REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 2958/02

In the matter between:

DENISE FRANKS **Plaintiff**

and

THE MEC FOR THE DEPARTMENT OF HEALTH FOR THE PROVINCE OF KWAZULU-NATAL **Defendant**

J U D G M E N T
DELIVERED ON: 20 JANUARY 2010

PATEL J

[1] On 31 August 2000, and at about 18h30, Ms Denise Franks, the plaintiff in this matter, was a passenger in a motor vehicle that was involved in a collision with a pedestrian. As a result of the accident the pedestrian, Mr Crophet Mandla Mthalane ("Mthalane") was killed. It is not in dispute that the plaintiff at the scene of the accident was treated by personnel employed by the defendant, the MEC for the Department of Health, Province of KwaZulu-Natal ("the defendant"), namely Messrs Dayal and

Dookie who at all material times were employed by the defendant and at the time they rendered assistance to the plaintiff they were acting within the course and scope of their employment with the defendant.

[2] It is the plaintiff's contention that she contracted AIDS or tested positive for the Human Immuno Deficiency Virus (HIV) very soon after the accident and this state of affairs resulted because Mthalane was infected with HIV. It is not in dispute that Franks suffered *inter alia*, the following injuries: a fractured skull and seven lacerations to the left side of her scalp. She bled profusely and Dayal and Dookie, *inter alia*, provided medical intervention to stem the bleeding. The exact nature of the intervention provided is in dispute and I shall advert to the same in the course of my judgment. The gravamen of the plaintiff's case is that Dookie alternatively Dayal were negligent in providing such intervention in that they had contact with Mthalane who according to the probabilities as constrained for by the plaintiff, was infected with the AIDS virus. It is the plaintiff's case that she was treated in a manner which failed to exclude the contamination of the plaintiff's blood with HIV from Mthalane. Their treatment of her was attended by negligence on the part of Dayal alternatively Dookie in that they failed to perform the treatment in a professional manner. The particulars of the negligence as pleaded are as follows:

> "*9.2. They failed to perform the said treatment of the plaintiff with the degree of care and skill required of the reasonable paramedical professionals and/or*

ambulance personnel in that they failed properly or at all to take the following into account:

9.2.1. The commonly known high incidence of HIV infection prevailing in South Africa at the time;

9.2.2. The fact that they were dealing with two patients and/or persons at the same time or at more or less the same time who both had open wounds and which wounds were bleeding and/or were exposing fresh human blood;

9.2.3. The foreseeable risk of cross contamination of the blood of one person by the blood of the other person and in particular contamination with HIV."

[3] At the outset, I was requested by the parties to order a separation of the determination of the merits from the quantum in terms of Rule 33 (4). I accordingly ordered that the trial would proceed on the question of liability only and the question of quantum would stand over for later determination. I shall do a recapitulatory focus on the evidence tendered before me, before I consider the applicable principles of the Aquilian action on which the plaintiff bases her cause of action.

[4] According to the plaintiff, prior to the accident she was a healthy woman who participated in sport. On the day of the accident she and her companions were travelling to Durban to participate in a netball competition when the accident occurred. At the time of the accident she had been married for 20 years and had a monogamous sexual relationship with her husband. Her husband tested HIV negative in various tests conducted after the date of the accident. She had undergone dental surgery to remove a tooth 2 days before the accident and had undergone a hysterectomy operation on 31 March 2000. In any event the dentist who treated the plaintiff tested HIV negative in a test conducted during 2004. She had passed out after the accident and had no clear recollection as to what happened to her immediately after the accident. She remembered waking up in a hospital in Pietermaritzburg.

[5] On 1 September 2000, one day after the accident an AIDS test was done on her because the nurse who had attempted to give her an injection sustained a "needle prick" injury which required that both she and the nurse be tested for AIDS. Her own blood test result came back negative so did that of the nurse. She was treated in the intensive care unit and discharged from the hospital in Pietermaritzburg on 5 September 2000. She went back to Johannesburg and received further treatment, in the form of cortisone tablets and observation at the Linksfield Clinic. She started showing symptoms of seroconversion illness during September. She was further treated by a Dr Spencer at the Linksfield Clinic around 10 October 2000. At the time Dr Spencer

was awaiting test results from the pathologists. It was confirmed by a Dr Blott on 17 October 2000 that the plaintiff had tested positive for HIV on or about 10 October 2000.

[6] Under cross-examination she further testified that her companions told her that when the paramedics attended the scene, they first attended to Mthalane and then to her but she had no independent recollection of this. As far as she was aware she had only received medical treatment from the paramedics. It was put to her that the paramedics would testify that they did not render any treatment to Mthalane because by the time they got there he was already dead and he was covered and in any event in all the procedures rendered at the scene by the paramedics, they had used latex gloves. As far as any Intravenous Line which was run by the paramedics, they had used a fresh needle. The plaintiff's husband confirmed the plaintiff's evidence that he was HIV negative both before and after the accident and at the time of testifying in court.

