

Judicial recognition of substandard medical treatment in South African public hospitals: The slippery slope of policy considerations and implications for liability in the context of criminal medical negligence

S v Tembani 2007 1 SACR 355 (SCA)

Introduction

In *Van Wyk v Lewis* 1924 AD 438 444, the South African *locus classicus* on medical negligence, Innes CJ observed that the ordinary medical practitioner should exercise the same degree of skill and care, whether he carries on his work in the town or the country, in one place or another, and that the fact that several incompetent and careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill and care which local patients have the right to expect. This sentiment was also echoed by the older writers on medical law (see Gordon, Turner and Price *Medical jurisprudence* (1953) 112) who opined that it cannot possibly make any difference to the skill and care required of a medical practitioner in himself, whether he practises in Cape Town or on some remote farm on the edge of the Kalahari desert. In view of the foregoing, it was thus trite law in South Africa for many years that the so called 'locality of medical practice' bore no influence on the assessment of medical negligence (criminal medical negligence or civil medical negligence - it is to be noted that the test for criminal and civil medical negligence is the same: the only difference lies in the onus of proof) (see Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 637). Although several cases of medical negligence were decided by the courts since 1924, the applicability or not of the 'locality rule' has not yet been conclusively revisited by the judiciary and the viewpoint of Innes CJ,

specifically in view of vastly improved medical facilities and the exchange and mobility of present information technology, is still generally accepted by the courts and our writers (see *Dube v Administrator Transvaal* 1963 4 SA 260 (W) 266; *Blyth v Van den Heever* 1980 1 SA 191 (A) 193D; *S v Kramer* 1987 1 SA 887 (W) 893; Barlow 'Medical negligence resulting in death' 1948 *THRHR* 117; Gordon, Turner and Price *Medical jurisprudence* (1953) 112; Strauss and Strydom *Die Suid-Afrikaanse geneeskundige reg* (1967) 268-270; Strauss *Doctor patient and the law* (1991) ; Claassen and Verschoor *Medical negligence in South Africa* (1992) 18; Strauss *Medical law in South Africa: International encyclopaedia of laws* (ed Blanpain)(2007) 95; *contra Collins v Administrator Cape* 1995 4 SA 73 (C)); Carstens 'The locality rule in cases of medical negligence' (1990) *De Rebus* 421; Carstens and Pearmain *Foundational principles of South African medical law* (2007) 636-638).

However, after the judgment in *S v Tembani* 2007 1 SACR 355 (SCA), it is apparent that the big divide between public and private health care in South Africa (private hospitals and public hospitals) with reference to medical infrastructure, resources, competent medical staff and other 'South African medical realities', will have a decided influence on the question of whether the locality of a medical practice is to be considered as a factor when assessing criminal medical negligence, specifically in the context of medical care in public hospitals. It is to be noted that, although *Tembani* was principally decided with reference to causation in criminal law where medical negligence could possibly be a *novus actus interveniens*, it is submitted that the 'locality rule' in medical law surfaced as the subtext of the decision.

The facts

The facts in the case appear from the judgment of Cameron JA: The appellant was convicted of murder in the High Court in Johannesburg (see *S v Tembani* 1999 1 SACR 192 (W)) and sentenced to 18 years' imprisonment. This is an appeal with the leave of the trial Judge (Hellens AJ) against his conviction. The appeal turns on whether an assailant who inflicts a wound which without treatment would be fatal, but which is readily treatable, can escape liability for the victim's death *because the medical treatment in fact received is substandard and negligent* (own emphasis). The murder conviction arose from an incident late on Friday night, 1996-12-14, at the Ivory Park informal settlement near Kempton Park, in which the appellant

shot his 28-year-old girlfriend, Ms Thandi H Lamani, at least twice. One bullet entered her chest between the fifth and sixth ribs. It penetrated her right lung, diaphragm and abdomen, perforating the duodenum. The other entered her calf, fracturing her tibia and fibula. At his trial, the appellant pleaded not guilty, reserved his defence and chose not to testify; but the trial court rightly accepted the first-hand accounts of the deceased's two sisters, Ms Ntombixolo Lamani and Ms Zodwa Lamani. The former witnessed the appellant shoot the deceased a number of times at point-blank range in the one-roomed shack they shared, while the latter hastened to the scene from nearby while the accused was still present, armed, and uttering murderous imprecations against the injured woman.

