

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 121/13

In the matter between:

S. K.

Plaintiff

and

THE MEC FOR HEALTH, EASTERN CAPE PROVINCE

Defendant

JUDGMENT

STRETCH J:

[1] The plaintiff instituted summons against the defendant in her capacity as the natural mother and guardian of S. K., a minor boy born on 2 August 2007 (hereinafter referred to as “the child”).

[2] It is common cause that the child was admitted to Frere Hospital when he was six months old, and that the defendant is the nominal defendant in respect of claims against this hospital.

[3] Upon admission the child presented with various symptoms pertaining to his health, including respiratory distress, a fever and high body temperature. He was diagnosed with pneumonia and gastroenteritis, and attempts were made to administer medication, including antibiotics, intravenously. To this end a drip was first sited on his forehead, and later in the lateral left aspect of his head.

[4] It is also common cause that fluids from this drip infiltrated the tissue surrounding the second drip site, causing necrosis of the tissue and injuring the third, sixth and seventh cranial nerves, which ultimately resulted in the child presenting with various facial deformities, which I will refer to in due course.

[5] The plaintiff alleges that the hospital staff were negligent, in that they failed to:

- (a) properly insert the drip intravenously;
- (b) prevent the drip fluid from infiltrating the surrounding tissue and/or bone at the drip site;
- (c) timeously discontinue the attempted intravenous infusion once complications had developed at the drip site.

[6] The plaintiff alleges that not only did the fluids from the drip infiltrate and infect the tissue surrounding both drip sites, but that this resulted in necrosis not only of this tissue but also of the bone in the area of the second drip site, which has caused the child to present with the following conditions:

- (a) a squinted and blind left eye which only partially closes;
- (b) a bald patch on the left lateral aspect of his head with no hair growth;
- (c) a lateral deviation of his mouth;
- (d) brain atrophy.

[7] It is the plaintiff's case that the treatment and the care which the child received at Frere Hospital was incompetent, inappropriate and negligent and the direct cause of the conditions he presents with, and not only in breach of the duty of care owed by the hospital staff to the child, but also in breach of the defendant's contractual and constitutional obligations to the plaintiff.

[8] The plaintiff's claim against the defendant has accordingly been framed under various heads of damages which it is alleged the child has suffered due to the negligent conduct of the hospital staff.

[9] At the commencement of the trial, it was agreed that the issues would be separated, and that the quantum of the plaintiff's claim against the defendant would be held over for later determination, if necessary.

[10] The defendant, having admitted that the child sustained injuries, denies that:

- (a) The hospital staff were negligent;
- (b) The injuries sustained resulted in necrosis of the bone or caused the admitted brain atrophy;
- (c) The child presently suffers from blindness in his left eye.

[11] It is contended on the pleadings (as amended) that the child suffered from malnutrition and cerebral atrophy and was chronically ill before his admission, suffering from conditions such as gastroenteritis, salmonella septicaemia, klebsiella infection and tuberculosis, and that he required prolonged oxygen therapy on admission.

[12] The plaintiff testified and presented the evidence of neurologist Dr Makobane, whereafter she closed her case. The defendant applied for absolution from the instance in response to which the plaintiff indicated that she wished to amend her pleading. The pleadings referred to at the commencement of this judgment are the upshot of that amendment. The application for absolution was refused. More about this later.

[13] The defendant called two expert witnesses: specialist neurologist Dr Bhagwan and paediatrician Dr Kara.

[14] It is not contended on the defendant's behalf that its servants were not negligent at all. On the contrary it has been conceded on the undisputed evidence that the defendant's servants were negligent in not removing the intravenous drip from the child's head when the area where the drip had tissueed became swollen, and that this negligence causally contributed to the child's facial injuries (including nerve injury and skin necrosis but excluding the alleged blindness to the left eye and excluding any form of brain atrophy) and that the defendant should accordingly be held liable for these admitted injuries together with 65 per cent of the costs of the

action (excluding those incurred in respect of Dr Mokabane), whereas the plaintiff should be held liable for the costs of the absolution application.

