THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 085/2014
Reportable

In the matter between:

CECILIA GOLIATH **APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH IN THE PROVINCE OF THE EASTERN CAPE **RESPONDENT**

Neutral citation: *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape* (085/2014) [2014] ZASCA 182 (25 November 2014)

Bench: Ponnan, Leach, Saldulker, Mbha JJA and Mathopo AJA

Heard: **10 November 2014**

Delivered: **25 November 2014**

Summary: Delict – medical negligence – surgical swab left in patient – inappropriate to resort to piecemeal processes of reasoning – only one enquiry – whether plaintiff has discharged the onus of proving on a balance of probabilities the negligence averred against the defendant – whether maxim *res ipsa loquitur* should be jettisoned from our vocabulary.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Lowe J sitting as court of first instance)

1. The appeal is upheld with costs including those consequent upon the employment of two counsel.
2. The order of the court below is set aside and in its stead is substituted the following order:

'Judgment is granted in favour of the plaintiff against the defendant for:

(a) Payment of the sum of R 250 000.

(b) Interest on the said sum at the legal rate *a tempore morae*.

(c) Costs of suit including the qualifying fees of Dr Muller.'

JUDGMENT

Ponnan JA (Leach, Saldulker, Mbha JJA and Mathopo AJA concurring):

[1] In dispassionate legal terms this is an appeal against the dismissal of an action for damages suffered as a consequence of the alleged negligent conduct of the medical staff in the employ of the respondent, who performed a surgical procedure on the appellant. In human terms it is a tale, at least from the perspective of the appellant, of dashed expectations, much anguish and insensitivity, culminating in lengthy, stressful, and perhaps needlessly expensive litigation. The resolution of the litigation,

so one suspects the appellant would have prophesized at its inception, ought not to have been particularly protracted or inordinately difficult. And yet, that is precisely the course it seems to have run.

[2] The facts, which are undisputed, fall within a fairly narrow compass. On 8 April 2011 the appellant, Ms Cecilia Goliath, who was then 44 years old, underwent a routine hysterectomy for a fibroid uterus at the Dora Nginza Hospital in Port Elizabeth. By 11 April 2011 she appeared to have recovered and was discharged. On Friday 15 April 2011 Ms Goliath attended a clinic in Grahamstown for the removal of abdominal stiches and a wound dressing. On 7 June 2011 she was re-admitted to the Dora Nginza Hospital with severe pain and a wound abscess. The abscess was scheduled to be operated on in theatre on 8 or 9 June 2011 but this was not done and on 10 June 2011 the abscess burst, leading to the cancellation of the operation and her discharge on no treatment. Two weeks later Ms Goliath was re-admitted to the Dora Nginza Hospital complaining of a hard swelling in the abdominal scar but, after examination by the medical staff, was re-assured that nothing was amiss and she was sent home. Being unwilling to return to the Dora Nginza Hospital for further treatment of the wound infection, she called on the Settlers Hospital in Grahamstown on 5 July 2011 and was admitted to the surgical ward for what was described in the hospital notes as ‘a painful abdomen, abdominal distension, wound infection and a draining of wound sinus’. As the wound infection and abdominal pain did not clear up she was referred to Dr S P Muller, a consulting surgeon at Settlers Hospital, who, suspecting a ‘deep foreign body in the wound’, performed a laparotomy on 15 July 2011 and a septic gauze swab was removed from her abdomen.

[3] Ms Goliath instituted an action for damages in the Eastern Cape High Court, Grahamstown against the respondent, the Member of the Executive Council for Health in the Eastern Cape (the MEC), as the authority responsible for the Department of Health and Hospitals in that Province. She alleged:

'7.1 the Doctor who treated the Plaintiff was a professional servant in the employ and service of the Defendant and acted within the course and scope of his/her employment as such; and

7.2 the nursing staff and nursing assistants were similarly professional servants in the employ and service of the Defendant and acted within the course and scope of their employment as such; and

. . .

7.5 the said Doctors and/or medical nursing staff owed the Plaintiff a duty of care to ensure that she was provided with proper and skilled medical treatment including hospital, health services, supervision and care in accordance with generally accepted standards.

8. The aforesaid Doctor/Doctors who treated the Plaintiff and the medical nursing staff who assisted in the treatment of the Plaintiff and acted negligently and in breach of the aforesaid duty of care in that they:

8.1 failed to ensure that all surgical swabs utilised in the operation had been accounted for before the Plaintiff`s abdomen was closed; and

8.2 failed to remove all surgical swabs from the Plaintiff`s abdomen when the abdominal wound was closed; and

8.3 they allowed the operation wound to be closed before removing the surgical swab from the Plaintiff`s abdomen.

