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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 10785/2006

In the matter between:

JOHANNES HENDRIK LOOTS N.O. Plaintiff
(in his capacity as curator *ad litem* to
JOHANNA CECELIA ERASMUS

and

THE PREMIER OF THE WESTERN CAPE
PROVINCE 1st Defendant

DR. K. DU PLESSIS 2nd Defendant

JUDGMENT : 09 SEPTEMBER 2009

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TRAVERSO, DJP :

[1] The plaintiff is suing in this matter in his capacity as curator *ad litem* to The patient ("*the patient*"). This is a claim for damages flowing from the alleged medical negligence of the second defendant. By agreement between the parties only the issue of merits and the special plea require determination at this stage.

[2] On 21 January 1999 the patient, who at the time was a mother of three children, submitted herself for the performance of a laparoscopic sterilisation which involved a bilateral fallopian tube ring occlusion. The operation was performed by the second defendant. The patient and her husband desired a sterilisation because they already had three children and felt that they could not afford more children.

[3] The procedure performed on the patient by second defendant was however not an occlusion of the fallopian tubes, but instead the falope rings were applied to her round ligaments. Not surprisingly, she fell pregnant soon thereafter. Once her pregnancy was confirmed, the patient was offered an abortion, which she and her husband declined because of religious considerations. They are members of the Baptist Faith.

[4] The pregnancy was uneventful but the birth went horribly wrong. An emergency caesarean section was performed. At some stage the patient developed Amniotic Fluid Embolism ("AFE"), which is a rare obstetric emergency. The *sequelae* of this complication were devastating. She has permanent neurological damage. She has poor vision, speaks with a slur, cannot walk without a frame with wheels

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on, has severe memory loss and has spasticity and severe muscle spasms in her limbs.

[5] The baby only survived for a short while.

[6] The evidence adduced at the trial was short and simple, and I will only briefly summarise it.

[7] Firstly Dr. Flemming, a neurologist testified and confirmed that the patient's brain damage was irreversible.

[8] Thereafter Dr. Dalrymple testified. He confirmed that the patient's fallopian tubes were not occluded by the second defendant. Instead the fallope ring was inserted onto the round ligament which is an organ which lies adjacent to the fallopian tube. He explained that there are three structures which lie very closely to one another in a woman's pelvis namely, the ligament to the ovary, the

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fallopian tube and then the round ligament of the uterus. The fallopian tube is a free lying structure and can be moved. The fallopian tubes have a fimbriated end. It resembles the petals of a flower and is referred in medical parlance as "*fimbriae*". The fimbriae are the outstanding feature by means of which the fallopian tubes can be identified.

[9] Dr. Dalrymple testified that pregnancy is a very dangerous period in a woman's life – approximately 600 000 women die in the world each year as a result of complications during pregnancy.

[10] He concurred with the conclusion of Dr. Van Helsdingen that the patient's condition came about as a result of AFE. It is common cause that this is an extremely rare condition which occurs only in pregnant women.

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[11] Dr. Dalrymple concluded, that in his view the second defendant was negligent in not occluding the fallopian tubes.

[12] That summarises the relevant facts. A host of issues were raised by the defendants. In essence however there is only one issue to decide and that is whether there is a sufficiently close link between the onset of AFE and the resultant consequences flowing therefrom, and the procedure performed by the second defendant.

[13] I will however before considering this issue make brief mention of the other issues raised:

The second defendant's negligence:

[14] Dr. Dalrymple was clear that in his expert view the second defendant was negligent. Although Mrs. Williams, who appeared for the defendants conceded that performing an incorrect procedure "*probably*" constitutes negligence,

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she argued that in view of Dr. Dalrymple's concession that doctors make mistakes and that even "*experienced laparoscopists*" make mistakes, I cannot simply find that the second defendant was negligent. This submission only has to be made to be rejected.

Was the plaintiff's case properly pleaded?