The victim was admitted to Tembisa Hospital (a public/state hospital) on the night she was shot, and died there 14 days later. The evidence established beyond doubt that the appellant intended to kill Ms Lemani, and the sole issue on appeal was whether he was responsible for her death. The cause of death was officially recorded, and proved at the trial, to be septicaemia as a consequence of a gunshot wound through the chest and abdomen. On the night of the deceased's admission, the medical personnel at Tembisa hospital cleaned the wound, inserted an intercostal drain and put her on antibiotic medication; but then - even though the next day she vomited and complained of abdominal pains, sure signs of peril - she was left insufficiently attended in the ward until Tuesday. By that time, four long days later, peritonitis (infection of the abdominal lining) had set in. Only then was a laparotomy (a surgical incision opening the abdominal cavity) performed, and the gunshot wound properly tracked and sutured, though the sufficiency of what was done, even then, is doubtful. Though she was belatedly transferred to the intensive care unit on 1996-12-23, and a second laparotomy performed on 1996-12-24, it was all too little, and far too late. In the graphic words of the district surgeon who performed the post-mortem, Dr Peters, by then 'everything had gone septic' and Thandi Lamani died in what must have been acute pain and discomfort on 1996-12-28.

The medical evidence makes pitiful reading and, ultimately, the unavoidable conclusion is that the deceased received inadequate and negligent care at Tembisa Hospital. The trial Court sympathetically observed that the doctor in charge, Dr Jovanovic, who attempted, on the one hand, to justify his interventions and the hospital's standard of care,

while, on the other, apologising for inadequate treatment and facilities, was caught 'in a cleft stick'. Despite his anguished explanations of the arduous conditions under which medical personnel are obliged to work at Tembisa Hospital, the trial Judge found that it had been *prima facie* established that the nursing staff and doctors were negligent. In particular, the trial Judge noted that the hospital was understaffed, especially over weekends, and that the doctor/patient and nurse/patient ratios were woefully inadequate. The medical records were deficient and no proper discipline was enforced in keeping them. The standard of nursing care was evidently poor. Even though these shortcomings resulted partly from budgetary constraints and a lack of resources, with consequent enforced prioritisation, the trial Judge did not consider he could find the standard excusably low and noted that it was indeed 'a sad experience to realise that many of our citizens and members of our society critically injured or wounded might find themselves by dint of their financial circumstances exposed to so woefully inadequate a system of medical care'.

The trial Judge accordingly found that the hospital's and doctors' negligence was not in the circumstances 'so overwhelming as to make the original wound merely part of the history behind the patient's presence in the hospital so that it could be said that death did not flow from the wound'. Applying a 'flexible approach to causation' - one that was 'practical' rather than 'over-theoretical' - Hellens AJ considered it in accord with justice to hold that, in the juridical sense, the medical negligence did not oust the causal connection between the shooting and the deceased's death. The appellant was accordingly convicted of murder.

The appeal

The legal question

Essentially, the legal question on appeal was simply whether the appellant, Tembani, whose actions (the shooting and serious wounding of his girlfriend) were the *factual cause* of her death, could also be noted as the *legal cause* of her death due to policy considerations specifically in the face of proven medical negligence by the attending medical staff of Tembisa Hospital? Put differently, could the appellant's defence that the proven medical negligence by the attending medical staff of the hospital is a *novus actus interveniens* which suspends any legal causation on his part, succeed? The trial court, with reference to, and reliance