9. In and as a result of the aforementioned negligent conduct of the Defendant`s employees, the Plaintiff developed the complications pleaded above, had to attend Dora Nginza Hospital during June 2011 as pleaded above and ultimately had to undergo the further surgery for a laparotomy by Dr SAM MULLER.

10. In the premises the wrongful and negligent conduct of the Defendant`s employees as aforesaid was directly causally connected to the Plaintiff developing a wound abscess and ultimately requiring further surgery.'

The MEC's plea to those allegations was that:

'8.2 Ms Goliath`s hospitalisation and treatment was consistent with a duty of care owed to her having regard to the conditions and standards prevailing at the time; and

. . .

9.2 the MEC`s employees and servants were not negligent in the manner alleged or at all.'

[4] The high court (per Lowe J) dismissed Ms Goliath`s claim with costs but granted leave to her to appeal to this court against the whole of its judgment. In arriving at its conclusion the high court identified the 'real issue' in the matter as whether the appellant had 'discharged the onus of establishing negligence'. The question, according to Lowe J,

'is whether on the appropriate test (viewed in the circumstances set out above) the surgeon, the theatre staff and swab sister (or any one of them) conducted themselves in a manner constituting negligence.'

That question the learned judge answered thus:

'I am unable to find that plaintiff has discharged the onus which fell upon her to establish the negligence of either surgeon or nursing staff in the theatre relevant to the swab being left behind.'

He accordingly dismissed Ms Goliath's claim with costs.

[5] In the course of his judgment Lowe J stated:

'It has been widely accepted that the majority judgement in ***Van Wyk v Lewis*** [1924 AD 438] eschewed the application of *res ipsa loquitur* maxim in medical negligence actions. Indeed it has been stated that our courts have declined to apply the doctrine in such cases because it has been argued, accepted and held that in the medical context, the requirement that the

occurrence must fall within the scope of the ordinary knowledge and experience of the reasonable man cannot be met.

It is trite that in medical negligence cases, a lower court is bound by the stare decisis legal precedent system and simply cannot invoke the *res ipsa loquitur* doctrine. See: **"*Should res ipsa loquitur speak for itself in medical accidents*:" Patrick Van Den Heever De Rebus: November 2002.** There is no South African authority which overrules **Van Wyk (supra)** on this issue, at least I was referred to and I was unable to find any in my own research. On the contrary the work ***Res Ipsa Loquitur* and medical negligence: A comparative survey: Van Den Heever & Carstens: Juta 2011:** whilst accepting that *res ipsa loquitur* was rejected as having application in medical negligence cases by the majority of the court in **Van Wyk** argue that this should be reconsidered for many reasons. They suggest that following the High Court judgement in **Pringle v Administrator Transvaal 1990 (2) SA 379 (WLD) at 384 H** the door has not closed on the possible application of the maxim in medical negligence cases, with the caveat that it can only be applied if the alleged negligence is derived from something absolute, and the occurrence could not reasonably have taken place without negligence. The authors go on to state "*If regard must be had to the surrounding circumstances to establish the presence or absence of negligence, the doctrine does not find application*." (at 27)

. . .

There can be no doubt whatsoever, that until **Van Wyk v Lewis (supra)** is reconsidered and overturned by a court of appropriate status, a lower court (such as this) is bound to accept that in medical negligence cases, and certainly in cases involving swabs, the doctrine cannot be applied and that a conclusion must be reached without regard thereto.

Van Wyk v Lewis (supra) was dealt with extensively in a doctoral thesis on the subject of the applicability of the maxim in the health care context by **Van Den Heever: "*The application of the doctrine of res ipsa loquitur to medical negligence actions*: a comparative survey".** The author revisits Van Wyk in extensive detail as is pointed out in: Foundational Principles of South African Medical Law: Carstens/Pearmain Lexis Nexis 2007), Van Den Heever reaches the conclusion that there was no reason in Van Wyk as to why the maxim should not have

been applied and that the court erred in finding that it was not applicable in the medical context.

. . .

I remain of the view, that whilst much may be said for revisiting the application of *res ipsa loquitur* in the medical negligence field, as is eloquently set out by Van den Heever in the De Rebus article referred to above and in the **Foundational Principles of South African Medical Law (supra),** I am bound by the principles set out in **Van Wyk v Lewis *(supra)***'.

