

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no. 7078/2023

In the matter between

SHANE CHEMINAIS

Plaintiff

And

DOCTOR JASON CRANE

Defendant

**JUDGMENT DELIVERED BY ACTING JUDGE W J PRETORIUS ON 24 APRIL
2025**

1. Plaintiff in this matter is Shane Cheminais, an adult male who resides at [...] M[...] Avenue, Trovatos Wine Estate, Cape Town, and who was born on the 5th of September 1958.
2. Defendant is Dr Jason Crane, an orthopaedic surgeon practicing as such at Room B175, First Floor, Cape Town Mediclinic, 21 Hof Street, Oranjezicht, Cape Town.
3. The Plaintiff's claim is that:
 - 3.1. the parties entered into an agreement on 15th of September 2021 in terms whereof Defendant undertook to treat Plaintiff, who presented with a bony deformity on his right heel;

- 3.2. it was an implied term of the agreement that Defendant would at all material times exercise such skill, care and diligence as was reasonably required of an orthopaedic surgeon;
 - 3.3. in concluding the agreement, the Plaintiff claims that it was within the contemplation and knowledge of the Plaintiff and Defendant that in the event of Defendant breaching the terms of the agreement, that the Plaintiff may suffer loss.
4. In the alternative to the aforesaid:
 - 4.1. the Plaintiff claims that a reasonable person in the position of Defendant would have foreseen that if the Defendant did not act with due professional care, and without negligence, Plaintiff may suffer loss;
 - 4.2. Plaintiff therefore claims that Defendant was under a legal duty of care towards Plaintiff to act with the due professional care and without negligence;
 - 4.3. Plaintiff claims that Defendant failed in his legal duty of care towards Plaintiff in that he acted without the necessary professional skill and care and negligently caused the Plaintiff to suffer loss.
5. The Plaintiff claims that the Defendant breached his contractual obligations owed to the Plaintiff and was in breach of his duty of care owed to the Plaintiff, in that he wrongfully, unlawfully and negligently:
 - 5.1. advocated surgery in the form of the excision of a Haglund deformity in circumstances where such surgery was not indicated, neither clinically or radiologically;

- 5.2. performed surgery in the form of the excision of a Haglund deformity in circumstances where such surgery was not indicated, either clinically or radiologically;
 - 5.3. caused a fracture of the calcaneus of the right foot;
 - 5.4. caused damage to the Achilles tendon during surgery; *and*
 - 5.5. failed to act with due care.
6. The Plaintiff claims that due to the aforesaid, the Plaintiff suffered certain losses and disabilities and therefore suffered the damages in the sum of R2 239 029.89.
7. The Defendant does not admit the existence of any contract between himself and the Plaintiff and denies that if such a contract existed, that he breached any of the terms of such alleged contract. The Defendant furthermore specifically denies that he had breached any aspect of any duty of care towards the Plaintiff.
8. The parties have agreed to separate the merits and quantum and therefore I am seized only with the merits of this matter.

THE WITNESSES

9. Plaintiff gave evidence and called in support of his case his wife, Mrs Cheminais, as well as a Dr Versfeld, an orthopaedic surgeon in respect of whom a Medical Legal Report was filed, dated 25 January 2024. The Defendant gave evidence himself and called in support of his case an orthopaedic surgeon, Dr DJ Vlok, in respect of whom an expert notice was filed, dated 24 May 2024.

