IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2822/2013

In the matter between:

REGINALD HAROLD BROWNLESS. **Plaintiff**

and

MEC FOR HEALTH, FREE STATE PROVINCE **1st Defendant**

MEC FOR HEALTH, MPUMALANGA **2nd Defendant**

JUDGMENT BY: **REINDERS J**

HEARD ON: 2 SEPTEMBER 2022

DELIVERED ON: 3 FEBRUARY 2023

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[1] On a stormy evening roundabout midnight on 14/15 December 2010 the plaintiff was travelling towards Koppies (Free State Province) when he lost control of his motor vehicle ("the accident"). As a result of the accident he was admitted to the Metsimoholo Hospital in Sasolburg for treatment of his injuries. The aforementioned hospital is located in the Free State Province

and resort under the authority and control of the first defendant who had been cited on that basis as the first defendant. The plaintiff was accepted in the early morning hours of 15 December 2010 as a patient at the hospital where he received medical treatment. Hospital personnel consulted him and he was administered an injection, ostensibly to control pain. X-rays were taken where after he consulted with a doctor who informed him that there was nothing wrong with him. After analgesic medication was prescribed he was fitted with a soft sponge neck collar and discharged.

[2] The plaintiff in his amended summons avers that the first defendant failed to diagnose that he had sustained a severe cervical injury as a result of the accident and had failed to treat him properly. Had he been properly diagnosed he would have received surgery and treatment which would have reduced the stiffness and loss of rotation in his neck of which he suffers now or, put differently, the failure of the first defendant to properly treat him exasperated the stiffness in his neck and loss of rotation.

[3] The first defendant filed a plea and although liability was denied in the plea, first defendant on 21 January 2021 conceded liability at a pre-trial conference.

In this respect the minute reads as follows:

> "The first defendant confirms that it has conceded the merits of plaintiff's claim (*sic*) insofar and to such extent as the Honourable Court may and/or will order that there was negligence on their part".

[4] The plaintiff in its summons joined a second defendant, the Member of the Executive Council for Health, Mpumalanga Provincial Government under whose authority and control the Mpumalanga Provincial Department of Health falls and who in turn is in control of the Witbank Provincial Hospital in the Mpumalanga Province.

[5] The plaintiff avers that on 11 February 2011 he was admitted as an outpatient to the Witbank Hospital with complaints of neck and head pain. The complaint in the summons against second defendant is that the aforementioned hospital failed to recognise and/or diagnose the plaintiff suffered the cervical injury (the C2 type 3 body fracture) and which was a highly unstable cervical spine injury. As a result, they failed to properly treat him resulting in the aforementioned neck stiffness and loss of 50% of rotation of his cervical spine. Plaintiff ultimately, according to the amended summons, claims from first defendant alternatively second defendant and in the further alternative first and second defendants, jointly and severally, the one paying the other to be absolved damages in the amount of R 1 271 300,00 together with interest and costs.

[6] The second defendant, contrary to the first defendant, denied liability and persisted therewith resulting in the trial before me.

[7] At the pre-trial conference it was agreed that the question in respect of the issue of liability and quantum should be separated to the extent that the issue in respect of the injuries, the extent of damages (if any) and calculation thereof stand over for later determination and requiring of me to adjudicate the question of the liability of the defendants. Although the minute does not make mention thereof, I was requested by plaintiff to make a determination of the defendants' respective liability in terms of sec 2(1) of the Apportionment of Damages Act 34 of 1956.

[8] It is common cause on the pleadings that the two mentioned hospitals fall under the auspices of the respective defendants and that they owed a legal duty towards plaintiff which included the duty to treat the plaintiff professionally. At the commencement of the trial I granted an order by agreement that I will adjudicate the question as to liability only.

[9] As stated the first defendant conceded liability and did not participate in the trial. Counsel for first defendant did have a watching brief and at the conclusion

of the trial requested leave to address me on the adduced evidence. As there was no objection, I granted such permission. It suffices to say that first defendant concluded its argument by requesting me to come to “a proper finding”. It was not suggested that I should dismiss plaintiff’s claim against first defendant or that I should order absolution of the instance. In view of the concession at the pre-trial conference I am satisfied that I can and should not

make any such orders but am compelled to grant an order against first defendant as I intend to do at the conclusion of this judgment.

