IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: C.A.&R: 8/2021
DATE HEARD: 25 OCTOBER 2021
DATE HANDED DOWN: 17 MARCH 2022

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE **APPELLANT**

and

M M[...] on behalf of ELM **RESPONDENT**

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This is a medical negligence matter. Ms M[...] (the respondent) sued the Member of the Executive Council for Health of the Eastern Cape Government (the appellant) in the Bhisho High Court for damages arising from a brain injury sustained by her child (referred to as ELM to protect his identity) after his birth at the Frere Hospital in East London. The respondent's case was that the injury was caused by the negligence of the hospital staff. The trial Court found for the respondent. It subsequently gave the appellant leave to appeal on a limited issue. On petition to the Supreme Court of Appeal, the appellant was given leave to appeal against the whole of the judgment. At the hearing of the appeal, the appellant gave notice of his/her intention not to appeal the order made by trial court in respect of the costs occasioned by a postponement of the matter on 22 October 2018.

[2] At the trial the parties agreed that the expert reports obtained by either of them be placed into evidence, as well as a joint minute drawn up by the two paediatricians, Drs Lombard and Mzizana. The respondent called Lombard as a witness, while the appellant in turn presented the oral evidence of Dr Harper, the paediatrician who attended to ELM at Frere Hospital. From this evidence the salient facts in no particular order may be stated to be the following: The respondent was admitted to Frere Hospital on 18 October 2010 where she gave birth to ELM by way of an emergency caesarean section due to foetal distress, pelvic disproportion, and a failed induction of labour. After his delivery, ELM was transferred to the nursery ward with mild respiratory distress. The next day he was placed with his mother in the maternity ward. A day later on the 20 October 2010, it was observed that ELM may have jaundice. This diagnosis was confirmed by a laboratory report during the morning of the same day.

[3] ELM was then transferred back to the nursery ward. Harper was consulted and treatment was commenced by giving intravenous haemoglobin and intensive phototherapy. Several more tests were performed on the 20th, and during the morning of the 21st. The results indicated no significant drop in ELM's total serum bilirubin level (the TSB level). Blood was ordered from the National Blood Services (the blood bank) for a transfusion to be performed. Before the arrival of the blood, and approximately at midday on the 21st, the respondent requested that ELM be transferred from Frere Hospital to Life Beacon Bay hospital, a private facility in East London. The transfer was preceded by the drafting of a referral letter to the attending paediatrician at the private hospital, Dr Paul. ELM was admitted to Life Beacon Bay hospital at 14h50. At 20h00 the blood transfusion was commenced. Throughout the time that ELM was at Frere Hospital, until the blood transfusion, he did not show any symptoms of neurological complications.

[4] The undisputed evidence of the two paediatricians and the radiologists with regard to the nature and the cause of the brain injury was in summary that ELM was diagnosed with dystonic cerebral palsy and profound developmental delay complicated

by epilepsy, intellectual disability and a hearing defect. The cause of the cerebral palsy was hyperbilirubinemia, which was the result of very high levels of TSB in ELM's blood during the neonatal period. The hyperbilirubinemia occurred due to an incompatibility between the respondent's blood group (0+) and that of ELM (B+) which caused haemolysis, that is, the destruction of ELM's red blood cells resulting in an increase in his TSB levels. The hyperbilirubinemia in turn caused bilirubin encephalopathy and subsequent brain dysfunction known as kernicterus.

[5] The published medical guidelines according to the two paediatricians recommend that an immediate exchange blood transfusion should be done if an infant's TSB is more than 85 micromol/L above the threshold level for an exchange transfusion. ELM had a TSB that was 141 micromol/L above the recommended threshold at approximately 37 hours of life on 20 October. The guidelines further recommend that infants who present with TSB above the threshold should have an immediate exchange transfusion done if the TSB is not expected to be below the threshold after 6 hours of intensive phototherapy. In ELM's case, his TSB was still above the threshold after 11 hours of treatment.

[6] The trial court was asked to decide the issues of negligence and causation. It found that the hospital staff at Frere hospital were negligent in not having ordered blood immediately upon ELM being diagnosed with jaundice. The court found that they instead decided to treat the jaundice by other means in the hope that his bilirubin levels would decrease, and that when it became clear the next day that this did not happen, it was only then that a decision was taken to order blood for a transfusion. This failure to immediately place an order for blood, the trial court found, contributed to and/or caused the harm suffered by the respondent.

[7] There was some debate in the trial court and in this court with regard to the manner in which the appellant formulated his/her plea to the individual grounds of negligence pleaded by the respondent in her particulars of claim. The contention was in essence that it was not open to the appellant to have presented evidence with regard to

when blood was ordered for a transfusion by reason of its plea of **"no knowledge"** of the grounds of negligence detailed in the respondent's particulars of claim. On a reading thereof, the plea is clearly not an example of good draftsmanship. The appellant's plea of **"no knowledge"** stands in contrast with his/her denial in the preceding paragraph of the plea of the material allegation that the hospital staff were negligent. **"The allegations made in this paragraph are denied and the plaintiff is put to proof."**

[8] The respondent chose not to except to the manner in which the appellant pleaded, or to raise any objection to the introduction of evidence relating to the ordering of blood from the blood bank. In the circumstances, an argument that the issues for decision were to be determined by a strict adherence to the pleadings, is laboured and no doubt forced by the shortcomings in the respondent's evidence. The fact is that the issue(s) for determination were defined by the joint minute of the paediatricians, and ultimately confined at the trial to firstly, whether there was an unacceptable delay in the ordering of blood for an exchange blood transfusion, and secondly, whether the delay was the cause of ELM's brain injury. The respondent's case, which was not pertinently pleaded, but nonetheless advanced at the trial, was that the hospital staff were negligent in that they did not immediately order blood when the laboratory test results on 20 October showed that ELM's TSB level placed him at risk of hyperbilirubinemia, but instead waited until the following day to order blood for a transfusion. That was consequently the focus of the evidence and the findings made by the trial court in relation to the issue of negligence.