[15] On the other hand, the plaintiff contends that in a case such as the one before me (where the issue of quantum falls to be adjudicated at a later stage), the only issues for determination are whether:

- (a) the defendant committed a wrongful act causing bodily injury;
- (b) the act is accompanied by fault on the defendant's part;
- (c) the plaintiff's patrimony suffered loss due to the bodily injury.

[16] Once that has been determined in the plaintiff's favour, so it is argued, it is not necessary for this court to determine a closed list of injuries. Indeed, according to the plaintiff it will be quite permissible for other related injuries to be thrown in at the stage of the hearing where quantum is traversed, and that the main issue between the parties (which in my view is whether the brain atrophy and what can only be described as a hole in the skull which the child ultimately presented with and the sequelae to these injuries) ought not to be considered or adjudicated upon by me at all.

[17] In the premises the plaintiff contends for an order in the following terms:

'The defendant is liable to the plaintiff for such damages as the plaintiff may prove or may be agreed upon, plus all costs, including those of the failed application for absolution from the instance.

[18] It is indeed so that at the commencement of this trial (before the pleadings were amended for the second time for purposes of clarity and to exclude the plaintiff's personal claim for emotional shock) it was recorded that the trial would proceed on all issues save that of quantum. In this regard the verbal exchange between me and the plaintiff's counsel is recorded as follows:

'COURT Yes. I just need to be quite sure at what juncture the parties have agreed to separate, because this often becomes problematic. Particularly when you have got a claim such as that of the mother's where it does not necessarily mean that if the staff at the hospital were negligent and if it is found that that negligence caused the complaints that the minor child is suffering from, that that negligence also caused the complaints that the mother is suffering from, because hers are in the nature of, for want of a better description, emotional shock, are they not?

MR NTSALUBA Yes.

COURT So is all of that going to be dealt with during this trial or are we just dealing with the issue of negligence at this trial?

MR NTSALUBA Yes M'Lady, yes indeed we will deal with all of those to the extent that we are able to do so.

....

COURT Yes, very well. Yes, the parties have agreed that this is an appropriate matter where the issue of quantum ought to be separated off from the other issues before this Court and [it] is accordingly directed that the issue of quantum is separated from all other issues which this Court is to deal with, and that the issue of quantum will not be dealt with at this stage.

MR MTSHABE As the Court pleases.

MR NTSALUBA Thank you M'Lady.'

[19] That concluded the exchange and the order made with respect to separation of issues in terms of rule 33(4) of this court's uniform rules.

[20] Rule 33(4) and (5) reads as follows:

- '(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led, or separately from any other question, the court may make an order directing the disposal of such question in in such manner as it may deem fit and may order that all further proceedings by stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.
- (5) When giving its judgment upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.'

[21] In my view one of the primary reasons for the seeking and the granting of separation of issues is so that a factual issue can be determined which can give direction to the rest of the case and in particular, to obviate the leading of evidence which may be academic at the end of the day. The purpose is to determine the plaintiff's claim without the costs and the delays of a full trial. It has been held that

this procedure is so important that an attorney should, as soon as pleadings have closed, make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs.¹

[22] The procedure is clearly aimed at facilitating the convenient and expeditious disposal of litigation.² The word 'convenient' within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness.³ It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.⁴ In this regard my questioning of the plaintiff's counsel as to the precise junction of the separation was not a mere formality. It has been held that it is imperative at the start of the trial that there should be clarity in this regard. If separate issues are to be determined, the questions to be determined must be expressed by the court with clarity and precision in its order.⁵ This is so because the subrule confers a wide discretion upon the court to shorten the duration of the proceedings and to facilitate the final determination of actions.