FACTS THAT ARE COMMON CAUSE

10. Mr Cheminais was a very active sportsman and an extreme cyclist before this incident. The Plaintiff, however, experienced chafing on the outside of the right heel and consulted the Defendant concerning this problem. The Defendant referred the Plaintiff for X-rays which were done on 14 December 2021. These X-rays showed a heel within normal limits and showed no osteophyte and also showed no features to suggest any Haglund's deformity.
11. It was agreed between Plaintiff and Defendant that the Plaintiff would undergo surgery, performed by the Defendant on 24 January 2022, in order to remove "a small osteophyte".
12. The Plaintiff was required by the Defendant to sign a consent form, which was blank with no details of the surgery filled in on it.
13. The consent agreement was signed in blank by the Plaintiff. This consent agreement was later completed in the offices of the Defendant by inserting onto it that the surgery would be a "right open resection of the Haglund's deformity". Plaintiff at no stage had sight of the completed document.
14. There is a considerable difference between surgery to repair a Haglund's deformity and surgery for the removal of a small osteophyte. The former requires the detaching of the Achilles tendon and the reattaching thereof using an anchor, whereas the removal of the osteophyte seldom requires interference with the Achilles tendon.
15. The calcaneus was fractured at some point in time although it is in issue as to whether the calcaneus was fractured during the surgery or was a result of undue stress placed upon the heel by the Plaintiff.
16. The Defendant interfered with the Achilles tendon at least insofar as the bursa was removed from between the Achilles tendon and the calcaneus and the area from where the bursa was removed, was debrided and/or cleaned. The Defendant denied, however, that he caused any damage to the Achilles tendon during the surgery.

17. The Plaintiff continued to experience considerable pain for a significant period of time and eventually consulted other medical practitioners in regard thereto.
18. On 25 July 2022, Dr Hastings advised that an Achilles tendon reinsertion surgical procedure should be performed as well as the transfer of the flexor hallucis longus tendon, and such surgery was eventually performed by Dr Hastings on 17 August 2022. It is not admitted by the Defendant that such surgery was necessary.
19. The Plaintiff's condition has improved but he remains unable to partake in any competitive cycling events and has no prospect of doing so in the future.

THE EVIDENCE

20. THE PLAINTIFF'S EVIDENCE

- 20.1 Plaintiff gave evidence that he sought the advice of the Defendant regarding a bony deformity on the outside of his right heel, which caused chafing of his right heel when cycling.
- 20.2 Plaintiff gave further evidence that he was advised that surgery was indicated and would be set up for 24 January 2022. The Plaintiff was always under the impression that this was a very small procedure in that it was only a small osteophyte that had to be removed, and that he would be up and about within a period of two weeks. Plaintiff held an entry for the Argus Cycle Tour on 9 March 2022, a cycle event in which he was in the top end of his age group in previous years. The Plaintiff was convinced that he would be able to take part in the Argus Cycle Tour on 9 March 2022. His evidence was that he would never have had the surgery, had he known that he would not be able to take part in the Argus Cycle Tour, as the difficulty with his ankle was not of such that it prevented him from cycling. Plaintiff also stated that, prior to the surgery, the ankle gave him more discomfort as opposed to acting as an impediment to his cycling.

20.3 The Defendant eventually performed the surgery on 24 January 2022. The Plaintiff was discharged the next day after some argument regarding the use of a new moon boot and crutches. He insisted that he has his own moon boot and crutches at home and was not prepared to pay for a new moon boot and crutches.

20.4 The Plaintiff saw the Defendant on 8 February 2022 and indicated to the Defendant that he was experiencing extreme pain. The Plaintiff again saw the Defendant on 15 March 2022 where an X-ray revealed that Plaintiff sustained a fracture to the calcaneus. The Plaintiff claims that Defendant explained to Plaintiff that he removed too much bone during the surgery, and this caused the fracture of the calcaneus and that Defendant apologised for this fact. Plaintiff saw the Defendant again on 10 April 2022 where he was advised to undergo physiotherapy.

20.5 Plaintiff gave evidence that he never paid for his surgery as he understood that to be the consequence of the fact that Defendant caused a fracture of the calcaneus.

20.6 Plaintiff gave evidence that he consulted Dr Craig Hastings, an orthopaedic surgeon, on 25 July 2022. Dr Hastings advised that an Achilles tendon reinsertion surgical procedure should be performed as well as a transfer of the flexor hallucis longus tendon. Dr Hastings performed this surgery on 17 August 2022.

