# CHAPTER 6

# *DE LEGE FERENDA* RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE AND RELATED MEDICAL MALPRACTICE ISSUES IN SOUTH AFRICA

## 6.1 INTRODUCTION

In advocating and supporting the approach that the doctrine of *res ipsa loquitur* should be applied to certain limited but meritorious medical negligence actions in South Africa, it is important to note that the prime bases on which reliance should be placed in support of such an approach, are not so much represented by principles such as equality, fairness and related policy and constitutional considerations, but rather the fact that its application is presently barred by the majority judgment in **Van Wyk v Lewis**. In this regard it should be borne in mind that the South African courts have, for more than a century been applying the doctrine of *res ipsa loquitur* to various other delictual claims, where the requirements for the application of the doctrine have been adhered to.

South African courts have only declined to apply the doctrine to medical negligence cases because it has been argued, accepted and held that in medical context, the requirement that the occurrence must fall within the scope of the ordinary knowledge and experience of the reasonable man, cannot be met. This notion is the brainchild of the majority judgment in **Van Wyk** and until this 1924 judgment is successfully challenged and overturned, lower courts are bound to follow this approach because of the *stare decisis* legal precedent system which is adhered to in South Africa. Based on the expert evidence which was led at the trial, it is submitted that there are reasonable grounds for advancing a persuasive argument that this judgment should in fact be overruled. Although support for applying the doctrine to medical negligence actions can also be found with reference to constitutional and other considerations it is endeavoured here to primarily focus on the judgment in **Van Wyk.**

Should the judgment in **Van Wyk** be overruled, there also seems to be no compelling reason not to apply the doctrine to related medical malpractice issues such as medical inquests, criminal prosecutions arising from medical negligence and disciplinary inquiries instituted by the Health Professions Council of South Africa relating to unprofessional conduct by its members.

## 6.2 WHY SHOULD *VAN WYK* BE OVERRULED?

### 6.2.1 THE COURT'S MISDIRECTIONS RELATING TO THE EXPERT MEDICAL EVIDENCE

The general impression created by several prominent medical experts who either testified at the trial or tendered evidence on commission, was that despite the fact that there were systems in place to prevent the post operative retention of surgical products, swabs were still being left behind in the bodies of patients by careful and skilful surgeons, not because it was dangerous to search for these swabs intra-operatively, but because of a failure of such systems and human error. The evidence was furthermore indicative of the fact that it was as dangerous to leave behind a swab in the patient than to search for it intra-operatively. If an operation had to be terminated because of the patient's critical condition before a missing swab was found, the surgeon would have had to re-open the patient and remove the swab as soon as the patient was able to sustain such a further surgical intervention.

In *casu* the evidence of Dr Lewis was that he had never been made aware that a swab had been retained. It also appears that he sought to further exculpate himself by *inter alia* testifying that it was a difficult operation, where time was of the essence and it was in the patient's interest to be stitched up and removed from the operating table as soon as possible. His defence was not conducted on the basis that he had to terminate the operation before finding the missing swab because of the plaintiff's critical condition. The *gravamen* of his case was the fact that he was not even aware that there was a swab missing and if there was, he averred that it was the responsibility of the theatre sister employed by the hospital and for whom he was not vicariously liable [1].

A balanced, objective consideration and evaluation of the evidence should have led the court to conclude that the fact that the swab was post-operatively retained by the patient established a *prima facie* case of negligence [2]. The defendant was able to escape liability by tendering acceptable exculpatory evidence. The facts of the case, moreover, provide a valuable example of circumstances where the plaintiff should have been

[1] Both in the pleadings and at the trial it was denied that a swab was retained.
[2] Correctly acknowledged in the minority judgement by Kotze J.

permitted to rely on the doctrine after proving only, that the swab was post-operatively retained. This *prima facie* inference of negligence (ie the retention of the swab) would merely have required from Dr Lewis to provide an exculpatory explanation of why it had been retained. In this regard he was able to establish that he was not aware that a swab was missing and in any event the responsibility of counting the swabs and informing the surgeon, if any, were missing was apparently that of the theatre sister, who was employed by the hospital and for whose actions he was not responsible. It is submitted that the evidence relating to the fact that the patient's condition was too critical to search for the missing swab, was tendered on the hypothetical assumption that Dr Lewis was in fact aware that a swab was missing. Evidence relating to this issue can therefore only be regarded as speculative and the court could easily have disregarded such evidence completely in order to adjudicate the *lis* between the parties. Even if the defendant relied on this defence exclusively, his evidence is clear that the plaintiff would have had to be re-opened surgically as soon as possible thereafter in order to detect and remove the missing swab [3].

