IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA **CASE NO.: 1354/2009**

In the matter between:

PRISCILLA ZANELE NBDABA **PLAINTIFF**

and

G. T. T. BUTHELEZI **DEFENDANT**

JUDGMENT

JAPPIE, J.:

[1] The Plaintiff, Priscilla Zanele Ndaba, brought an action for damages against the Defendant, Dr Gabriel Buthelezi, a specialist gynaecologist and obstetrician based on the latter's alleged negligence in the performance of a total abdominal hysterectomy on her.

[2] During January 2006 the Plaintiff experienced severe abdominal pain which caused her to seek out and consult with the Defendant. After an examination the Defendant diagnosed the Plaintiff as having severe pelvic inflammation. The Defendant prescribed for her antibiotics and antifungal medication.

[3] On the 19 January 2006 the Plaintiff once again consulted with the Defendant as

she was still experiencing abdominal pain. An examination was carried out and the Defendant found no abnormalities with the Plaintiff's uterus and consequently suggested that a laparoscopic evaluation be done which was arranged for the 23 January 2006.

[4] The laparoscopic evaluation was done on the 23 January 2006 and it showed that the Plaintiff had a congested uterus indicating the presence of inflammation. The Defendant once again saw the Plaintiff on the 27 January 2006 and discussed with her the results of the laparoscopic examination. The Defendant further discussed with the Plaintiff the option of having a hysterectomy. The Plaintiff expressed an interest in this. However, according to the Defendant, he had some reservations about performing the procedure as there were certain compromising factors in her situation. The factors under consideration at that stage were that the Plaintiff was HIV positive and that she was diabetic. According to the Defendant these factors could have a poor effect on the healing process after the procedure. The Defendant explained the situation to the Plaintiff

[5] The Defendant once again consulted with the Plaintiff on the 10 February 2006 and at this consultation the Plaintiff expressed the desire for a total abdominal hysterectomy and arrangements were made for the procedure to be done on the 13 February 2006.

[6] On the morning of the 13 February 2006 the Plaintiff was admitted to the Midlands Hospital, Pietermaritzburg where the Defendant performed the total abdominal hysterectomy on the Plaintiff.

[7] The Plaintiff remained in hospital for a few days and was discharged from hospital on 17 February 2006. Immediately thereafter she developed diarrhea which caused her to be readmitted to hospital on the 18 February 2006. She remained in hospital for a further 2 days and was discharged on the 20 February 2006.

[8] According to the Plaintiff some five or six days later she noticed that she had become incontinent and pus and urine were passing through her vagina.

[9] According to the Plaintiff she saw the Defendant on the 10 March 2006 and complained to him that she had become incontinent and that she was experiencing dripping of urine from her vagina. According to the Plaintiff the Defendant was unsympathetic and told her that if she had a complaint she ought to report this to his council. He further told her that she should take up her complaint with her medical aid.

[10] According to the Defendant what occurred during the course of the visit on the 10 March 2006 is the Plaintiff complained of only occasionally experiencing urinary incontinence. Because the Plaintiff had been fitted with an indwelling catheter after her

surgery he concluded that the Plaintiff's incontinence was due to a urinary infection which was not uncommon after a hysterectomy. He treated her for this condition prescribing for her certain antibiotic. This was the last occasion when he interacted with the Plaintiff as a patient.

[11] Nevertheless, the Plaintiff once again came to see him on her about the 15 May 2006. On this occasion she told him that she was unhappy with the way she had been treated by him. She informed him that she had developed a problem which had been attended to by Dr. Dada. However Dr. Dada's intervention had been unsuccessful and it was anticipated that she would have to undergo a further operation. She demanded from the Defendant compensation for her further medical expenses. According to the Defendant it could have been at this stage when he informed the Plaintiff that she should take up her complaint with her medical aid. This was the last occasion that he, the Defendant, saw the Plaintiff.

[12] Abdool Kader Dada is a urologist practicing in Pietermaritzburg. He testified that on the 17 February 2006 the Plaintiff was referred to him and she complained of urinary incontinence. She informed him that on the 13th February 2006 she had undergone a total abdominal hysterectomy. He arranged for a cystogram which was performed on the 20 March 2006. The cystogram confirmed that the Plaintiff had developed a vesico-vaginal fistula. He explained that a hole had developed between the Plaintiff's bladder and vagina which caused urine and pus to pass out through her vagina.

The site of the fistula was where the outer bladder wall met the outer wall of the vagina.

