CONTAMINATION WITH HIV ON THE SCENE OF AN ACCIDENT DUE TO THE NEGLIGENCE OF PARAMEDICAL PROFESSIONALS: CHALLENGES FOR DETERMINING LEGAL LIABILITY

Franks v MEC for the Department of Health , Kwazulu-Natal unreported case no 2958/02 dated 20 January 2010 (KZP)

1 Introduction

Since the HIV/AIDS-epidemic, contemporary South African jurisprudence has focused almost exclusively on the rights and duties of people living with HIV/AIDS. In this regard the science of the disease, confidentiality issues, health care insurance benefits and access to health care, discrimination against people with HIV and HIV in special settings (such as hospitals, schools and prisons) have been legally analysed (see Cameron *Witness to AIDS* (2005) 42ff; Hassim,

Heywood and Berger (eds) *Health and democracy* (2007) 276ff; Carstens and Pearmain *Foundational principles of South African medical law* (2007) 809ff; cf *Van Vuuren NNO v Kruger* 1993 4 SA 842 (A); *C v Minister of Correctional Services* 1996 4 SA 292 (T); *Venter v Nel* 1997 4 SA 1014 (D); *Van Biljon v Minister of Correctional Services* 1997 4 SA 441 (C); *Hoffmann v South African Airways* 2001 1 SA 1 (CC); *Minister of Health v Treatment Action Campaign* 2002 5 SA 717 (CC); *VRM v Health Professions Council of South Africa* 2003 JOL 11944 (T); *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C); *EN v Government of the RSA* 2007 JOL 18957 (D); *NM v Smith* 2007 5 SA 250 (CC)). However, the rights of "innocent" victims who have been infected with HIV due to unfortunate circumstances (such as motor-vehicle accidents and subsequent improper medical treatment), have up till now received no or very little attention in South African medical law. The primary focus in the assessment of medical negligence in this regard up till now, was on the negligent transfusion of blood contaminated with HIV (see Smit "Regsaanspreeklikheid wat kan onstaan vanweë 'n bloedoortapping" (unpublished LLM dissertation UNISA (1992)) 17ff; Strauss "Legal liability for transmission of AIDS virus by means of blood transfusion" 1991 *South African Practice Management* 16; Van Wyk "Aspekte van die regsproblematiek rakende VIGS" (unpublished LLD thesis UNISA 1991) 23ff; Van Wyk "Blood transfusions, HIV and legal liability in South Africa" 2005 *Medicine and Law* 615ff; see also the case of *X v SA Blood Transfusion Services*, unreported, discussed by Strauss 1991 *South African Practice Management* 18 (this case involved a negligent blood transfusion with contaminated blood [the blood contained the AIDS virus] – the doctor was, however, not involved); cf in general Carstens and Pearmain 809ff).

It is to be noted that the alleged legal liability on account of the negligent transmission of HIV in any of the abovementioned scenarios, more often than not, was mainly dependant on the fact whether factual causation and legal causation could be determined or proved. It is for this reason that the present case under discussion offers legal dimensions of note, specifically in the field of the law relating to the negligence of paramedical professionals in particular, and medical negligence in general.

2 The facts

The salient but somewhat protracted facts of the case appear from the judgment of Patel J: On 31 August 2000 and at about 18:30 the vehicle in which the plaintiff (Denise Franks) was a front-seat passenger collided with one Mthalane, a male person (the deceased). It was common cause that Mthalane would have died within 5 to 10 minutes after the impact. The paramedics, Dayal and Dookie, who were at all material times servants of the defendant and acting in the course and scope of their employment, arrived at the scene 50 to 55 minutes later and attended to the plaintiff. Dayal had physical contact with the deceased when he went to declare him dead. The plaintiff was a healthy, married woman who had a monogamous sexual relationship with her husband at the time of the accident. The plaintiff's husband tested HIV negative in various tests conducted after the date of the accident. Although the plaintiff had had a hysterectomy operation some time before the accident and dental surgery to remove a tooth two days before the accident, Professor Smith, the defendant's expert witness, discounted these interventions as a possible reason for the infection. The plaintiff tested HIV negative on 1 September 2000, one day after the accident. Although there was no