[9] As stated, the two paediatricians made a joint minute (the term **"joint statement"** is preferred.) In summary, the content of their joint statement was that bilirubin encephalopathy is a preventable condition through early detection and treatment, inclusive of phototherapy and an exchange blood transfusion. The two paediatricians also agreed that the supportive treatment which ELM received at the hospital was appropriate, but that the ordering of blood for an exchange transfusion was unduly delayed. This delay was premised on their assumption that the blood was only

ordered on the 21st, and that **"If the blood had been ordered on the morning of 20-10-2010 the transfusion could have been done that same evening. That was the best opportunity to prevent the development of bilirubin encephalopathy."** The paediatricians were also recorded to have been in agreement that **"the exact duration of exposure to hyperbilirubinemia to cause bilirubin encephalopathy is unknown as timing of when encephalopathy will occur cannot be predicted; and the parents request to transfer to a private hospital caused further delay."** The last aspect of importance in the joint minute was that ELM remained neurologically sound.

[10] On a reading of the joint statement, it in essence dealt with three aspects, namely, (i) the recommended treatment; (ii) the failure to order blood on the 20th, and (iii) the predicted outcome based on such failure. The first aspect is without controversy. The second aspect is a factual issue, and the third is an opinion predicated on the assumed fact that blood was not ordered on the 20th. The issues raised at the trial and the focus of the evidence was on the aforesaid factual issue; the treatment that ELM received at Frere Hospital; and what had ultimately transpired after ELM was transferred to a private facility.

[11] Before I proceed to deal with the evidence and the findings made by the trial court, it may be convenient to briefly deal with some aspects relating to the assessment of the evidence of expert witnesses in the context of the evidence presented in this matter, and the submissions made in argument.[1] The first aspect is that, as a general rule, it is the task of the court to determine issues of fact and not that of an expert witness. The reason therefore lies in the purpose and nature of expert evidence. The purpose of expert evidence is to assist the court in determining the issues in dispute where its determination requires knowledge or expertise in some or other subject or in a field, usually of a technical or a scientific nature.[2] The function of the expert witness is

[1] With regard to the assessment of expert opinion, generally, see Afrikander v The Member of the Executive Council for Health, Eastern Cape ((8) 2021) BHC delivered on 21 January 2022) and the authorities referred to therein.

[2] I dealt with these conflicts in some detail in the judgment of VN on behalf of PN v The Member of the Executive Council for Health & Social Development of the Eastern Cape (HCPE) (Case No: 132/2015, delivered on 31 August 2021).

therefore to form views and draw inferences in circumstances where a court is unable to do so reliably, unless it receives assistance or guidance from someone with the relevant expertise[3] The prime function of an expert witness has been said to **"guide the court to a correct decision on questions falling within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried …"[4]** The test for the admissibility of an expert's opinion therefore whether the court **"… can receive *"appreciable help"* from that witness on a particular issue; in other words, "the test is a relative one, depending on the particular subject and the particular witness with reference to that subject."[5]**

[12] It is important to note the distinction between evidence of opinion and the evidence of fact on which the opinion is based. Expert evidence is by its nature an opinion premised on the drawing of an inference from established facts**.** In the present context it amounts in essence to a statement that established medical opinion, as the expert witness interprets it, dictates a particular result under an assumed set of facts. Accordingly, by reason of its very nature, expert opinion must have a factual basis. The facts, which are usually found in the primary evidence, provide the necessary link with the opinion, which in turn cannot be reached without the application of expertise. If the expert witness is unable to give direct evidence with regard to the existence of a fact, the opinion is based on a fact assumed to be true for the purpose of giving the opinion, and it must be proved at the trial to give the opinion any probative value. **"In the law of evidence "opinion" means any inference from observed facts, and the law on the subject derives from a general rule that witnesses must speak only to that which was directly observed by them."[6]** and **"An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common**

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[3] Coleman Cross-examination: A Practical Handbook 1st ed at page 107.
[4] Van Wyk v Lewis 1924 AD 438 at 447 and S v Gouws 1967 (4) SA 527 (E) at 528 D – F.
[5] Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 616 H.
[6] Cross on Evidence 7th ed at page 489. See also Cross on Evidence 7th Ed at page 489. See also Schmidt and Rademeyer Law of Evidence at page 17 – 4 and McGregor and Another v MEC for Health Western Cape (1258/2018) [2020] ZASCA 89 (31 July 2020) (McGregor) at para [21].

cause, or established by his own evidence or that of some other competent witness."[7]