[7] Kim Ritchie confirmed the plaintiff's evidence relating to her companions in the car. She was seated at the back. She described how the pedestrian Mthalane collided with their car. As far as her recollection went the police arrived first and thereafter the ambulance. The police had stopped at Mthalane first and had thereafter come to where they were. When the paramedics arrived she saw them moving the body of Mthalane from the side of the road onto a grassy patch. They were to quote, her words: "well they were doing something with him, I don't know, but they were

working on him and I can't say what they were doing, but they were definitely there with him for a while and then after that they came through to where we were placed." She was then about 20 metres away from Mthalane. The paramedics thereafter attended to the plaintiff and attempted to put a drip in her hand. A lot of blood was gushing from the plaintiff's head immediately after the accident. Under cross-examination she testified that although the windscreen shattered when Mthalane hit the windscreen, there was no break in the windscreen. After colliding, Mthalane was lying in between the yellow line and the grass. She did not know what the police did when they arrived at where Mthalane was lying. This witness readily conceded that she was trying her best to recollect after 4 to 5 years but she was certain that when the ambulance arrived it stopped first where Mthalane was. The paramedics moved his body off the road. She also saw them checking on the body but she could not say what precisely they were doing. She assumed that they were checking for any vital signs for life. As far as she was aware only Ronel her friend had tried to stem the plaintiff's bleeding by pressing a towel against her head. She remembered the paramedics giving the plaintiff oxygen. The paramedics had gloves on but she did not see them putting on a pair of clean gloves after attending to Mthalane.

[8] Zwelinjani Mthalane testified that the deceased Mthalane was his son. He confirmed the handwriting of his son in his notebook. This notebook is significant as Mthalane apparently had some association or interest in HIV/AIDS as there was more than one

telephone number for AIDS helplines in his handwriting in this notebook.

[9] The next person to testify was Dr David Colin Spencer. He had specialised in internal medicines and infectious diseases. He used to run the HIV unit at the Johannesburg Hospital but had thereafter gone into private practice as a physician with a particular interest in infectious diseases. He had authored a book on AIDS/HIV. His expertise in this field of HIV/AIDS was clearly established. He had been asked by the plaintiff's physician to comment on her blood picture. On examination he found that her vital signs were normal but there was a faint erythematist rash which can be part of an acute HIV seroconversion syndrome. Although she showed signs of seroconversion, I do not propose to analyse his further medical evidence save to say that Dr Spencer was of the opinion that the plaintiff picked up HIV around four to six weeks from the time he examined her and this timing strongly suggested that she was infected in or about the time of the accident. Dr Spencer discounted the HIV infection as having been got from a dental extraction which the plaintiff had two days before the accident and pointed to scientific literature to support his contention. He further pointed out that science had now reached a stage that doctors could with relative precision indicate the time when the infection took place and the relevant window period. In view of her long marriage, her husband being HIV negative and their monogamous sexual practice as told to him by the plaintiff he was satisfied that it was her exposure to blood which led to her contracting the

infection. The doctor was emphatic that HIV does not float in the air and had to ultimately come from another human source. Under cross-examination he pointed out that the plaintiff was already complaining of fatigue and this was a further indication that seroconversion was taking place.

[10] Apropos an infection having taken place whilst the paramedics were inserting the IV-line and even if new packs were used by the paramedics, risk of infection, is not always minimised. Dr Spencer had this to say and I quote:

> *"…but having been in some of these sorts of situations in emergency rooms and so on myself over the years, all I can say is as you've fumbling to find the vein and the tension rises, you drop things next to a person, you don't always do it quite as you ought to, that's the reality. And I've lived through this over thirty years."*

This statement speaks volumes for a potential for negligent behaviour when medical intervention is provided at accident scenes.

[11] The next person to testify was Doctor Stewart Hunter Chite. Dr Chite is a specialist neurosurgeon and practised as such at the Pietermaritzburg Medi-Clinic where the plaintiff was brought. He considered the plaintiff's records and discounted infection as having taken place at the Medi-Clinic. He was emphatic that in terms of the procedures extant at the clinic he did not see how

contamination with HIV could have occurred during the time plaintiff was sutured in casualty since medical protocol of wearing gloves is strictly observed at the hospital. Even in the case of needle stick injuries, there is always a greater risk of transmission of the HIV virus from the patient to the health care worker and not vice versa. When the needle stick injury occurred both the plaintiff and the nurse were checked and both were HIV negative on 1 September 2000. He completely discounted infection from instruments used during suturing since new packs are used for every patient.

[12] After the evidence of Dr Chite, the plaintiff closed its case. Counsel for the defendant applied for absolution from the instance. I had at that stage to determine whether at the close of the plaintiff's case the plaintiff had discharged the ordinary burden of proof resting on her at least at a *prima facie* level and had placed sufficient or adequate evidence before the court to put the defendant on its defence. In my view the plaintiff had placed adequate *prima facie* evidence from which an inference could be drawn as to what the source of the HIV infection could be. There was Kim Ritchie's evidence as to how the paramedics had handled the deceased. The deceased must have been covered in blood after the accident. This was not disputed. Further, it was not in dispute that the paramedics who pronounced him dead must have had contact with the deceased. In my view, the evidence was sufficient for me to refuse an absolution from the instance.