real evidence before the court that Mthalane was HIV positive or had full-blown AIDS, he appeared to have some association with HIV/AIDS, as there was more than one telephone number for AIDS-helplines in his handwriting in his notebook, as identified by his father. It was not in dispute that Dayal rendered assistance to the plaintiff both outside and inside the ambulance although the nature of the intervention provided by him was in dispute. Dayal also pronounced Mthalane dead and touched his body in various parts in order to do so.

The plaintiff was taken to Medi-Clinic in Pietermaritzburg after the treatment administered on the scene and the wound to her head was sutured and after further treatment she was discharged on 5 September 2000. She went back to Johannesburg and received further treatment in the form of cortisone tablets and observation at the Linksfield Clinic. Upon showing signs of seroconversion illness during September 2000 she was further attended to by doctors Blott and Spencer. On 17 October 2000, after obtaining blood test results, it was confirmed by Dr Blott that the plaintiff had tested positive for HIV on or about 10 October 2000. With the then extant method of testing, the medical experts all placed the estimated time of contamination with the virus at the end of August 2000 or the beginning of September 2000, that is, at about the time of the collision. All the experts agreed that the virus does not float in the air and the plaintiff must have become infected by cutaneous or mucosal exposure to blood or other body fluids contaminated with HIV. The prevalence of the HIV virus in the male population in KwaZulu-Natal in and around 2000 was, according to the experts, in the region of 30%.

According to the expert evidence the only possible cause of plaintiff contracting HIV was through sexual contact with an infected partner or contact with contaminated blood or other fluid. The possibility of contamination of the plaintiff through sexual contact with an infected partner was excluded in evidence. It was not disputed that she was monogamous and that her husband tested HIV negative in the various tests done after the collision. The only other possibility was plaintiff coming into contact with contaminated blood. Infection through the hysterectomy that the plaintiff underwent during March 2000 and the dental surgery that the plaintiff had two days before the accident was discounted by Professor Smith, the defendant's witness, as well as by the other doctors who testified. The plaintiff's treatment at the Medi-Clinic in Pietermaritzburg after the accident was also excluded by the evidence of Dr Chite. The defendant could not point to any act or omission at the Medi-Clinic which could have led to contamination. The only incident of any significance that occurred at the Medi-Clinic was that one of the nurses pricked herself with a needle when handling the plaintiff. The incident caused the clinic to test both the plaintiff and the nurse for HIV. Both the plaintiff and nurse tested negative and all the experts including Professor Smith accepted that at that stage the plaintiff was negative. This incident could also be excluded as a possibility as the nurse pricked herself and the virus would then have been transferred to the nurse and not the plaintiff. In any event there was no evidence that the nurse later experienced any seroconversion and had to be put on anti-retroviral medication. Similarly, the plaintiff's subsequent treatment at the Linksfield Clinic could also be excluded as a possible cause. She only received oral cortisone treatment and was under observation. On her evidence, which was undisputed, there were no needles used, no blood transfusions or anything in the treatment that could have led to a contamination. Dr Spencer also excluded this as a possibility. He testified that the plaintiff was

already showing signs of the seroconversion illness when she was taken to the Linksfield Clinic, which means that she was already contaminated. The contamination could therefore not have taken place at the Linksfield Clinic. The only possible cause at the Linksfield Clinic was put by the defendant's counsel to Professor Martin in cross-examination for the first time. This was a "bone marrow trephine and aspirate" referred to in the report of Dr Spencer dated 10 October 2000. However, this possible cause was excluded by Professor Martin when his attention was drawn to the fact that the said procedure was done at the request of Dr Blott, who only saw the plaintiff for the first time on 27 September 2000. At that stage the plaintiff was already presenting with acute seroconversion illness. It was apparent from the abovementioned that the only possible (and probable) cause of the contamination was the scene of the accident.

