

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION: MTHATHA)**

In the matter between:

CASE NO. 1783/2012

ONGEZWA MKHITHA

PLAINTIFF

VS

ROAD ACCIDENT FUND

1ST DEFENDANT

MEC FOR HEALTH, EASTERN CAPE

2ND DEFENDANT

JUDGMENT

DAWOOD, J:

1. The Second Defendant raised a Special Plea effectively stating that in terms of Section 17 of the Road Accident Fund Act 50 of 1996 (hereinafter referred to as the Act) the Plaintiff was obliged to sue the First Defendant exclusively since her claim was caused by or arose from the negligent driving of the insured vehicle. In other words the Second Defendant alleged that the Plaintiff was precluded from suing the Second Defendant because her right of recourse was exclusively against the Fund by virtue of the provisions of Section 17 of the Act.
2. In order for the Special Plea to succeed in this case the court has to effectively find that the Plaintiff would be able to successfully sue the First Defendant in circumstances where:

- a) There is, for the purposes of this application at least, uncontroverted testimony to the effect that the treatments received was substandard and resulted in the present *sequelae*; and
 - b) On the available evidence the *sequelae* of the injuries as sustained in the collision would, if reasonable care was exercised by the doctor, have been very different.
3. Section 19 (a) of the Act places the Road Accident Fund in the shoes of the driver and excludes liability in circumstances where the driver or owner would not have been liable.
4. I accept the argument advanced by the Plaintiff's counsel that Section 17 has to be read in conjunction with Section 19 and cannot be read in isolation.
5. The Plaintiff would accordingly have to establish all the elements of delictual liability in order to be successful in her claim for damages against the Fund and she would have to establish that such damages flow from the collision.
6. This court has to examine whether or not the Plaintiff would succeed against the First Defendant in respect of the present *sequelae* in order to determine the Special Plea.
7. In the event that the Plaintiff was not able to successfully sue the First Defendant for the damages from the present *sequelae* then by allowing the Second Defendant's Special Plea, this court would effectively be non-suiting the Plaintiff and denying her right of recourse against a wrongdoer.
8. This clearly would amount an infringement of her rights both constitutionally and under the common law.
9. The Fund in this case has conceded liability in respect of the collision.
10. It is common cause that:-
 - a) There was a collision;
 - b) That the insured driver was negligent in causing the collision;
 - c) That the Plaintiff sustained injuries in the collision that necessitated medical intervention.
 - d) That the Fund would be liable for damages flowing from the collision.
11. It is accepted from the uncontroverted testimony of the Plaintiff's expert that the present *sequelae* would not have resulted from the injuries sustained if the Plaintiff was properly treated and that the *sequelae* of the injuries arose from what he termed sub-standard medical intervention by the relevant orthopaedic surgeon who treated the Plaintiff.

12.

a) A reasonable driver and the Fund would expect that a person injured in a collision would receive reasonable medical care and proper medical attention and accordingly negligent or sub-standard care would not be reasonably foreseeable and would be too remote to hold the Fund liable to compensate the Plaintiff for damages that flow from the sequelae of negligent treatment which is vastly different from that which would have ordinarily occurred had the Plaintiff received proper attention.

b) In **Mitchell vs. Dixon**¹ , Innes CJ:

“A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill and care, he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not”.

c) The Plaintiff accordingly has a common law right of recourse against the Second Defendant in circumstances where a reasonable degree of skill and care has not been exercised by the doctor in its employ.

13. In looking at the aspect of causation the Plaintiff would not have sustained the injuries but for the collision, which was accordingly the factual cause of the Plaintiff’s injuries however if properly treated the *sequelae* thereof would have been very different from the present *sequelae*. Accordingly the Plaintiff would not have suffered the present *sequelae* as a result of the collision although the injuries sustained in the collision most certainly resulted in the necessity for medical intervention.

14. The Plaintiff would accordingly experience difficulty in establishing legal causation on the part of the fund for the present *sequelae* of the injuries, in light of the fact that these arose from the subsequent intervening substandard medical intervention.