[13] The defence called as its first witness Mahendra Mahabeer, a route inspector employed by Toll Road Consessions (Pty) Ltd. His company provided route patrol service. He obtained Intermediate Life Support qualification in 1996. This allowed him to do more than what a paramedic with a basic qualification could do namely, put a drip line and provide advance treatment. His uniform was basically blue in colour with a badge. He was informed by his control room at 18h40 that an accident had occurred and he arrived on the scene by 18h48. He gave a situation report to the control room to the effect that the pedestrian was dead and the plaintiff was not serious and moreover stable. He put one dry bandage on the plaintiff. A breakdown service operator helped him to put a cervical collar on the plaintiff. He was there when the paramedics, Messrs Dayal and Dookie arrived. They gave her oxygen and according to this witness they had latex gloves on and further they put her on a special spinal board and then rolled the plaintiff onto a stretcher. According to him the paramedics did not go to the deceased first but rather came to the plaintiff.

[14] He did not see either of the paramedics attempting to put an IV-line on the plaintiff. He, however, did not go to see whether they did so when they had placed the plaintiff inside the cab. The windscreen of the car though shattered was still intact. Under cross-examination he informed the court that since he had put the dry dressing, it would not have been necessary for the paramedics to put a further dry dressing on plaintiff's head. Mr Du Plessis pointed to a blatant contradiction between this witness's testimony

as to where the plaintiff was and what the paramedics reported in the accident report. This witness was insistent that plaintiff was seated in the rear of the car with the bleeding having been stemmed whilst the paramedics noted that she was lying on the road. The other contradiction related to this witness's statement that a dry dressing had already been applied by him whereas the accident report indicated that the paramedics not only gave the plaintiff oxygen but also applied a dry dressing. Similar contradiction seemed apparent apropos the cervical collar this witness was supposed to have placed around the neck of the plaintiff. Another aspect of this witness's evidence which appeared to be disturbing was his insistence that protocol demanded that he attended to a seriously hurt patient at an accident scene first, yet he failed to attend to Mthalane and merely took the word of Francois, the tow truck attendant that "he said he looks like he's dead". He did not attend to Mthalane to confirm the same. The witness was constrained to admit that with passage of time his memory may be faulty as to whether the plaintiff's bleeding had been stemmed or whether she was still bleeding. Nor was his evidence whether an intravenous drip line was inserted at the scene by the paramedics, especially in light of Ritchie's evidence convincing. The court gained the clear impression that this witness who must have attended hundreds of accident scenes had no independent recollection since he was required to recall the incident years after it happened.

[15] He further testified that the paramedics only attended to the certification of Mthalane as being dead after the plaintiff was put into the ambulance. He further testified that in order for anyone to pronounce someone dead one would have to determine whether there was a carotid pulse which is found in the neck and this is done by feeling the pulse. Similarly one would have to determine whether there was a brachial pulse. He was emphatic that one could not declare anybody physically dead without making contact with the body of the person. What is further enigmatic is that the police officers who were at the scene saw him administering treatment to the plaintiff and despite his higher qualification did not ask him to certify Mthalane dead.

[16] The next person to testify on behalf of the defendant was Professor Allan Smith. His expertise was *inter alia*, in virology and at the time of testifying he was based at Albert Luthuli Central Hospital in the Department of Virology. In the course of his research Professor Smith was involved with the research of HIV and AIDS. He testified that unlike other viruses, the HIV was less robust outside the body. In an external environment and depending on the humidity the virus would not be viable outside of the body for more than about five or ten minutes. The virus is transmitted in three ways. One is by the exchange of blood or body fluids. The second by sharing syringes and needles and this is common amongst drug abusers but this is again a case of transmission of body fluid from one person to another. The third is vertical transmission, that is from mother to child. At an accident scene all

that is required for infection to take place is that infected blood, the quantity of which can be quite small is conveyed from the infected person to the open wound surface of the recipient person or the uninfected person. The small quantity could be as less than a tenth of a millilitre namely a drop or two. The Professor conceded that it is probable that somebody who had handled a person who had an open wound and was infected then even a little less than a drop would be enough to transmit the virus to the recipient of an open wound, provided the blood is still liquid or wet and not completely dry since the virus is not viable in dry blood.

[17] The Professor was certain that there was no obvious way in which blood could have been transferred from the outside of the windscreen into the interior of the vehicle. Prof. Smith further conceded that in 2000 and with the level of scientific knowledge and equipment the window period would have been six weeks. According to this witness Mthalane would have died within five to ten minutes and the blood pressure would have dropped precipitously soon after the impact and therefore there would have been very little, if any, external bleeding. Abrasions on the body which Mthalane had, tend to weep rather than to spill blood. If the paramedics arrived about 45 minutes later and in the absence of continuous oozing, the blood on the face would have dried. Although the virus would normally not survive outside the human body for more than 5 to 10 minutes if the blood started drying, if however, the virus is "*in moist atmosphere and the temperature is approximately below ambient, in other words cold room rather*

than hot, it would last – it would live longer but the longer it is out of the human body, the less infected it becomes because there is certain aspects of the structure of the virus which begins to weaken."