[13] It follows that, unless the facts on which an expert witness expresses an opinion on are not in dispute, they are nothing more than factual assumptions which is inadmissible hearsay unless proved by admissible evidence.[8] Subject to the qualification that in any given matter, all or some of the facts may be common cause, in that its existence was pertinently agreed upon by the litigants, or it was not placed in issue on the pleadings, it is the duty of the court as the final arbiter of fact, to decide if the factual basis for an opinion had been established. **"expert assistance does not extend to supplanting the court as the decision-maker. The fact finding judge cannot delegate the decision-making role to the expert."**[9]

[14] The second aspect is that the nature of expert evidence dictates that an evaluation of such evidence focuses primarily on the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds**. "The cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached."**[10] What carries weight is the reasoning, and not the conclusion. When the expert evidence is, as in this matter, in the form of an evaluative opinion, an unsubstantiated conclusion will be of no or very little value. Wessels JA explained it as follows in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH (Coopers):

"[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an experts bold statement of his opinion is not of any real

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[7] Menday v Protea Assurance Co Ltd 1976 (1) SA 565 (E) at 569 and Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh 1976 (3) SA 352 (A) (Coopers) at 370 F – G.
[8] Price Waterhouse Coopers Inc v National Potato Co-op Ltd [2015] 2 All SA 403 (SCA) at para [99].
[9] Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 (SC) at para 49.
[10] MEC for Health and Social Development, Gauteng v TM obo MM (380/2019) [2021] ZASCA 110 (10 August 2021) at para [125]. Also Buthelezi v Ndaba 2013 (5) SA 437 (SCA) (Buthelezi) at para [14].

assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

[15] The third aspect relates to the respondent's submission that the evidence of Harper with regard to when blood was ordered, must be disregarded, as it stood in contradiction to what the appellant's paediatrician, Mzizana, agreed in the joint minute, namely the existence of an unacceptable delay in the treatment of ELM. This contention was premised on the now often (mis) quoted statement in BEE v Road Accident Fund (BEE)[11] that **"Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement."[12]** The statement in BEE relied on is correct when read in the context of the facts of that matter. The issue for determination by the court was the computation of the plaintiff's loss of earnings in a claim against the Road Accident Fund. The parties engaged forensic accountants who compiled reports on the financial affairs of the plaintiff's employer. The reports were clearly factual in nature. The parties further agreed in a pre-trial minute that the forensic auditors would meet **"with a view of identifying areas of common ground and issues of difference for resolution."** The mandate of the two forensic accountants was accordingly to seek common ground with regard to the very subject matter of their respective expert reports.

[16] The purpose of the meeting of experts is to identify the matters in their expressed opinions on which they agree and disagree in relation to the issues arising in the proceedings, thereby reducing the issues for decision, saving time and costs. What the matters are in respect of which agreement may be reached will therefore in general be circumscribed by the field of expertise of the expert witnesses in question; what those experts were requested to give an expert opinion on in the case in question; and more specifically, as in BEE, what the litigants agreed the respective expert witness must address at their meeting. It therefore follows that as a point of departure, any aspect on

[11] 2018 (4) SA 366 (SCA).
[12] At para [64].

which expert witnesses have reached agreement on in a joint statement must of necessity be limited to the subject matter of their opinions and their field of expertise. Their competence to reach agreement will therefore not extend to an agreement with regard to any assumed facts unless, as in BEE, they were also engaged to investigate the facts.[13] An expert witness is not an agent of a litigant[14] and does not have implied authority to bind a litigant with regard to any matter falling outside his or her field as an expert witness, unless it is agreed to by the litigant in question. The mandate of the experts of a joint meeting is therefore, unless otherwise agreed to by the parties, limited to separate out the aspects on which they agree from the contentious aspects in their respective opinions within their field of expertise.

[17] Accordingly, unless the status of the facts which underlie an agreed opinion in a joint statement has been clearly stated, those facts remain nothing more than facts, the existence of which is assumed for purposes of the expert witnesses expressing the agreed opinion. It is evident from the issues raised in the present matter that the opinion expressed by the two paediatricians in their joint statement that the ordering of blood was unduly delayed, was based on an assumed fact that blood was only ordered on the 21st, and not on the 20th. Neither of the two paediatricians dealt with this issue in the summaries of their opinions. What they set out to address in those summaries was limited to what they were engaged for, namely an opinion in their area of expertise with regard to the clinical cause of ELM's neurodevelopmental delay. Also absent is any mandate by the parties or a directive by the court that the two paediatricians were to consider and limit any issues of a factual nature.

[18] The second comment is that expert opinion can only be taken as having been agreed upon, and to have remained uncontroverted, if it is clear from the joint statement itself that the conclusion postulated is without controversy. In the present matter the conclusion that a blood transfusion on the evening of the 20th provided the best opportunity, was qualified by the further conclusion which Lombard and Mzizana agreed

[13] BEE supra at para [52].
[14] BEE supra at para [66].

on in their joint statement, namely that the exact duration of exposure to bilirubinaemia to cause bilirubin encephalopathy is unknown. These two conclusions go towards the question of what was reasonably foreseeable in the circumstances in deciding the issue of negligence, and whether the negligent conduct caused or contributed to the injury suffered by ELM. This apparent qualification failed to place the conclusion of the existence of a **"best opportunity",** which is unsupported by any chain of reasoning supporting that conclusion, [15] into a category of evidence that was without controversy, and which may otherwise constitute proof in relation to the aforementioned issues.