20.7 The Plaintiff gave evidence that his foot and leg was in a moonboot and that he was using crutches, until 15 December 2022. On this date the moonboot was removed, and the Plaintiff thereafter mobilised using one crutch with continued physiotherapy. The Plaintiff thereafter gave evidence that he is not able to do any form of serious cycling anymore and that his cycling is limited now to recreational cycling mostly with his wife.

20.8 EVIDENCE BY THE PLAINTIFF'S WIFE, MRS CHEMINAIS

20.8.1 Mrs Cheminais gave evidence that she was against the surgery from the outset as she regarded it as unnecessary. She furthermore gave evidence that the Plaintiff insisted on having the surgery as it was going to be a limited procedure and that he would be back on his bicycle within two weeks of the surgery;

20.8.2 Mrs Cheminais also testified that the Plaintiff at this stage cannot do any form of competitive cycling and is now limited to recreational cycling from time to time, mostly, with her.

20.9 DR VERSFELD

20.9.1 Dr Versfeld testified that in his opinion the X-ray revealed a normal looking heel without any suggestion of a Haglund's deformity. Dr Versfeld refers to the notes of Defendant, which reads as follows:

"In this case I think he has clearly just a small osteophyte causing his troubles, and I do not feel that the calcaneus tendon (Achilles tendon) is causing traction against the calcaneus or the Haglund's deformity is the cause. Therefore, three options are either ????. Very limited resection of the calcaneal osteophyte, without removing or detaching the Achilles tendon and the last option would be a formal resection of the bone, detaching the Achilles tendon and reattaching using an anchor. The plan: We have decided to make a small incision removing the osteophyte."

20.9.2 Dr Versfeld also testified that if a small excision of the osteophyte was done without disturbing the Achilles tendon insertion, this would have resulted in a rapid post operative recovery consistent with the Plaintiff's interpretation that in two weeks he would be able to cycle again;

20.9.3 Dr Versfeld testified that there was a rather extensive resection of the upper portion of the calcaneus done, with the resultant significant interference with

the Achilles tendon insertion. In addition, there was evidence of a fracture of the calcaneus after the operation. When questioned, Dr Versfeld indicated that bone excision from the calcaneus was in his opinion between 10 and up to 50 times bigger than he would have expected from the removal of a small osteophyte;

20.9.4 Mr Walters, acting on behalf of Defendant, took issue with Dr Versfeld, primarily on two issues. The first issue was the cause of the fracture of the calcaneus and the second issue was the damage to the Achilles tendon. Mr Walters indicated that the Defendant would testify that he saw no fracture of the calcaneus during the operation and that in his view the fracture was a result of the overuse by the Plaintiff causing a “stress fracture”. Mr Walters also said that his expert, Dr Vlok, would give evidence to the fact that the MRI-scan does not indicate any damage to the Achilles tendon, and would support the Defendant’s evidence that the fracture of the calcaneus was a stress fracture caused by overuse of the ankle by the Plaintiff post-surgery.

20.9.5 In cross examination, Dr Versfeld strongly disputed the suggestion that the fracture of the calcaneus was a stress fracture as stress fractures developed over a considerable period of time and required consistent force on the affected area for a long period of time. In his view, the fracture of the calcaneus was caused during the initial surgery by Defendant. Dr Versfeld also persisted in cross examination that the Achilles tendon was damaged during the surgery and that such conclusion required a study of all the images of the MRI, not only the one image referred to hereinabove.

20.9.6 Dr Versfeld further testified that the extensive surgery was done without good indication, was badly done with the resulted fracture of the calcaneus and serious damage to the tendon and tendon insertion, and that the surgery was therefore done without the due care and attention to detail expected of an orthopaedic surgeon and constituted medical negligence.

