THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 351/2012

In the matter between:

DOREEN TOPHAM **Appellant**

and

MEMBER OF THE EXECUTIVE COMMITTEE FOR THE DEPARTMENT OF HEALTH, MPUMALANGA **Respondent**

Neutral citation: *Topham v Member of Executive Committee for the Department of Health, Mpumalanga* (351/2012) [2013] ZASCA 65 (27 May 2013)

Coram: Mpati P, Brand and Cachalia JJA and Van der Merwe and Meyer AJJA

Heard: **10 May 2013**

Delivered: **27 May 2013**

Summary: **Medical negligence – failure to diagnose hip dislocation resulting in avascular necrosis involving femur head – liability of medical doctor's employer – issues relating to negligence and causality.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mabesele J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo dismissing the appellant's claim with costs is set aside and there is substituted an order which reads:

   '(a) The defendant is declared liable for payment of the plaintiff's proven or agreed damages resulting from the negligent failure to have diagnosed her right hip dislocation on 1 May 2006 and the avascular necrosis involving her right femur head that developed as a result thereof;

   (b) The defendant is ordered to pay the plaintiff's costs of the trial on 12, 13 and 14 September 2011, such costs to include the qualifying and reservation fees, if any, of the plaintiff's expert witnesses, Drs Van der Westhuizen and Kaiser.'

JUDGMENT

MEYER AJA (MPATI P, BRAND and CACHALIA JJA and VAN DER MERWE AJA concurring):

[1] This is an appeal against the judgment of Mabesele J in the North Gauteng High Court dismissing a delictual claim for damages. The claim arose from the alleged failure of a doctor employed at Rob Ferreira Hospital in Nelspruit, Mpumulanga to diagnose a hip dislocation. The appellant, Mrs Doreen Topham, appeals with the leave of this court. The court a quo was only concerned with the issues pertaining to the

respondent's liability while the quantum of damages allegedly suffered by the appellant stood over for later determination.

[2] The respondent is the Member of the Executive Committee for the Department of Health, Mpumalanga. It is common cause that the respondent would be vicariously liable for any negligent treatment or diagnosis of the appellant by the medical doctors and staff of the Rob Ferreira Hospital.

[3] The appellant was involved in a motor vehicle collision during the early hours of 1 May 2006 in which she dislocated her right hip. She was taken to the Rob Ferreira Hospital by ambulance and admitted to the casualty section. Her vital signs were recorded by the nursing staff and she was then examined by Dr Molete, a newly admitted intern, but he failed to diagnose her hip dislocation. In fact, he found nothing wrong and discharged her. Upon her discharge later that morning the appellant went to the home of her mother, Mrs Martha Topham, where she was cared for and assisted until her re-admission to the Rob Ferreira Hospital on 9 May 2009. She was re-admitted, after consulting a general practitioner in private practice, Dr Smith, on 8 May 2006. He referred her for x-rays and diagnosed a dislocated right hip. He then referred her to the Rob Ferreira Hospital. The medical personnel at the Rob Ferreira Hospital agreed with this diagnosis and treated her for this condition until her discharge on 1 June 2006.

[4] In dismissing the appellant's claim the court a quo found that, although Dr Molete 'misdiagnosed' the appellant's right hip dislocation, he performed the correct procedures to determine the problem and he had adhered to the standard of care that was required of him. His conduct was therefore neither negligent nor the cause of the appellant's damages. In the appellant's particulars of claim Dr Molete and the other personnel were alleged to have been negligent in that they neglected to diagnose her dislocated right hip; failed to realise that there were abnormalities of the right hip joint; neglected to treat her for the anterior dislocation of the right hip properly and timeously; and failed to take such steps as were reasonable to ensure that she did not suffer any harm or damage other than what would normally follow from the investigation and treatment of her condition. That negligence, according to the appellant, resulted in a complication

known as 'avascular necrosis' involving her right femur head. She consequently claimed damages from the respondent.

[5] The judgment of the court below cannot be supported. The learned judge not only disregarded evidence presented by and on behalf of the appellant but also failed properly to consider the evidence of Dr Molete. He further made an irrelevant and unwarranted credibility finding against the appellant. To my mind, the evidence overwhelmingly supports the conclusion that Dr Molete had been negligent in failing to diagnose the appellant's right hip dislocation and treating her accordingly.