[23] In *Road Accident Fund v Krawa*⁶, the full court inter alia held that:

- (a) in the procedural context of a separation of issues on the pleadings for trial, the nature of those issues had in the first place to be determined from the pleadings;
- (b) in this context the enquiry relating to quantum/damages was not always limited to a mere calculation, but could also include matters relevant to the *existence* of patrimonial loss or damage (as opposed to the *nature* of such damage);
- (c) since an essential feature of the dependant's action was his right to support by the deceased, a failure to prove a duty of support would mean a failure to prove patrimonial loss requiring compensation;

¹ Rauff v Standard Bank Properties 2002 (6) SA 693 (W) at 703I-J.

² Dowson & Dobson Industrial Limited v Van der Werf 1981 (4) SA 417 (C) at 420E.

³ S v Malinde 1990 (1) SA 57 (A) at 67J-68E.

⁴ Minister of Health and Another NO v New Clicks South Africa 2006 (2) SA 311 (CC) at 354J-355C.

⁵ Absa Bank Ltd v Bernert 2011 (3) SA 74 (SCA) at 79C.

⁶ 2012 (2) SA 346 ECG at 359C-360B and 366E-370B.

- (d) the existence of a legal duty and the concomitant right to support were therefore inexplicably bound up with the question of damages, as the term was understood in the context of a separation of issues for trial;
- (e) in conceding the merits of the case, the Road Accident Fund did not, given the ordinary meaning of the term in the context, concede that the plaintiff had suffered patrimonial loss, and accordingly matters pertaining to the deceased's duty of support remained in issue despite the concession;
- (f) the application to amend its plea by the Road Accident Fund had to be granted insofar as it related to the plaintiff's averment that the deceased had been under a legal duty to support him.

[24] The relevant portions of the plaintiff's particulars of claim in the matter before me, read as follows:

'The facts:

- 5. On or about 10 February 2008 S. was admitted at the hospital presenting with various signs of being sick including respiratory distress, a fever and high body temperature.
- 6. In due course S. was diagnosed with pneumonia and gastroenteritis, whereupon an attempt was made to put him on an intravenous course of antibiotics or other medicines, with the drip site being sited initially in his forehead and later on the left lateral aspect of his head.
- 7. Fluids from the intravenous drip infiltrated or extravasated into the tissue surrounding both drip sites, causing infection, and subsequently necrosis, of particularly the tissue and bone surrounding or beneath the second drip site and also damaging or injuring the third, sixth and seventh cranial nerves.
- 8. As a consequence of the above, S. now presents with-
 - 8.1 a squinted and blind left eye which does not close fully;
 - 8.2 a bald patch on the left lateral aspect of his head on which the hair no longer grows at all;
 - 8.3 a lateral deviation of the mouth; and
 - 8.4 brain atrophy.
- 9. As evidenced by the above, the medical and/or nursing care S. received from the hospital was inappropriate, incompetent and negligent and such inappropriate, incompetent and negligent treatment was the direct cause of conditions with which he now presents.

The duty of care and breach thereof

10. ...

11. As a direct result of the negligence of the medical and/or nursing staff of the hospital S. sustained the injuries, and their *sequelae*, set out above.

...

Grounds of negligence

13. ...

Damages

14. As a result of the incompetent, inappropriate and negligent treatment he received from the relevant hospital medical and/or nursing staff, all of which, by the exercise of reasonable care, skill and diligence, were avoidable, S. experienced pain and suffering, disfigurement, loss of amenities of life and psychological trauma for which he will in future require treatment.

15. As a further consequence of his injuries, S. sustained psychological or intellectual impairment and will in the future suffer a significant reduction of his income or earning capacity as a consequence of such impairment.

16. In the circumstances, the defendant is liable in damages to the plaintiff under the following heads (in South African Rand currency):

16.1 General damages	750 000
16.2 Past and future medical expenses	750 000
16.3 Future loss of earnings or earning capacity	2 500 000
TOTAL	4 000 000

...

Wherefore the plaintiff prays for judgment against the defendant for –

(a) Payment of the total amount of R4 000 000,00 as tabulated above; ...'