15. A brief examination of the authorities illustrates what is necessary in establishing legal causation.

i) In **Groenewald v Groenewald**², Streicher JA referred to Corbett CJ’s dictum with regard to causation as follows:

*“In International Shipping Co (Pty) Ltd v Bentley*1990 (1) SA 680 (A) at 700E--*I Corbett CJ formulated them as follows:*

¹ 1914 AD 519 at 525

² 1998 (2) SA 1106 SCA at 1113

'The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". 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 causa 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 an 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 plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

There can be no doubt that the factual cause of the alleged result were the intentional threats to, assault of, and confinement of the plaintiff by the defendant. Had it not been for those acts of the defendant there would have been no reason for the plaintiff to escape by climbing through the window and attempting to reach the ground from the ledge outside the building.

The test to determine legal causation

'is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part'.

ii) In **LEE v MINISTER FOR CORRECTIONAL SERVICES**³, the Court held that :

*“The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked **to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote**. This is termed legal causation. This element of liability is complex and is surrounded by much controversy. There can be no liability if it is not proved, on a balance of probabilities, that the conduct of the defendant caused the harm. **This is so because the net of liability will be cast too wide**. A means of limiting liability, in cases where factual causation has been established, must therefore be applied. Whether an act can be identified as a cause depends on a conclusion drawn from available facts or evidence and relevant probabilities. Factual causation, unlike legal causation where the question of the remoteness of the consequences is considered, is not in itself a policy matter but rather a question of fact which constitutes issues connected with decisions on constitutional matters as contemplated by s 167(3)(b) of the Constitution.” (my emphasis)*

iii) In **Ntombenkosi Hlomza v The Minister of Safety and Security**⁴ the Court held at paragraph 11 that:

*“When dealing with causation in the law of delict it is necessary to deal with two distinct problems. The first aspect is the question of factual causation and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. **The second aspect is whether or not the omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote**. In the Skosana case, Corbett JA referred with approval to Professor Fleming, "The Law of Torts", fourth edition, p.169, in this regard as follows:*

³ 2013 (2) SA 144 (CC) at paragraphs 38 and 39

⁴ 2011 JDR 0030 (ECM)

"The first involves what may broadly be called the 'factual' question whether the relationship between the defendant's breach of duty and the plaintiff's injury is one of cause and effect in accordance with 'scientific' or 'objective' notions of physical sequence. If such a causal relation does not exist, that puts an end to the plaintiff's case, because no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed.

The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. **There must be a reasonable connection between the harm threatened and the harm done.** As a matter of practical politics, some limitation must be placed upon legal responsibility, because the **consequences of an act theoretically stretch into infinity.** The task is to **select those factors which are of sufficient significance to justify the imposition of liability and to draw a boundary along the line of consequences beyond which the injured party must either shoulder the loss himself or seek reparation from another source.**"

16. In this case the substandard medical intervention that resulted in the present *sequelae* appears to constitute a *novus actus interveniens* if one has regard to the authorities:

- i) **Neethling**⁵ provides that a *novus actus interveniens* (new intervening cause) is an independent event which, after the wrongdoer's act has been concluded, either **caused or contributed to the consequence concerned**....where a *novus actus interveniens* completely extinguishes the causal connection between the conduct of the wrongdoer and the consequence, with the result that the wrongdoer's act can longer be considered to be a factual cause of the consequence, the actor obviously goes free.
- ii) It is trite law that a *novus actus interveniens* severs the chain of causation between the initial wrongful act and the consequences of the intervening cause⁶.
- iii) Subsequent negligent medical treatment is a prime example of such an intervening cause⁷.