[10] In my view there was no need for plaintiff to proceed with a full blown trial once first defendant conceded liability. Plaintiff’s claim as framed against second defendant is in the alternative. On a proper reading of the prayers once first defendant is liable, second defendant is not liable, being a claim in the alternative. For the aforementioned reason the trial was unnecessary. Plaintiff’s explanation that the nature of the wording of first defendant’s concession left plaintiff with no choice but to continue with the action against second defendant, does not convince me and as mentioned first defendant did not participate or oppose an order which will declare it to be liable.

[11] Notwithstanding my conclusion above in respect of second defendant I will deal with what I perceive to be the evidence against second defendant. Almost two months after plaintiff’s discharge from Sasolburg Hospital plaintiff attended as outpatient at the Witbank hospital where he was medically treated on seven occasions, the last being in April 2011. He informed the personnel that X-rays were taken at Sasolburg Hospital but that there was no fracture seen on the X-rays. He complained of neck and head pain. On 11th February 2011 he was examined and X-rays were taken. Plaintiff

terminated his treatment and failed to return to his scheduled appointment at orthotics on 19 April 2011.

[12] Both the plaintiff and second defendant called orthopaedic surgeons to testify and the two surgeons compiled a joint minute dated 10 March 2022. The surgeons concluded that the diagnosis of an unstable cervical fracture was missed and treatment was based on a stable fracture.

12.1 Dr A Olivier, testifying on behalf of second defendant, opined that the treatment given to plaintiff at Witbank Hospital was proper as it pertains to conservative treatment of a patient with a stable fracture. He testified that no instability was detected.

12.2 Dr NA Kruger, an orthopaedic spinal surgeon who testified as an expert witness for plaintiff, made his conclusions as to the unstable fracture amongst others on X-rays taken at the Groote Schuur Hospital in May 2015.

12.3 It is common cause that he performed a posture fixation fusion of C1 and C2 causing significant loss of movement. It was agreed by the experts that the fusion caused loss of 50% rotation of the plaintiff's neck.

12.4 In cross-examination Dr Kruger made mention thereof that it is difficult to opine what the conclusion at Witbank Hospital should have been without seeing the actual X-rays taken at Witbank Hospital. When plaintiff testified he confirmed having been in possession of the X-rays (including his medical records at Witbank) which he all provided, according to him, to Groote Schuur Hospital. Those X-rays and medical records were obviously of critical importance and could have shed light on what the Witbank Hospital had seen or should have seen when they treated plaintiff. It is common cause that not only medical records were kept, but X-rays and the MRI scan was done by the hospital. Both experts opined that a hospital would do what is reasonably

expected of it in these circumstances by taking X-rays and/or an MRI scan. This the second defendant had done. The imaging evidence was crucial to show the extent of the fracture, if any, and obviously to make a diagnose as testified by Dr Kruger. Plaintiff was placed in possession of the documentation by second defendant on his own version.

To then fail to produce such evidence without any explanations at the trial and at the same time averring failure to properly interpret such documentation in my view tantamount to a trial by ambush.

[13] It is plaintiff who bore the onus to convince me that second defendant was negligent. I am not on a preponderance of probability convinced of second defendant's negligence and although I cannot reject any of the experts' evidence, I prefer the evidence and conclusions reached by Dr Olivier. In respect of second defendant I have already indicated that in view of the formulation of plaintiff's claim as discussed supra, plaintiff is only entitled to judgment against first defendant, but if I am wrong, it follows that I would have dismissed plaintiff's claim against second defendant on the evidence for the reasons stated.

[14] The trial proceeded before me for three trial days. The plaintiff could have moved for judgment against first defendant on the first day of trial and there would have been no need to proceed against the second defendant thereafter. In as far as plaintiff will be successful against first defendant, plaintiff will only be entitled to costs limited up and until the first day of trial and will the order therefore so reflect.

[15] I therefore make the following orders:

15.1 It is declared that first defendant is liable to compensate plaintiff in respect of damages suffered by plaintiff consequent upon his admission to the Sasolburg Hospital on 15 December 2010 and first

defendant's failure to diagnose and treat plaintiff's cervical injury sustained in the motor vehicle collision on the aforementioned date.

15.2 First defendant to pay plaintiff's costs limited up and until 10 May 2022.

15.3 The plaintiff's claim against second defendant is dismissed with cost.

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C REINDERS, J

On behalf of the Applicants:	Adv R van Wyk Instructed by: A Batchelor & Associates c/o McIntyre & Van der Post BLOEMFONTEIN
On behalf of the first respondent:	Adv T Ntoane Instructed by: State Attorneys BLOEMFONTEIN
On behalf of the second respondent:	Adv DH Wijnbeek Instructed by:

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