The Appeal Court based its holding (that *res ipsa loquitur* could not find

[3] In which case there would have been no question of negligence on his part.

application in this case) on the fact that the court would in view of the notion that the medical layman knows very little, if anything, of complicated abdominal surgery have had to also consider the surrounding circumstances provided by expert medical opinion. It is submitted that the court made two fundamental errors in this regard: Firstly, the occurrence (ie the post-operative retention of the swab) clearly bespoke negligence, even from the medical layman's point of view. It cannot be argued with any confidence that the court would have had to consider expert medical evidence to be persuaded that the swab should not have been left behind in the patient's body. It appears that the court only considered the 'surrounding circumstances' at the stage when the defendant provided his exculpatory evidence. Unfortunately the majority of the court compounded this material misdirection by elevating a speculative defence to accentuate the complexities of abdominal surgery, which had the effect of placing the 'occurrence' outside the realm of the ordinary experience and common knowledge of the medical layman.

As indicated above the court moreover also misconstrued the expert evidence by accepting that swabs are often left behind in patients' bodies if a

life threatening intra-operative situation develops. By disregarding the further evidence that such a swab cannot be left in the patient and has to be removed as soon as the patient is up to a further operation, the completely wrong impression was created and unfortunately still subsists.

### 6.2.2 THE COURT'S ERRONEOUS REASONING AS TO THE STAGE AT WHICH IT SHOULD CONSIDER WHETHER THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE HAVE BEEN MET

It is clear from the judgment that the court formed its holding that the doctrine could not find application to medical negligence cases, only after considering the evidence of the defendant. By having regard to the evidence that a surgeon in a complicated abdominal operation sometimes has to terminate the operation before searching for a missing swab, in order to save the patient's life, it seems as if the court deducted that the leaving of a swab in the body of a patient does not necessarily imply negligence and an investigation of the surrounding circumstances is required before the issue as to the possible negligence of the defendant can be decided. It is respectfully submitted that this approach by the court conflates a question of law (ie

whether an inference of negligence can be drawn from the occurrence itself) and a question of fact (ie whether the facts, including the evidence of the defendant, or absence of such evidence support the inference of negligence).

It cannot seriously be contended that the leaving behind of a surgical instrument in the body of a patient after the completion of an operation does not create a *prima facie* inference of negligence (which does not require the court to have regard to any surrounding circumstances). Viewed in this context, Mrs van Wyk adhered to the requirements for the application of the doctrine (at the stage of closing her case) because she had established the facts (proof of the retention of the swab in her body) upon which an inference of negligence (which is a question of law), may be drawn. The courts approach of having regard to the defendant's explanation in order to decide whether the inference of negligence is derived from an 'absolute' and not something 'relative', is with respect, a fundamental misdirection. To illustrate the court's erroneous reasoning in this regard, the example of a motorvehicle skidding onto its incorrect side of the road provides an appropriate comparison by way of analogy.

South African courts accept that evidence of the skidding of a motorvehicle onto its incorrect side of the road, establishes a *prima facie* inference of

negligence on the part of the driver of that vehicle and the doctrine could therefore legitimately be applied to these circumstances. If the defendant, for example, tenders expert evidence to the effect that the skid was caused as direct result of a malfunction of the motorvehicle's 'ABS braking system' (the mechanical and engineering details and operation of such an advanced braking system cannot possibly fall within the common knowledge and ordinary experience of the reasonable man) this explanation should be sufficient to exculpate him. If the **Van Wyk** court's reasoning is applied to this example, the court would find that the doctrine cannot be applied to accidents of this nature because the layman knows very little, if anything, about the complicated workings of an advanced braking system of a modern motorvehicle.