3 The legal issues

On behalf of the plaintiff it was contended that she was treated in a manner which failed to exclude the contamination of the plaintiff's blood with HIV from Mthalane. Her medical treatment was attended by negligence on the part of Dayal or alternatively Dookie in that they failed to perform the treatment in a professional manner. The particulars of the negligence as pleaded were as follows:

> "They failed to perform the said treatment of the plaintiff with the degree of care and skill required of the reasonable paramedical professionals and/or ambulance personnel in that they failed properly or at all to take the following into account: The commonly known high incidence of HIV infection prevailing in South Africa at the time; the fact that they were dealing with two patients and/or persons at the same time or at more or less the same time who both had open wounds and which wounds were bleeding and/or were exposing fresh human blood."

The court had thus to assess the vicarious liability of the MEC for the Department of Health, based on negligence of the paramedical professionals. This assessment entailed a scrutiny of delictual liability with specific reference to the element of causation and fault. It is to be noted that the parties requested the court at the outset to order a separation of the determination of the merits from the quantum in this case in terms of Rule 33(4) of the High Court Rules (see para 3 of the judgment).

4 The judgment

In its determination of the possible vicarious liability of the defendant, the court considered the guiding legal principles with reference to the element of causation and medical negligence. This determination firstly necessitated a factual scrutiny of the expert evidence led at the trial, specifically in context of the onus of proof borne by the plaintiff. In this regard, as a point of departure, the court reminded itself of what was said in the case of *Dingley v The Chief Constable, Strathclyde Police* 2000 SC (HL) 77 89D–E, which was quoted with approval in *Michael v Linksfield Park Clinic (Pty) Limited* 2001 3 SA 1188 (SCA) 1201G–H:

> "(O)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence" (see para 44 of the judgment).

The court carefully considered the expert evidence (see paras 45–51) and observed that the causation element of delictual liability presented a challenge for the plaintiff in this case, as it did in most cases where delictual liability had to be established. This element of delictual liability though simple on the face of it, in application becomes a complex element. In this regard the court relied on the judgment in *Minister of Police v Skosana* 1977 1 SA 31 (A) 34E–F where Corbett JA stated the following foundational principles relating to causation:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote" (see para 53 of the judgment).

The court confirmed that both factual and legal causation had to be established by the plaintiff, and noted that factual causation would be present in a given case if it had been proved on a preponderance of probabilities that the act concerned had caused the relevant consequence; that is to say that the damage flowed from the unlawful act. It was then explained that legal causation concerns the question whether a particular defendant or tortfeasor should be held liable for the damage he has caused in a wrongful and culpable manner. In this regard the court referred to Corbett JA who expressed this distinction as follows in *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) 832G–I:

> "(I)t is generally recognised that causation in the law of delict gives rise to two distinct enquiries. The first, often termed 'causation in fact' or 'factual causation', is whether there is a factual link of cause and effect between the act or omission of the party concerned and the harm for which he is sought to be held liable; and in this sphere the generally recognised test is that of the *conditio sine qua non* or the 'but for' test. This is essentially a factual enquiry. Generally speaking no act or omission can be regarded as a cause in fact unless it passes this test. The second enquiry postulates that the act or omission is a *conditio sine qua non* and raises the question as to whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue; or whether the harm is, as it is said, 'too remote'. This enquiry (sometimes called 'causation in law' or 'legal causation') is concerned basically with a juridical problem in which considerations of legal policy may play a part."

The court then held that the best known theories for determining causation and legal causation in particular is a flexible approach, based on policy considerations, reasonableness, fairness and justice. This flexible approach, the court observed, was given judicial recognition by Van Heerden JA in *S v Mokgethi* 1990 1 SA 32 (A) 39 where it was stated that there is no single and general criterion for legal causation which is applicable in all instances. Of significance, according to the court, was the further statement of Van Heerden JA, that the basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice (see para 55 of the judgment).

