:

⁵ Strauss “*The Physician’s Liability for Malpractice: A Fair Solution to the Problem of Proof?*” 1967 SALJ 419.

⁶ Giesen 515.

⁷ Claassen and Verschoor 27.

“The maxim applies where an accident occurs in circumstances in which accidents do not normally happen unless there has been negligence by someone. The fact of the accident itself may give rise to an inference of negligence by the defendant which, in the absence of evidence in rebuttal, would be sufficient to impose liability. There is no magic in the phrase *res ipsa loquitur* - “the thing speaks for itself”. It is simply a submission that the facts establish a prima facie case against a defendant. The value of this principle is that it enables a plaintiff who has no knowledge, or insufficient knowledge, about how the accident occurred to rely on the accident itself and the surrounding circumstances as evidence of negligence, and prevents a defendant who does know what happened from avoiding responsibility simply by choosing not to give any evidence”⁸.

Hirsh *et al* provide the following exposition of the doctrine:

“The underlying premise of *res ipsa* is the result bespeaks negligence- it would not happen were the defendant not negligent. It is a presumption against the defendant and in some jurisdictions shifts the burden of proof to the defendant to show lack of negligence. In others it merely shifts the burden of going forward. The rationale behind the presumption is basically twofold: convenience and fairness. By virtue of his control over the instrumentality it is assumed the defendant knows what happened. At least he is more likely to know than the plaintiff. Also, in terms of fairness the defendant is in a better position of explaining what happened. Plaintiff has been injured by something over which he had no control and certainly had no idea it would be thrust upon him”⁹.

⁸ Jones 97.

⁹ Hirsh *et al* “*Res Ipsa Loquitur and Medical Malpractice - Does it really Speak for the Patient?*” 1984 *Med Trial Tech Q* 410 412; In **Horner v Pacific Ben Ass’n Hospitals** 462 Wash 2d 351 382 P2d 518 523 (1963) Hales J expressed the following thoughts on the doctrine: “The rule is a good one, and it ought not to be muddled with over-refinement and the casuistry

so frequently the by-product of overwriting and overtalking about the same subject. We declared the rule in near original form, supported by a plethora of authority, in the following language: “This doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception to 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 the 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 explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part”. For examples of earlier landmark cases where the doctrine was considered in cases of medical negligence, see for example: **Mitchell v Dixon 1914 AD 519**; **Van Wyk v Lewis supra 438**; **Morris v Winsbury-White [1937] 4 All ER 494 (KB)**; **Mahon v Osborne [1939] 2 KB 14 [1939] 1 All ER 535 (CA)**; **Cassidy v Ministry of Health [1951] 2 KB 343 [1951] 1 All ER 574 (CA)**; **Roe v Ministry of Health [1954] 2 (QB) 66**; **Foster v Thornton 170 So 459 (Fla 1936)**; **Dierman v Providence Hospital 31 Cal2d 290 188 P2d 12 (1947)**; **Ybarra v Spanguard 25 Cal2d 486 154 P2d 687 (1944)**; **Salgo v Leland Stanford Jr Univ Bd of Trustees 154 2d 560 317 P2d 170 (Cal App 1957)**. For examples of more recent cases see: **Pringle v Administrator Transvaal 1990 2 SA 379 (W)**; **Howard v Wessex Regional Health Authority [1994] 5 Med LR 57 (QB)**; **Delaney v Southmead Health Authority [1995] 6 Med LR 355 (CA)**; **Ratcliffe v Plymouth & Torbay Health Authority [1998] LLR 162 (CA)**; **Cangelosi v Our Lady of the Lake Regional Medical Center 564 So2d 654 (1990) La LEXIS 1009 (1990)**; **Welte v Mercy Hospital 482 NW2d 437 (1992) Iowa Sup LEXIS 47 (1992)**; **Wick v Henderson, Mercy Hospital and Medical Anesthesia Associates 485 NW2d 645 (1992) Iowa Sup LEXIS 114 (1992)**.

1.2 PURPOSE

The purpose of the present thesis is to research the utility and effect of the application of the doctrine of *res ipsa loquitur* to medical negligence cases. More particularly, the aim and object of this thesis is to establish conclusively that the approach of the South African courts that the doctrine of *res ipsa loquitur* can never find application to medical negligence cases is untenable and out of touch with modern approaches adopted by other Common law countries. It is further endeavoured to provide a theoretical and practical legal framework within which the application of the doctrine of *res ipsa loquitur* to medical negligence and related matters can develop in future.

The method employed is to set off and compare the approach adopted in the legal system of South Africa with those applied in the legal systems of England and the United States of America.

1.3 CHOICE OF LEGAL SYSTEM

In selecting the legal systems of England and the United States of America for the comparative survey the following issues were considered:

1. The English legal system appears in general to be representative of the Anglo-Saxon approach also adopted in Australia and until very recently in Canada ¹⁰. In England the application of the doctrine to medical negligence cases is limited but regarded by some commentators as an important evidential tool in the armament of a ‘patient - plaintiff’.