21. **THE DEFENDANT’S EVIDENCE**

21.1 THE DEFENDANT

21.1.1 The Defendant had a difficult task in that he had to admit from the outset that the consent form should never have been signed in blank and that the description of the surgery that was filled in at a later stage, was incorrect;

21.1.2 The Defendant furthermore had to defend the fact that radiologically there was no indication of any deformity and/or osteophyte. The Defendant's evidence was also problematic on the existence of an osteophyte as he stated in his evidence that he clinically observed and felt the osteophyte. This evidence was not consistent with his notes which stated "no obvious palpable Haglund's deformity";

21.1.3 The Defendant was adamant that he never caused the fracture of the calcaneus and denied that he ever admitted to doing so. The Defendant furthermore gave evidence that the reasons for the problems of the Plaintiff is the fact that he did not do proper post-operative care in that he refused to use crutches, alternatively, use them inadequately and further, used a moonboot that was not required for his condition. The Defendant could not find any note in which he indicated prior to the surgery that the Plaintiff would require a moonboot and crutches and that it would take at least six weeks for the Plaintiff to recover before he could commence exercise again;

21.1.4 The Defendant did however make multiple references, after the 24 January, to the fact that the Plaintiff did not comply with his instructions on the use of crutches and a moonboot and was of the opinion that all the difficulties experienced by the Plaintiff, was a result of this non-compliance with his post-operative instructions and care.

21.2 DR VLOK

21.2.1 Dr Vlok was of the opinion that the fracture of the calcaneus was due to a stress fracture as a result of "tiptoeing on the foot" by the Plaintiff. Dr Vlok further gave evidence that, in his view and from the one MRI image that he

saw, that there was no damage to the Achilles tendon as a result of the surgery performed on the Plaintiff;

21.2.2 Dr Vlok, notwithstanding strenuous attempts by Mr Walters, denied that he has ever seen any of the other MRI images (**other than the one on page 16 of the Index to Defendant's Expert Reports part of the document filed on behalf of the Defendant**);

21.2.3 Dr Vlok furthermore testified to the fact that he would never have done the operation if he was the Defendant with the available radiological evidence that was before the Defendant. He advised that all Defendant should have done was to require from the radiologist different angles of the foot and if no osteophyte was visible, and in Defendant's opinion there may yet be an osteophyte, then the Defendant should have ensured the benefit of a CAT scan. Dr Vlok said in the absence of such radiological evidence he would not have performed such surgery, and he would merely have advised that the Defendant considers adjusting his footwear for cycling purposes;

21.2.4 Dr Vlok, when questioned as to how many of his patients have ever suffered a stress fracture after excision of a small osteophyte, indicated that he does not do operations on feet, therefore could not provide an answer to this question.

FACTUAL DISPUTES

22. Insofar as there are factual disputes arising from irreconcilable versions, such should be resolved in a manner described by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and Another vs Martell Cie SA and Others*¹ to:

22.1 come to the conclusion on the disputed issues a court must make findings on a) the credibility of the various factual witnesses; b) their reliability; and c) the probabilities;

¹ *Stellenbosch Farmers' Winery Group Ltd and Another vs Martell Cie SA and Others* [2002] ZASCA 98

22.2 In the circumstances where a court has to consider conflicting expert evidence, the following has been held:

In *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another*², this Court referred with approval to the principle laid down in *Bolitho v City and Hackney Health Authority*³. Therein, the court held that the evaluation of expert evidence entails a determination of whether and to what extent the opinions advanced are founded on logical reasoning. The court is not bound to absolve a defendant from liability for alleged negligent medical treatment or diagnosis based on the evidence of an expert genuinely held and which accords with sound medical practice. A defendant can therefore be held liable despite a body of professional opinion sanctioning his conduct. The court must be satisfied that such opinion has a logical basis and that the expert has considered comparative risks and benefits and has reached 'a defensible' conclusion.

22.3 In the same vein, in *Mediclinic v Vermeulen*⁴, this Court held that an opinion, which is expressed without logical foundation, may be rejected.

22.4 In *Dingley v The Chief Constable, Strathclyde Police*⁵, the court warned that:

'One cannot entirely discount the risk that, by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the quest whether a particular thesis has been proved or disproved – instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.' (my emphasis.)'