upon, the English case of *R v Smith* [1959] 2 QB 35, dismissed this defence and graded medical negligence in finding that medical negligence, (although proven), will only be a *novus actus interveniens* if such negligence was 'overwhelming'. This finding was made based on *policy considerations*, which generally translates into judicial considerations based on fairness, justice and reasonableness (compare also Van Oosten *Oorsaaklikheid by moord en strafbare manslag* (unpublished LLD thesis, University of Pretoria 1981) 459; Hart and Honoré *Causation in the law* (1985) 241; Snyman *Criminal law* (2002) 89; Burchell *Principles of criminal law* (2005) 209; Burchell *Cases and materials on criminal law* (2007) 138; *S v Daniels* 1983 3 SA 275 (A); *S v Mokgethi* 1990 1 SA 32 (A); *S v Ramasunya* 2000 2 SACR 257 (T); *S v Counter* 2003 1 SACR 143 (SCA).)

The judgment

In considering the stated legal question, Cameron JA first restated the substantive legal principles pertaining to causation in South African Criminal Law and reviewed the applicable case law (see paragraph [10]-[20] of the report). He noted that there was no doubt that without the appellant's murderous attack the deceased would not have died; equally, had there been no medical intervention after the attack, the gunshot wound would have proved fatal. It was reiterated that what was at issue, therefore, was the legal responsibility for the death in the manner in which it ensued (see para 11 at 361b-d of the report).

It was further accepted that the deliberate infliction of an intrinsically dangerous wound, from which the victim was likely to die without medical intervention, must generally lead to liability for an ensuing death, whether or not the wound was readily treatable, and *even if the medical treatment given later was substandard or negligent*, unless the victim so recovered that at the time of the negligent treatment the original injury no longer posed a danger to life (own emphasis)(see para 25 at 366e-g of the report). The Judge justified this approach on the basis of the following interconnecting policy considerations:

- Firstly, an assailant (such as the appellant) who deliberately inflicted an intrinsically fatal wound consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained mortal, diminish the moral culpability of the perpetrator;
- Secondly, *in a country like South Africa where medical resources were not only sparse, but grievously maldistributed, it was quite wrong to*

impute legal liability on the supposition that efficient and reliable medical attention would be accessible to a victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. Such an approach would misrepresent reality, for it presumes levels of service and access to facilities that do not reflect the living conditions of a considerable part, perhaps the majority of the country's population. To assume the uniform availability of sound medical intervention would impute legal liability in its absence on the basis of a fiction and this cannot serve the creation of a sound system of criminal liability. Improper medical treatment was neither abnormal nor extraordinary in South Africa and the supervention of negligent treatment did not constitute an intervening cause that exculpated an assailant while the wound was still intrinsically fatal (own emphasis)(see paras 26-28, paraphrased at 366h-367e of the report);

- In conclusion, it was ruled that *even gross negligence in the administration of medical treatment would be insufficient to relieve an original perpetrator of criminal liability* for an ensuing death, provided that 'gross negligence' did not imply an absence of good faith on the part of those responsible for the treatment (own emphasis)(see para 29 at 367f-i of the report.)

Consequently, the appeal was dismissed (Heher JA, Combrinck AJA, Malan AJA and Theron AJA concurring).

Evaluation

Judicial recognition of improper medical treatment as neither abnormal nor extraordinary in South Africa

In a time when it is an acknowledged fact that public health care in South Africa is in crisis and gravely compromised due to a lack of resources and infrastructure, an acute shortage of medical staff (specifically in public/state hospitals), when the public (more specifically public health care users), non-governmental organisations (such as the Treatment Action Campaign (TAC)) and the media constantly question, scrutinise, and challenge the political leadership when it comes to the delivery of health care services in the public sector, the comments of Cameron JA, in this respect, are hardly surprising. In fact, it is submitted that it is undoubtedly a bold and sobering stance on the general quality of health care in the public sector that is to be commended and welcomed. At last there is judicial recognition about the stark reality of the public health care landscape in South Africa. This stance is further

borne out by disturbing recent statistics pertaining to the deaths of mothers, babies and children in the South African health care system. According to an official report *Every death counts* published in March 2008 and presented by the Minister of Health (see www.health-e.org.za, www.doh.gov.za), the deaths of 42 000 South African babies and children could be prevented every single day if gaps in the healthcare system (including poor patient care and lack of interventions to address HIV/AIDS) were addressed (see also *Health and democracy: A guide to human rights, health law and policy in a post-apartheid South Africa* (2007)(eds Hassim, Heywood and Berger).