[19] Turning then to deal with the issues raised at the trial, the first question is whether the hospital staff were negligent in the manner advanced by the respondent at the trial. Negligence is established if a reasonable person would foresee the reasonable possibility of his or her conduct injuring another person and causing that person patrimonial loss, and would take reasonable steps to guard against such occurrence.[16] The requirements for negligence are applied to a reasonable person in the position of a defendant. This means that the specific qualities of a defendant, such as specialised skill and knowledge, which he or she possessed at the time, must be considered in assessing his or her conduct against the requirements for negligence. [17]

[20] The relationship between a plaintiff and a defendant that possess specialised skill and knowledge may consequently require a standard of care from the defendant that is different to what that standard would otherwise be. It is however not expected of such a defendant to exercise the highest possible degree of professional skill.[18] What is expected is the general level of skill and diligence which is possessed and would

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[15] In Coopers supra Wessels JA raised it as a possibility that an uncontroverted expert opinion may relieve the court from its duty to determine the cogency of the opinion. This aspect was dealt with in Griffiths v TUI (UK) Limited 2020 [EWHC} 2268 (QB), and the preferred position, it is suggested, is that there exists no bright line distinction between controverted and uncontroverted expert reports. As with the evidence of all witnesses, it is the function of the court to assess whether the evidence in an expert report is sufficient to enable the party relying on it to meet the required standard of proof. The approach to an uncontroverted opinion depends on the circumstances, and while it may be rare to reject a coherent opinion, an unsubstantiated opinion which is nothing more than the say so of the expert witness may be found to have no evidential value.

[16] Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E.

[17] Van Wyk v Lewis supra at 444.

[18] Mitchell v Dixon 1914 AD 519 at 525.

ordinarily be exercised by a reasonable member of the branch of the profession to which he or she belongs under similar circumstances. Applied to the facts of the present matter, liability will only be imposed if it is found that the injury sustained by ELM was reasonably foreseeable, and that the hospital staff had failed to provide the level of skill and competence that could otherwise expected to be provided by a reasonable health care worker in similar circumstances.

[21] The evidence raised two issues in the context of deciding the element of negligence. First is the factual issue based on the evidence of Lombard that the blood for an exchange transfusion was ordered on 21 October, and that this, in his and Mzizana's opinion, created an inordinate delay in the treatment of ELM's condition. The second issue is whether it was reasonably foreseeable as a possibility that the failure to order blood on the 20th would result in ELM sustaining a brain injury.

[22] Dealing firstly with the factual issue, it was common cause at the trial that Harper, under whose care ELM was in the nursery ward at the hospital, attempted on the 20th to obtain fresh whole blood for an exchange transfusion from the blood bank in East London, but that there was nothing available. This compelled the hospital to order blood from the next nearest blood bank that was situated in Gqeberha. Blood was ordered and it was scheduled to be received by the blood bank in East London at 17h00 on the 21st from where it was later fetched after ELM was transferred to the private facility. It was further not in dispute that the hospital was not required to maintain supplies of blood on hand, and that it had no control over the availability of blood at any particular point in time. It was similarly common cause that the blood bank is an independent entity which the appellant and the hospital exercised no control over.

[23] The circumstances in which the conduct of Harper and the hospital staff must accordingly be assessed against the required legal standard, were that there was no immediate fresh whole blood available at the blood bank in East London on the 20th to perform an exchange blood transfusion; that it had to be sourced from Gqeberha; and

that there would inevitably have been some delay before it would be received in East London. What was done in the circumstances was testified to by Harper.

[24] According to Harper he had a clear recollection of the matter despite the lapse of time by reason of the stressful situation created at the time by the unavailability of blood at the blood bank in East London; the considerable efforts that were made to attempt other methods of treatment; the fact that blood had to be obtained from the blood bank in Gqeberha; and the fact that after all the arrangements had been made for the transfusion, the parents requested that ELM be transferred to another hospital. Harper's testimony was that after ELM was diagnosed with jaundice on 20 October, he was moved to the nursery where Harper was based. When the results from the laboratory were received and ELM's TSB levels were found to be very high, it was established, according to what Harper referred to as the "charts" in the nursery, that the recommended treatment for an infant matching the profile of ELM, was an exchange blood transfusion. The blood bank was contacted as that was the first line of treatment according to the guidelines in the circumstances. They were however informed that there was no, what is referred to as, "whole fresh" blood available at the East London blood bank, and that blood had to be ordered from Gqeberha.

[25] ELM was then treated with phototherapy. When it later became clear during the course of the day, that the cause of his high levels of TSB was the fact that the respondent and ELM's blood groups were incompatible, and there was no blood available, a decision was made to commence treatment by way of intravenous haemoglobulin, also referred to as Polygam. This type of treatment which Harper said is expensive, is used when one of the indicators is the presence of incompatible blood groups. ELM was further kept hydrated, and he was given medication known as Phenobarbitone, which assists the liver in processing bilirubin, and consequently to reduce the levels thereof.

[26] According to Harper, during the course of the morning on 20 October, he instructed a staff member to ask the blood bank to order blood for a transfusion.

Treatment was in the interim continued and further tests were performed during the course of the treatment in order to monitor the effectiveness thereof. There was no significant reduction in the bilirubin levels, and the treatment was repeated at least twice. Phototherapy was continued throughout the night while they were awaiting the arrival of the blood from Gqeberha the following day. The hope was that the treatment would be effective and that a blood transfusion would ultimately not be required. ELM was fed during this time, kept hydrated and he continued to receive phototherapy. According to Harker, there was no indication during this time that ELM's condition was deteriorating, and there were no signs of acute bilirubin encephalopathy present.