⁵ Law of delict 6th edition page 206

⁶ (cf. Premier, Western Cape and Ano v Loots NO [2011] ZASCA 32)

⁷ (Neethling Potgieter and Visser Law of Delict (ibid) p. 207 footnote 233)

- iv) As correctly pointed by Milton⁸ “... in modern times medical proficiency is normal and ... negligent, improper procedures are abnormal...”.
- v) The court in **Fourie N.O. v Hansen and Another**⁹ referred with approval to the description of a novus actus interveniens currently set out in **The Law of South Africa**¹⁰ where the court held:

“ The law relating to subsequent independent causes excusing a defendant from liability from his initial negligent act has been succinctly summed up by the authors of Joubert (ed) “The Law of South Africa”... where it is stated:

‘An intervening cause is an independent, unconnected and extraneous factor or event which is not foreseeable, and which actively contributes to the occurrence of harm after the defendant’s original conduct has occurred. Such an independent force can take the form of an intervening natural phenomenon, conduct by a third party, or even the plaintiff’s own conduct ... **A novus actus has the effect of completely neutralising the causative potency of the defendant’s original conduct, for it indicates that, even though the causative link remains factually intact, the link between the conduct and the harm is too tenuous.**’” (my emphasis)
- vi) The approach is stated as follows in Road Accident Fund v Russell¹¹:

“The trial court found that the suicide was not a novus actus interveniens but was causally connected to the negligence of the insured driver. It appears from a proper appraisal of the evidence that no factors extraneous to the injuries caused by the accident led to the suicide. Such inducing factors as there might have been ... were all direct consequences of his injuries.”
- vii) The nature and effect of a novus actus interveniens is illustrated by the facts of **Mafesa v Parity Versekeringsmaatskappy Bpk (in Likwidasie)**¹² where the Plaintiff sustained a leg fracture in a collision caused by the negligence of the driver of a vehicle insured by the Defendant. No contributory negligence on the part of the Plaintiff was proved. After the leg had set clinically, the plaintiff was discharged from hospital. Because his leg was still in splints he

⁸ South African Criminal Law and Procedure Vol II (ed) p.345

⁹ 2001 (2) SA 823 (W) at 742 E-G

¹⁰ Vol. 8 Part 1 (2ed para 135)

¹¹ 2001 (2) SA 34 (SCA) para [16]

¹² 1968 (2) SA 603 (O)

had been given crutches. The Plaintiff negligently walked on a smooth floor, fell and had to undergo a second operation. The court **decided that the Plaintiff's negligent conduct was an intervening cause which broke the causal effect of the driver's original negligent conduct. The Defendant was therefore not liable for the damage flowing from the Plaintiff's second operation.**

- viii) In **Alston & Another v Marine & Trade Ins Co. Ltd**¹³ the Plaintiffs, a husband and wife, were injured in a motor vehicle collision. The husband suffered from manic depression, due to a brain injury sustained in the collision, and was treated with a drug called parstellin which has harmful side-effects when taken together with certain foodstuffs, particularly cheese. The husband had consumed cheese and suffered a stroke due to the negative effects of the combination of parstellin and cheese. The court held that **the stroke was due to a *novus actus interveniens* or superceding cause and that the statutory insurer was not liable to compensate the husband for the consequences of the stroke.**
- ix) In **Ramosunya v S**¹⁴, an Appeal against conviction and sentence on charge of murder. It was common cause that Appellant had stabbed the deceased four times. However, he denied that it was the stab wounds, which led to the death of the deceased. The deceased died in hospital after six days of treatment. The cause of death was certified as being sepsis in the lungs. Held; that the question was not whether the sepsis could have been caused by the stab-wounds, but whether the stab wounds could have led to the sepsis which in turn led to the death of the deceased. Appellant **relied on the defence of *novus actus interveniens* in the form of medical negligence.** He argued therefore, that no nexus existed between the injuries inflicted by him, and the death of the deceased. In other words, the causal chain was said to have been broken. The Court found that there was a reasonable possibility that this may be true. No evidence existed to prove beyond reasonable doubt that the appellant had definitely caused the death. The appeal against conviction on this count was upheld.