Although the foregoing stance taken by Cameron JA is to be welcomed in that this judgment merits the unavoidable inference that the ‘locality’ where medical treatment is administered (specifically if it is a public hospital where health care services are compromised such as stated in *Tembani*) will have a definite influence on the subsequent liability of the attending medical staff (*contra* the judgment of Innes CJ in *Van Wyk v Lewis supra*), one has to be wary of the far reaching implications this judgment may hold for legal liability in the context of medical negligence as a causative factor in public hospitals. However, one first has to assess the expectation of improper medical treatment in the South African hospital setting against the slippery slope of policy considerations.

Improper medical treatment/medical negligence, policy considerations and implications

It is trite law that the legal test for medical negligence (in the context of criminal liability), is one of reasonable foreseeability and preventability with reference to the yardstick of the reasonable competent medical practitioner/health care provider: would a reasonable competent medical practitioner *in the same circumstances* have foreseen the possibility of death through his/her actions/omissions, and: would a reasonable competent medical practitioner *in the same circumstances* have taken steps to prevent death from ensuing. It is clear that the specific *circumstances* or ‘locality’ where the medical intervention or treatment is administered plays a decisive role in the assessment of whether the accused medical practitioner was negligent or not. To put it bluntly, in the words of Gordon, Turner and Price *Medical jurisprudence* (1953) 113, ‘the point is that a practitioner, wherever he may be, cannot be expected to perform miracles or to make bricks

without straw'. In a purely elementological construction for criminal liability, it is to be noted that the test for medical negligence is in principle a test for *culpability or fault*, but nevertheless heavily influenced by the particular circumstances of each case - hence the importance of the judgment in *Tembani* for the 'locality rule.'

The determination for medical negligence as a *novus actus interveniens* in the context of causation requires that where an accused (such as Tembani) invokes medical negligence (such as the attending medical staff in Tembisa Hospital) as a *novus actus interveniens* breaking the chain of causation, it follows that the court has to decide whether that medical negligence (if proven) is, in *itself*, the factual and legal cause of the victim's death. This determination, whether the attending medical staff in *Tembani* were in themselves, through their omissions to treat the victim, the *factual and legal cause* of her death, was never explicitly done by the Trial Court or the Supreme Court of Appeal in the judgment of *Tembani*. What was done was simply to state, by applying the *condictio sine qua non* yardstick, that Tembani's actions were the factual cause of the victim's death, and that his actions, on the basis of policy considerations, were also the legal cause of her death. For this reason his defence of proven medical negligence as a *novus actus interveniens* on account of the same policy considerations was rejected due to the fact that the medical negligence was not 'overwhelming' (Trial Court) or that one can expect substandard medical treatment in South African public hospitals (Supreme Court of Appeal). Even 'gross medical negligence' will not avail the assailant!

Based on the foregoing, it is submitted that both courts should have tested whether the proven medical negligence was in fact the factual and legal cause of the victim's death. In this regard the omissions on the part of the attending staff, for purposes of factual causation, should have been tested with the *conditio cum qua non*. The question is simply whether the victim would have survived if she promptly received proper medical care? If the answer to this question is in the affirmative, then the inference is that the medical negligence is the factual cause of the victim's death. Only then is the test for legal causation indicated. It is in this respect that the yardstick of policy considerations becomes a slippery slope: what are the implications for the attending medical staff if the finding is made that their medical negligence were indeed the factual and legal cause of the victim's death? Strictly speaking the attending medical staff are then *prima facie* liable and will have to be charged with culpable homicide, reported to the Professional Board of the Health

Professions Council of South Africa for professional misconduct and/or subjected to a judicial inquest and possibly a civil claim for damages. It is apparent that the Courts in this regard are extremely wary *on the basis of policy considerations* not to make such a finding, even if it means that they have to grade the medical negligence as 'overwhelming and gross' or to effectively invoke the expectation of substandard medical treatment in South African public hospitals as the norm, or even to reintroduce the rule *versari in re illicita* in the context of causation. This latter rule was rejected in South African criminal law in *S v Bernardus* 1965 3 SA 287 (A), which stated that an accused is liable for all the consequences merely on account of his *unlawful* actions/omissions, irrespective of whether he foresaw those consequences or not.