[13] On 22 March 2006 the Plaintiff was taken to theater and a repair of the fistula was attempted. However, the first attempt at repairing the defect failed. The fistula recurred shortly after the surgery performed by him. Dr Dada explained that this was due to an infection at the site of the fistula which delayed in healing because of her diabetes and HIV status.

[14] On 10 April 2006 he met with the Plaintiff and advised her that it would be best to allow the infection to settle down for about three months and then to re-attempt to close the vesco-vaginal fistula. On 29 June 2006 Dr. Dada once again operated on the Plaintiff. On this occasion the surgery was successful and the vesco-vaginal fistula was repaired. Dr. Dada consulted with the Plaintiff on the 31 July 2006 and found that she was no longer complaining of urinary incontinence and it appeared as if the surgery performed by him had been successful. This was his last consultation with the Plaintiff.

[15] Professor Green-Thomson, is a past chief specialist and was head of the Department of Obstetrics and Gyneocology at the King Edward VIII Hospital, Durban and at the Medical School of the then University of Natal. He was provided with a bundle of documents which contained inter alia, the clinical notes of the Defendant, the report on the Plaintiff by Dr. Dada, radiological and ultrasound reports and the hospital

records of the Plaintiff. From these documents he compiled a medico-legal report in which he set out and explained the cause, the formation and development of the vesco-vaginal fistula suffered by the Plaintiff.

[16] Professor Green-Thomson testified as to the compilation of his report and explained in evidence the reasons for his opinion and conclusions. He was extensively cross-examined.

[17] According to Professor Green-Thomson the documentation showed that the Plaintiff had developed a vesco-vaginal fistula which had been situated between the posterior wall of the fundus of the bladder and the anterior wall of the vagina. He stated that the fistula occurred as a direct result of the surgery performed on her on the 13th February 2006 by the Defendant. The progressive increase in urinary incontinence, complained of by the Plaintiff, starting as occasional and ending up as total urinary incontinence is typical of devascularisation which caused ongoing tissue necrosis, progressive bladder damage, which then gave rise to a progressive increase in the size of the fistula and a worsening of the urinary incontinence. He further expressed the view that the Plaintiff's diabetes and HIV status could not be blamed for the primary bladder damage which caused the development and presentation of the fistula. He explained that the bladder had been devascularised because the Defendant had failed to adequately separate the bladder from the uterus during the performance of the hysterectomy.

[18] Professor Green-Thomson expressed the view that the fistula that resulted can be construed as a result of the Defendant's negligence. He explained that the Defendant ought to have taken precaution and care to ensure that the bladder was separate and free at the time when he performed the surgery, particularly at the time of effecting homeostasis at the vault of the vagina.

[19] During the cross-examination of Dr Green-Thompson he gave detailed evidence as to the anatomy of the area where the fistula had formed. His evidence also contained detail as to how a surgeon should perform a hysterectomy and the possible complications that could occur if not performed properly.

[20] Professor Leon Snyman is a gynaecological oncologist and is at present the principal specialist at the Department of Obstetrics and Gynaecology at Kalafong Hospital at Atridgeville, Pretoria. He disagreed with the opinion expressed by Professor Green-Thomson in that he regarded as unlikely that the fistula occurred as a result of a devascularisation of the bladder during the performance of the surgery. He expressed this view because there is no note by the Defendant that he (ie the Defendant) had cauterized in the area where the fistula developed. Professor Snyman expressed the view that the most likely event which gave rise to the formation of the fistula is either , the formation of a small haematoma or uncollected blood in the area where the fistula developed. He testified that the blood could have come from the vault (of the vagina)and that it could have tracked its way to the back of the bladder where it remained undetected and

uncollected.

[21] The only person who can give direct testimony as to how the Defendant performed the surgery is the Defendant himself. The Defendant, however, when asked if he could recall what he did during the procedure gave the following answer:

> "The details of when she was wheeled into the threatre, put under anesthetic, what happened, what I did, the steps in the procedure, no I would not recall."

The Defendant further explained that according to his medical notes he performed a standard total abdominal hysterectomy. He explained that as far as he can recall there was nothing which indicates that there was anything unusual which had occurred when he performed the surgery. The Defendant testified that he performed the surgery in his usual manner. The only occurrence that could in a sense be construed as unusual happened towards the end of the operation when there was oozing on the vaginal vault which he dealt with by putting in extra stitches in that area. He further explained that the oozing was somewhat unusual because he could not recall another case where he had recorded that there was oozing following on a hysterectomy.