[15] The particulars of claim allege that the patient's condition was brought about by maternal hypertension. Mrs. Williams argued that because it is now common cause that the patient's condition was brought about by AFE, and not maternal hypertension, her case as pleaded was "*conceded*", and that accordingly the plaintiff should be non-suited on this ground alone. This submission is without substance. Firstly the plaintiff filed a replication in terms whereof it was admitted that the patient suffered AFE. Secondly the parties at a pre-trial conference agreed, *inter alia*, that the patient suffered a severe brain insult

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consequent upon her developing AFE. The evidence in this regard was conclusive and that is the only basis upon which this trial was conducted. The issues were canvassed fully and in the end most of the evidence was common cause.

Does the waiver/consent apply?

[16] The patient signed a consent to the operation which contained, *inter alia*, an acknowledgement that although the purpose of the procedure was to ensure permanent infertility, she understood that pregnancy may occur in exceptional circumstances, and that if it did occur she would not hold the first defendant liable.

[17] The terms of the consent relates exclusively to a fallopian tube occlusion sterilisation procedure. The defendants have admitted that such a procedure was not carried out on the patient. In any event her pregnancy was

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the result of the fact that she was not sterilised. She did not fall pregnant despite being sterilised.

[18] This point too is without substance.

Causation:

[19] This is the only real issue in this case.

[20] The defendants denied that the patient's condition was caused by the second defendant's negligence on two grounds, namely that she:

20.1 knew and appreciated that the sterilisation procedure was not failsafe;

20.2 was offered a termination of pregnancy, which she refused, thereby electing to bear the risks of pregnancy.

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[21] As regards the first point I need to say no more. The patient was not sterilised.

[22] On the second point the uncontested evidence of Mr. Erasmus was that he and his wife refused an abortion because it would have been contrary to their Baptist religious beliefs. It was never suggested that the patient was advised to have an abortion because of any medical necessity, or any other medical consideration. On the face of it, it appears to have been offered to her for reasons of expediency. The patient's refusal to have an abortion was therefore neither negligent or unreasonable. In the circumstances her refusal cannot lead to the defendants being released from liability. (In this regard see S. v. Mokgethi, 1990(1) SA 32 (A) at 41F – 45D).

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Legal Causation:

[23] It is well established that causation in the law of delict gives rise to two distinct stages of the enquiry. Firstly it must be established whether the negligent act or omission materially contributed to the condition of the patient. If it did not, that is the end of the enquiry. If it did, the second question is whether the harm is sufficiently closely linked to the negligent act for legal liability to ensue, or whether the harm is too remote. (Minister of Police v. Skosana, 1977(1) SA 31 (A) at 34.)

[24] As regards the first test it has in my view been shown on the common cause facts that there is factual causation:

24.1 The patient and her husband decided that she would be sterilised because she did not want any more children.

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24.2 The second defendant failed to occlude her fallopian tubes as a result of which she fell pregnant.

24.3 Her pregnancy was uneventful but the birth went horribly wrong. At some stage she developed AFE – which is a very rare, unpredictable and unpreventable condition.

24.4 AFE occurs only in pregnant women.

[25] If one were to apply the "*but for*" test and ask the question – if the second defendant had performed the correct procedure, would the patient have suffered AFE with the resultant consequences - the answer is obvious.

[26] It is therefore only the legal causation which is in issue. The approach to adopt in establishing whether there was

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legal causation was set out in S. v. Mokgethi, 1990(1) SA 32 (A) at 39D – 41B. In this matter Van Heerden JA held that there is no single and general criterion for legal causation which is applicable in all circumstances. A flexible approach is suggested:

At p. 40D-F:

> *"Dit spreek vanself dat 'n elastiese maatstaf sy nadele het. Dit het egter ook sy voordele. So bv sê Gordon (op cit op 109): 'Remoteness is at once the most difficult and the most useful of the causal criteria, because it is the vaguest.' Ek betwyfel dan ook of 'n regstelsel sonder 'n oorheersende elastiese maatstaf vir die bepaling van juridiese oorsaaklikheid kan klaarkom. Soos blyk uit die passasies wat hierbo uit Skosana en Daniels aangehaal is, kom beleidsoorwegings ter sprake en moet daarteen gewaak word dat 'n dader se aanspreeklikheid nie die grense van redelikheid, billikheid en regverdigheid oorskry nie. Sodanige oorwegings en begrippe is moeilik vatbaar vir nadere omskrywing. Dit is daarom, meen ek, dat in Blaikie and Others v. The British Transport Commission 1961 SC 44 op 49, gesê is:*
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> > *'The law has always had to come to some kind of compromise with the doctrine of causation. The problem is a practical rather than an*

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intellectual one. It is easy and usual to bedevil it with subtleties, but the attitude of the law is that expediency and good sense dictate that for practical purposes a line has to be drawn somewhere, and that, in drawing it, the court is to be guided by the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher."

At p. 41A:

"Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde sort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie."

[27] In applying the flexible approach the basic question remains whether there is a sufficiently close relationship between the wrongdoer's conduct and its consequences that such consequences may be imputed to the wrongdoer in

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view of policy considerations based on reasonableness, fairness and justice. This must be considered in the light of Dr. Dalrymple's evidence that pregnancy is a dangerous condition which is frought with medical risks for the mother. In my view therefore any prudent doctor would have foreseen that his failure to occlude the fallopian tubes would possibly result in the patient's pregnancy and that pregnancy carries inherent risks which might lead to bodily harm or even death. That was the uncontested evidence of Dr. Dalrymple.

[28] Much was made by the defence of the fact that AFE is a rare condition and the fact that Dr. Dalrymple testified that AFE as such would not reasonably have been foreseeable by the second defendant.

[29] It is by now well-established that the wrongdoer does not have to foresee the precise nature of the harm which may occur, but only the general kind or nature thereof. (See

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Botes v. Van Deventer, 1966(3) SA 182 (A) at 191F-G; Kruger v. van der Merwe, 1966(2) SA 266 (A) at 272D-G; Standard Chartered Bank of Canada v. Nedperm Limited, 1994(4) SA 747 (A) at 768I-J.)

[30] There can be no doubt that there is a connection between the second defendant's negligence and the pregnancy of the patient. The AFE was a complication of the pregnancy and the ensuing birth. As I have already said, any prudent doctor should be aware of the risks inherent in pregnancy, and in my view cannot escape liability merely because the specific harm was not foreseen.

[31] In the circumstances I am satisfied that the plaintiff has proved that the second defendant, acting within the course and scope of his employment with the first defendant, was negligent in that he undertook a duty of care to occlude the fallopian tubes of the patient by the placement of rings but in

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breach thereof placed the rings on her round ligaments. As a consequence of this failure, the patient fell pregnant and unfortunately devastating complications occurred.

[32] I am therefore satisfied that the first and second defendants are liable to pay such damages as the plaintiff may prove at the resumed hearing of this matter.

[33] On the question of costs it was argued that I should award costs immediately as any damages which might be ordered in the future will fall into the High Court range.

[34] I agree that there is no reason why the costs of the hearing thus far should stand over. There was no dispute before me about the patient's condition, or that her condition was brought about by AFE. Neither was it in contention that the patient suffered extremely severe consequences. There

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is therefore no likelihood that her ultimate reward will not be above the jurisdictional limit of the Magistrates' Court.

[35] I therefore make the following order:

(a) First and second defendants are liable to pay such damages as the plaintiff may prove at the resumed hearing of this matter;

(b) First and second defendants are ordered to pay the costs of the hearing regarding the merits, such costs to include the qualifying expenses of Dr. Flemming and Dr. Dalrymple.

TRAVERSO, DJP