[6] The learned Judge concluded:

'I should say that had the *maxim res ipsa loquitur* been applicable to this matter and had I been able to rely thereon, the result in this matter may well have been completely different and in those circumstances the absence of an explanation by the defendant may well have been sufficient, by way of inferential reasoning, to establish negligence on the part of the medical staff concerned. I am unable, however, in the circumstances discussed above to make such a finding as I regard myself bound by **Van Wyk (supra)** and I respectfully consider the contrary view taken in **Ntsele (supra)** at paras [105-121] relevant to *res ipsa loquitur* to have been incorrectly decided.'

Those sentiments appear to have moved the learned judge to grant leave to Ms Goliath to appeal to this court. And, in turn, prompted the Centre for Law and Medicine of the University of Pretoria to obtain leave from the registrar of this court to be admitted as an *amicus curiae.* Heads of argument were accordingly filed with the registrar of this court on behalf of the *amicus* and counsel was briefed to address us in argument from the bar on the issue.

[7] It is important at the outset to emphasise that in law (as I suppose in most disciplines) terminology is important, because the use of incorrect terminology usually conduces to conceptual confusion. In both the pleadings and argument in this case

one frequently encountered the refrain ‘duty of care’. In *McIntosh v Premier, KwaZulu-Natal & another* 2008 (6) SA 1 (SCA) para 12 Scott JA observed:

‘The second inquiry is whether there was fault, in this case negligence. As is apparent from the much-quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word “duty”, and sometimes even the expression “legal duty”, in this context, must not be confused with the concept of “legal duty” in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression “duty of care” is similarly a source of confusion. In English law “duty of care” is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, “duty of care” in English law “straddles both elements of wrongfulness and negligence”.’

[8] The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant’s negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (*Van Wyk v Lewis* 1924 AD 438 at 444). A surgeon is in no different a position to any other professional person (*Lillicrap, Wassenaar and*

Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 488C). It has been pointed out that a 'medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' (*Mitchell v Dickson* 1914 AD 419 at 525). As Scott J put it in *Castell v De Greef* 1993 (3) SA 501 (C) at 512A-B: 'The test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field' (cited with approval in *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) para 15).

[9] In *Buthelezi v Ndaba* (para 16), Brand JA, after referring to *Van Wyk v Lewis* as the *locus classicus* on medical malpractice, pointed out that the maxim *res ipsa loquitur* 'could rarely, if ever, find application in cases based on alleged medical negligence'. Significantly, my learned colleague was astute not to say that it could never find application to a case based on medical negligence. The evident reluctance of our courts to apply the maxim is because, as Lord Denning MR observed in *Hucks v Cole* [1968] 118 New LJ 469 ([1993] 4 Med LR 393) 'with the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong'. For to hold a doctor negligent simply because something had gone wrong, would be to impermissibly reason backwards from effect to cause (*Medi-Clinic Limited v Vermeulen* (504/13) [2014] ZASCA 150 (26 September 2014) para 27).

[10] Broadly stated, *res ipsa loquitur* (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case

against him. The maxim is no magic formula *(Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573E). It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (Zeffert & Paizes 'The South African Law of Evidence' 2ed at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself (see *Groenewald v Conradie; Groenewald en Andere v Auto Protection Insurance Co Ltd* 1965 (1) SA 184 (AD) at 187F) - where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading (*Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 445F) – it being trite that the onus resting upon a plaintiff never shifts (*Arthur v Bezuidenhout and Mieny* at 573C). Nothing about its invocation or application, I daresay, is intended to displace common sense. In the words of Lord Shaw in *Ballard v Northern British Railway Co* 60 Sc LR 448 'the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working' (cited with approval in *Naure NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 and *Arthur v Bezuidenhout and Mieny* at 573F-G).

[11] In *Sardi v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H, Holmes JA made plain that it is inappropriate to resort to piecemeal processes of reasoning and to split up the enquiry regarding proof of negligence into two stages. He emphasized that there is only one enquiry, namely whether the plaintiff, having regard to all of the evidence in the case, has discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant. In that regard the learned judge of appeal stated:

‘As INNES, C.J., pertinently insisted in *Van Wyk v Lewis*, 1924 AD 438 at p. 445, lines 8 - 9, "It is really a question of inference". It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility; see *Rankisson & Son v Springfield Omnibus Services (Pty.) Ltd*., 1964 (1) SA 609 (N) at p. 616D. At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the *onus* of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of *(a)*, first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then *(b)*, deciding whether this has been rebutted by the defendant's explanation. See *R*. v *Sacco*, 1958 (2) SA 349 (N) at p. 352; *Grootfontein Dairy v Nel*, 1945 (2) P.H. 15 (A.D.); *Arthur v Bezuidenhout and Mieny*, 1962 (2) SA 566 (AD) at pp. 574 - 576.’

