

**THE APPLICATION OF THE DOCTRINE OF *RES IPSA*  
*LOQUITUR* TO MEDICAL NEGLIGENCE CASES:  
A COMPARATIVE SURVEY**

by

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## PREFACE

This work was completed in January 2002 and submitted as a doctoral thesis at the University of Pretoria. It assumed a long, sometimes arduous journey through legal minefields in an endeavour to extricate the essence of the highly controversial doctrine of *Res Ipsa Loquitur* as applied to medical negligence cases.

During the research period my initial promotor Ferdinand van Oosten passed away tragically and Prof Carstens kindly agreed to assist and guide me to the finalization of the project. I am extremely grateful for his patience, encouragement and unfailing support throughout.

Special thanks are due to Carl van Rensburg, who obtained a copy of the record of **Van Wyk v Lewis** from the archives of the Supreme Court of Appeal in Bloemfontein, Tommy Prins, Jean Nell and Gillian Coutinho, for their assistance especially with regard to the research in respect of the English and American Law. My heartfelt thanks also go to Christa Buys for her sterling effort with regard to the final editing of the manuscript.

The task of completing a thesis puts a strain not merely on the author but also on his family, friends and colleagues. My thanks are due to all who



endured the process with such patience, fortitude and support, especially Luana, Joy and my children Jannah and Pat.

I dedicate this work to the memory of Vic and Ferdinand.

January 2002

Patrick van den Heever

## SUMMARY

The application of the doctrine of *res ipsa loquitur* to medical negligence cases: a comparative survey by Patrick van den Heever, submitted in partial fulfillment for the requirements for the degree of DOCTOR LEGUM in the DEPARTMENT OF PUBLIC LAW, FACULTY OF LAW, UNIVERSITY OF PRETORIA, under the supervision of Prof P A CARSTENS.

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

**The research includes a comprehensive comparative survey of the diverging approaches with regard to the application of the doctrine to medical negligence cases between the legal systems of South Africa,**

**England and the United States of America. The most important conclusions which the investigation revealed were the following:**

**1. There are substantial differences with regard to the application of the doctrine between the three legal systems, with regard to the requirements for, the nature of, the 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 opinions of legal commentators on the subject.**

**2. Whereas the approach adopted by the South African courts with regard to the application of the doctrine to medical negligence cases is outdated and untenable, more legal clarity, however, exists in South Africa with regard to the application of the doctrine to personal injury cases in general, so that the existing principles which are applied provide a structure within which the extension of its application to medical accidents can be readily accommodated.**

**3. The current approach adopted by England, where provision is made for the application of the doctrine to obvious medical blunders as well as more complex matters, where the plaintiff is permitted to buttress evidence**

relating to the *res* with expert medical evidence, commends itself for acceptance. Such an approach not only alleviates the plaintiff's burden of proof but also provides adequate protection to the defendant by endorsing the principle of honest doubt in the form of letting the defendant prevail if he comes to court and explains that despite due care, untoward results do sometimes occur especially in the practice of medicine.

**4. The approach adopted by the majority of jurisdictions in the United States of America is probably too liberal and unstructured so that it may in some instances result in the imposition of liability in medical context, in a arbitrary fashion.**

5. Constitutional principles such as procedural equality, policy and other considerations support the extension of the application of the doctrine to medical negligence cases in South Africa. There are also substantial grounds for advancing a persuasive argument that the majority judgment in the **Van Wyk v Lewis case** should be overruled and that the general application of the doctrine of *res ipsa loquitur* should not only be extended to cases of medical negligence, but also to related legal procedures which follow a medical accident such as medical inquests, criminal prosecutions and disciplinary inquiries instituted by the Health Professions Council of South Africa.

## OPSOMMING

Die toepassing van die leerstuk van *res ipsa loquitur* in gevalle van mediese nalatigheid: 'n regsvergelykende studie

deur Patrick van den Heever, voorgelê ter vervulling van 'n deel van die vereistes vir die graad DOCTOR LEGUM, in die DEPARTEMENT PUBLIEKREG, FAKULTEIT REGSGELEERDHEID, UNIVERSITEIT VAN PRETORIA, onder promotorskap van Prof P A CARSTENS.