[27] As stated, the blood was scheduled for arrival at 17h00 on 21 October. At approximately midday on the 20th while waiting for the blood to arrive to commence the transfusion, and after the necessary equipment had already been set up to perform the transfusion, ELM's parents requested that he be transferred to a private facility. Harper asked a junior doctor in the nursery, Dr Evans, to prepare a referral letter for the paediatrician at Life beacon Bay hospital, and arrangements were made for ELM to be transferred as per his parent's request. Harper testified that he instructed Evans to ensure that at the end of the referral letter it is clearly recorded that blood had been ordered from Gqeberha. The reason for this, according to Harper, was that he did not want the private hospital to initiate the same process to obtain whole fresh blood. This was obviously in an attempt to prevent any delays in performing a transfusion on that day. ELM was transferred to the private hospital at 14h50.

[28] What transpired after ELM's transfer was not in contention. At 19h00 it was recorded that the hospital was still waiting for the blood from **"Frere Blood bank."** There was no record of any enquiries having been made before then about the arrival of the blood, which was clearly stated in the referral letter to be at 17h00. The necessary volume of blood required for an exchange transfusion was 576 millilitres. However, only 390 millilitres were transfused. Up to the time of the commencement of the transfusion, ELM had exhibited no signs of neurological compromise.

[29] The evidence of the respondent's paediatrician, Lombard, was that the order for blood was made on the 21st and not on the 20th. It is on this assumed fact that he and Mzizana expressed the view that there was an undue delay, and that if the blood was ordered on the morning of the 20th, the transfusion could have been done that same evening. The factual assumption that the blood was ordered on the 21st and not on the 20th, was based on two written documents in what Lombard in his evidence regarded as having been the clinical notes kept by the staff in the nursery. The first entry reads as follows:

"21/10/10 No significant drop in total serum bilirubin overnight despite triple phototherapy and polygon:

- **Blood for exchange transfusion ordered from PE.**

At this stage neonate is neurologically sound with no signs of kernicterus and no seizures. On all feeds."

The document in which the second entry was made also reflects the date of 21 October. It reads:

" ◦ **Baby requires exchange transfusion. Blood ordered from PE (560m/a whole blood), as now available in E London. Estimated time of arrival at Blood Bank 17h00."**

[30] Lombard did not have personal knowledge of when the blood was ordered. His evidence on this aspect was based solely on the absence of a notation in the aforementioned documents that blood was ordered on the 20th, and on the recording of the fact that blood was ordered under the date of 21 October. When the blood was ordered is a factual issue, which had to decided by the court on all the evidence placed before it. Any inference which Lombard, or for that matter Mazizana, sought to draw from documentary evidence with regard to what was a factual issue, was hearsay evidence and inadmissible. Their evidence was confined to provide expert opinion with

regard to, amongst other things, the treatment that ELM required at the time based on his medical condition, the standard of the treatment on the established facts, and the cause of the injury which ELM sustained. Any attempt at establishing facts from the documentation placed into evidence by way of inferential reasoning, was within the exclusive domain of the trial court.[19] In the absence of any objection having been raised by the appellant at the trial to the introduction of Lombard's evidence with regard to the factual issue, the question was confined to a determination of what its evidential value was, when measured against all the other evidence.

[31] The trial court found, as a fact, that the blood was only ordered on the 21st. To this extent it found that an entry about the order of fresh whole blood in the hospital records was only made on the 21st; that no witnesses were called to corroborate Harper's instruction on the 20th that blood be ordered; that Harper was not the author of the documents in question; and that while he may honestly have believed that he gave the said instructions, his memory was fallible as the human memory is known to fade with the passage of time.

[32] These findings are not supported by the evidence and are clearly wrong.[20] Other than Lombard, who could go no further than to give, what was nothing more than his interpretation of the contents of the document, Harper was the paediatrician in charge who managed the treatment of ELM. His evidence with regard to what was recorded in the documents must be assessed in the context of that fact, and the fact that he personally instructed Evans to compile both documents and told him what to write therein. The documents in question were not, what Lombard considered to be the day-to-day notes written by medical personnel in a ward, but rather two pages of a referral note with a summary of ELM's condition for the information of the receiving paediatrician at the private hospital.

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[19] MEC Department of Health, Province of Kwa-Zulu Natal v Franks [2011] JOL 27319 (SCA) at para [9].
[20] R v Dlumayo and Another 1948 (2) SA 677 (A) at 705 – 706 and Roux v Hattingh 2012 (6) SA 428 (SCA) at para [12].