[6] Professional negligence is determined by reference to the standard of conduct of the reasonably skilled and careful practitioner in the particular field and in similar circumstances. A medical practitioner diagnosing and treating a patient is expected to adhere to the general level of skill, care and diligence possessed and exercised at that time by the members of the branch of the profession to which he or she belongs. It follows that a wrong diagnosis does not per se amount to negligence on the part of the medical practitioner concerned. It will only be negligence if the practitioner's conduct does not comply with the general standard of care to which I have referred.[1]

[7] The appellant testified and called three witnesses at the trial. They were her mother, and two medical experts. One was a specialist in diagnostic radiology, Dr Van der Westhuizen, and the other a specialist general surgeon, Dr Kaiser, who also had experience as a trauma doctor and in the treatment of orthopaedic injuries. Their evidence was uncontroverted. The only witness who testified for the respondent was Dr Molete.

[8] The appellant testified that she was travelling with her younger sister and the latter's boyfriend in a motor vehicle driven by her sister when the collision occurred. The driver lost control of the car and collided with a tree. She was seated behind the

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[1] *Mitchell v Dixon* 1914 AD 519 at 525; *Van Wyk v Lewis* 1924 AD 438 at 444 and 462; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 221A; *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA) paras 35 and 37; *Premier of the Western Cape Province & another v Loots NO* [2011] ZASCA 32 para 12; *Buls & another v Tsatsarolakis* 1976 (2) SA 891 (T) at 893H–895F; *S v Kramer & another* 1987 (1) SA 887 (W) at 893E–895A; *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W) at 384I–385E; *Castell v De Greef* 1993 (3) SA 501 (C) at 509F–510A and 511I–512B.

driver's seat and her leg at the knee was trapped and squeezed by that seat. She could only be freed by having metal parts of the driver's seat cut. Her right hip, mouth and neck were injured. She experienced severe pain in her right hip and was taken to hospital. Her mother, Mrs Martha Topham, testified that she rushed to the Rob Ferreira Hospital after hearing of the collision. Her daughter complained of neck pain and pain in her right hip. The appellant's recollection of the events immediately after the incident was understandably unclear because she was in considerable pain at the time.

[9] It cannot, however, be disputed from her evidence and that of her mother's that the appellant was experiencing severe pain in her right hip when she was discharged from the hospital after her initial admission. She was unable to stand, walk, sit up or bend her right leg. It was too painful. Her mother and brother-in-law had to assist her into a wheelchair and into the vehicle to take her home.

[10] The evidence of the appellant and that of her mother about the days that followed her discharge until her re-admission to hospital requires no elaboration. It is to the effect that her physical condition did not improve and her pain never waned. She remained unable to stand, to walk, to sit up straight or to take care of herself. Her mother took care of her needs and assisted with her personal care.

[11] According to the clinical notes of Dr Molete he saw the appellant at 4:22 am on 1 May 2006. At that time he was one of two doctors on duty in the casualty section of the hospital, which was a very busy multi-disciplinary institution with a high intake of patients in its casualty section at the end of every month. The appellant was brought to casualty by the emergency medical service personnel and handed over to him. He spoke to her. His notes indicated that she had complained of pain in her right thigh and mouth, that her right thigh had been immobilised with a splint and that she had a collar on her neck. He found her to be clinically stable and fully conscious with a Glasgow Coma Scale reading of 15/15. Her vital signs, which according to Dr Molete are important indicators of a patient's condition, were normal.

[12] Dr Molete examined the appellant for what he called 'very serious life threatening conditions' because she had been a victim of a motor vehicle accident. He applied the

'head to toe' method of examination, which is an assessment of a patient's head, neck, chest, cardio-vascular system, abdomen, back and limbs. His examination revealed no abnormalities of her head, chest, vascular system, abdomen and back. Because her neck was in a collar it could only be mobilised once a neck injury was excluded. In examining her limbs Dr Molete found that she had extreme pain in her right thigh. He suspected a fracture of the appellant's right femur. He was also alerted to the possibility of a fracture thereof by the emergency medical service personnel. He only examined that limb visually.

[13] Dr Molete testified that patients involved in motor vehicle accidents were prone to neck fractures and injuries to the thorax and to the pelvis. X-rays of the cervical spine, chest and pelvis were the normal set of trauma x-rays that were called for in such cases. He had 'screening' x-rays taken of the appellant's cervical spine, chest and pelvis in addition to those of her right thigh. He denied that he had failed to examine the appellant for a possible dislocation of the hip. He included, he said, the appellant's pelvis when he referred her for x-rays in order to 'screen' her for fractures of the pelvic bone and for any other pelvic injuries or abnormalities. Dr Molete reviewed all the x-rays without a radiologist's report and diagnosis and found no abnormalities.