The logical conclusion of this form of erroneous reasoning is that the doctrine cannot be applied to any accident where the exculpatory explanation tendered by the defendant, involves matters of a technical or complicated nature which ordinarily falls outside the scope and experience of the reasonable man. This approach is clearly wrong and provides another compelling reason for this judgment to be overruled.

## 6.3 OTHER CONSIDERATIONS WHICH SUPPORT THE APPLICATION OF THE DOCTRINE TO MEDICAL NEGLIGENCE CASES

### 6.3.1 THE CONSTITUTIONAL PRINCIPLES OF EQUALITY AND THE RIGHT TO A FAIR TRIAL

In terms of Section 9 of the **Constitution of the Republic of South Africa Act** [4] everyone is equal before the law and has the right to equal protection and benefit of the law. In this regard it could be argued that the victim of a medical accident is at a procedural disadvantage because of the fact that a patient is usually anaesthetised or under the influence of an anaesthetic agent when the accident occurs, as a result of which, he or she is completely in the dark as to what actually happened. To permit the plaintiff under these circumstances, to rely on *res ipsa loquitur* would level the playing fields between the plaintiff and the defendant to a certain extend by promoting procedural equality. Section 34 of **Act 108 of 1996 (as amended)** also recognises the right to fairness in civil litigation which provides further constitutional motivation for the application of the doctrine to medical negligence actions.

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[4] **Sec 9(1) Act 108 of 1996 (as amended)**. See also Carstens 1999 *De Jure* 26.

During March 2001 the **Promotion of Access to Information Act** [5] came into force. In terms of section 50 of this Act a patient is now entitled to request access to his medical records provided that such access is required for the exercise or protection of any rights, that the procedural requirements of the act is adhered to and that the access is not refused in terms of any ground for refusal as specified in the Act. The promulgation of this Act can be regarded as one of the most significant breakthroughs with regard to medical accidents from the patient's perspective. A patient was previously only entitled to inspect such records after legal proceedings had been instituted in terms of the practices of discovery of documents provided by the rules of the lower and higher courts [6]. The fact that a patient is able to inspect his medical records prior to litigation will now enable his legal representatives to investigate the merits of a possible medical negligence claim with much more precision and may even lead to a reduction of malpractice claims because accurate medical record keeping with regard to the medical intervention under investigation will usually reflect the circumstances under which the medical accident occurred and if there is little prospect of success an action will be ill-advised.

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[5] **Act 2 of 2000**.
[6] Rule 35 of the High Court Rules and Rule 23 of the Magistrate's Court Rules.

### 6.3.2 POLICY CONSIDERATIONS

Policy considerations supporting the application of the doctrine of *res ipsa loquitur* to medical negligence cases include the defendant's greater access to the facts explaining the injury, the plaintiff's frequent unconscious or anaesthetised state at the time of the injury, the special fiduciary relationship between the medical practitioner and the patient as well as the perceived 'conspiracy of silence' and reluctance to provide expert medical testimony amongst medical practitioners. These considerations support the view that it is more just and equitable to require from the defendant to provide an explanation as to what exactly happened than to require the plaintiff to prove specific acts of negligence under circumstances where he is usually not in a position to do so [7].

### 6.3.3 MODERN APPROACHES IN OTHER LEGAL SYSTEMS

It is clear from the comparative survey between South Africa, England and the United States of America that the approach of the South African courts with regard to the application of the doctrine of *res ipsa loquitur* to medical

[7] See supra 158.

negligence actions is out of touch with modern trends in this regard. The more patient-orientated approach initiated in **Castell v De Greef** [8] is in line with developments in other legal systems with regard to Health Care Law in general, and creates an environment where further traditional and outdated approaches such as the approach adopted in **Van Wyk v Lewis** can be successfully challenged. The emphasis which is placed on patient-orientated informed consent as well as advanced information technology furthermore have the effect of placing certain aspects of medical science within the common knowledge and ordinary experience of the reasonable man which in turn expands the parameters of the possible application of the doctrine to medical negligence cases.