Die oogmerk en doel van hierdie proefskrif is om die aanwending en die effek van die toepassing van die leerstuk van *Res Ipsa Loquitur* op sake van mediese nalatigheid te ondersoek. In die besonder is gepoog om oortuigend aan te toon dat die huidige benadering van die Suid-Afrikaanse howe, naamlik dat die leerstuk nie op sake van mediese nalatigheid toepassing kan vind nie, mank gaan aan akademiese en praktiese stamina, en nie tred hou met moderne benaderings wat gevolg word in ander gemenereg lande nie. Daar word voorts gepoog om 'n teoretiese en praktiese raamwerk daar te stel, waarin die toepassing van die leerstuk op mediese- en ander verwante sake van mediese wanpraktyk, kan ontwikkel in die toekoms.

**Die navorsing behels 'n omvattende regsvergelykende oorsig met betrekking tot die verskillende benaderings wat gevolg word in die regstelsels van Suid-Afrika, Engeland en die Verenigde State van Amerika met betrekking tot die toepassing van die leerstuk op sake van mediese nalatigheid. Die belangrikste gevolgtrekkings wat die ondersoek blootgestel het was die volgende:**

**1. Daar is aansienlike verskille met betrekking tot die toepassing van die leerstuk tussen die drie regstelsels ten aansien van die voorvereistes, aard, prosesregtelike effek op die bewyslas en die aard van die verweerder se verontskuldigende verduideliking in antwoord daarop. Hierdie verskille word verder beklemtoon deur verskille tussen die beginsels wat deur die howe nagevolg word in teenstelling met opinies van regsgeleerdes op die onderwerp.**

**2. Alhoewel die benadering van die Suid-Afrikaanse howe ten opsigte van die toepassing van die leerstuk op sake van mediese nalatigheid waarskynlik te konserwatief is, heers daar egter meer regsekerheid ten opsigte van die algemene toepassing daarvan op deliktuele sake as in die ander twee regstelsels met die gevolg dat die bestaande beginsels 'n struktuur daarstel, wat die uitbreiding van die**

**toepassingsgebied van die leerstuk tot sake van mediese nalatigheid, gemaklik kan huisves.**

3. Die huidige benadering wat deur Engeland gevolg word naamlik dat die leerstuk toegepas word op ooglopende mediese ongelukke sowel as meer ingewikkelde sake, waar die eiser toegelaat word om die *res* met deskundige mediese getuienis aan te vul, is besonder ontvanklik vir aanneming. Nie alleen vergemaklik hierdie benadering die eiser se bewyslas nie maar bied ook terselfdertyd genoegsame beskerming aan 'n verweerder wat homself van sy weerleggingslas kwytskuldig as hy tot bevrediging van die hof kan aantoon dat ten spyte van die uitoefening van alle redelike sorg, komplikasies nogtans kan intree in mediese konteks.

**4. Die benadering van die meerderheid jurisdiksies in die VSA is waarskynlik te liberaal en gaan in sommige opsigte mank aan struktuur, met die gevolg dat dit kan lei daartoe dat regs aanspreeklikheid op 'n arbitrêre wyse kan volg.**

5. Konstitusionele beginsels soos prosesregtelike gelykheid, beleids- en ander oorwegings ondersteun die uitbreiding van die leerstuk tot mediese nalatigheid sake in Suid-Afrika. Daar bestaan ook geldige redes vir 'n oortuigende betoog dat die meerderheidsbeslissing in die **Van Wyk v Lewis-**

saak omvergewerp behoort te word en dat die toepassing van die leerstuk nie alleen uitgebrei behoort te word tot sake van mediese nalatigheid nie maar ook tot verwante mediese wanpraktyk aangeleenthede soos mediese-geregtelike doodsondersoeke, strafregtelike vervolgings en tugondersoeke van die Raad vir Gesondheidsberoepes van Suid-Afrika.