22.5 In *Life Healthcare Group (Pty) Ltd v Suliman*⁶, this court held that:

² *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* [2002] 1 ALL SA 384 (A) par 34

³ *Bolitho v City and Hackney Health Authority* [1998] AC 232 (H.L. (E).)

⁴ *Mediclinic v Vermeulen* 2015 (1) SA 241 (SCA) par 5

⁵ *Dingley v The Chief Constable, Strathclyde Police*⁵ 2000 SC(HL) 77 at 890-E

⁶ *Life Healthcare Group (Pty) Ltd v Suliman* 2019 (2) SA 185 (SCA) par 15

‘Judges must be careful not to accept too readily isolated statements by experts, especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.’

22.6 In essence, a court must consider probabilities along with the views of experts.

EVALUATION OF ALL THE EVIDENCE

23 THE EVIDENCE OF THE PLAINTIFF AND HIS WIFE, MRS CHEMINAIS

23.1 The evidence of the Plaintiff and his wife is important, primarily insofar as it reflects on the credibility of the Defendant.

23.2 The first issue relates to the recovery period that was communicated by the Defendant to the Plaintiff. In this regard, the Defendant says it was four to six weeks, whereas the Plaintiff was adamant that the recovery period was going to be two weeks and that he would have no difficulty in competing in the Argus Cycle Tour.

23.3 In this fact the Plaintiff is corroborated by his wife, as well as Dr Versfeld, as Dr Versfeld states that the removal of a small osteophyte will be in accordance with a recovery period as suggested by the Plaintiff. In this regard, it must be borne in mind that the Defendant envisaged the removal of a small osteophyte which is not the surgery he performed. He excised a two centimetre by one centimetre calcaneus bone from the Plaintiff's right foot.

23.4 The Defendant was not able to find any reference to the recovery period and the use of a moonboot prior to 24 January, in his notes. There are, however, multiple references to the use of the moonboot and crutches after the surgery on 24 January.

23.5 Dr Versfeld was adamant that the size of the excision of the calcaneus bone by the Defendant was considerably more than was indicated by the excision of a small osteophyte. Dr Versfeld was of the view that the excision was 10 to 50 times larger and more extensive than he would have envisaged for the removal of a small osteophyte. According to Dr Versfeld the original surgery would require the two-week recovery time whereas the recovery time for the actual extensive surgery performed would be much longer.

23.6 I find, on a balance of probabilities, that the surgery envisaged and conveyed to the Plaintiff was a minor surgery whereas the Defendant in actual fact performed surgery which required a very large excision of the calcaneus and significant surgery between the calcaneus and the Achilles tendon. I also find the version of the Plaintiff, that the recovery period would be two weeks and not four to six weeks, more probable than the version of the Defendant that the recovery period would be four to six weeks. I make this finding for the following reasons:

23.6.1 In the first place I have no reason to doubt that the Plaintiff envisaged taking part in the Argus Cycling Tour after the surgery. This evidence was uncontested.

23.6.2 In the second place, the aforesaid evidence of the Plaintiff was supported by his wife which evidence was also uncontested.

23.6.3 In the third place this version fits in with the fact that prior to the surgery a small osteophyte was to be removed whereas the actual surgery was far more invasive.

23.6.4 The probabilities are therefore that the Defendant indicated a two-week recovery period which he had to revise to a longer recovery period after the surgery.

23.7 The next issue of importance in relation to the evidence of the Plaintiff and his wife relates to the admission by the Defendant to the Plaintiff, that he had fractured the calcaneus during the surgery. This fact is vehemently denied by the Defendant. The Plaintiff claimed that the Defendant indicated to him that he removed too much bone during the surgery, and this resulted in the fracture of the calcaneus. Plaintiff claimed that it was this admission that caused him to insist that the Defendant carries the financial responsibility of the MRI scan, suggested by the Defendant. Defendant does not dispute the fact that the Plaintiff made this demand.