## 6.4 DE LEGE FERENDA RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE TO SPECIFIC MEDICAL MALPRACTICE PROCEDURES IN SOUTH AFRICA

### 6.4.1 CIVIL MEDICAL NEGLIGENCE CASES

Despite the fact that a plaintiff, by using the provisions of the **Promotion of**

[8] **supra 408**. The Supreme Court of Canada has however abolished the doctrine completely.

**Access to Information Act,** is now able to obtain copies of all medical records pertaining to his treatment before formulating his claim, it is submitted that the application of the doctrine of *res ipsa loquitur* could still play an important role in medical negligence cases. In this regard it must be borne in mind that medical records are not always accurate especially those records which relate to a medical emergency, where different role players each contribute to the treatment and the records are usually completed after the event. These records may be incomplete or certain vital information may not have been recorded. There is also the possibility that records may be tampered with or amended to the defendant's advantage, before copies are made available [9].

In South Africa the principle that the plaintiff cannot rely on the doctrine if the facts are known is well-established and understandable [10]. There seems to be no reason, however, why a plaintiff should not be allowed to rely on the doctrine in the alternative. The main reason for applying the doctrine, is to assist the plaintiff to at least establish a *prima facie* case in circumstances

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[9] See for example **Michael v Linksfield Park Clinic (Pty) Ltd 2001 3 SA 1188 (SCA)** where the second defendant deviously contrived a false and misleading operation record which attracted an adverse costs order.

[10] **Groenewald v Conradie supra 187**.

where the occurrence proclaims negligence but where the true facts are unknown to the plaintiff. It is submitted that the policy considerations referred to supra, support the approach that a medical defendant should at least be required to explain how the accident happened when he is in a position to do so. The fact that there is no shifting of the *onus* to the defendant provides adequate protection to the defendant from an evidential point of view.

In practice so-called blatant medical blunders such as the erroneous amputation of a healthy limb or injury to a healthy part of the body remote from the operation site, seldom if ever goes to court on the merits and the plaintiff will usually also be in a position to plead specific acts of negligence. While this may be the practical position there appears to be no reason in theory why a plaintiff should not be able to rely on the doctrine should he choose to do so or perhaps rely on the doctrine in the alternative.

In more complicated actions the English '**Ratcliffe model'** commends itself for acceptance. It is submitted that a plaintiff should both be permitted to prove the necessary facts relating to the accident from which the inference of negligence may be drawn and tender expert medical evidence to the effect

that this type of accident should nor occur if due care has been exercised. In this regard it is reiterated that the doctrine merely assists the plaintiff to establish a *prima facie* case. In medical negligence cases that is seldom where the evidential problems for the plaintiff cease but it's application should at least require the defendant to explain the accident and allow the plaintiff to test this version by way of cross-examination. It is often extremely difficult, in any event, to prove that all the consequences from which the plaintiff suffers were occasioned by the accident. Where, for example a malignant tumour is misdiagnosed it is often impossible for the plaintiff to prove on a balance of probabilities that a correct diagnosis at the time would have significantly influenced the outcome or the final prognosis.

The existing approach of the South African courts with regard to the procedural effect of the doctrine on the *onus* of proof and the nature of the defendant's explanation in rebuttal is acceptable. If the defendant elects not to give evidence the court can still rule in his favour despite the fact that the plaintiff has established a *prima facie* case by applying the doctrine. In this regard it is submitted, however, that if there is evidence that the defendant is in a position to explain the accident but elects to close his case without

leading such evidence, the court should draw a negative inference from such election which, together with the inference of negligence derived from the application of the doctrine, should be able to elevate the *prima facie* case of the plaintiff to conclusive proof status.

### 6.4.2 MEDICAL INQUESTS

In terms of Section 16(2) of the **Inquests Act** the judicial officer holding an inquest is charged to record a finding as to the identity of the deceased, the cause or likely cause of death, the date of death and as to whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person [11].