[25] In my view the nature of the issues as determined from the pleadings are the following:

- (a) Whether the defendant's servants had been negligent and in breach of their duty of care towards the child in their treatment of him as described;
- (b) Whether their conduct is causally connected to the injuries described;
- (c) Whether the injuries described have caused and will cause the plaintiff to suffer the damage to her patrimony which she has described;
- (d) Whether the defendant is liable to compensate the plaintiff for this damage; and lastly,

- (e) Whether the defendant should pay the amounts reflected by the plaintiff or whether the quantum of these damages (in other words 'the amount in fees, compensation or damages to be determined by a court' as per the definition of the term 'quantum' in *Claassen's Dictionary of Legal Words and Phrases*⁷) ought to be quantified or calculated differently.

[26] This being the case, it seems clear to me that when I was requested at the commencement of this trial to make a consent order directing that only the issue of quantum would be dealt with separately it was intended to mean and in fact meant that all other issues (save for the calculation of the monetary value to be affixed to the plaintiff's damages) were intended to be disposed of at this trial, in order to give proper and meaningful effect to the purpose of rule 33(4) as set forth hereinbefore.

[27] *Krawa*, and indeed the other cases which counsel for the plaintiff have referred me to⁸ are clearly distinguishable from the matter before me. On the contrary, neither of the reported cases referred to by counsel deal with separation of issues in terms of rule 33. *Evins v Shield Insurance* relates to the issue of prescription. *Nonkwali v RAF* traverses the question of whether a plaintiff has any recourse in respect of an additional injury discovered after the institution of an action for compensation against the Road Accident Fund. In the unreported matter of *Kitayi v RAF* the plaintiff had initially claimed damages in the region of R200 000 for a fractured femur which she had sustained in a motor-vehicle accident. The minute of a pre-trial conference records the following:

'The parties have agreed to separate the merits from the *quantum* of the damages suffered by the Plaintiff. This Honourable Court will accordingly be requested to deal with the issue of the Defendant's liability (negligence) first.'

[28] Thereafter the parties agreed to an order which reads as follows:

- '1. The defendant is liable to pay 60 per cent of the plaintiff's proven or agreed damages as a result of the accident that took place on the July 2002 (sic).
2. The defendant shall pay costs on the High Court scale.'

⁷ Second Edition (June 2013) volume 4 Q-4.

⁸ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); *Nonkwali v Road Accident Fund* 2009 (4) SA 337 (SCA); *Kitayi v RAF* (unreported) ECM case no. 690/06.

[29] During the following year the plaintiff (with no objection from the defendant) amended the claim to include a further injury and to increase the quantum of the damages accordingly. The defendant's application to amend by delivering a special plea denying the further injury was met with resistance but was subsequently granted. The High Court, in dismissing the special plea held that the introduction of a further injury was not an attempt to-reopen the settled issue of liability and by implication, the plaintiff would still have to prove the existence of the injury, causation and quantum in respect of the further injury if called upon to do so.

[30] In the matter before me, extensive expert evidence was presented on both sides relating particularly to the child's injuries as referred to in the plaintiff's claim. At the end of the day it was clear from the collective evidence of the experts that the hospital staff's failure to remove the intravenous line earlier constituted negligence and that this resulted in tissue infiltration which in turn caused the child's face to swell up in the manner in which it did.

[31] In my view, Dr Kara, who was called by the defence, was an exceptionally fair witness who answered all questions put to him in a forthright and logical manner, and who was prepared to make candid concessions when they were called for in the true spirit of an unbiased expert witness. His mandate, as reflected at the covering page of his medico legal report was to comment specifically on an IV (intravenous) line infiltration, its consequential facial scarring and its relationship to neurological impairment including a facial nerve palsy and neurodevelopmental delay. It is significant that the child was six years and six months old when Dr Kara performed his assessment, this being just short of six years post-morbidly (the child having been hospitalised from February 2008 to May 2008).