23.8 I found it extraordinary that a patient would insist that a doctor pays for an MRI scan unless he has reason to believe that the doctor was in some way responsible for the predicament that required an MRI scan.

23.9 This caused me to scrutinise Bundle 'A' for any reference that may throw light on this issue. I found two entries, not canvassed by the legal representatives of the parties. These entries, however, have a significant impact on the probabilities in relation to this admission by the Defendant. It should be noted that these entries were made by two totally disinterested parties and obviously without contemplation of any legal consequences thereof.

23.9.1 The first entry was made by the admission person on the admission form dated the 17 July 2022. Under the heading "Primary reason for admission" the following was entered:

"A doctor broke the foot by mistake. Painful right foot – patient undergone surgery but the doctor hit the wrong bone" (Page 95 of Bundle 'A')

23.9.2 The second entry seems to be made by the ward nurse on the same day. Under the heading "Continuous progress report", the Nurse entered the following:

“A male patient of Dr Hastings came in the ward from home, complaining about painful right foot. Patient verbalised that he was undergoing foot surgery seven months ago so the Doctor broke his foot accidentally”

23.10 I find that the evidence of the Plaintiff, and the probabilities, supports a finding that the Defendant admitted responsibility for the fracture of the calcaneus during the surgery. This finding is in addition to the finding herein below in which I concluded that the medical evidence supports the fact that the Defendant caused the fracture of the calcaneus during surgery.

24 THE EVIDENCE OF DR VERSFELD

24.1 It is important to note, at this juncture, that Dr Versfeld considered all the radiological evidence. In particular, he had regard to all the images of the MRI-scan. Dr Versfeld testified that the calcaneus was fractured during the surgery and was unpersuaded by any opposite view. He was adamant that a stress fracture could not have developed with a patient in so much pain as a result of his “tiptoeing”. His evidence was that a stress fracture required a long period of consistent force on an affected bone, to cause a stress fracture. This did not occur in this instance. His evidence is supported by the fact that the Defendant concedes that the only time that a stress fracture could have occurred, was between 8 February (as the Plaintiff was bedridden before then) and approximately the two to three weeks before the X-ray taken on 14 March. This left a very limited period of time for a stress fracture to develop and, having regard to the extreme pain in which the Plaintiff found himself, which is undisputed, it is unlikely that he could have placed the necessary stress on his heel that would have resulted in a stress fracture.

24.2 Dr Versfeld furthermore insisted that the MRI of 22 July was indicative of damage to the Achilles tendon and the Defendant caused same during the surgery that occurred on 24 January. I reiterate the fact that Dr Versfeld testified that one would have had to study all the images of the MRI scan in order to come to this conclusion. Dr Versfeld was also adamant that a consideration of only one image by Dr Vlok, was inadequate.

24.3 It also must be borne in mind that the Defendant admitted that he removed the bursa from between the calcaneus and the Achilles tendon and that he cleaned and/or debrided this area. There was therefore active surgery in the area of the excision of the Achilles Tendon.

24.4 Dr Versfeld was thoroughly cross-examined by Mr Walters regarding these issues. Dr Versfeld was in my view a very good witness who gave concessions when concessions were due and was unmoved on his opinion that the surgery was the cause of a fracture of the calcaneus, and that this was not a stress fracture and furthermore, that the Achilles tendon was damaged during the aforesaid surgery.