[14] Dr Molete removed the splint that immobilised the appellant's right thigh because no fracture of that limb was detected on the x-ray. He continued with his clinical examination. The x-ray of her pelvis and his clinical examination satisfied him that there were no abnormalities in her pelvis. He testified that his clinical examination of the appellant's pelvis was done properly and that '… there is no way that (he) could have missed a dislocation.' It is now, of course, common cause that there was indeed a dislocation.

[15] Dr Molete testified that he usually recorded all important aspects of his examination of a patient in his clinical notes. Although they reflect his examination and his findings in respect of the appellant's head, neck, chest, abdomen, back and right femur before he referred her for x-rays they, apart from the results of the x-rays, did not reveal anything about his clinical examination of her pelvis and right thigh after he had received the x-rays. He conceded that he ought to have recorded that he had

performed an examination of her pelvis. He was not able to give any plausible explanation as to why he had not done so. Except for what he recorded in his notes Dr Molete's evidence was essentially limited to his usual practice and procedure of examining patients in the position of the appellant. He could not remember whether he had performed further tests once he had received the x-rays but he testified that it was highly unlikely that he would not have followed his usual practice and procedure.

[16] Dr Van der Westhuizen's opinion that the x-ray taken of the appellant's pelvis was of such poor quality that it was of no diagnostic value was not disputed. It could not assist in detecting or excluding a hip dislocation. A hip dislocation would in any event, in the opinion of Dr Van der Westhuizen, not have shown up on the specific x-ray. A lateral view of her hip was required to detect or to exclude a hip dislocation. Dr Molete conceded this much. Despite this Dr Molete did not deem it necessary to obtain further x-rays. The respondent's counsel informed the trial judge during Dr Van der Westhuizen's testimony that Dr Molete '… had deferred to a clinical examination to clear the patient with regards to a hip dislocation.' Yet, Dr Molete testified that in diagnosing the appellant he also relied on the x-ray that was taken of her pelvis.

[17] Although he is not a clinician, Dr Van der Westhuizen was of the opinion that a hip dislocation could clinically be excluded without reference to any x-rays if a clinical examination of a patient produced free movement of the joint without pain. In his opinion this could be determined clinically by means of what in general medicine is called the 'Trendelenburg' test or manoeuvre, which is a stand-up examination where every joint is tested. Dr Kaiser testified that a patient who is admitted after a motor vehicle accident should receive a complete clinical examination once a complete history of the patient had been obtained. The patient should be asked where pain is experienced. In the case of a hip injury or suspected hip injury a proper examination also entails asking the patient whether he or she could stand up and to flex or bend his or her hip: a patient with a hip dislocation cannot stand up or bend or flex his or her upper leg, because it is too painful. The examination also embraces the vascular and nerve supply to the leg; observing the movement of the leg with one's hands in order to feel whether there is a fracture or crepitus or the alignment is out; pulling the leg in

order to feel whether there is a fracture or dislocation or letting the patient walk in order to make a determination from the patient's movements; asking the patient to stand on both legs, then on one, and then on the other - the Trendelenburg test. A patient with a hip dislocation will not be able to stand on the leg that is dislocated. Dr Kaiser further opined that the clinical appearance of a hip dislocation could not go unnoticed. The patient presents with a slightly shorter leg, because the leg pulls up. The leg is internally rotated and in abduction, which means that the abnormal leg is pushing into the normal leg and the hip joint is slightly bent.

[18] Dr Kaiser was of the opinion that a patient with such severe pain as the appellant had experienced should not have been discharged merely because the x-rays were inconclusive. Further examination and investigation was required in order to detect the cause for the pain. If there is any uncertainty in a case of severe pain in a hip joint the patient should be sent for a lateral x-ray and a radiologist should interpret it if necessary in order to ensure that a dislocation is not overlooked. If necessary a CT scan or MRI examination must be performed. Dr Molete agreed with the opinion of Dr Kaiser that if he was uncertain about the appellant's condition the prudent and professional action for him to have taken would have been to have referred her for proper radiological observation and, if that proved insufficient, for a CT scan or MRI investigation. He testified that he did not do so, because it was in his view not necessary.

[19] According to Dr Kaiser a hip dislocation is a severe trauma injury caused by a massive force. The way her injury was caused was, in his opinion, consistent with a hip fracture, which was excluded at the time, or a hip dislocation. The force of hitting a knee against an object causes it to flex and turn and the hip to dislocate. The upper leg either dislocates to the front, to the back or centrally where it locks into the hip socket. Orthopaedic surgery has very few emergencies but a hip dislocation is one involving a vascular injury. The blood supply to the femur head is reduced or disrupted when the hip joint is dislocated. There is a 'golden period' of six hours after the injury within which the dislocated hip joint must be repaired. Otherwise a patient runs a very high risk – 85.8% - of developing the complication of avascular necrosis leading to the death of the tissue of the femur head which receives insufficient blood supply. Avascular

necrosis is a progressive condition which develops over time. The extent to which avascular necrosis involves the femur head is determined by the extent of the vascular damage. The femur head will collapse in time due to a major avascular necrosis involving the whole femur head.