The laws governing criminal trials are to be applied to certain procedures of the Inquest Court [12] and as will appear from a discussion of the application of the doctrine of *res ipsa loquitur* to criminal prosecutions, infra, it would

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[11] The Inquests Act, Act 58 of 1959 (as amended).

[12] Section 8. See also: Strauss 436-438; Carstens *"Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op grond van Nalatigheid"* 1996 (unpublished doctoral thesis UP) 313-318.

appear that the doctrine can be applied in such prosecutions and hence could also find application to a judicial inquest on that basis. The facts of a recent unreported medical inquest held in the Bellville magistrate's court, provides an interesting example of where the doctrine could have found application in a medical inquest [13].

On 19 February 1997 the deceased (who was suffering from leukaemia at the time) received two chemotherapeutic agents intrathecally from a doctor at the Tygerberg Hospital. One of the chemotherapeutic agents (Vincristine) which was administered intrathecally should have been administered intravenously. After re-admission to the Hospital's ICU unit for observation, the deceased displayed signs of ascending *polyneuropathy*. His condition continuously deteriorated and eventually on the 7 March 1997 adrenalin infusion was discontinued and he was extubated. At 13h02 the deceased was asystolic with no detectable bloodpressure. According to expert medical evidence at the inquest inadvertent intrathecal administration of Vincristine

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[13] **In re C Goldie GDO 154/99** (unreported).

is not only considered life-threatening but usually fatal. The doctor testified that she misunderstood telephonic instructions from a colleague and because she did not have previous experience in administering the drug, the accident occurred.

One of the other possibilities with regard to the possible cause of death considered at the inquest was that of the deceased suffering a neurotoxic fatal reaction to the intrathecal administration of the other drug Methotrexate which was administered at the same time. At *post mortem*, the cause of death was described by the neuropathologist as a toxic/metabolic etiology originating in the CSF. Some of the expert medical evidence was further to the effect that it could not be said with certainty whether the injury was caused by the Vincristine or a possible neurotoxic reaction to the Methotrexate. Legal representatives of some of the interested parties argued that the court could not establish the cause of death on this basis and if the cause of death was unknown at *post mortem*, nobody could be held accountable for the deceased' death.

If the Inquest Court applied the doctrine of *res ipsa loquitur* to the facts of this case, the facts giving rise to the inference of negligence would simply have been the inadvertent intrathecal admimistration of the Vincristine. Such evidence would have pointed to *prima facie* negligence by the doctor who administered the agent and would also have established a *prima facie* cause of death. The doctor would have had to furnish an exculpatory explanation. If it was found that the misunderstanding between the doctors, although unfortunate, could not exculpate the doctor who administered the drug, the explanation relating to another plausible non-negligent cause of death ie the possible neuro-toxic fatal reaction would then have had to be weighed with all the other evidence.

In this inquest the court rejected the possible neurotoxic reaction to the Methotrexate as a probable cause of death and also found that the deceased' death was brought about by the inadvertent intrathecal administration of the Vincristine which *prima facie* amounted to an offence by the doctor. It appears that the doctrine could be successfully utilized to assist an Inquest Court to record its findings, as the above example clearly illustrates [14].

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[14] Although the law which applies to criminal proceedings is made applicable to certain specified matters by section 8, Inquests are not regarded as criminal prosecutions as such. See **Wessels v Additional Magistrate Johannesburg 1983 1 SA 530 (T)**.

### 6.4.3 CRIMINAL PROSECUTIONS

The courts in South Africa have applied the doctrine of *res ipsa loquitur* in criminal prosecutions in general and similarly there seems to be no compelling reason not to apply the doctrine to criminal proceedings which follow a medical accident, in particular.

The important difference between civil and criminal proceedings in this regard is the standard of proof to be applied at the end of the case when the court considers all the evidence. The standard of proof 'beyond reasonable doubt' will obviously require more proof for a conviction to stand compared to the 'balance of probabilities' standard which is applicable to civil actions [15].

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[15] See **S v Mudoti supra 278**; **S v Maqashalala 1992 1 SACR 620 (Tk)**.