[18] When questioned by the court that temperatures fall in the evening in the Moor River area at that time of the year, and would the virus not survive longer if the environment is moist, his response was not directly to the point. Instead Prof. Smith indicated, he himself would keep the virus at minus 4 degrees in laboratory conditions to keep the virus at its peek. Further the mobility of the virus would be dependant on whether the atmosphere was drying the virus. However, he could not respond positively when questioned by the court as to how long the virus would survive if it was kept moist. He did not know since experiments had not been done. However, when blood is extracted and sealed in bags and kept at about 4 degrees celsius the virus would be viable and the blood itself will have 3 weeks shelf life, hence infection by blood transfusion. This blood is never kept at below freezing point otherwise the cells would be destroyed. He ventured an opinion without any literature to back it up that the virus, in a cool environment, where the temperature was around 12 degrees, the virus could not survive for more than 10 to 15 minutes.

[19] He agreed with Dr Bhayat that Mthalane's death would have occurred within five to ten minutes. The normal clotting time of blood is about 10 minutes except in haemophiliacs. Further once the heart muscles start weakening, the pressure will drop and blood can stop circulating even before death. Normally the circulation of the blood would stop at the same time as death. Prof. Smith further confirmed from the reports shown to him that on 10.10.2000 the plaintiff's blood tests showed that she was HIV positive. Prof. Smith further testified that because there are so many biological variables the window period could vary.

[20] Prof. Smith was of the view that infection occurring from the paramedics having worked on Mthalane even before attending to the plaintiff should be discounted because Mthalane had died approximately 40 to 45 minutes before they arrived on the scene. He further ventured the opinion that in the year 2000, 20% of the male population of South Africa was HIV positive. On resumption later Prof. Smith informed the court that if Mthalane was left face down this would have made a difference with regards to blood flow. Prof. Smith further conceded that one could get viable HIV from clotted blood. The content of the amount of HIV will also be dependant on whether a person had full blown AIDS or not. Prof. Smith also agreed that scalp wounds bleed profusely and the plaintiff would have been bleeding profusely.

[21] Prof. Smith further testified that for the paramedics to have infected the plaintiff they would have had to take off the dressing

placed by Mahabeer since a virus will not go through a bandage since it has no motion on its own. Although a smear of blood will dry quickly thereby affecting the lifespan of the HIV virus, the situation would be different if there was a thick clot of blood.

[22] Under further cross-examination Prof. Smith discounted the plaintiff's dental surgery as a source of the infection. He further accepted that the test conducted on the plaintiff on 1 September 2000 was negative. Prof. Smith further conceded that there was nothing that he was aware of which happened to the plaintiff during the window period to have caused the infection. Further Prof. Smith conceded that few people would go around having the telephone number of the AIDS helpline on them.

[23] The next person to testify was Mr Afzal Dayal. He was the paramedic who attended the scene of the accident. He was qualified in basic life support and worked for the defendant in the Emergency Medical Rescue Services or Ambulance and Emergency Medical Services as it was then known. In his Basic Life Support programme, he was not taught to put up an IV-line. Protocol required them to wear protective gloves, protective jackets and boots. The gloves are supplied to them in a box of hundreds. The gloves are kept in the primary response box in the ambulance. At the relevant time they wore blue uniforms, drove 4X4 bakkies and kombi type ambulances. Their vehicles had orange and yellow reflective tapes. They carried a primary response box, a trauma board, a spanner board and a scoop stretcher.

[24] Dookie was the driver of the ambulance when they arrived at the scene. Dookie parked the ambulance behind the Tolcon vehicle. He met Mahabeer and Mahabeer informed him of the treatment he had given but with the passage of time he could not remember what Mahabeer told him about the nature of the treatment given by him to the plaintiff. He informed the court that at an accident scene they were required to keep a patient data book in which the patient's details and diagnosis of the patient is supposed to be kept. Whilst a copy of the report remains in the book, two copies are given to the hospital and two are kept at their base. The data had to be filled in by the attending paramedics and if there is any intervention from a senior paramedic, the book had to be handed to such person. He being the senior, completed the book.

[25] A senior paramedic, Mr Rob Enslin's signature also appears because he provided an intervention at about 12h12 en route to the hospital near Townhill on the N3. This witness gave the most enigmatic evidence that Mahabeer had not told him that Mthalane was lying dead at the scene of the accident. He went to a white car and found the plaintiff in the back seat of the car and observed that she had a cervical collar around her neck and a bandage around her forehead. He put on a pair of gloves and thereafter laid the plaintiff on the ground. They rolled her onto a trauma board and gave the patient oxygen. They thereafter got her into the ambulance.