In the final assessment of the expert evidence, the court ruled that all the experts readily conceded that the theories advanced by them were very hard to apply to individual cases because of the variable factors which come into play. The court emphasised that it was ultimately the court's task to determine the

existence of a causal relationship on a balance of probabilities and with reference to all the circumstantial evidence, and that an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not in itself rise above the level of possibility. The court found that the plaintiff, bearing the onus, has led all evidence reasonably available to her and it was therefore for the court to determine an inference of probable connection. In this regard the court ruled that the plaintiff had at least at a *prima facie* level made out a case that the deceased may have had HIV or for that matter full blown AIDS. This led the court to conclude that in the absence of evidence providing an alternative explanation, the only reasonable inference in the circumstances is that Mthalane was HIV positive at the time of the accident (see paras 56–58 of the judgment).

Ultimately, and with reference to the stated legal issues and the evidence, the court found that the servants of the defendant, and Dayal in particular, failed to perform the treatment of the plaintiff with the degree of care and skill required of a reasonable paramedical professional, in that he failed properly or at all to ensure that no contamination occurred in the handling of Mthalane and the plaintiff. The court ruled that Dayal should have been aware that with the high incidence of HIV infection prevailing in KwaZulu-Natal in particular, and South Africa in general at the time, and with two patients each having open wounds which were bleeding and/or were exposing fresh human blood, he should have foreseen the risk of cross contamination of blood and should have taken all necessary precaution to avoid such contamination. Consequently the court ordered that the defendant was liable for any damage that the plaintiff may be found to have suffered as a result of her contamination with HIV.

5 Assessment

On a primary level the judgment in this case is instructive as it focuses on legal liability incurred by negligent paramedical professionals acting in emergencies in context of contamination with HIV by victims of motor-vehicle accidents. In South Africa with the HIV/AIDS pandemic and many citizens living with the disease, such incidents are not only conceivable but a real and possible eventuality. This is certainly the first reported case in this regard. It is precisely for this reason that it is to be noted how the trial court determined legal liability with reference to the salient elements of delict (and more specifically vicarious liability). Undoubtedly the most challenging delictual element to be proved by plaintiffs in cases of this nature, is the element of causation, that is to say that the defendant through his/her negligent act or omission was the factual and legal cause of the HIV-contamination. It is to be noted that causation is but one of the elements to be proved on a preponderance of probabilities (the other elements being conduct, wrongfulness, fault and damages) (cf Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010) 4ff).

As the determination of causation was pivotal to the outcomes of this case, the trial judge was at pains to make a definitive finding of the proven facts from which the causal chain of events could be inferred. In this regard much reliance was placed on the evidence of a host of medical experts who testified during the trail. The court's approach to the assessment of expert medical evidence and subsequent finding that the conduct of the servants of the defendant was indeed the factual and the legal cause of the contamination (based on the *conditio sine qua non* test and policy considerations as enunciated in relevant case law), can in

principle not be faulted (see Carstens and Pearmain 860ff; *Michael v Linksfield Park Clinic supra* 1200A–1201F). It is, however, clear that the court, in the determination of causation, carefully scrutinised the proven facts in this case, to ensure that the causal chain of events, on a balance of probabilities, indeed proved the contamination. A substantial part of the judgment was devoted to this aspect. It is apparent from the judgment that once causation was proved, the rest of the elements of delictual liability (notably medical negligence) fell into place. In the face of the court's finding that the two paramedics did not follow the correct emergency protocols on the scene of the accident (see para 49 of the judgment), the inference was drawn that they failed to perform the treatment of the plaintiff with the degree of care and skill required of a reasonable paramedical assistant in the same circumstances (see para 60 of the judgment). Although there is not too much direct consideration in the judgment as to the yardstick of the "objective reasonable paramedic in the same circumstances, in terms of reasonable foreseeability and reasonable preventability", it is apparent that the court was guided by inferences drawn from the circumstantial evidence.