[22] When the Defendant was asked for his view as to how and why the Plaintiff had developed a fistula he gave the following explanation:

> "On the balance of probabilities, and taking into account that she had had a

previous Caesarian section performed on her, and that usually in such instances, there is greater adherence between the bladder and the uterus/cervix/vagina area, it could be that somewhere along the line of dissecting the bladder from the uterus, there might have been compromise of the bladder wall in that region where the dissection was taking place. Whether this would have been to [through ?] difficulty with formation of a proper and natural plane between the bladder and the uterus, or whether it was poor technique, or whether it was rough handling, as the other issues that have been mentioned in the past about how this situation would come to pass. But the long and short of it would be that somewhere along the line, something would have caused the bladder wall in that region to be compromised. And as has been indicated, in many instances where this happens, or in some instances where this – where there is such compromise of the blood vessels, of the blood supply to that region of the bladder, there may not be obvious evidence of that at the time.

Yes. --- Yes.

But you see this – it appears to be between you and Professor Green-Thompson on this point, seems to be common cause that at some stage there must – the bladder must have been compromised, because that's where the VVF developed? – Yes."

[23] In his evidence the Defendant did not say how it came about that the bladder could have been compromised and that this was simply a matter for speculation.

However, he conceded that if the bladder had been compromised it should not have happened.

"And if it suggested to you that is should not have happened, what your response would be? -- Ja, my response would be, it should not have happened, I would agree with that. It should not have happened."

[24] When he was cross-examined about the oozing he noted that had occurred on the vault of the vagina, he expressed the view that this could have been caused by the inadequacy of a stitch that was already in place. He further conceded that the oozing could have resulted in some blood flowing to the rear of the bladder. Even though he had a vague recollection he was certain that he had established adequate haemostasis which included stopping the source of the bleeding and removing all blood or clots from the operative field. That being so, he was confident that if any blood had tracked towards the back of the bladder he would have removed it. However, he nevertheless conceded that he could have missed some blood that found its way to the back of the bladder. The Defendant then conceded that as a result of the oozing, if some blood had tracked its way to the back of the bladder and that he may have missed this could have result in an infection in the general area which would have given rise to a heamotoma and exacerbated the formation of the fistula.

[25] At the commencement of the trial the parties had agreed that in terms of rule 33(4) to separate the question of liability from the issue of the quantum of damages. The

issue to be decided at this stage is whether or not the Plaintiff can show that the Defendant, when he performed the total abdominal hysterectomy, did so negligently, resulting in the development and formation of a vesico-vaginal fistula. The onus of proof lies upon the Plaintiff. The maxim *res ipsa loquitur* do not apply. The Defendant would be liable only if it can be shown that he failed to exercise reasonable skill and care in the performance of the procedure.

[26] In deciding what is reasonable skill and care the evidence of an expert in the field is of assistance. The decision of what is reasonable under the circumstances is, however, for the Court to determine. The Court, of course, will have regard for the views of the expert, but it is not bound to adopt those views.

[27] The two experts, Professor Green-Thompson and Professor Snyman expressed conflicting and contradictory views. However, both were in agreement that there must have been a primary event or "trigger" which led to the formation of the fistula.

[28] According to Professor Green-Thompson the "trigger" was the devascularization of the wall of the bladder which occurred when the Defendant, during the course of the procedure, separated the wall of the bladder from the wall of the uterus. Professor Green-Thompson expressed the view that the devascularization of the wall of the bladder in the circumstances of this case can be said to be negligent.

[29] According to Professor Snyman, the "trigger" was either a haemotoma which formed after the procedure or uncollected blood which settled at the back of the bladder which gave rise to an infection leading to the necrosis of the bladder wall and thus to the formation of the fistula. In his report, supported in his testimony, Professor Snyman expressed the view that an important aspect that must be considered is that there is no conclusive scientific evidence anywhere in the world regarding the true phathogenesis of post-hysterectomy vasco-vaginal fistulas. Everything written in this regard is mainly speculation. Professor Snyman expressed the view that the development of a fistula is recognized as an unavoidable complication. That being so, he concluded that the complication of the vesco-vaginal fistula that occurred in the case of the Plaintiff was probably not as a result of any negligence on the part of Dr. Buthelezi.

[30] It was argued on behalf of the Defendant, by Adv. Marais SC, that on all the evidence the Defendant had executed the procedure in "a text book style" and other than the oozing on the vaginal vault had observed and noted no other complications. In the immediate post operative period, there were no indications of incorrect surgery or complications. It was submitted that whatever had triggered the fistula must have been so minor that it remained unobserved and therefore cannot be attributed to any act or omission on the part of Dr Buthelezi.