[26] In the ambulance they transferred the oxygen line because the portable oxygen did not have a humidifier and the plaintiff complained that the oxygen was dry. He thereafter applied a dry dressing, a bigger dry dressing on top of the other dressing that had been put on her head. As he had completed the treatment of the patient, an SAP member came up to the ambulance and asked if one of them could come and have a look at another patient. He removed his gloves and put it on the stretcher and asked Dookie to standby with the patient. When they got to the point where Mthalane was lying, he slipped his hands into his side pocket of his uniform and put on another pair of gloves. He initially checked for a pulse on the patient's hand. There was no pulse. He thereafter checked for pulse around Mthalane's neck and once again there was no pulse. He thereafter placed his hands on his chest and found he was not breathing. He checked for pupil movements and found that the pupils were fixed and dilated. The patient was still and there were no movements. He certified him dead. He did not notice any blood on Mthalane.

[27] When he got back to the ambulance he was told that the patient had rejected the cervical collar in that she removed the same herself. When he got to the ambulance he removed the second pair of gloves and put it back at the bottom of the stretcher in a disposal box. En route to the hospital the plaintiff asked to urinate and they gave her a bed pan and waited outside. Rob Enslin arrived and asked them whether they wanted any help. He did not find it strange that unsolicited Enslin had come to their assistance. He

had handed over the plaintiff to Enslin's care because protocol demanded that if a senior paramedic intervenes, this should happen.

[28] When he got to the hospital and opened the ambulance door he noticed that Enslin had put a drip up. He could provide no plausible answer as to why Enslin would provide an intervention just as they were about to reach the hospital. He sought refuge in the protocol. On 7 October 2002, he was required to make a statement. In his examination in chief he denied emphatically the evidence given by Ritchie that they had attended to Mthalane first before attending to the plaintiff. He was emphatic that they did not put any IV-lines on the plaintiff because of their qualification.

[29] Under cross-examination he conceded that it was imperative that he completed the accident report form accurately. This witness became evasive and shifty in his evidence as to why he had recorded that the patient was lying on the road when in fact as his *viva voce* evidence went he said he found her at the back of the car. After lengthy questioning this witness finally conceded that his report was wrong about where he found the plaintiff when he arrived at the scene of the accident. His explanation as to why he applied a dry dressing when a dressing was already placed on her head according to Mahabeer was not convincing. His explanation was that they had seen dry blood on the dressing and therefore they applied a further dressing.

[30] This witness conceded that he attended many accident scenes. He further conceded that there was nothing peculiar about this accident scene which would have made him remember it from the 12 or odd accident scenes he attended weekly. He informed the court that he did not know why two years after the incident he was required to compile a report. He conceded that after 2 years he could not remember whether the patient had a head injury. His evidence as to why it was necessary to be specific about mentioning the wearing of gloves was not convincing in light of his having left out other significant details from his statement. The death of Mthalane would have been significant and that too was left out of the statement. Similarly his evidence about having to "barrel roll" the patient on to the stretcher was in conflict with the evidence of Mahabeer that the plaintiff was mobile and did herself get on to the stretcher. He conceded finally that his evidence was tailored to what would normally happen at an accident scene and not what he observed on the night in question.

[31] Similarly he had difficulty in answering why Enslin's intervention was necessary when they were about 3 minutes away from the hospital. His explanation on this aspect has to be received with caution by the court since he sought refuge in the fact that Enslin was his superior. Anybody with any sense would have intervened and said to his superior that we are minutes away from the hospital and there is no need to put on an IV-line now especially since valuable time would be lost in engaging in this exercise. The unreliability of this witness's evidence became more apparent as

the cross-examination continued since his earlier evidence as to how many times the ambulance stopped before reaching the hospital was also brought into question.

[32] Similarly he could not respond to the contradiction which emerged in his evidence that Mahabeer had told him that Mthalane was dead and lying not far from where the plaintiff was found by this witness. He further was emphatic that he used latex gloves to protect himself and no one else. After further cross-examination he conceded that he could not, because of the poor lighting see how much blood was on Mthalane. He conceded that he was merely assuming that there was no blood on the deceased because of the poor lighting. Nor was he able to explain why Mahabeer had stated in his evidence that it was not necessary to put any further dry dressing on the patient since he had already done so. Nor is it plausible as to why a further dry dressing was necessary if on this witness's own evidence there was no oozing of blood. He further conceded that if Mahabeer had told him that somebody had been involved in the accident and was in a more serious state, whether dead or not he would have attended to that person first.

[33] The next person to testify was Dr Mohammed Faruk Bhayat, a general practitioner who at the relevant time was a part-time district surgeon for Mooi River. He described to the court what a bruise was as opposed to an abrasion. In the case of an abrasion and if it involved the corium of the skin, there would be bleeding onto the surface of the skin. A fair amount of bleeding however

can be expected from a laceration depending on the extent and depth of the laceration. On 31 August 2000 at 20h00 he certified Mthalane as being dead. According to his examination, the main injury which the deceased had was a fracture of the central sternum. He also had a ruptured spleen. There were also abrasions on the right lateral chest and the right buttock. There were abrasions on both knees and there were abrasions on the left ankle. According to this witness from the injuries that the deceased had, he would have died within several minutes. Further the pumping of the blood would stop as soon as a person was dead. Post mortem lividity would set in very quickly after death but between one or two hours after death. According to Dr Bhayat the bleeding would have been from the forehead area and also from the abrasions. When he examined him later there must have been dry blood.