[33] Harper's evidence was that he informed Evans that it was important to state at the end of the summary that blood had been ordered **"Because the private facility use the same blood bank that we do and we did not want them to go through the same process of trying to order fresh whole blood when we had ordered it. Therefore, I instructed the junior doctor to write very clearly at the bottom of the letter that blood had been ordered from Port Elizabeth. This letter is not a day-to-day account of doctors writing notes on each day. It is a summary of the care. The fact that the note '*blood for exchange transfusion'* is at the end is because I instructed them to make it very clear that the blood had been ordered. This is a summary letter to Dr Paul and I think there is a misunderstanding that these are in fact sequential notes written on different dates."**

[34] Harper's evidence of his instructions to Evans, and the purpose of the documents in question is direct evidence. The notion that Harper's evidence required corroboration was tantamount to placing a burden of proof on the appellant. The question of the onus is of capital importance in the assessment of the evidence. The *onus* is on a plaintiff to establish the elements for delictual liability.[21] The blood was ordered from an entity distinct from the appellant. The respondent was equally placed to establish from the blood bank when the order for the blood was placed. She chose not to do so. Further, the documents on which the respondent relied on for proving negligence, do not unambiguously support the allegation that blood was ordered 21 hours late, as contended by Lombard. On a literal reading thereof, it goes no further than a statement of fact that blood had been ordered. Harper's evidence of what the purpose of the document was, and the reason for the notation that blood was ordered at the end of the two pages of what was a single letter of referral to Paul, was not gainsaid. On the contrary, his explanation of the purpose of the documents is borne out by the fact that it was written on printed forms with the headings **"Dietary assessment and plan"** and **"Department Dieetkunde Patient Referral",** and not what one would expect to be the

[21] Minister of Police v Skosana 1971 (1) SA 31 (A) (Skosana) and Blyth v Van Den Heever 1980 (1) SA 191 (A) (Blyth).

customary daily sequential notes kept by the doctors and the nursing staff in a hospital ward.

[35] That the two documents were written on the instruction of Harper to serve as a referral letter to Paul, and to provide a summary of ELM's condition and his treatment, is evidenced by the heading of the referral letter; its date; the fact that it was recorded to be for **"ATTENTION Dr Paul – Paediatrician @ Beacon Bay";** and the acronym **"PTO"** that is found under the printed heading, **"The patient has been put on the following treatment."** The second document then, under the heading **"History",** records the birth of ELM and his progression until 21 October. It is fairly obvious from this that these were not two separate documents, but rather part and parcel of one document, namely the referral letter authored by Evans on the instructions of Harper. That it was written on Harper's instruction, is evidenced by the fact that both pages were signed **"pp Dr K Harper."**

[36] There further exists no support for the suggestion that Harper's memory may have failed him due to the lapse of time. He explained why he had a clear recollection of the case, and there exists no reason on the evidence as a whole to doubt the truthfulness of his evidence in that regard, and none has been suggested. On the probabilities, the fact that it was common cause that Harper already sought to secure blood from the blood bank in East London on the 20th, makes it more probable than not that he would have taken steps on the same day to get blood from an alternative source. He was clearly aware of the fact that a blood exchange transfusion was required, and the supportive treatment he ordered, which Lombard conceded was appropriate and very **"aggressive"** in circumstances when blood was not immediately available for a transfusion, was indicative of the seriousness and the care with which ELM's case was treated by him.

[37] Harper's actions do not speak of a medical practitioner who was ignorant of what was expected of him, or who was remiss in his care and attention of the treatment of a patient who required emergency treatment. On the evidence as a whole, it was more

probable than not, that an order for blood was placed on the 20th as opposed to a **"wait and see"** approach having been adopted, as found by the trial court. More so, in light of the fact that the cause of the high bilirubin levels was established to be the incompatibility of ELM's blood group with that of his mother, which clearly meant that ELM's condition was not likely to otherwise improve unless he received an exchange transfusion.

[38] A further assumption about the facts that was made by Lombard was that if blood was ordered on the morning of 20 October, the transfusion could have been done that same evening. There is an absence of any factual basis to reach such a conclusion. There was no evidence of the time it would have taken between placing an order for blood in Gqeberha, and its delivery at the blood bank in East London. It is accordingly nothing more than speculation that if it was ordered on the 20th it would have arrived on the same day, or by implication, that the fact that the blood was scheduled to arrive at 17h00 on the 21st, was indicative of the order only having been placed on that day.

[39] Similarly to it having been open to the respondent to establish when an order for blood was placed with the blood bank, this was not information that fell exclusively within the knowledge of the appellant. It was open to the respondent to have obtained evidence to that effect from the blood bank. There was consequently no factual basis for Lombard's assumption that an exchange blood transfusion could have been performed on the 20th. In the absence of evidence to that effect, there was further nothing to detract from the veracity of Harper's evidence that he gave an instruction for the blood to be ordered on the 20th. In the absence of anything to the contrary, there exists no reason to conclude that that instruction was not carried out in the ordinary course of business.

[40] The trial court accordingly erred in its rejection of the appellant's evidence that blood was ordered on 20 October. If it is accepted in favour of the respondent that the trial court's factual finding with regard to the ordering of blood was correct, the next question is whether it was reasonably foreseeable in the circumstances of this case that

ELM would develop bilirubin encephalopathy if blood was not ordered on the 20th, and the hospital staff instead made a decision, as contended by the respondent and found by the trial court, to first treat ELM's condition before a blood transfusion was undertaken.

[41] Lombard proceeded from the premise that the medical guidelines recommend an immediate exchange blood transfusion. A departure from the guidelines would not necessarily establish negligence. The treatment is a recommended one, and it **"would still be necessary to establish that what actually occurred departed from the standard of care that a reasonable and respected body of opinion would regard as acceptable treatment"** by a medical practitioner in the position of the hospital staff.[22] Lombard's evidence was that bilirubin encephalopathy is a reversible condition, and that it presents itself in three stages. In the first stage, the infant will be lethargic. If an exchange transfusion is performed at that stage, the condition is reversible. In stages two and three the likelihood of lasting damage being done was much higher. Lombard's evidence in this regard must further be assessed against his acceptance in the joint minute that the exact duration of exposure to bilirubinaemia to cause bilirubin encephalopathy cannot be determined. While it may serve to emphasise the seriousness of the condition and that it should be treated with the necessary urgency, it acknowledges at the same time that bilirubin encephalopathy does not develop immediately, but over a period of time.