25 THE EVIDENCE OF THE DEFENDANT

25.1 The Defendant's evidence was in general problematic. In the first place, it must be noted that under Defendant's supervision the Plaintiff signed a blank consent form and never had sight of the completed form. In the second place, an erroneous procedure (the removal of a Haglund's deformity) was filled in on the consent form. In the third place, the Defendant proceeded with surgery in the absence of any radiological support. In the fourth place there was very little evidence of clinical support for his decision to remove the so-called small osteophyte. The latter two issues are particularly concerning as Dr Vlok, his own witness, gave evidence that under no circumstances would he have operated with no radiological evidence present as in this case. The Defendant's notes also fail to make any reference to the removal of a small osteophyte after the surgery was performed. The medical notes, however, are replete with references to the removal of a Haglund's deformity, which was not the surgery agreed upon or envisaged by the Plaintiff. (These references can be seen on Bundle 'A', pages 10, 11, 19, 25, 30, 32, 45, 50 and 64). The Defendant's explanation that the references to a Haglund's deformity was because of his use of the bluespier system, can be understood in some instances when reliance is placed on the bluespier system. This does not address the multiple references to an operation, which the Defendant claims, was not performed.

This is particularly problematic if regard is had to the fact that all the evidence is indicative of surgery much closer to the removal of a Haglund's deformity than the mere removal of a small osteophyte.

25.2 The Defendant's evidence was also not accepted in relation to the recovery period and the admission in regard to the fracture of the calcaneus. I have given my reasons in regard thereto hereinabove.

25.3 The Defendant's evidence is furthermore problematic in that there could be little doubt that the surgery envisaged and agreed with the Plaintiff, the removal of a small osteophyte, and the excision and debridement of the Achilles tendon eventually, was vastly different from each other.

25.4 The Defendant also had to eventually concede that the Plaintiff's evidence in regard to the fact that he never paid for the surgery was correct. This concession, was notwithstanding the vociferous denial by the Defendant of this fact until the final argument in this matter.

25.5 I therefore find the Defendant's evidence to be less persuasive than that of Dr Versfeld and in so far as their versions differ, I accept the evidence presented by Dr Versfeld.

26. EVIDENCE OF DR VLOK

THE FRACTURE OF THE CALANEUS

26.1 The evidence of Dr Vlok that Defendant should not have operated with the lack of radiological support for the surgery makes logical sense particularly in the absence of strong clinical support. This evidence clearly means that Defendant's decision to embark on surgery without adequate and better radiological and/or clinical support falls below the standard expected of an orthopaedic surgeon in these circumstances. The evidence of Dr Vlok in relation to the fracture of the calcaneus, it being according to him a stress fracture, is not persuasive. In this regard, Dr Versfeld explained that a stress

fracture occurs over a long period of extensive pressure exercised on that particular area of the body that the stress fracture occurs.

26.2 I find that, in view of the small window in which a stress fracture could have occurred, it is unlikely that the fracture of the calcaneus was a stress fracture as suggested by Dr Vlok. I am fortified in this finding by the fact that Dr Vlok conceded that he has never seen such a stress fracture after the removal of a small osteophyte, as he does not operate on feet.

26.3 I find that on a balance of probabilities, the medical evidence is indicative of the fact that the fracture of the calcaneus occurred during surgery. The aforesaid conclusion is in addition to my finding hereinabove that the probabilities supports an admission by the Defendant that he caused the fracture of the calcaneus by the removal of too much bone during the surgery.

THE DAMAGE TO THE ACHILLES TENDON

27. Dr Vlok's evidence concerning the damage to the Achilles tendon can also not be preferred when compared with the evidence of Dr Versfeld in relation thereto. Dr Versfeld's evidence was in general preferable to that of Dr Vlok for the many reasons set out hereinabove. Dr Vlok's evidence was also inferior to that of Dr Versfeld as Dr Vlok, on his own admission, had regard to only one of the images of the MRI. Dr Versfeld indicated that in order to properly assess the damage to the Achilles tendon, one has had to have regard to all ten to twelve images of the MRI-scan. This seems to me logical and was clearly explained by Dr Versfeld during his evidence. The fact that Dr Vlok only had regard to one of the images of the MRI, leave me with no viable choice other than to accept the evidence of Dr Versfeld in this regard. I therefore find that the Defendant caused damage to the Achilles tendon during the surgery, which damage had to be corrected in further surgery.