¹³ 1964 (4) SA 112 (W)

¹⁴ [2000] JOL 6559 (T)

17. Having regard to the authorities cited above and applying them to the facts of this case the conduct of the doctor, for present purposes of determining the Special Plea and on the evidence presented for such purposes, appears to be a *novus actus interveniens* that would negate legal causation as against the Road Accident Fund and exclude the Fund from being liable for the consequences of the *sequelae* that were caused by the substandard treatment of the Plaintiff.
18. The Plaintiff accordingly would not be able to successfully prove its case against the Fund for the *sequelae* that arose, on the present available uncontroverted negligent or substandard treatment received at the hospital. This treatment in the present context constitutes a *novus actus interveniens* and the original wrongdoer cannot be liable even though the initial injury was caused by or arose out of the collision. The present *sequelae* thereof is too remote to be causally connected to the original injury. The present *sequelae* caused by a negligent medical intervention, was not reasonably foreseeable by the driver or the Fund and the Fund accordingly cannot be held liable for the unforeseen consequences arising out of substandard medical intervention and treatment.
19. Section 17 does not provide a blanket entitlement to claimants involved in collisions to claim damages for all the consequences and *sequelae* of injuries sustained in a collision irrespective of how remote. The authorities referred to make it abundantly clear that the Plaintiff has to establish a causal connection for the Fund to be liable and that a *novus actus interveniens* precludes the claimant from claiming against the Fund. Section 17 does not change the common law position in this regard nor does it vitiate the First Defendant's defences of *novus actus interveniens*.
20. Section 17 of the Act also does not expressly or implicitly restrict the Plaintiff's right of recourse to parties unconnected with the collision. The Act merely precludes the Plaintiff from suing the driver or owner because the Fund is put in the shoes of the driver/owner and the Plaintiff would need to satisfy all the elements of a delictual claim.
21. The Act was not intended to hold the Fund liable for all consequences of the collision irrespective of how remote nor can Section 17 be interpreted to that effect.
22. The court would effectively be restricting the plaintiff's claim for damages to what would have been the normal *sequelae* arising from the collision in the event of a finding being made that the Plaintiff only has a claim against the fund in terms of Section 17 and cannot sue the Second Defendant.

23. The Second Defendant has not convinced this court that Section 17 of the Act precludes the Plaintiff from suing the Second Defendant or restricts the Plaintiff to only suing the Plaintiff.
24. The Act was not intended to be a No fault Act but merely to put the fund in the shoes of the driver/owner.
25. Section 17 was not intended, nor was the Act intended to, nor does the Act preclude the Plaintiff from suing a joint wrongdoer unconnected with the driving of the motor vehicle.
26. The Act was not intended to restrict the Plaintiff's constitutional and common law right of recourse against other wrongdoers unconnected with the driving of a vehicle nor to deny the Fund of legitimate defences nor to eliminate the necessity for the Plaintiff to prove its entitlement to the damages that it claims.
27. Section 17 of the Act also cannot be read to do away with the elements of legal causation and *novus actus interveniens* or to preclude the Plaintiff from exercising her common law and constitutional right and has to be read in conjunction with the rest of the Act and particularly Section 19 and simply hold the Fund liable for all consequences.
28. I have had due regard to all the arguments presented by the parties and find that that there is no merit in the Special Plea raised by the Second Defendant which falls to be dismissed with costs.
29. I accordingly make the following order:
- i) The Second Defendant's Special is dismissed.
 - ii) The Second Defendant is directed to pay the costs inclusive of costs of the two counsels in respect of the Plaintiff in respect of the Special Plea.
 - iii) The Second Defendant is directed to pay the First Defendant's costs in respect of the Special Plea.

FBA DAWOOD

JUDGE OF THE HIGH COURT

DATE HEARD:

23 MARCH 2015

JUDGMENT DELIVERED:

01 OCTOBER 2015

FOR THE PLAINTIFF:

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WITH ADV G. POTGIERER

INSTRUCTED BY:

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