[32] With respect to the hospital records, Dr Kara stated the following in his report (which opinion he emphasised in evidence):

'The hospital notes are comprehensive and it seems as if the child was reviewed at least twice a day by doctors, the treatment and investigations seem appropriate. It is obvious that this was a critically ill child and the problems are summarised below:

- Unresolving pneumonia (on TB treatment and various antibiotics), with resolution only after 6-8 weeks.
- Malnutrition on admission with gastroenteritis
- Hypoalbuminaemia (which would delay healing at the drip site)
- Salmonella septicaemia and Klebsiella infection with multiresistance.
- Severe drip site necrosis on left parietal and temporal area, requiring surgery (skin graft)
- Left 3rd cranial nerve palsy and left 7th cranial nerve palsy (said to be upper motor neurone – suggesting it was an intracranial lesion but to me it appears to be lower motor neurone suggesting a local neuropathy).
- Eye surgery – tarsorrhaphy (eye opening is narrowed to protect the eye from drying).

The IV Line – The IV line infiltration and damage to the scalp, face, neck and possibly the eyelid area is indefensible...

There is little doubt that the continued flow of fluid and drugs into the facial tissue led to tissue necrosis and permanent scars. The pain suffered at the time of the injury and the long term psychological damage due to the disfiguration of the face is immense. The entire episode was easily avoidable had the line been discontinued on the 17th Feb 2008 when first noted.

...The Facial Nerve Injury - ...It would make sense that this was damage due to facial swelling following the IV line infiltration. The probable cause for the 3rd (or 6th) nerve palsy is a combination of factors rather than 1 specific factor and its cause may not be related to the facial nerve palsy...

... The Developmental delay – it is unlikely that this was related to the IV line issue. This was an extremely ill child even prior to the IV line infiltration – he was malnourished, had cerebral atrophy on CT scan (which was done at the end of Feb 2008). Cerebral atrophy is not likely to occur 10 days after an acute injury, it is more reasonable that this was pre-existing eg due to malnutrition and illness. By this I mean that the CT scan if done on admission may have shown the same features...

In summary are too many confounding factors to attribute the developmental delay to be due to the IV line complications (this is the only item of negligence in hospital care). It is more likely to be due to the combination of malnutrition, encephalopathy and possible vasculitic injury with microthrombi following septicaemia...

Conclusion – S. K.

The facial injury and facial nerve injury with skin necrosis and disfigurement and the eye injury (including the need for surgery to protect the eye) is attributed to the negligence on the part of the staff at Frere Hospital who failed to act timeously when

they noted the facial swelling in the area of the IV line site – discontinuing the infusion may have limited the damage considerably.

It is not possible to convincingly link the developmental delay, speech delay and possible intellectual impairment to the events that occurred in hospital in Feb. 2008 due to numerous other factors (as detailed in paragraph 25.3) that may have contributed to cortical atrophy and developmental deficits.'

[33] It is accordingly clear on the evidence presented on the defendant's behalf that the defendant ought to be held liable for all the injuries referred to in the plaintiff's claim, except for the alleged brain atrophy which was referred to for the first time in the report on a CT scan performed some time after the child was admitted to hospital, the blindness to his left eye and the "psychological or intellectual impairment" somewhat obliquely alluded to in the plaintiff's third attempt at drafting comprehensible particulars of claim.

[34] The evidence presented on the plaintiff's behalf with respect to these conditions is not at all clear. There is no reliable independent evidence to suggest that the child's sight in his left eye is compromised or absent. The claim in this regard accordingly falls to be dismissed.

[35] On the aspects of psychological and intellectual impairment, I only have the evidence of the plaintiff, whose averments that the child is reported to be a slow learner, are vague and inconclusive at best. In any event, the report of Dr Mokabane who testified for the plaintiff makes no mention of psychological and intellectual impairment and a compromise of the child's earning capacity. Here too, the claim falls to be dismissed.

[36] This leaves the claim that the child presents with brain atrophy as a consequence of the hospital staff failing to timeously remove the intravenous line which had tissue on two occasions when sited in the child's head.