THE DEFENCE OF THE DEFENDANT

28. The Defendant's defence is based on the fact he claims that all the problems of the Plaintiff emanate from his inadequate post operative care. The Defendant made many notes on the Plaintiffs inadequate use of the moonboot and crutches, consistently referring in his notes to the fact that this failure by the Plaintiff places his Achilles tendon at risk. I have already found, and it is obvious from Defendants notes that the plaintiff was totally unaware that the actual surgery was far more extensive than was envisaged. The Plaintiff was definitely not aware that Defendant performed surgery on and around the Achilles tendon. One would have expected that, instead of being critical of the plaintiffs post operative care, a reasonable and prudent surgeon would have carefully explained to the Plaintiff (and possibly his wife) that the actual surgery performed by him was far more invasive than originally envisaged. Defendant should then have explained that the nature of the actual surgery performed required significant changes to the previously envisaged post operative care. There is not a note or an iota of evidence that he had this conversation. The most plausible reason for this failure that comes to mind is that he did not want to divulge this fact to the plaintiff as the plaintiff was already extremely upset at the unexpected level of pain he was experiencing. It is to me obvious that had the defendant played open cards with the plaintiff, the plaintiff may have been upset but would in all probability have understood that he may have to adjust the manner in which he conducts his post operative care.
29. His failure to do so, is in my view, falls below the norm of a prudent reasonable orthopaedic surgeon in the circumstances. If, therefore I found that the post operative care of the Plaintiff was the cause of his injuries, I would in all probability have found that Defendant's failure in this regard was the cause of the Plaintiff's injuries.

NEGLIGENCE

- 30.1 The test for negligence is whether a reasonable person in the appellant's position would have reasonably foreseen harm befalling the respondent as a result of his conduct and would have taken reasonable steps to prevent the harm. If so, the question is whether he took reasonable steps to avert the harm

that ultimately occurred. The reasonableness of such conduct is assessed objectively.

30.2 Liability for medical negligence, as set out in *Goliath v Member of the Executive Council for Health, Eastern Cape*⁷, is determined by asking whether the failure of the professional person to adhere to the general level of skill and diligence possessed and exercised by the members of the branch of his profession to which he or she belongs would normally constitute negligence. What constitutes the general level of skill exercised by members of a particular profession is demonstrated through evidence of experts in that profession.

30.3 I applied these principles in reaching my conclusions.

CONCLUSION

31. I find that, on the basis of the evidence before me the Plaintiff proved on a balance of probabilities that:

- a. the parties entered into an oral agreement on 14 December in terms whereof Defendant undertook to remove a “small osteophyte” on the right heel of the Plaintiff.
- b. it was an implied term of the agreement that Defendant would at all reasonable and material times exercise such skill, care and diligence as was reasonably required of an orthopaedic surgeon;
- c. The Defendant breached the terms of the agreement between the parties in that he performed significantly more extensive surgery than was agreed upon, fractured the calcaneus and caused significant harm to the Achilles tendon and therefore conducted the surgery without the necessary skill, care and diligence and thereby causing the Plaintiff to suffer the consequences set out hereinbelow;

⁷ *Goliath v Member of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA)

- d. I also find that Defendant, in performing the surgery, did not act with the necessary skill and care, and thereby was negligent, in fracturing the calcaneus and causing significant harm to the Achilles tendon during such surgery and therefore causing the Plaintiff to suffer the consequences set out hereinbelow;
- e. the consequences the Plaintiff suffered was that the surgery performed by the Defendant resulted in **a serious and permanent disability of the right foot and ankle.**

COSTS

32.1 The Defendant is liable for the Plaintiff's costs of suite on a party and party scale, including, but not limited to:

32.1.1 Senior counsel's fees at scale C; and

32.1.2 The reasonable and necessary qualifying expenses of the following expert witness:

32.1.2.1 Dr G Versveld, orthopedic surgeon.

WJ PRETORIUS
ACTING JUDGE
WESTERN CAPE HIGH COURT