[31] It was further submitted that as there is no clear evidence as to what actually

triggered the fistula, the Plaintiff, on whom the burden of proof rests, had failed to establish any negligence on the part of the Defendant and consequently the Court ought to absolve the Defendant from the instance.

[32] It may be so that Professor Green-Thompson and Professor Snyman are in disagreement as to what the possible trigger event was that set off the development of the fistula. However, it is, in my view possible to find on a balance of probability what that event could have been.

In *Govan v Skimore 1952 (1) 732 Selke, J at 734 A* said the following:

> "In a criminal case, however, as I understand it, every fact material to establish the guilt of the accused must, unless it is admitted, be established by proof beyond reasonable doubt, and inferences from facts must, in order to be permissible, be such as leave no reasonable doubt of the propriety and correctness. That is a difference between the proof requisite in civil and criminal proceedings. *Rex v Blom supra*, was a criminal case, and in my opinion, it is a fallacy to suppose that that the second principle in Blom's case represents the minimum degree of proof required in a civil case, for, in findings of facts, or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* (3rd ed., para 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

[33] The two experts, professor Green-Thompson and professor Snyman have postulated two different trigger events. According to professor Green-Thompson the trigger event was the devascularization of the bladder wall. According to professor Snyman the trigger event was either a haemotoma in the area where fistula developed or an infection resulting from uncollected blood at the back of the bladder.

[34] Doctor Buthelezi in his evidence excluded the latter possibility. According to Dr Buthelezi he had removed all unnecessary blood or clots from the operative field. Although he conceded the possibility that he may have missed some of the blood there is no evidence to suggest that he did indeed miss any of the blood which resulted from the oozing.

[35] Insofar as the trigger event put forward by professor Green-Thompson is concerned, ie. the devascularization of the bladder wall, the Defendant conceded this could have occurred "*on the balance of probabilities*."

[36] It seems to me, that on the available evidence and in particular in the light of the Defendant's aforesaid concession, that the probable cause for the formation of the vesico-vaginal fistula was a devascularization of the bladder wall which occurred during the performance of the procedure.

[37] Having determined the probable cause for the formation of the fistula the issue now is whether it can be said that this was due to the negligence of the Defendant.

[38] In *Van Wyk v Lewis 1924 AD 438 Wessels JA* said at 461-2:

> "We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he fall short he is negligent."

[39] In *Michael and another v Linksfield Park Clinic (PtY) Ltd And another 2001 (3) SA 1188* at paragraph 34 the Court said the following:-

> "In the course of the evidence counsel often ask the experts whether they thought this or that conduct was reasonable or unreasonable, or even negligent. The learned Judge was not misled by this into abdicating his decision making duty. Nor, we are sure, did counsel intend that that should happen. However, it is perhaps as well to re-emphasise that the question of reasonableness and

negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve the considerations of credibility but rather the examination of the opinions as the analysis of the essential reasoning, preparatory to the Court's reaching its own conclusion on the issue raised."

[40] When the Defendant was cross-examined by counsel for the Plaintiff, Adv. Moola SC, on the issue of the bladder wall being compromised, the following exchange occurred:-

"You can't recall as what you did during the operation in regard to the bladder, wall except to say you would have performed and used your standard technique – Yes. Would that be fair to you?

So if the bladder and we must accept because it is common cause that the bladder was compromised, you can only speculate as to how that may well have happened? – Yes. You can't take it any further than that? – No I could not. And if it is suggested to you that it should not have happened, what would your response be? – Ja my response would be it should not have happened. I would agree with that **it should not have happened**.

But we know it did happen? – We know it did happen?- Yes"

[41] Having come to the conclusion that the trigger event which set off the formation of the fistula was the devascularization of the bladder wall, the Defendant who is in the best position to pronounce whether he was negligent or not, conceded that the devascularization ought not to have occurred. That being so the Defendant on his own showing did not exhibit the requisite skill and care that was required of him in the given circumstances. Consequently it is my view that the Defendant whilst in the performance of the total abdominal hysterectomy acted negligently in causing the bladder wall to become devascularized.

[42] In the result the order that I make is as follows:

1. Defendant is ordered to pay the Plaintiff such damages as either agreed or as the Plaintiff may establish at trial.

2. The Defendant is ordered to pay the Plaintiff's costs of the hearing to date.

DATE OF HEARING: 15 March 2012

DATE OF JUDGMENT: 22 May 2012

Counsel for the Plaintiff: Advocate F. Moola SC

Instructed by: Attorneys Sarawan & Company

Counsel for the Defendant: Advocate Jean Marais SC

Instructed by: Macrobert Incorporated