[37] The issue of brain atrophy is not mentioned at all in Dr Mokabane's initial report. In an addendum to that report delivered some time later, after having considered various other reports including those of Drs Bhagwan and Kara Dr Mokabane once again makes no reference to "brain atrophy", but does say that "it

would however seem that S. lost part of his skull as it appears on the reports.” In commenting in evidence on a medico legal report by an eye surgeon, Dr Mokabane’s view was that the brain atrophy was as a result of intravenous sepsis caused by the failure to remove the drip. According to the doctor the sepsis resulted in necrosis which caused the child’s skull bone to disappear. In the premises Dr Mokabane disagreed with the opinion of the eye surgeon which states that the “atrophy (small shrunken brain), ...is unlikely due to events in the past two weeks and it takes a lot longer for tissue to evolve. The brain atrophy is related to antenatal or immediate postnatal results.”

[38] Dr Bhagwan’s evidence that the person best qualified to comment on aspects of brain atrophy (colloquially described as shrinkage of the brain) would be a paediatric neurologist or a paediatrician (such as Dr Kara) was not challenged. Dr Kara’s firm opinion (which was not seriously challenged and which appears from excerpts from his medico-legal report which I have already referred to) is likewise that the atrophy was due to a pre-existing condition such as malnutrition or illness, which according to Kara’s reading of the clinical records were present when the child was admitted.

[39] Dr Kara referred this court in evidence to a publication on CT scans of the head and cerebral atrophy in infants with protein energy malnutrition, by Samir El-Tatawy (department of radiology, faculty of medicine, Cairo University), and Nadia Badrawi and Amal Bishlawy (department of paediatrics, faculty of medicine, Cairo University). According to studies and tests performed by the authors, protein energy malnutrition is found predominantly in infants whose requirement for protein have not been met for some time, the age of peak incidence being between the ages of six and 30 months. Of the 40 infant subjects with protein malnutrition, all had mental symptoms, and the results of CT head scans revealed that all the infants presented with central and cortical atrophy. In the word of Dr Kara, “if the baby does not grow, the brain does not grow.”

[40] As I have said, I am satisfied that Dr Kara’s evidence was presented in an unbiased fashion. The plaintiff’s expert on the other hand, tended at times to be argumentative, emotional, and in my view overly critical of the informed view of her

colleagues. I am satisfied that where her evidence and her views differ from those of Dr Kara, Dr Kara's evidence is to be preferred.

[41] In the premises I am not persuaded that the plaintiff has shown on a balance of probabilities that the cerebral atrophy detected when the CT scans were performed, is causally connected to the conduct of the hospital staff.

[42] The plaintiff has however been partially successful and in my view is entitled to the costs of this action. This partial success is in my view, attributable in the main to the plaintiff having been granted leave to amend her pleading, which application she brought in response to the defendant's claim for absolution from the instance at the close of the case for the plaintiff in terms of rule 39(6), which she is entitled to do and which application I granted in terms of the wide provisions of rule 28(10). This being the position, I am of the view that the plaintiff ought to be liable for all costs occasioned by and consequential to the application for an amendment, including all costs occasioned by consequential adjustments to the documents and the plea already filed by the defendant.

[43] In the premises I make the following order:

Order:

- (a) The defendant is liable for the plaintiff's proven or agreed damages arising out of the negligent treatment of the plaintiff's child S. K., at Frere Hospital during the period February to May 2008, which treatment has caused the child to suffer facial injuries, facial nerve injuries, skin necrosis and facial disfigurement in the form of a squint left eye which does not close properly, a permanent bald patch on the left lateral aspect of his head, and a lateral deviation of his mouth.**
- (b) The defendant is directed to pay the plaintiff's costs including the costs associated with the plaintiff's successful opposition to the defendant's claim for absolution from the instance, but excluding all costs associated with the amendment of the plaintiff's particulars of**

claim and the consequential pleading and filing of further documents, which costs are to be borne by the plaintiff.

I.T. STRETCH

26 June 2015

JUDGE OF THE HIGH COURT