[42] This importantly raises the question of the timing of when ELM was at an increased risk of developing of bilirubin encephalopathy, and flowing therefrom, the probability of it developing before the arrival of the blood on the 21st regardless of the treatment which ELM received while in the care of the hospital staff at Frere Hospital. Negligence, in the context of the case advanced by the respondent, is dependent on the question of whether it can be found to have been reasonably foreseeable that if blood was not ordered on the 20th, and an exchange blood transfusion was not done on that same day, ELM would have suffered bilirubin encephalopathy.

[22] AM and Another v MEC for health, Western Cape 2021 (3) SA 337 (SCA) at para [74].

[43] Lombard's opinion with regard to this aspect, and the probability of the consequences that may result from a failure to order blood and perform a transfusion on the 20th, went no further than that a transfusion on the evening of that day presented **"the best opportunity to prevent the development of bilirubin encephalopathy."** His oral testimony at the trial placed it no higher than a similarly unreasoned statement that if the blood was ordered on the 20th, it would have meant that ELM was exposed to a high level of TSB for twenty-four hours less.

[44] There are several difficulties with Lombard's evidence on this aspect. It is fairly obvious that the sooner a patient receives the required treatment, the better his or her chances of making a recovery are. This statement however does not address the question of whether, when blood was not immediately available in East London, and Harper decided on an aggressive regimen of treatment, the harm that ultimately befell ELM was reasonably foreseeable, and that the treatment received by ELM at Frere Hospital was in the circumstances below the required standard expected in those circumstances. As stated earlier, the cogency of an expert opinion depends on its consistency with the proven facts and on the process of reasoning which led to the conclusion reached. Lombard's expressed opinion is unsupported by any reasoning which could have placed the trial court in a position to determine its reliability. It was simply premised on the assumption that if blood was ordered on the 20th, it would have been received that same day, and would in turn have enabled a transfusion to be performed much earlier.

[45] There was no evidence to support a conclusion that the blood would have been received on the same day. The opinion also failed to account for the fact that Harper commenced alternative treatment, which Lombard agreed was appropriate in the circumstances. When asked about similar treatment which ELM received later on that evening at the private facility, Lombard agreed that the type of treatment is supportive in nature, and that it may adequately reduce the TSB levels. To this he added, **"And I**

would think it could be reasonable to say let's wait, repeat the [test for TSB level] after another while and see what happened. Does it go down, does it go up?"

[46] The evidence of the laboratory results of ELM's TSB level, raises the probability that the treatment prevented the TSB level to further increase, which in turn may account for the fact that on the 21st ELM's condition, until the transfusion was commenced at the private hospital at 20h00 that evening, was recorded as being neurologically sound. This, according to Lombard in his evidence, meant that ELM was **"not even in stage 1 yet,"** and **"as we have discussed even if a baby presents with stage 1, the condition is still reversible."** None of these aspects were addressed by Lombard in his evidence. As stated, the high-water mark of his oral testimony was that on the morning of the 21st, ELM's condition was still reversible, and if an exchange transfusion had been done on the 20th "**While the baby was still neurologically normal, on a balance of probabilities the chances are that we could have had a normal child."**

[47] This unreasoned conclusion and apparent failure to appreciate his role as an expert witness, and that of the court,[23] typified Lombard's evidence. The fact is that ELM remained neurologically normal until at least 20h00 on the 21st, during which time he received treatment that was more likely that not successful to the extent that it prevented his TSB level from further increasing. It in turn meant that the level at which it was kept at did not cause any neurological damage to his brain. His condition was kept stable throughout the time that he was in the care of hospital staff at Frere Hospital. On the available evidence, the respondent had accordingly failed to prove, on the required standard of the burden of proof, that the healthcare workers at Frere Hospital were negligent.

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[23] **"Experts have no place expressing views on what is or is not a conclusion on a balance of probabilities. That is a legal concept that is used by court to determine a factual result where there are factual conflicts. It is a function the remit of which is that of the court, not that of the witness."** I Khoza obo K khoza v The MEC for Health, Gauteng Province (28516/16) [2018] ZAGPJHC 580 (8 October 2018).

[48] I am of the view that even if it were to be found that negligence had been proven, the evidence does not establish that the negligence caused or materially contributed to the injury suffered by ELM. The plaintiff must allege and prove the causal connection between the negligent act or omission relied upon and the harm suffered.[24] Causation as an element of liability gives rise to two distinct enquiries. The first, said the Constitutional Court in Lee v Minister of Correctional Services (Lee)[25], is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did, then the second enquiry, referred to as legal causation arises, namely whether the negligent act is sufficiently closely or directly linked to the loss for liability to ensue, or whether the loss is too remote. This is a legal problem in which considerations of legal policy may play a part.[26]

[49] Factual causation is determined by the **"but-for"** test. In terms of this test a plaintiff must prove on the required legal standard of proof that, but for the negligent conduct of the defendant, the injury or harm would not have occurred. In the case of positive conduct on the part of a defendant, the negligent conduct is mentally removed to determine whether the relevant consequence would still have occurred. However, in the case of an omission, such as in the present matter where the conduct relied upon was the failure to timeously order blood, the factual enquiry is in the realm of hypothesis. The negligent omission is eliminated and hypothetical reasonable conduct is superimposed into the facts of the case.[27] **"In the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission."[28]** Stated differently, causation in the case of an omission entails **"a retrospective analysis of what would probably have happened if the alleged wrongdoer had acted**