[34] After the evidence of Prof. Smith, Mr Du Plessis made an application to re-open the plaintiff's case. The defence had no objection to this. Dr Lyn Margaret Webber who by Prof. Smith's own concession was an expert in the field took the stand. Her expertise in the field and the extent of her publications in the field were not challenged. She considered herself an expert in the field of HIV. She was concerned about Prof. Smith's evidence as regards the viability of the HIV virus within the dead body scenario and thought that the virus could be infectious and could be transmitted under varying circumstances. She joined issue with Prof. Smith with regards to the clotting time of the blood once it

was exposed since clotting does not always happen and this she regarded as a variable since there could still be seepage or oozing of body fluids and blood after death.

[35] Of significance was her joining issue with Prof. Smith that the AIDS virus would not be viable after five to ten minutes. This only happens in exceptional circumstances. Clotted blood will also have in it viable HIV. She was firmly of the view having discussed the present scenario with her colleagues in the field that even after the 40 to 50 minutes after which the paramedics attended to the plaintiff there would still have been viable virus on Mthalane if he had the virus, especially if he had full blown AIDS since an extremely large amount of virus would have been present. That is why even with a needle stick injury where there is a miniscule amount of blood, infection is possible. This is because millions and millions of virus are present per millilitre or per small amount of body fluid, making a person with full blown AIDS more infectious.

[36] Dr Webber, although by her own profession not 'an absolute expert in anatomical pathology' was of the opinion, unlike Prof. Smith, that the matted hair in the region of the wound would probably make it more likely for the virus to remain in that area if there has been an exposure to the virus, the hair or that organic environment will allow the virus to get trapped in the fibrin and make it more viable. However, at the same time the virus was fragile and in exposed environment outside the human body, would die easily.

Variable and environmental factors will determine the period or time of its survival.

[37] As far as the present case is concerned, the doctor was of the view that even though there was a passage of some 40 to 50 minutes between the accident and the intervention by the paramedics, it was not improbable that she could have been infected and she reasons as follows:

> *"My comment on this is, that the virus has been shown to survive in dead environmental body fluids and organs, that would be my first strong contention about that. And then listening to this case on the measure of probability, hearing no other possible way of transmission or exposure to the plaintiff, I would use that as my second statement. And then my third one is that it's well-known in the literature. M'Lord, there are unusual cases that have been documented where people have acquired blood virus such as HIV in unusual or out of the ordinary manner, and that is well documented, so that's my third point."*

[38] On the version of the defendant's witnesses, in particular Dayal, Dr Webber readily conceded that infection would be improbable. She, however, was in agreement with the documented literature on the subject which seems to indicate that infection has taken place in unusual circumstances. Dr Webber attended to post mortem autopsies where cadavers were lying around forty eight / seventy two hours, when traces of the virus were found both under control

and uncontrolled circumstances. She herself has tested bodies and found traces of the virus up to 5 days *post mortem*. As far as the incidence of AIDS and the inference to be drawn from the fact that Mthalane had an AIDS helpline telephone number, Dr Webber indicates that there could be a strong chance that he was infected since she herself was involved in testing of two hundred bodies of young men who had died in trauma, and in 1999, thirty five percent were HIV infected.

[39] The next person to testify was Prof. Des Martin, a virologist with more than 20 years experience in the field and an impressive curriculum vitae. His experience and standing in the field is on record. He too like the previous witnesses professed an opinion on the viability of HIV and its ability to survive outside the human body. The HIV virus has been known to survive *post mortem* in excess of two weeks. The survival of HIV outside the human body depended on a number of variables. These include the ambient temperature, the presence of organic material like blood clots and the viral load of the patient. Where blood clots are found on the plaintiff's head and on the deceased's body this would have increased the survival rate of the HIV. He readily conceded that if dressing was applied this would have made transfer less possible provided there was no manipulation of the plaintiff's hair in the process of such application. However, looking at the temporal association between the plaintiff's illness, that is to say when she started showing signs of seroconversion and the actual date of diagnosis of her being HIV positive, he agreed that the

probabilities suggested that she was infected at the time of the accident on the assumption that Mthalane was HIV positive. From his experience lacerations on the face tended to bleed profusely. After his evidence the plaintiff finally closed her case.

[40] On the conspectus of the evidence led and the pleadings the following facts are common cause:

1.1. On 31 August 2000 and at about 18h30 the vehicle in which plaintiff was a front seat passenger collided with Mthalane.

1.2. Mthalane would have died within 5 to 10 minutes after the impact.

1.3. The paramedics, Messrs Dayal and Dookie who were at all material times servants of the defendant and acting in the course and scope of their employment arrived at the scene 50 to 55 minutes later and attended to the plaintiff.

1.4. Dayal had physical contact with the deceased when he went to declare him dead.

1.5. The plaintiff was a healthy married woman who had a monogamous sexual relationship with her husband at the time of the accident.