[12] Thus in every case, including one where the maxim *res ipsa loquitur* is applicable, the enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence (*Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd* 1982 (4) SA 890 (A) at 897H-898A). That being so, and given what Holmes JA described as the ‘evolved mystique of the maxim’, the time may well have come for us to heed the call of Lord Justice Hobhouse to jettison it from our legal lexicon. In that regard he stated in *Ratcliffe v Plymouth and Torbay Health Authority* [1998] EWCA Civ 2000 (11 February 1998):

‘In my judgment the leading cases already gives sufficient guidance to litigators and judges about the proper approach to the drawing of inferences and if I were to say anything further it would be confined to suggesting that the expression *res ipsa loquitur* should be dropped from

the litigator's vocabulary and replaced by the phrase *a prima facie case*. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a *prima facie* case is being made out. Where expert and factual evidence has been called on both sides at a trial its usefulness will normally have long since been exhausted.'

[13] Medical negligence cases do sometimes involve questions of factual complexity and difficulty and may require the evaluation of technical and conflicting expert evidence. But the trial procedure, which is essentially the same as in other cases, is designed to deal with those and thus no special difficulty ought to be involved in determining them. In this case the matter must be approached on the basis that at the conclusion of the hysterectomy, one of the swabs was overlooked and remained in Ms Goliath`s abdomen. For, in no other way could it have found its way into her body. The compensation demanded is in respect of an injury alleged to have been sustained by reason of the negligence on the part of the attending medical staff in the employ of the MEC. The MEC`s liability therefore depends on whether the injury sustained was due to negligence on the part of his employees in allowing the swab to be left in Ms Goliath's abdomen.

[14] In addition to Ms Goliath, Dr Muller, who performed the laparotomy, when the swab was removed, testified. No witnesses were called on behalf of the MEC. As is commonplace in cases of this kind, Ms Goliath did not fully know what had occurred because the relevant procedure was an operation carried out under general anaesthetic. Dr Muller testified that: 'Leaving an abdominal swab in the abdomen invariably causes abdominal infections'; and 'it's thank God a very rare situation to have a swab left in an abdomen after an operation'. He explained that it is a rare occurrence because 'rigid regulations [exist] that must be followed at all times after

any operation and most definitely abdominal operations'. He added 'it should not happen ever'.

[15] In supporting the conclusion reached by the high court, counsel for the MEC set much store by *Van Wyk v Lewis*, which it was suggested was on all fours with this case. But, as Innes CJ stressed in *Van Wyk v Lewis* (at 445), each case ultimately depends upon its own facts. In that, Kotze JA was at one with the Chief Justice when he observed (at 453) 'the question of negligence or no negligence must be ascertained from a consideration of all the facts viewed as a whole'. So too was Wessels JA when he stated (at 461- 462):

'We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care and judgement of the average surgeon in similar circumstances? If he falls short he is negligent.'

[16] *Van Wyk v Lewis* concerned a very difficult operation conducted by artificial light - one in which, because of the danger to the patient's life, it was imperative to get the patient off the operating table as soon as possible. Here we are concerned with a routine hysterectomy performed in a modern surgical theatre in circumstances where there was no suggestion that Ms Goliath's life was in any danger during its course. Unlike in *Van Wyk v Lewis,* we simply do not know who was in attendance during the surgical procedure or whether the 'rigid regulations' alluded to by Dr Muller had been followed. In particular we do not know whether there was a count of the swabs (or at the very least an attempt at one) prior to sewing-up the patient. And if so, what was the level of training, and how experienced was, the person to whom that task was

assigned? Tellingly in *Van Wyk v Lewis* that task fell to a very experienced theatre sister. On that score Innes CJ was unwilling to hold that a surgeon who leaves that task to a competent sister was on that account guilty of negligence (at 449), and even assuming in those circumstances that she was negligent in her check, it did not follow that the surgeon was liable for the consequences (at 450). As the nurse was not a party to that case, the learned Chief Justice declined the invitation to express an opinion as to her liability. In this case the MEC has been sued in his capacity as the employer of all of the medical staff who at the relevant time attended on Ms Goliath during the course of the operation, at least one of whom would have had to perform the rather important task of checking and counting the swabs.