### 6.4.4 DISCIPLINARY INQUIRIES INSTITUTED BY THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

The disciplinary committee of the Health Professions Council of South Africa is a creature of statute and is not a court of law but a professional body acting in a quasi-judicial capacity [16]. The conduct of disciplinary inquiries held in terms of the Act are governed by regulations.

With regard to procedure and evidence it has been held that bodies such as the disciplinary committee should be held more strictly to the rules of procedure practiced by a court of law. The extent to which such adherence is required will be influenced by the circumstances of the case, the subject matter of the inquiry, and particularly the rule of procedure or evidence which is sought to be applied, the principle being, that the less technical that rule of procedure and evidence is, the more likely the tribunal will be held bound by it [17].

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[16] The Health Professions Council acts in accordance with the regulations promulgated under **Section 61(1)(h)**, read with **Section 61(4**) of the Health Professions Act, 1974 (Act 56 of 1974) as amended. Government Notice No 22584 24 August 2001.

[17] **De La Rouviere v SA Medical and Dental Council 1977 1 SA 85 (NPD)**. See also: **South African Medical and Dental Council v McLoughlin 1948 2 SA 355 (A) 410**; **South African Medical and Dental Council v Lipron 1949 3 SA 277 (A)**.

There seems to be no reason in principle why the *pro forma* prosecutor in such an inquiry should not be permitted to rely on the doctrine, particularly where the subject of the charge relates to medical negligence causing injury. In this regard it should be born in mind that the medical practitioner is usually insured and legally represented by experienced lawyers who would be familiar with the doctrine and who would ensure that their clients' rights are protected in this regard. A recent disciplinary inquiry provides an interesting example of an instance where the application of the doctrine would probably have assisted the complainant to a certain extent [18]. The pro forma charge sheet read as follows:

> "…THAT you are guilty of improper or disgraceful conduct or conduct which when regard is had to your profession is improper or disgraceful in that on or about…and in respect of Mr E ('your patient') you performed a laparoscopic cholecystectomy ('the operation') whilst you failed to take adequate precautions and/or failed to exercise due care in light of adhesions in your patient's abdomen and thereby caused damage to your patient's small bowel".

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[18] **MP 0-24570-4/313/97**.

The legal representative acting for the surgeon successfully objected to the leading of any evidence relating to the post-operative course and treatment afforded to the complainant because of the restrictive manner in which the charge had been formulated. Should such evidence have been indicative of culpable substandard care, the accused may have been convicted. It is submitted that if the doctrine of *res ipsa loquitur* would have been applied to the circumstances of this inquiry, the accused would certainly have had to deal with the whole of the treatment (including the post-operative treatment) of the complainant in order to satisfy the requirements which are applicable to an exculpatory explanation in rebuttal. In this instance the accused was acquitted as the intra operative intervention was not regarded by the board as sub-standard or indeed negligent [19].

## 6.5 PLEADING *RES IPSA LOQUITUR* IN MEDICAL NEGLIGENCE CASES

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[19] See also in general: Taitz *"The Disciplinary Powers of the South African Medical and Dental Council"* 1988 *Acta Juridica* 40; Strauss 369 376; Carstens 1996 (unpublished doctoral thesis UP) 318ff; **Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad 1996 4 SA 1120 (T)**.

### 6.5.1 GENERAL

A pleading, in general, can be considered as a document which sets out the facts upon which the legal relief a party claims, is based [20]. The object of a pleading is to state the facts clearly and concisely upon which a party relies so that the other party can come to court prepared to meet that case and also to enable the court to identify the issue or issues it is to adjudicate upon [21].

With regard to conclusions, opinions or inferences, the facts giving rise to for example, an inference, must be pleaded. It is submitted that the facts which a party relies on to establish a basis upon which the doctrine of *res ipsa loquitur* can be invoked must be pleaded and set out in the plaintiff's particulars of claim.

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[20] Harms *Civil Procedure in the Supreme Court* (2001) 236. See also in general: **Trope v South African Reserve Bank 1993 3 SA 264 (A)**; **Jowell v Bramwell-Jones 1998 1 SA 836 (W)**; Supreme Court Rule 18(4).
[21] **Du Plessis v Nel 1952 1 SA 513**; **Ferreira v SAPDC (Trading) Ltd 1983 1 SA 235 (A)**.