1.6. The plaintiff's husband tested HIV negative in various tests conducted after the date of the accident.

1.7. Although the plaintiff had had a hysterectomy operation some time before the accident and a dental surgery to remove a tooth 2 days before the accident, Prof. Smith, the defendant's expert witness discounted these interventions as a possible reason for the infection.

1.8. The plaintiff tested HIV negative on 1 September 2000, one day after the accident.

1.9. Although there was no real evidence before us that Mthalane was HIV positive or had full blown AIDS, he appeared to have some association with HIV/AIDS, as there was more than one telephone number for AIDS helplines in his handwriting in his notebook as identified by his father.

1.10. It was not in dispute that Dayal rendered assistance to the plaintiff both outside and inside the ambulance although the nature of the intervention provided by him is in dispute.

1.11. Dayal also pronounced Mthalane dead and touched his body in various parts in order to do so.

1.12. The plaintiff was taken to Medi-Clinic in Pietermaritzburg after the treatment administered on the scene and the wound

to her head was sutured there and after further treatment she was discharged on 5 September 2000.

1.13. She went back to Johannesburg and received further treatment in the form of cortisone tablets and observation at the Linksfield Clinic.

1.14. Upon showing signs of seroconversion illness during September 2000 she was further attended to by Drs Blott and Spencer.

1.15. On 17 October 2000 after obtaining blood test results it was confirmed by Dr Blott that the plaintiff had tested positive for HIV on or about 10 October 2000.

1.16. With the then extant method of testing, Dr Spencer, Dr Blott, Prof. Smith, Dr Webber and Prof. Martin all placed the estimated time of contamination with the virus at the end of August 2000 or the beginning of September 2000, i.e. at about the time of the collision.

1.17. All the experts agreed that the virus does not float in the air and the plaintiff must have become infected by cutaneous or mucosal exposure to blood or other body fluids contaminated with HIV.

1.18. The prevalence of the HIV virus in the male population in KwaZulu-Natal in and around 2000 was according to the experts, and I do not think it to be contravened, was in the region of 30%.

[41] According to the expert evidence the only possible cause of plaintiff contracting HIV was also through a sexual contact with an infected partner or contact with contaminated blood or other fluid. The possibility of contamination of the plaintiff through sexual contact with an infected partner was excluded in evidence. It was not disputed that she was monogamous and that her husband tested HIV negative in the various tests done after the collision.

[42] The only other possibility is plaintiff coming into contact with contaminated blood. Infection through hysterectomy that the plaintiff underwent during March 2000 and the dental surgery that the plaintiff had 2 days before the accident was discounted by Prof. Smith, the defendant's witness as by the other doctors who testified. Her treatment at the Medi-Clinic in Pietermaritzburg after the accident was also excluded by the evidence of Dr Chite. The defendant could not point to any act or omission at the Medi-Clinic which could have led to contamination. The only incident of any significance that occurred at the Medi-Clinic was that one of the nurses pricked herself with a needle when handling the plaintiff. The incident caused the clinic to test both the plaintiff and the nurse for HIV. Both the plaintiff and nurse tested negative and all the experts including Prof. Smith accepted that at that stage

the plaintiff was negative. Further the incident can also be excluded as a possibility as the nurse pricked herself and the virus would then have been transferred to the nurse and not the plaintiff. In any event there was no evidence that the nurse later experienced any seroconversion and had to be put on anti-retroviral medication. Similarly, the plaintiff's subsequent treatment at the Linksfield Clinic can also be excluded as a possible cause. She only received oral cortisone treatment and was under observation. On her evidence, which is undisputed, there were no needles used, no blood transfusions or anything in the treatment that could have led to a contamination. Dr Spencer has also excluded this as a possibility. He testified that the plaintiff was already showing signs of the seroconversion illness when she was taken to the Linksfield Clinic, which means that she was already contaminated. The contamination could therefore not have taken place at the Linksfield Clinic.

[43] The only possible cause at the Linksfield Clinic was put by the defendant's counsel to Prof. Martin in cross-examination for the first time. This was a "bone marrow trephine and aspirate" referred to in the report of Dr Spencer dated 10 October 2000. However, this possible cause was excluded by Prof. Martin when his attention was drawn to the fact that the said procedure was done on the request of Dr Blott, who only saw the plaintiff for the first time on 27 September 2000. At that stage the plaintiff was already presenting with acute seroconversion illness. It follows from the

abovementioned that the only possible (and probable) cause of the contamination was the scene of the accident.

[44] Before I go any further and consider the expert evidence, it is salutary to remind oneself of what was said in the case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 at 89D-E, which was quoted with approval in *Michael and Another v Linksfield Park Clinic (Pty) Limited and Another* 2001 (3) SA 1188 (SCA) at 1201G-H.

> *"(o)ne 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 question 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".*

[45] The events at the scene have to be analysed carefully. I might at the outset state that I found the evidence of Mahabeer and Dayal not to pass muster with regards to reliability. I state hereinbelow the reasons for my conclusion. They attended scenes of accidents daily and nothing they said made this incident stand out in their memory years after the accident. Their recollection without contemporaneous notes has to be viewed carefully. Ritchie would

on the other hand have had reason to remember the incident since not only was her friend hurt and a pedestrian died but she was not accustomed to attending accident scenes.