[20] A patient is entitled to a thorough and careful examination such as his or her condition and attending circumstances permit with such diligence and methods as are usually practiced under similar circumstances by members of the branch of the profession to which the attending doctor belongs. The opinions of Drs Van der Westhuizen and Kaiser provide the benchmark by reference to which Dr Molete's conduct falls to be assessed. The examination procedure explained by Drs Van der Westhuizen and Kaiser is evidently elementary and forms part of general medicine. The opinion of Dr Kaiser that every general practitioner should be able to diagnose a hip dislocation has not been questioned. Dr Molete also testified that he would not have missed a hip dislocation and he suggested that the appellant must have sustained her right hip dislocation subsequent to her discharge from the Rob Ferreira Hospital on I May 2006. This of course was not the case.

[21] Dr Molete's examination and diagnosis of the appellant manifestly fell short of the degree of professional skill and diligence expected of an average general practitioner in similar circumstances. In examining her Dr Molete did not notice the obvious clinical signs with which a patient suffering from a hip dislocation presents. There is no evidence that he performed the Trendelenburg test when he examined her. He relied on an x-ray of her pelvis that was of such poor quality that it had no diagnostic value. His reliance on that x-ray formed part of his examination and persuaded him to have her discharged. Having found no cause for the appellant's severe hip or thigh pain Dr Molete neglected his duty by not taking further measures to establish the cause of her pain such as calling for further x-rays. The appellant should simply not have been discharged in circumstances where the cause of her pain had not been determined.

[22] In my view the respondent's counsel correctly conceded that it has been proved that the appellant suffered personal injury or harm as a result of Dr Molete's

negligence.[2] The appellant was examined by Dr Kaiser on 30 October 2008. At that stage she still had severe pain in her right hip area. Based on the history of the appellant[3] and his clinical examination of her,[4] Dr Kaiser's opinion was that she had developed the complication of avascular necrosis of her right femur head. Dr Kaiser was of the opinion that the long term consequences of failing to diagnose a hip dislocation were serious and that the appellant would probably require a hip replacement in the future.

[23] The appellant succeeded in proving that she developed avascular necrosis of her right femur head. But for Dr Molete's negligence the appellant, as a matter of probability, would not have suffered that complication. The appellant's counsel conceded this, also correctly in my view. The question whether Dr Molete's negligent conduct is also linked sufficiently closely or directly to the harm suffered by the appellant for legal liability to ensue has not been pertinently raised. It could hardly be contended that considerations of reasonableness, justice and fairness dictate that the respondent should not be held liable for the harm suffered by the appellant.

[24] In the result the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo dismissing the appellant's claim with costs is set aside and there is substituted an order which reads:
   '(a) The defendant is declared liable for payment of the plaintiff's proven or agreed damages resulting from the negligent failure to have diagnosed her right hip dislocation on 1 May 2006 and the avascular necrosis involving her right femur head that developed as a result thereof;

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[2] Causation in delict involves two distinct enquiries: the first is factual causation which is generally conducted by applying the 'but for' test and the second is legal causation or remoteness of damage. See *Premier of the Western Cape Province v Loots NO* (fn 1) para 16 *et seq*.

[3] She having been involved in a motor vehicle collision on 1 May 2006; the hip dislocation injury sustained by her in that collision; her initial symptoms; the diagnosis of her right hip dislocation about eight days after the injury had been sustained; the commencement of treatment long after the 'golden period' of six hours had expired; and the severe pain in her right hip that she still experienced when she was seen by Dr Kaiser more than two years after she had dislocated her right hip joint.

[4] She had limited movement of her right hip joint; she had an abnormal gait; and all the signs of a hip joint problem.

(b) The defendant is ordered to pay the plaintiff's costs of the trial on 12, 13 and 14 September 2011, such costs to include the qualifying and reservation fees, if any, of the plaintiff's expert witnesses, Drs Van der Westhuizen and Kaiser.'

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P A Meyer
Acting Judge of Appeal

APPEARANCES:

For Appellant:	JH Ströh SC (with him JA du Plessis)
	Instructed by:
	O Joubert Attorney Riviera,Pretoria
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For Respondent:	F Diedericks SC (with him N Naidoo)
	Instructed by:
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