### 6.5.2 *RES IPSA LOQUITUR*

It appears as if a plaintiff who is able to plead specific acts of negligence is not permitted to rely on the doctrine at all [22]. As discussed supra, however, there seems to be no reason why a plaintiff should not be able to rely on the doctrine in the alternative.

In **Madyosi v SA Eagle Insurance Co Ltd** the plaintiff alleged facts which are *res ipsa loquitur* but went on to particularise the cause. Comrie J referred to the judgment of Greenberg J in **Naude NO V Transvaal Boot and Shoe Manufacturing Co** where he said that –

> "I, have considered the ambit of plaintiff's allegations of negligence, on the basis that it was not necessary for plaintiff, in his declaration, to allege any specific ground of negligence and that it would have been sufficient merely to alledge the bare incidents that the car was parked by the defendants agent on an incline, started off on its own accord and collided with Miss Naude while she was on the pavement…Nevertheless, plaintiff having alleged specific grounds of negligence, in my opinion, is limited to these grounds",

and found that, where in an action for damages arising from an accident the plaintiff alleges facts which are *res ipsa loquitur* and then goes on to

[22] **Groenewald v Conradie supra 187**.

particularize the cause by identifying the person responsible and alleging specific acts of negligence the plaintiff has limited his case and has conveyed that limitation to the defendant. Should the defendant admit the *res ipsa loquitur* facts and plead an explanation no new issue is created although the defendant will attract a duty to adduce some rebutting evidence in support of the explanation. He further found that whether or not the plaintiff alleges *res ipsa loquitur* the defendant has a duty to plead a defence or explanation such as sudden mechanical failure so that the plaintiff is alerted to evidence for which he may otherwise be unprepared [23].

It appears that when the plaintiff alleges *res ipsa loquitur* the defendant must either admit or deny or confess and avoid all the material facts alleged by the plaintiff or state of the stated facts are not admitted. He must also clearly and concisely state all the material facts upon which he relies. This means that the defendant will not be entitled to rely on a defence which he has not specifically pleaded [24].

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[23] **supra 185ff**.
[24] Cooper 113.

Should the above general principles of pleading *res ipsa loquitur* be applied in medical context the following suggestions are advanced in this regard:

1. The plaintiff should clearly and concisely plead the facts upon which *res ipsa loquitur* is alleged.
2. If the plaintiff relies on specific acts of negligence arising from a medical accident it is submitted that this should not preclude him from relying on *res ipsa loquitur* provided that he pleads those facts as an alternative.
3. The defendant should clearly and concisely plead all the facts upon which his explanation in rebuttal is based. If the defendant denies the *res ipsa loquitur* allegation without pleading an explanation he should not be permitted to do so at the trial because the plaintiff will be unprepared to meet such evidence at that stage of the proceedings.
4. A clear and concise exposition of the facts which establish the defendant's exculpatory explanation in his plea provides the opportunity for the plaintiff to adequately prepare for trial and could conceivably also facilitate out of court settlements where the explanation in rebuttal is of such a nature that the plaintiff, who bears the *onus*, would have little prospect of success at the trial.

## 6.6 CLOSING REMARKS

The principles relating to the application of the doctrine of *res ipsa loquitur* in general, are well settled and applied consistently by South African courts. On the assumption that the doctrine of *res ipsa loquitur* will remain an important weapon in the evidentiary armament of a plaintiff in personal injury cases, it is of extreme importance that its application be extended to medical accidents for the reasons advanced supra. Provided that the doctrine is applied to limited but meritorious medical negligence actions in an even and consistent fashion remarks such as the following will be negated once and for all:

> "Lawyers are often accused of using Latin tags to befuddle the public and demonstrates that the law is far to difficult to be left to mere laymen. Some Latin phrases, seem to befuddle the lawyers themselves. *Res ipsa loquitur* is a case in point" [25].

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[25] Anonymous "*Does Res Ipsa Loquitur speak for itself?*" 1998 *PI* 6.