[24] See Skosana and Blyth supra.
[25] 2013 (2) SA 144 (CC).
[26] Skosana supra at 34 F – G. (Skosana).
[27] International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700 F-I. Also Skosana supra at 35G.
[28] Lee supra at para [45].

positively in the light of the available evidence and the probabilities originating from human behaviour and related circumstances."[29]

[50] In Skosana[30] the court dealt with the failure of members of the police to provide the plaintiff with prompt medical assistance, and approached it as follows:

"The negligent delay in furnishing the deceased with medical aid and treatment, for which Davel and Mahela were responsible, can only be regarded as having caused or materially contributed to his death if the deceased would have survived but for the delay. This is the crucial question and it necessarily involves a hypothetical inquiry into what would have happened had the delay not occurred. Generally, the *onus* is on the respondent to establish this proposition on a balance of probabilities."[31]

[51] When the test for causation in the case of an omission is applied, a chain of events may follow, or must be postulated upon the injection of positive conduct into the facts of the case which are necessary to complete the link between the negligent conduct and the alleged harm suffered.[32] In the context of the facts of this matter, if the failure relied on is eliminated, and replaced with the hypothetical conduct relied on, namely the ordering of the blood on the 20th, the consequential event postulated is that an exchange blood transfusion was to be performed on the same day to prevent ELM from developing bilirubin encephalopathy. This event is however premised on the supposition that the blood would have arrived on the 20th. As stated, there was no evidence raising the probability of that being the case. The blood had to be ordered and dispatched from another city, and there was no evidence that blood was immediately available in Gqeberha, bearing in mind that what was required was not any blood, but what was referred to as whole fresh blood.

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[29] Neethling, Potgieter and Visser Law of Delict (2015) at page 191 – 192.
[30] Supra at fn 28.
[31] At 35 E-F. See also Minister of Safety and Security v Geldenhuys 2004 (1) SA 515 (SCA) and Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA).
[32] Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para [25].

[52] In the absence of evidence about the availability of such blood at the blood bank and Gqeberha, and the time it would have taken for it to be dispatched and taken to East London, it is nothing more than speculation that it would have been received on the 20th, and not only on the 21st if the order was made on the 20th. The time that was set for the arrival of the blood in East London on the 21st is not a fact that on its own justifies such an inference. While inferential reasoning is an accepted technique that is utilised in judicial fact finding, the inference sought to be drawn must be capable of being drawn from the objective facts established by evidence.[33] If the evidence is tenuous, it cannot form the foundation for the court to make any finding of fact.[34]

[53] If it is accepted that the blood may only have arrived on the 21st if it was ordered on the 20th, the difficulty facing the respondent is that the evidence raised the probability that the factual cause of ELM's injury was not the arrival of the blood in East London at the time which it did, but rather the decision to transfer ELM to a private hospital, and the conduct of the hospital staff at that facility in performing the exchange transfusion. The accepted evidence was that ELM was still neurologically normal when the transfusion was commenced at 20h00 at Beacon Bay Life Hospital. His condition, therefore, on the evidence of Lombard, was still reversible at that time. However, despite the transfusion of blood ELM's condition did not improve as it was expected to do. His neurological condition started deteriorating during the exchange blood transfusion and his TSB level did not improve. On Lombard's evidence, a procedure of that nature has a risk factor of 5 %. What those risks are, Lombard did not say.

[54] Further, Lombard acknowledged that the staff at the private facility had failed to transfuse sufficient blood and that it may have been necessary to do a further

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[33] The inference must be the readily apparent and acceptable inference from a number of possible inferences. See AA Onderlinge Assuransie Bpk v De Beer 1982 (2) SA 603 (A) at 620 E – G; Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) and Goliath v MEC for Health 2015 (2) SA 97 (SCA); and Ocean Accident & Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159 B-D. **"Evidence does not include contention, submission or conjecture."** Great River Shipping Inc v Sunnyface Marine Limited 1994 (1) SA 65 (C) at 75 I – 76 C. McGregor and Another v MEC for Health, Western Cape (1258/2018) ZASCA 89 (31 July 2020) att para [21].

[34] Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa 2012 (1) SA 58 (SCA) at para [24] and Motor Vehicle Assuarance Fund v Dubuzane 1984 (1) SA 700 (A) at 706 B – D.

transfusion. This, Lombard acknowledged in cross- examination, fell below the standard of treatment expected, and could have had a detrimental effect on ELM's deteriorating condition. Asked whether it may account for the injury sustained by ELM, Lombard gave his characteristically unreasoned response that **"I would not say account per se, I would say contribute."**

[55] In all the circumstances, the trial court erred in holding the appellant liable in damages arising from the injury suffered by ELM. The appeal must therefore be upheld. There exists no reason to depart from the usual order relating to costs.

[56] In the result, it is ordered:

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and replaced with the following:
"The plaintiff's claim is dismissed with costs."

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
I agree:
I SCHOEMAN
JUDGE OF THE HIGH COURT
I agree:
V NONCEMBU
ACTING JUDGE OF THE HIGH COURT

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