It is to be noted that paramedics and medical emergency staff do not operate in the abstract but are of late regulated by legislation (see the Health Professions Act 56 of 1974, as amended; Constitution of the Professional Board for Emergency Care Practitioners GN R1059 in *GG* 25235 of 28 July 2003, with effect from 4 August 2003; Regulations Relating to the Qualifications for Registration of Emergency Care Practitioners GN R1006 in *GG* 30393 of 26 October 2007; see also Regulations Relating to the Specialities and Sub-specialities in Medicine and Dentistry GN R590 in *GG* 22420 of 29 June 2001). Courts and legal practitioners would be well-advised to consider these regulations as a normative framework against which the unprofessional and/or negligent conduct of emergency care practitioners/paramedics should be assessed, also in context of contamination with HIV (see also the *Charter of rights on AIDS and HIV* (1991); *National patients' rights charter* (1999); *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa* (2008); cf Rubinstein, Eisenberg and Gostin *The rights of people who are HIV positive* (1999) 3ff).

It is with regard to the foregoing framework applicable to emergency care practitioners as well as constitutional considerations, that criticism can be levelled at the judgment under discussion. It is submitted that the case was judged purely on common law principles (also in context of procedural parameters), while no consideration was given to the regulatory framework applicable to emergency care practitioners or applicable provisions of the Constitution. In the determination of legal liability for contamination with HIV, the question may be posed whether a patient's right to access to health care and emergency health care as afforded in section 27 of the Constitution also extends to primary emergency medical treatment by paramedics or emergency care practitioners, specifically NOT to be contaminated with HIV? Could emergency care practitioners invoke the limitation clause (section 36) in the Constitution and advance some form of necessity/emergency (justifiable and reasonable in an open and democratic society) to escape legal liability (also in context of the common law justification of necessity)? May the right to emergency health care be limited for economic reasons or simply by virtue of the fact that health care services in the public sector are severely compromised due to staff shortages and/or lack of resources? Is there a difference in the level of access to health care services and emergency care in private ambulance services (offered by private hospitals) as

opposed to ambulance services/emergency care offered by public hospitals (see Currie and De Waal *The Bill of Rights handbook* (2005) 315ff; Hassim, Heywood and Berger 30ff; Carstens and Pearmain 21ff; Van Oosten "Deviations from or extensions of medical interventions: the defences" 1998 *De Jure* 197ff; Van Oosten "Some reflections on emergencies as justification for medical interventions" in Ahrens (ed) *Festschrift für Erwin Deutsch zum 70 Gebürtstag* (1999) 673ff; *Soobramoney v Minister of Health, KZN* 1998 1 SA 765 (CC)). Is it submitted that any constitutional or common law limitation to a patient's right to emergency health care would strike at the delictual element of wrongfulness and not at causation? Although these issues were apparently not canvassed in the pleadings before the court, it is submitted that had the court, in addition to the common law construction, also considered the constitutional construction to the particular issues, the judgment could have been an ideal conduit to have developed the common law in accordance with the spirit and purport of the Bill of Rights as mandated by the Constitutional Court in *Carmichele v Minister of Safety and Security* 2002 1 SACR 79 (CC). Such a consideration calls for a "reconfiguration" of the common law principles and would have given effect to a multi-layered approach which has as its source the applicable supreme provisions of the Constitution; the applicable principles of the common law; relevant legislation; interpretative case law and considerations of medical ethics. Only then does the applicable legal framework become integrated and harmonised.

Ultimately, the judgment serves as a stark reminder to emergency care practitioners to act with the necessary circumspection and professionalism at accident scenes to avoid contamination of accident victims with HIV and incur subsequent liability.

PIETER CARSTENS
University of Pretoria