It is submitted that the judgment in *Tembani* sends a clear message to all accused and potential accused who inflicted, or will in future inflict, serious harm to a victim/potential victim - the message is this: even if the victim survives the initial wounding/attack and is taken to hospital, medical negligence (even if it is gross) will for all practical purposes and in principle *never* qualify as a *novus actus* in South African criminal law as one can expect substandard medical treatment in South African public hospitals! As an accused, one will thus never be able 'to hide', as it were, behind medical negligence (even if it is 'gross') to escape criminal liability in the context of causation. This submission begs the following question: *conversely* will the negligence (even 'gross negligence') of attending medical staff in public hospitals in the context of the facts in *Tembani* always be able to invoke the 'locality rule'/substandard medical treatment (on the basis of policy considerations) as a defence against legal liability even where their medical negligence was a contributing and underlying cause of the victim's death? Will they, as they did in *Tembani*, always escape liability despite a finding that they were medically negligent? Nowhere in the judgment is there an indication of what is meant by 'gross negligence', apart from stating that it does not imply the absence of 'good faith on the part of those responsible for the treatment'. Although *Tembani* was convicted and sentenced to 18 years imprisonment, what legal redress is there for the victim's family against the medical negligence of the hospital? Do they now have to vent their indignation and frustration for their loss by lodging a costly civil claim against the public hospital? Is there, from their perspective, no criminal sanction for the negligence of the medical staff? With all due respect, is it possible that the 'slanted' policy considerations of *Tembani* might be perceived as 'legal protectionism' by the Bench in

favour of the medical profession? What about constitutional equity in the public health care system? What are the constitutional implications for the state in the context of its constitutional obligation to provide for access to health care services (as per s 27 of the Constitution of South Africa)? Is the unavoidable implication of this judgment that South African citizens who are dependent on public health care will have access to health care services, but that the quality and content of those services will be compromised as substandard or negligent medical treatment is neither abnormal nor extraordinary in our public hospitals? Surely this is highly questionable and will open the door to a wave of litigation against the state for failing to fulfil its constitutional obligations to provide medical care, and access to health care, that are of an acceptable standard (at least in context of the minimum core requirement thereof). Although the comments of Cameron JA were restricted to public health care in South Africa, the question remains whether his comments may be extended to medical practitioners, nurses and health care providers in the private sector (such as private hospitals)?

A suggested principled approach

The foregoing questions surface as a result of the inevitably *unprincipled approach* one embarks upon when the 'slippery slope' of *policy considerations* enters into the equation of legal causation. Policy considerations entail value judgments with reference to fairness and justice which are concepts that are not easily judicially distilled. Value judgments, more often than not entail the balancing of various conflicting interests. In the *Tembani* judgment these interests are clear: the reprehensible actions of an accused who launched a vicious and murderous attack upon the innocent victim, inflicting serious and life threatening injuries, versus the overworked and understaffed medical hospital staff who 'only did their best' under difficult and medically compromised circumstances. The choice becomes clear: the accused placed the victim in the hospital and will therefore not escape liability for his actions merely because the medical staff acted negligently. However, the concepts of fairness and justice in law and in a constitutional democracy beg legal certainty, and legal certainty begs a principled and constitutional approach.