2. In the United States of America the doctrine is applied much more liberally and there is also divergent approaches between the various states. In contrast to the South African and English systems the general requirements for the application have also been modified to a certain extent but such modification must be considered as the natural growth of the doctrine and more particularly as a more natural employment of the doctrine through adaptation to a particular field of litigation ¹¹.

3. The German legal system was also considered as representative of the Continental approach as a possible system to compare with regard to the

¹⁰ In **Fontain v Loewen Estate (1997) 156 DLR (4TH) 181** the Supreme Court of Canada held that the doctrine of *res ipsa loquitur* must be treated as expired and no longer used as a separate component in negligence actions. See also McInnes “*The Death of Res Ipsa Loquitur in Canada*” (1998) *LQR* 547-550.

¹¹ See 190 *infra*.

application of the doctrine but it would seem that the only comparable evidentiary rule is that of the “*prima facie* evidence of first appearance” (or so-called “Schussigkeit” in medical malpractice context) which had the effect of making the legal system of the USA a more attractive and appropriate choice for purposes of the comparative survey”¹².

1.4 METHODS

The method employed to deal with the application of the doctrine of *res ipsa loquitur* to medical negligence cases is to firstly, expound and discuss the legal position relating to the application of the doctrine in general and to medical negligence cases in particular, in each of the three legal systems separately, with the incorporation of case law and legal opinion and secondly, to embark on a comparative- and critical analyses by having regard to the similarities and differences of the various diverging approaches in the three legal systems. There are substantial differences between the three legal systems with regard to the requirements for, the nature of, the

¹² De Lousanoff *Facilitations of Proof in Medical Malpractice Cases: A Comparative Analysis of American and German Law* (1982) 128ff; For a further discussion of the burden of proof in medical negligence cases in German Law see: Buppert *Arzt und Patient als Rechtsuchende* (1980) 123; Deuch *Arztrecht und Arzneimittelrecht* (1992) 145; Giesen *Arzthaftungsrecht* (1992) 192, Laufs und Uhlenbruch *Handbuch des Arztrecht* (1992) 666.

procedural effect on the onus of proof and the nature of the defendant's explanation in rebuttal. These differences are further compounded by differences between the principles enunciated by the courts and the views of legal commentators on the subject. Although the aforesaid differences militate against the presentation of an accurate description of the approach followed in each legal system, it is endeavoured to find and expose as much common ground as possible in each respective legal system with reference also to case law and legal opinion. The United States of America provide an even more formidable challenge in this regard due to the diverging approaches followed by the various states and the plethora of reported cases and legal commentaries on the subject. In order to keep the parameters of this thesis within manageable bounds it is endeavoured to present a broader perspective where more emphasis is placed on majority approaches and concurring legal opinion.

In the chapters relating to the legal systems of South Africa, England and the United States of America which follow, the origin and development of the doctrine are traced and the general requirements for the application of the doctrine, the nature-and effect of the doctrine on the onus of proof and the nature of the defendant's explanation in rebuttal are expounded. A detailed exposition of the application of the doctrine to medical negligence cases

follows thereafter, with reference to case law and legal opinion. Due to the fact that the South African courts have consistently declined to apply the doctrine to medical negligence cases it is problematic to compare the South African case law with the case law of England and the USA on the subject. In contrast to the position in South Africa there is a panoply of reported authorities on the subject in England and a plethora of authorities in the USA. To also keep the comparative survey of the latter legal systems within manageable bounds the case law has been divided into broader medical categories. Most judgments selected in the text are leading ones as far as the application of the doctrine is concerned which are supplemented in some instances by reference to other important judgments in the footnotes. The opinions of legal commentators in the USA on the subject is comprehensive to the extent that an overview of such commentaries is also provided in the text.

In the chapter relating to the legal system of South Africa it will be shown that the judgment in **Van Wyk v Lewis** presently bars the application of the doctrine to medical negligence cases. In order to achieve the main objective referred to above, it is necessary to subject the **Van Wyk** judgment to close scrutiny and critical evaluation, in order to show conclusively that this

judgment should be overruled. Each chapter is concluded with a synopsis of the relevant legal principles which are applied when the doctrine is invoked generally, and with the exception of the South African legal system, to medical negligence cases in particular. A comparative and critical analyses between the three legal systems follow thereafter which include a synopsis at the end. In conclusion an attempt is made to highlight further considerations in support of the application of the doctrine to medical negligence cases in South Africa and certain *de lege ferenda* proposals are also ventured with regard to the application of the doctrine to other related legal procedures such as medical inquests, criminal prosecutions and disciplinary inquiries instituted by the Health Professions Council of South Africa.