



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME
COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

HAL obo MML v MEC for Health, Free State (Case no 1021/2019) [2021] ZASCA 149 (22 October 2021)

Today, the Supreme Court of Appeal (the Court) dismissed an appeal against an order of Free State High Court, Bloemfontein, dismissing a medical negligence claim by the appellant, HAL, on behalf of her minor child, MML, who was born at a public hospital. When he was nine years old, a magnetic resonance imaging (MRI) scan of MML's brain revealed that he had suffered a hypoxic ischemic encephalopathy (HIE), a brain injury caused by lack of oxygen and lack of blood flow in the brain. It was further confirmed that this was a partial prolonged type brain injury. In a subsequent action, the appellant instituted action against the respondent, the Free State Member of the Executive Council (MEC) for Health, in the Free State Division of the High Court, Bloemfontein (the high court). She claimed that MML had suffered the brain injury during the latter stages of the labour and birth process (ie the intrapartum period). She attributed MML's injury to the negligence of the hospital staff, alleging they did not adequately monitor her and her unborn child, as a result of which they failed to detect foetal distress. This, she alleged, led to MML's brain injury. The trial was hampered by the absence of neonatal and obstetric records. The experts who compiled their reports did so on the basis of the limited available records and the appellant's factual statements. After considering the limited hospital records, the

evidence of the appellant and several expert witnesses, the high court dismissed the appellant's claim.

On appeal, the main issue was whether MML's brain injury was suffered during the latter stages of the labour and birth process (ie the intrapartum period). After a survey of the experts' opinions, the majority concluded that there were many proven and objective facts that point to MML's brain injury as not being typical of an intrapartum one. Some of the important indicators the majority considered were: a seemingly healthy child at birth, being pinkish in colour; the normal APGAR scores; the available hospital records which show that the child was well enough to be discharged a day after birth and that breast-feeding was initiated successfully; and the child's normal growth until at least 18 months. The majority also considered academic literature referred to by the experts, which set out criteria to determine when a brain injury can be deemed to have occurred in the intrapartum period. It concluded that MML did not fulfil any of the criteria. As a result, the appeal was dismissed with costs.

On the other hand, the minority judgment concluded that the evaluation of the evidence by the trial court was flawed. It reasoned that given the lack of hospital records, which was the respondent's responsibility, the appellant's evidence should have been treated more generously than would ordinarily be the case. The minority found that the appellant had established both the negligence and the necessary causation and would thus have upheld the appeal.

In a third judgment, the majority deprecated the manner in which the trial was conducted, in respect of the status and role of expert reports and joint minutes; the admissibility of evidence; and the sequence in which the witnesses were called. The Court also clarified the effect and reach of this Court's decision in *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA).