IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **YES**
Date:	Signature:

CASE NO: 44326/13

DATE: 26 OCTOBER 2017

In the matter between:

M, M Plaintiff

And

DR S VALLABH Defendant

JUDGMENT

Ramapuputla AJ:

INTRODUCTION

[1] The plaintiff claims damages from the defendant consequent upon an agreement concluded with the defendant for the rendering of medical services, which included the performance of a hysterectomy on the plaintiff.

[2] The plaintiff was born on […] April 1959 and therefore 53 years of age when the hysterectomy was performed on her on 15 August 2012 at the Lenmed Private Hospital (Lenmed Hospital).

[3] After the plaintiff's discharge from the Lenmed Hospital on 18 August 2012 she developed sepsis (in the surgery wound) which subsequently became necrotic and required extensive surgical debridement, which was performed by Dr Chasumba, a specialist surgeon, at the Brenthurst Clinic on 10 and 13 September 2012.

COMMON CAUSE FACTS

[4] There is no dispute regarding pre-operation procedure and conduct.

[5] The hysterectomy procedure performed on the plaintiff is a major procedure. The plaintiff's diabetes, obesity and hypertension rendered her a high-risk patient. The plaintiff's diabetes and obesity aforesaid potentially jeopardised the plaintiff's wound healing post-surgery and increased her prospects of wound infection.

[6] The plaintiff and defendant were cognisant of the fact that wound infection and delayed wound healing are frequent complications after the performance of a hysterectomy.

[7] It is common cause that the defendant did not prescribe antibiotics on 23 August 2012 (when the plaintiff's wound was found to be indurated) and that he did not clean the plaintiff's wound on 27 August 2012 or prescribe antibiotics (when he found the wound to be open and septic).

CHRONOLOGY

[8] On 18 August 2012 the plaintiff was discharged from the Lenmed Hospital with antibiotics (Augmentin).

[9] She was directed to return for the removal of her sutures on 23 August 2012.

[10] On 23 August 2012 the plaintiff returned to the defendant's rooms, the defendant examined the plaintiff's wound and found that it was indurated (hardened tissue).

[11] The induration of the plaintiff's wound on 23 August 2012 was caused by an underlying infection.

[12] The defendant assumed that the plaintiff completed her course of antibiotics. The defendant directed the plaintiff to return to his rooms on 27 August 2012 for the removal of the sutures.

[13] On 27 August 2012 the plaintiff returned to the defendant's rooms and the defendant's assistant removed the plaintiff's sutures. Upon examination the defendant found the plaintiff's wound to be open and septic and contacted Sister Beverley telephonically in the plaintiff's presence. The defendant thereafter referred the plaintiff to Sister Beverley for wound care treatment.

The defendant did not give the plaintiff any other directions, her file or clinical records.

[14] On the same date, the plaintiff immediately thereafter attended Sister Beverley's rooms (also in the Lenmed Hospital). Sister Beverley examined the plaintiff's wound and took two photographs of the wound with her mobile phone for later transmission to her laptop for filing.

[15] The plaintiff informed Sister Beverley that she could not afford her treatment. She provided the plaintiff, on a Lenmed Hospital letterhead, with a handwritten list of wound care treatment items to purchase. The plaintiff did not return to her for wound care treatment. Sister Beverley had a longstanding professional arrangement with the defendant for patient referral.

[16] Sister Beverley did not inform the defendant that the plaintiff did not return for wound treatment. The defendant did not contact Sister Beverley to enquire about the plaintiff's condition or progress.

[17] Sister Beverley is no longer in possession of her diaries in which she recorded the information relating to the plaintiff and her other patients (for the years 2012, 2013 and 2014) because she left those at her previous place when she moved premises. She also does not have the pictures of the plaintiff's wound because those were accidentally deleted by another nursing Sister who was working with her the other day. She lost her cell-phone in a robbery.

[18] The plaintiff returned to the defendant's rooms after Sister Beverley treated her wound (still on 27 August 2012) and found a lady she described as the

defendant's wife at the reception desk (she identified her in Court on 26 October 2012).

[19] She explained to the defendant's wife that she could not afford the treatment by Sister Beverley and enquired whether the defendant could not re-admit her to hospital for the required treatment. The defendant's wife walked towards the defendant's rooms and returned after a while stating to the plaintiff: 'Your husband must pay'.

[20] The plaintiff thereafter attended her general practitioner's rooms, Dr Moosajee, for advice and/or assistance. Dr Moosajee is the one who referred the plaintiff to the defendant after the latter suspected pre-cancer. Dr Moosajee denied the plaintiff's testimony that she spoke to him on the telephone from his reception desk on 27 August 2012 and that he gave her advice about the continued treatment of her wound.

[21] The plaintiff's condition worsened and on 4 September 2012 she contacted Dr Moosajee telephonically. Dr Moosajee's made a note. He concluded, from the information gained from the plaintiff, that the plaintiff's wound was septic ('oozing') and prescribed antibiotics.

[22] By 8 September 2012 the plaintiff's wound and condition worsened further in consequence of which she was seen by Dr Moosajee's locum, Dr Shaboodien, at Dr Moosajee's rooms. Dr Shaboodien contacted the defendant telephonically and informed him that the plaintiff had 'bad wound sepsis'.

[23] The defendant prescribed 4 grams of Augmentin to the plaintiff over the telephone and instructed Dr Shaboodien to advise the plaintiff to see him (the defendant) on Monday 10 September 2012.

[24] The same evening the plaintiff went to the Brenthurst Clinic where she was admitted.

[25] Dr Maisto compiled and signed a preliminary report dated 8 September 2012. From the records after his examination it is evident that the plaintiff had increased blood pressure, severe wound infection and breakdown, severe foul adherent exudate and cellulitis. Dr Maisto also recorded that there was a complete breakdown of repair.

[26] Dr Chasumba examined the plaintiff on 9 September 2012 during his ward rounds (usually conducted between 08h00 and 10h00) and found the wound to be necrotic ('vrot'). He immediately concluded that extensive debridement surgery will be necessary and informed the plaintiff accordingly.

[27] On 10 September 2012 Dr Chasumba performed extensive debridement surgery on the plaintiff in theatre. Before he commenced with the surgery he personally took the photograph which depicts a severely necrotic wound with extensive slough.

[28] On 13 September 2012 Dr Chasumba performed further debridement surgery on the plaintiff.

[29] The plaintiff did not attend to the defendant's rooms on 10 September 2012, and the defendant did not contact her on that date or enquire about her non-attendance on this occasion or about her condition.

THE PLAINTIFF'S CASE

[30] The plaintiff's case essentially revolves around the plaintiff's post-operative care. The grounds in respect of which the plaintiff contends that the defendant breached his duty of care towards her are based on the lack of a post-operative management plan.

[31] The plaintiff submits that the defendant omitted to prescribe antibiotics to the plaintiff on 23 August 2012 when he found her wound to be indurated.

[32] The plaintiff further submits that the defendant's conduct between the period 27 August 2012 until 10 September 2012 amounted to a total abandonment of his own patient.

THE DEFENDANT'S CASE

[33] The defendant's defense is that the plaintiff had unilaterally, for whatever reason, elected not to continue with the post-operative wound care management plan instituted by him**.**

[34] That the plaintiff failed to inform the defendant that she was not going to continue with the management plan recommended by him and that she had decided not to go back to him under any circumstances because she perceived that 'he did not accept her'.

[35] The plaintiff conceded that the defendant had never refused to treat her. Further, that she had not informed him of her intention not to return to Sister Beverley.

[36] The plaintiff and defendant signed a consent form on 14 August 2012. Her claim against the defendant in contract is regulated by the aforesaid consent form. The consent form specifically advised the plaintiff of the following risks, severe infection, return to theatre, bruising, delayed wound healing and keloid formation. The plaintiff was therefore informed of the risks and consented to the risks set out in the consent form.

ISSUES TO BE DECIDED BY THE COURT

[37] The parties are agreed that at this stage the court is to determine only whether there was negligence. If so whether it was a cause of or contributed to plaintiff's condition. The issue of quantum has been separated for later determination should this court find in the plaintiff's favour on the merits. The issues for determination are:

(a) Whether the alleged omission by the defendant caused or contributed to the aggravation of the sepsis and ultimately led to the total breakdown of the plaintiff's post-operative wound.

(b) Whether the conduct of the defendant amounted to negligence which attracts legal liability.

(c) Whether the plaintiff contributed to the negligence attributed to the defendant. In particular, her unqualified daughter cleaning the wound, her failure to go back to Sister Beverley and the defendant.

EXPERT WITNESSES

[38] **Dr Davis**

Dr Pierre Davis is a gynecologist who started practice on 1 December 1978 and retired 9 years ago. In order to keep himself up to date he goes to congresses regularly. He testified that Sister Beverley's prescription of dressing packs, Jelonet and Transpore appear to be a recommendation for self-treatment. He confirmed that the plaintiff had a raised BMI (body mass index) and that she was obese. With obese patients upon whom hysterectomies are performed there is a greater chance of wound infection. An indurated wound is a wound that becomes hard. His evidence was that if he was told on 8 September 2012 that a patient of his had 'bad wound sepsis' he would have seen the patient immediately. His evidence was that the prescription of Augmentin by Dr Vallabh was totally inappropriate. Dr Davis was of the view that Dr Vallabh ought to have treated the plaintiff's wound until it had healed. Dr Davis indicated that in his view Dr Vallabh ought to have done a pus swab on 27 August 2012. Dr Davis' evidence was that had the wound been cared for properly, a much smaller intervention would have been required. He stated that whilst Dr Vallabh had not refused treatment on 8 September 2012, advising the plaintiff to come back to see him on the Monday was unacceptable. He ought to have followed up with the patient when she did not arrive on the Monday, 10 September 2012. When there is a

complete breakdown of the wound there is no place for conservative management.

[39] **Dr Swart**

He is still in practice. He does not agree with Dr Davis that Dr Vallabh had abandoned the patient. He considered the referral to Sister Beverley to have been an appropriate referral. It is not reasonable to expect of Dr Vallabh to call the plaintiff or Sister Beverley. The usual practice is that a patient is requested, post-operatively, to contact the doctor 6 weeks post-operatively or, if there is a problem. His evidence is that the plaintiff had unilaterally decided not to continue with her wound care treatment. Although in her mind it was 'for good reason', she had not informed Dr Vallabh. There was no bilateral decision between doctor and patient that the plaintiff could discontinue the treatment plan. Accordingly, Dr Vallabh was under the impression that the treatment plan which he had put in place was being followed. He does not agree that a pus culture ought to have been taken on 27 August 2012. Dr Swart testified that Dr Vallabh's conservative management of the plaintiff on 27 August 2012 was appropriate. On being informed of the septic wound on 8 September 2012, Dr Vallabh was entitled to rely on the description given to him of the patient by Dr Shaboodien. Given that there was not systemic infection, the fact that Dr Chasumba said the patient was not in distress, it was reasonable for Dr Vallabh to say that the patient should see him on Monday and to prescribe Augmentin. The patient's autonomy to decide not to return to Dr Vallabh had to be respected. He testified that if a patient refuses to continue with treatment, it would be that patient's right.

PLAINTIFF

[40] The plaintiff's testimony is flowing and the contradictions she made are of minor consequence. She was not shaken during cross-examination and she expressed her emotion when she recalled the way she was treated by the defendant. Her recollection of the treatment by the defendant was that of an unwanted person.

SISTER BEVERLEY

[41] I find Sister Beverley to be the most dishonest, evasive and a very deceiving witness. On her evidence she demanded a payment of R 500- from the plaintiff which amount she reduced to R 300- because the plaintiff could not afford treatment. This conduct by her is very questionable because the defendant's expert, Dr Swart, voluntarily gave information that Discovery Medical Aid does not charge for wound cleaning. The plaintiff's husband is a member of Discovery Medical Aid**.** Dr Swart added that Discovery Medical Aid has nurses who go to patient's houses and clean the wounds for no charge. Whether Dr Vallabh knew about the no charge wound cleaning by Discovery Medical Aid and still referred the plaintiff to Sister Beverley with whom he has a long-standing working relationship is something of great concern. Whether Sister Beverley called Discovery Medical Aid to check whether they can send their no charge wound cleaning nursing Sister is not established. It is probable that Sister Beverley knew about this but did not inform the illiterate plaintiff.

The loss of photographs and the plaintiff's file (in a form of a diary) also confirms the dishonesty and deception she displayed throughout her

testimony. In the case of *Khoza v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government*[1]2015 (3) SA 266 (GJ) it was held that aside from the ordinary obligations of medical practitioners to maintain their patient's records the National Health Act 61 of 2003 expressly legislates for it. The policy considerations that underlie the legislation are self-evident. *Prima facie* it would appear not to be in the interests of justice to condone, without an acceptable explanation, a failure on the part of a state institution (this includes health practitioners) to comply with a positive obligation imposed by statute, and enforced by significant penalties, to ensure that records are preserved, are not tampered and that proper access controls are put in place.

DR MOSAJEE

[42] Dr Mosajee did not want to see Plaintiff when she came to his rooms on 27 August 2012, instead he spoke to her through his reception telephone. He did not allow her through to his consulting room. Dr Mosajee threatened that he will not answer the plaintiff's Counsel's questions.

DR VALLABH

[43] This witness was very arrogant (he persisted in telling Counsel for the plaintiff 'what did you expect me to do?'). He was very condescending. He contemptuously read that the plaintiff had a demeaning infection. This is one of the few times he faced the Bench. He leaned against the witness box, he sometimes walked out of the witness box, he constantly apologised for not

[1] 2015 (3) SA 266 (GJ).

facing the bench, he was very rude to plaintiff's Counsel. He bragged about the more than two thousand patients he has and has no time to be phoning and making a follow-up on the plaintiff. He just did not have time. He does not appreciate the seriousness of the claim against him and is the epitome of nonchalance.

REASONS FOR JUDGMENT

[44] A patient who consults with a doctor in private practice enters into a contractual relationship with the doctor. It is an implied term of the contract that the doctor owes the patient the duty of care. The doctor undertakes to render professional services and the patient undertakes (normally) to pay for services. This contract between a doctor and patient takes the form of an implied agreement that the doctor will diagnose the patient's complaint and treat the patient for it in the usual manner. Doctors do not guarantee that the patient will be cured unless they specifically say so.[2]

[45] Doctors in private practice may accept or refuse patients provided that they do not refuse to treat the patient on unconstitutional grounds or where a person requires emergency medical treatment.

The following questions need to be asked:

WAS THERE POST OPERATIVE WOUND CARE MANAGEMENT?

[2] See D McQuid-Mason & M Dada *A-Z OF Medical Law* (2011) 166 para 204.

[46] Sister Beverley told the court that when the defendant refers a patient to her, the patient becomes hers. She also said that she discharges the patient. In contradicting the above assertion, the defendant alleges that it is an established practice for Sister Beverley to contact him after a second wound examination. This contradiction leads me to conclude that there was no post-operative wound care management plan.

DID THE DEFENDANT ASSESS THE PLAINTIFF WHEN CIRCUMSTANCES REQUIRED?

[47] On 23 August 2012 the defendant failed to check the underlying cause of the wound infection despite the fact that he was not sure whether the underlying cause of infection is obesity, and/or diabetes, and/or hypertension, and/or a complication of the removal of the lesion which was pre-cancerous. He failed to open the wound. In cross-examination he was asked if on that day if the facts revealed that diabetes is an underlying cause what would he do? His response was: 'I would call Dr Kalla (the intensivist) immediately'. The defendant still did not assess the plaintiff.

DID THE DEFENDANT FAIL TO TAKE THE NECESSARY MEASURES TO PREVENT THE AGGRAVATION OF POST OPERATIVE WOUND INFECTION?

[48] The defendant testified that on 27 August 2012, 'the wound was in the early stages' when he referred the plaintiff to Sister Beverley. The defendant further testified 'they would have caught it within 48 to 72 hours and plaintiff would have been up and above'. These assertions prove that had the defendant intervened earlier, the wound would not have worsened to the stage where it

was on 8 September 2012.This proves that the defendant knew exactly what to do but chose not to because he just did not want to continue treating the plaintiff.

DID THE DEFENDANT PROPERLY CONSIDER VARIOUS RISK FACTORS WHICH INCREASED THE PLAINTIFF'S RISK FOR POST OPERATIVE WOUND INFECTION?

[49] From 23 August 2012, the defendant never called Dr Kalla to come and check the plaintiff's diabetes and hypertension. He himself never conducted any tests. His evidence is that he only asked the plaintiff if she was taking Dr Kalla's medication. The defendant says the wound was hardened because there was an underlying infection. The wound had not improved by then and defendant thinks 'it was because the plaintiff's diabetes was poorly controlled'. The defendant did not do any tests because the plaintiff was not systematically infected. He asked the plaintiff to come back after 4 days to re-assess the wound.

DID THE DEFENDANT FAIL TO CONDUCT A PROPER INVESTIGATION IN ORDER TO DETERMINE THE APPROPRIATE COURSE OF TREATMENT?

[50] When the defendant prescribed Augmentin the very first time he said he ascertained that the plaintiff's wound was ok, she was normotensive, blood sugar was fine and the wound was healthy. Surprisingly on 8 September 2012 the defendant prescribed 4 grams of Augmentin after speaking to Dr Shaboodeen on the telephone. Dr Shaboodeen described the wound as 'bad

wound sepsis'. There is no evidence that plaintiff's wound was ok, she was normotensive, blood sugar was fine and the wound was healthy. This is in contrast to what the defendant said was the correct procedure when he prescribed Augmentin the first time.

[51] The defendant testified that Dr Shaboodeen prescribed a generic of lower dose despite the fact that he telephonically requested her to prescribe 4 grams of Augmentin. This clearly confirms the allegation by the plaintiff that Dr Shaboodeen said the defendant 'must clean his mess'. The inference I draw from Dr Shaboodeen's conduct is that of a person who does not want to be involved with something that has already gone wrong.

[52] Dr Shaboodeen did not come to give evidence of the type of examination, tests performed on the plaintiff and the details of the conversation she had with the defendant. Therefore, the evidence of the plaintiff that Dr Shabodeen only looked at the wound and told her to 'put your clothes back on' without performing proper clinical examination and tests is uncontested.

CAUSATION

[53] In the case of *International Shipping Co (Pty) Ltd v Bentley*[3] it was pointed out by Corbett JA that causation involves two distinct enquiries. The first enquiry is whether the wrongful conduct was a factual cause of the loss. The second enquiry is whether the wrongful act is linked sufficiently closely or directly to

[3] 1990 (1) SA 680 at 700.

the loss for legal liability to ensue or whether the loss is too remote. Regarding the first enquiry he said the following:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a c*ausa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter*, if it would not have ensued. In short, recognition of a duty of care is the outcome of a value judgment that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes'.

FORESEEABILITY

In the case of *Kruger v Coetzee*[4] the court held that for the purposes of liability culpa arises if (a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring

[4] 1966 (2) SA 428 (A).

another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases. That the harm in this case is foreseeable is demonstrated by the consent form signed by both the plaintiff and defendant. Wound infection and return to theatre are listed as frequent risks.

[54] The defendant as a *diligens paterfamilias* foresaw the reasonable possibility that his failure to take tests to exclude underlying causes, take a pus swab, prescribe appropriate antibiotics and/or to admit the plaintiff when she requested him to do so could cause an aggravation of the plaintiff's wound. Had the defendant so acted, the aggravation, severe wound infection and breakdown, severe foul adherent exudate and cellulitis would have been avoided.

UNLAWFULNESS

[55] In *Minister van Polisie v Ewels*[5] it was held that our law has developed to a stage wherein an omission will be regarded as unlawful conduct when the

[5] 1975 SA (3) 590 (A).

circumstances of the case are of such a nature that the omission not only incites moral indignation but also the legal convictions of the community demand that it should be regarded as unlawful and the damage suffered ought to be made good by the person who neglected to do a positive act. Subsequent decisions have reiterated that the enquiry in that regard is a broad one in which all the relevant circumstances must be brought to account.

[56] The defendant testified that the fact that the wound worsened meant that there was a deep-seated infection. He said he opened the wound. He confirms that there was underlying infection on 27 August 2017, which was above the fascia of the abdomen but he did conduct any tests to determine the cause of the infection. He had a legal duty to test but he omitted to do so.

[57] The fact that defendant referred to the plaintiff as fat indicates the humiliation suffered by the plaintiff. The fact that the plaintiff went from one health practitioner to another, who in turn phoned the defendant to make him aware that his patient sought help, and he did nothing about it, is unlawful conduct because not only does it incite moral indignation but also the legal convictions of the community demand that it should be regarded as unlawful and the damage suffered ought to be made good by the defendant.

[58] The defendant testified that he was waiting for Sister Beverley to contact him after the second wound examination as that is their established practice. Upon Sister Beverley failing to contact him he did not contact Sister Beverley nor the plaintiff to find out the status of the wound. The fact that Sister

Beverley did not contact the defendant on the second wound examination, of a high-risk patient, places a moral obligation on the part of the defendant to inquire from Sister Beverley of the whereabouts of the plaintiff.

[59] In any event the defendant is lying because Sister Beverley had already testified that when defendant refers a patient to her for wound cleaning the patient becomes hers. When Sister Beverley is done with the patient she then discharges that patient. Furthermore, the defendant knew that the plaintiff had no money to pay Sister Beverley but failed to request Sister Beverley to treat the plaintiff without charge. This proves that there was no post-operative wound management plan.

[60] My conclusion is that the defendant acted unlawfully by failing to put a post-operative wound management plan in place.

[61] The defendant also acted unlawfully by failing to provide Sister Beverley with the risks profile of the plaintiff. Sister Beverley testified that she gets the patients' information from the patients themselves and not from the defendant. Sister Beverley went to an extent of testifying that the patients themselves know the details of their illnesses and the type of treatment that they get from the defendant.

[62] Sister Beverley said she was going to treat the plaintiff without the guidance of Dr Kalla. What is worse is that the defendant testified that Sister Beverley

sometimes prescribes antibiotics despite the fact that she does not have a license to dispense such medication.

[63] Common law places a duty on a doctor, depending on the circumstances to disclose to a patient the dangers or risks involved in a medical procedure.[6]

[64] A risk is material if in the circumstances of the case, a reasonable person in the patient's position would if warned of the risk be likely to attach significance to it; or the practitioner is or should reasonably be aware that the particular patient if warned of the risk, would likely attach significance to it.[7]

[65] The defendant did rightfully warn the plaintiff of the probable risks of the procedure. The plaintiff attached significance to the warning. When the plaintiff felt pain, walking with the assistance of her husband, she approached the defendant and the defendant ignored her and instead allowed her secretary to dismiss the plaintiff. What is worse is that the defendant through his secretary told the plaintiff that 'your husband must pay' despite the fact that plaintiff did not afford Sister Beverley's costs of treatment. There is no evidence that the plaintiff denies that she was warned of the risks of hysterectomy.

[66] There is no evidence that the plaintiff expected the wound to heal immediately. All the plaintiff wanted was for the defendant to take care of the

[6] *Richter v Estate Hamman* 1976 (3) SA 226 (C).
[7] *Castell v De Greef* 1994 (4) SA 408 (C) at 426F-H.

wound and avoid aggravation because the defendant was duty-bound to do so.

REASONABLENESS

[67] The standard of care the courts expect from a doctor is not the highest standard but rather a reasonable standard. In the case of *Mitchell v Dixon*[8] it was held to be as follows:

> '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; and he is liable for the consequences if he does not.'

[68] In the case of *Daniels v Minister of Defence*[9] the court held that the test is ultimately how would a reasonable medical practitioner in the position of the defendant have conducted himself, what procedures would he follow, what information would he impart to the patient, how would he disclose that information and at what pace and with what amount of rigour would those measures be employed for it to constitute reasonable and diligent conduct. A further consideration is the level of insight that a diligent and reasonable practitioner in the position of the treating doctor ought to possess and ought to *demonstrate in taking account of the likely consequences occasioned by a delay in making a definitive diagnosis and in sending a patient home without such a diagnosis before a patient can receive treatment for a definitive diagnosis***.** It is clear that defendant delayed the determination of the underlying cause of the sepsis.

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[8] 1914 AD 519 at 525.
[9] 2016 (6) SA 561 (WCC).

[69] A court cannot absolve a defendant merely because medical evidence shows a sound medical practice. If professional opinion overlooks an obvious risk, it will not be a reasonable practice. The defendant cannot be absolved because the hysterectomy went well.

[70] A failure to act in accordance with an awareness of possible danger as a reasonably skilled and careful doctor ought to, has been found to constitute negligence.

[71] The experts' evidence differs in many respects. Their testimony is more confusing than helpful and it is very difficult to draw logic from it.

[72] The evidence of Dr Swart and Dr Davis differ and the joint minutes were prepared before the trial began. Nothing could have prepared them for the oral evidence of the defendant. I am convinced that if they were privy to the oral evidence of the defendant they could have come up with different joint minutes.

[73] For example Dr Swart in his testimony testified that the 4 grams of Augmentin prescribed by defendant over the telephone was inappropriate. Dr Swart voluntarily testified that 4 grams of Augmenton is a wrong prescription and it is too much.