[17] When an inference of negligence would be justified and to what extent expert evidence would be necessary would no doubt depend on the facts of the particular case. Questions of absolution from the instance at the close of the plaintiff's case aside, a court is not called upon to decide the issue of negligence until all of the evidence is concluded (*Arthur v Bezuidenhout and Mieny* at 573H). Thus any such explanation as may be advanced by a defendant forms part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the damage was caused by the negligence of the defendant or its servants (*Osborne Panama SA v Shell & BP* at 897G-H). Here although the procedure performed on Ms Goliath was under the control of the MEC`s employees, and what they did or did not do was exclusively within their direct knowledge, none of those employees were called to testify. In *Ratcliffe v Plymouth and Torbay Health Authority* (para 48) Lord Justice Brooke made the point that:

'It is likely to be a very rare medical negligence case in which the defendants take the risk of calling no factual evidence, when such evidence is available to them, of the circumstances

surrounding a procedure which led to an unexpected outcome for a patient. If such a case should arise, the judge should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence: the defendants' hypothesis must have the ring of plausibility about it. . . .'

[18] Lowe J appears to have allowed himself to be diverted from the obvious inference of negligence dictated by the evidence in this case by virtue of his heightened focus on the applicability of the maxim *res ipsa loquitur* to cases based on alleged medical negligence. He appeared not to appreciate that:

'At the end of the trial, after all the evidence relied upon by either side has been called and tested, the judge has simply to decide whether as a matter of inference or otherwise he concludes on the balance of probabilities that the defendant was negligent and that that negligence caused the plaintiff`s injury. That is the long and short of it.'

(Per Lord Justice Hobhouse (*Ratcliffe v Plymouth and Torbay Health Authority*).)

In that connection the important distinction between an onus of proof and an obligation to adduce evidence (*Arthur v Bezuidenhout and Mieny* at 573A) came to be blurred. For as Wessels JA pointed out (*Van Wyk v Lewis* at 470):

'Now there is no doubt that it is the duty of an operating surgeon to use reasonable skill and care to remove all swabs from the body of his patient before he proceeds to sew up. He cannot rely implicitly on the count of the nurse, he must search and make as sure as possible that all swabs have been removed. If he shows any indifference in such a matter he is guilty of negligence.'

[19] Thus at the close of Ms Goliath's case, after both she and Dr Muller had testified, there was sufficient evidence which gave rise to an inference of negligence on the part of one or more of the medical staff in the employ of the MEC who attended

on her. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court to draw is the only reasonable inference, it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences (*AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); see also *Cooper & another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA)). That being so, the MEC, in failing to adduce any evidence whatsoever, accordingly took the risk of a judgment being given against him. After all, it was open to the MEC to adduce evidence to show that whilst Ms Goliath was undergoing surgery, reasonable care had indeed been exercised by his employees. That he did not do. Nor, for that matter was so much as a version put during cross examination to either Ms Goliath or Dr Muller on behalf of the MEC. Moreover, no explanation was advanced as to why the medical staff who attended on Ms Goliath were not called as witnesses. It may well be that in these circumstances an inference may be justified that the MEC feared that if one or more of them were to enter the witness-box such person's evidence would expose facts unfavourable to his case. Accordingly, as the matter had been fully explored in the evidence, at the conclusion of the trial the task of the court was to decide whether, on all of the evidence and the probabilities and the inferences, Ms Goliath had discharged the onus of proof resting upon her on a preponderance of probability. In my view she unquestionably had. It follows that the appeal must succeed.

[20] It remains to record that the issue of the quantum of damages in this case that stood over for later determination by the high court (or agreement between the parties) has since been settled by the parties, with the MEC undertaking to pay to Ms Goliath the sum of R 250 000 in consequence of the event that is the subject of this claim.

[21] In the result:

1. The appeal is upheld with costs including those consequent upon the employment of two counsel.

2. The order of the court below is set aside and in its stead is substituted the following order:

‘Judgment is granted in favour of the plaintiff against the defendant for:

(a) Payment of the sum of R 250 000.

(b) Interest on the said sum at the legal rate *a tempore morae*.

(c) Costs of suit including the qualifying fees of Dr Muller.’

_____

V PONNAN

APPEARANCES:

For Appellant:	I J Smuts SC (with him S H Cole) Instructed by: Wheeldon Rushmere & Cole Grahamstown c/o Symington & De Kok Bloemfontein
For Respondent:	G H Bloem SC (with him S Rugunanan) Instructed by: Whitesides Grahamstown State Attorney Bloemfontein
For Amicus Curiae: (Centre for Law and Medicine)	A C Oosthuizen SC (with him P van den Heever) Instructed by: Rosenberg Reitz Barry Bloemfontein