It is respectfully submitted that both the Trial Court and the Supreme Court of Appeal in *Tembani* did not follow a *principled approach* with regard to the determination of legal causation in the context of medical negligence as a *potential novus actus interveniens*. By 'grading' medical

negligence to 'overwhelming or gross' and by ruling that because the expectation of substandard/negligent medical treatment in our hospitals is neither abnormal nor extraordinary, the Court has, in my opinion, created a disproportionate and artificial yardstick by allowing too much leverage for unacceptable and even unethical medical standards in our public hospitals to flourish, under a protective veil of policy considerations. This approach has, with respect, serious implications for the fundamental application of a Bill of Rights, specifically in the context of constitutional equity and the state's obligation to deliver acceptable health care services. Surely the medical staff members of our public hospitals are not above the law and have to practise their trade according to the legal rules and norms as well as the ethical rules prescribed by the Health Professions Council of South Africa and the Nursing Council? Surely these professional bodies will not tolerate these sub-standards and will certainly frown upon the expectation (as opposed to the *reality*) of substandard/negligent treatment? If these medical practitioners/nurses/health care providers fall below those prescribed standards, as a result of compromised medical circumstances, they may invoke whatever grounds of justification (such as necessity and/or other emergency) and/or other defences (such as lack of culpability, medical misadventure or even the application of the 'locality rule', bearing in mind that the test for negligence is also a rule of circumstance)) in order to escape liability. Even if the Court in *Tembani* had found that medical negligence was indeed a *novus actus interveniens*, it follows that only the element of *causation* is proven (in the premise that the *novus actus interveniens* is indeed the factual and legal cause of the victim's death). It goes without saying that the mere fact that the medical team legally caused the victim's death, does not mean that they are guilty of culpable homicide. The State will still have to prove, beyond reasonable doubt, in a separate and new trial, that the medical staff, having caused the death, also acted *unlawfully and with fault* (being the other essential elements for criminal liability). As was argued before (see Carstens and Pearmain *Foundational principles of South African medical law* (2007) 852), it is doubtful whether a successful prosecution will be led against medical staff who acted in the same way as the medical staff in *Tembani* as they may escape liability on the basis of the absence of unlawfulness or fault. However, the decision to prosecute such negligent medical staff lies with the Director of Public Prosecutions and/or the Professional Boards of the Health Professions Council of South Africa/South African Nursing Council.

By the same token, the reproachable accused in *Tembani* would also not have escaped criminal liability if the Court did indeed find that the medical negligence was a *novus actus interveniens*. The accused would still have been liable for attempted murder and is, in principle, eligible to receive the same punishment as though he has committed the completed crime of murder (as was the case in *S v Ramosunya* 2000 (2) SACR 257 (T)). It is to be noted that it is the duty of the State to prove beyond reasonable doubt the *absence* of a potential *novus actus interveniens*. If one has regard to the judgment in *Ramosunya supra*, it is submitted that in the *Tembani* judgment it is doubtful whether the State has proved that the medical negligence was indeed NOT a *novus actus interveniens*, and that the accused should therefore have received the benefit of the doubt. One has to bear in mind that the Trial Court in *Tembani* did find that the medical negligence was an ‘operating cause’ of the victim’s death.

Conclusion

Ultimately, in conclusion and in view of the foregoing, it is respectfully submitted that the Court in *Tembani* should have applied a principled approach with reference to the essential elements for criminal liability as well as constitutional equity, and should have found, on the proven evidence that the medical negligence, which was the factual cause of death, was indeed a *novus actus interveniens*. Whether the *novus actus interveniens* (the medical negligence) would indeed have also transpired to become the legal cause of the victim’s death, remains an open question and should have been left to the prerogative of the Director of Prosecutions, as *dominus litis*, to decide whether to prosecute the medical staff in a new trial or not. Although the stance taken by Cameron JA that substandard/negligent medical treatment in South African public hospitals is neither abnormal nor extraordinary, is to be generally welcomed as a concrete judicial recognition of the compromised reality of public health care services in this country, it is submitted that this recognition of locality in medical care should not be invoked in the context of policy considerations for the determination of the element of causation, but should rather be invoked to assist medical practitioners/nurses/health care providers to escape liability in the context of the elements of unlawfulness and/or fault. Such an approach will also accord with the core values of our constitution. A sound criminal justice system, working in tandem with a constitutional dispensation based on human