[74] Dr Davis thinks the defendant's conduct towards the plaintiff constitutes abandonment while Dr Swart thinks it does not. Dr Swart opines that when the plaintiff did not go back to Sister Beverley and the defendant, the latter had no obligation to enquire as to the plaintiff's whereabouts.

[75] In this regard Dr Davis contended that a service contract that exists cannot be terminated unless the patient is referred elsewhere or arrangements were made for future care. Therefore, when a practitioner ceases to treat a patient before the patient has recovered or has terminated his or her contract with the practitioner this amounts to abandonment of the patient. *In light of the above differences and the fact that both specialists changed their evidence under cross-examination, I'd rather decide this case on the evidence of the other witnesses.*

[76] I am convinced that even if I were to decide the case on the expert reports, no amount of the expert reasons can justify what was said by the defendant in his testimony.

[77] Logic dictates that before a doctor prescribes any medication he must examine a patient and where the situation dictates, do some blood tests, or take a pus swab and do cultures. The defendant failed to do that.

[78] The defendant fell on his own sword. On 23 August 2012 the defendant failed to check the underlying cause of the wound infection despite the fact that he was not sure whether the underlying cause of infection is obesity, and/or diabetes, and/or hypertension, and/or a complication of the removal of the lesion which was pre-cancerous. Logic dictates that this is a step that every medical practitioner must take. How else is the medical practitioner able to tell what to prescribe, and the procedure to follow if the wound is not healing or is healing slowly. The lack of determining whether sepsis resulted

from obesity, and/or diabetes, and/or hypertension, and/or a complication of the removal of the lesion which was pre-cancerous definitely resulted into the damage suffered by the plaintiff. If the source of the sepsis was determined then the defendant would have been in a position to prescribe proper antibiotics.

[79] The Defendant gave oral evidence that he did not have time to follow-up on the plaintiff as he has many patients, he did not examine the plaintiff when he was required to do so, he did not take any tests to determine which medicine to prescribe, he did not contact Sister Beverley to find out what happened with the plaintiff after his referral, and he failed to check the underlying cause of the sepsis, and aggravation of the wound.

CAUSAL LINK

[80] In the case of *Minister of Safety and Security v Van Duivenboden*,[10] the court held that:

> 'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[10] 2002 (6) SA 431 (SCA) para 25.

[81] Based on the testimony of the defendant himself that on 27 August 2012, 'the wound was in the early stages' when he referred the plaintiff to Sister Beverley and the fact that the defendant further testified 'they would have caught it within 48 to 72 hours and plaintiff would have been up and above', the 'but-for test' is satisfied. If the defendant would have acted within 48 to 72 hours, the open septic wound would not have worsened. Had the defendant not negligently omitted to admit the plaintiff on 27 August 2012, there could not have been any aggravation. Therefore, the requisite causal link is established.

ABONDONMENT

[82] Another issue for determination is whether defendant abandoned the plaintiff. The defendant testified that he requested Sister Beverley to do a histology. The defendant did not lead evidence to the effect that he requested the results of the histology. That on its own indicates that the defendant abandoned the plaintiff. Had he followed up on the histology, Sister Beverley could have informed him that plaintiff did not come back for treatment. It is at that stage that defendant would be expected to contact the plaintiff and advise her even telephonically, of the consequences of her failure to attend treatment. An inference that can be drawn is that defendant abandoned the plaintiff from the day he referred her to Sister Beverley. The so-called referral was in fact getting rid of the plaintiff constructively. This abandonment is negligent and makes the defendant liable to the plaintiff.

[83] The negligence of the defendant from 23 August to 08 September 2012 caused the damages suffered by the Plaintiff.

[84] There is no contributory negligence by the plaintiff's daughter cleaning of the wound.

ORDER

[85] I accordingly grant an order that:

The defendant is to pay 100 per cent of:

1. The agreed or proven damages of the plaintiff;

2. The cost of plaintiff's attorneys and counsel's fees including in respect of preparation of trial;

3. The costs attendant upon the obtaining of the medico-legal reports of the following expert witnesses Dr Davis; and

4. The preparation, reservation and appearance fees of Dr Davis.

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NE RAMAPUPUTLA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON: 26 October 2017

JUDGMENT DATE: 24 November 2017

FOR THE PLAINTIFF: Adv Strydom (SC)

INSTRUCTED BY:	AF van Wyk
FOR THE RESPONDENT:	Adv Goedhart
INSTRUCTED BY:	Webber Wentzel