[46] Ritchie was in the vehicle with the plaintiff when the collision with the pedestrian occurred. Her evidence was that the ambulance personnel, i.e. the defendant's employees, stopped at the body of the deceased before they came to assist the plaintiff. She could not see what they were doing to the deceased, but saw that they were 'working on him'. She assumed that they were checking for vital signs. They also removed the body from the road surface. They thereafter came to the plaintiff and administered treatment to her. Part of this treatment was an attempt to put an IV-line in the plaintiff's arm. They also put a bandage on the plaintiff's head after manipulating the wound. The plaintiff was sitting on the grass in the time that the ambulance took to arrive on the scene. Ritchie's evidence is, to a large extent, corroborated by the ambulance return completed by the defendant's employees. The return makes no mention of Mahabeer, the Tolcon official who alleged that he was first to arrive on the scene. It states that the ambulance personnel applied the dry dressing to the plaintiff and inserted an IV-line. It further states that the plaintiff was found lying on the road on arrival. Ritchie's evidence was further corroborated by the tachograph, which indicated that the ambulance stopped twice on the way to the clinic. In my view Ritchie was a credible witness and her evidence should be preferred above that of the defendant's witnesses.

[47] Mahabeer testified that he was employed by Tolcon and was the first person to arrive on the scene after the collision. He said he was the person who put on a dry dressing on the plaintiff's head and also placed a cervical collar on with the assistance of a breakdown operator, one Francois. Mahabeer's evidence can be criticized in the following respects:

47.1. Ritchie could not remember him being on the scene, although she remembered the breakdown operator, the SAPS and the ambulance personnel;

47.2. He said the wound to the plaintiff's head was only bleeding slightly, whereas all the other factual witnesses said that it was bleeding profusely. The fact that the wound must have been bleeding profusely was confirmed by all the experts;

47.3. He reported the death of the pedestrian to the control room without satisfying himself that the pedestrian was in fact deceased. On his version he accepted the word of a lay person, namely the breakdown operator;

47.4. His version that he escorted the plaintiff to the passenger side of the motor vehicle was never put to any of the plaintiff's witnesses. This leads to the inescapable inference

that he never told the defendant's legal representatives thereof;

47.5. The evidence that the plaintiff was placed in the right rear passenger seat and never on the ground, was in any event contradicted by both Ritchie and Dayal's ambulance return;

47.6. His evidence of the situation report provided to Messrs Dayal and Dookie was contradicted by Dayal;

47.7. He did not mention all the passengers in the plaintiff's vehicle in his report. His explanation that his attention was directed at the injuries was shown to be false, as no injuries were shown on his report;

47.8. He said it would not have been necessary for the ambulance personnel to place a dry dressing on the plaintiff in light of the dressing he had already put on. This contradicted the evidence of Dayal;

47.9. His version that he attended to the plaintiff who was in a stable condition without first going to the pedestrian who was reported to be dead, is highly improbable;

47.10. He contradicted himself on whether he saw any damage to the motor vehicle in which the plaintiff was travelling.

47.11. On his own version he would not know whether the ambulance first stopped at the deceased before it proceeded to the scene where the plaintiff was;

47.12. It is improbable that the SAPS would not have requested him to check whether the deceased was dead, especially since the SAPS would have observed him administering treatment to the plaintiff and would have known that he was medically trained.

Because of all these inherent improbabilities in the evidence given by Mahabeer, the evidence of Ritchie has to be preferred above his insofar as they contradicted each other.

[48] Dayal was called by the defendant to explain what transpired at the scene. His evidence has to be viewed with caution and suspicion, for the following reasons:

48.1. He could not provide a satisfactory explanation for the inscription on the ambulance return to the effect that they had found the plaintiff lying on the road on arrival at the scene;

48.2. It is improbable that they would have applied a second dry dressing to the plaintiff's head when they only saw some 'dry blood' on the side of her head;

48.3. On his own admission he could not remember the incident after two years;

48.4. He omitted a lot of important details in his report that was compiled two years after the incident, but felt it necessary to specifically mention the fact that they had put on gloves;

48.5. He contradicted the evidence of Mahabeer regarding the manner in which the plaintiff was placed on the trauma board, on the situation report provided to them and on where the plaintiff was when he went to declare the pedestrian dead;

48.6. He conceded that his evidence was not based on his memory of the incident but on normal procedure. He further conceded that normal procedure would have demanded that he attend to a more seriously injured person first and that was Mthalane especially since Mahabeer had not examined him nor did anybody at the time Dayal arrived at the scene told him he was dead;

48.7. His evidence that the ambulance only stopped once on the way to the clinic is contradicted by the tachograph;

48.8. His evidence about the changing of the gloves was not based on his recollection of the incident, but on the protocols that they had to follow. Further it is improbable and against reasonable protocols to carry spare gloves in pockets since a protocol will demand that gloves are kept sterile. He gave no plausible explanation as to why and when he could have placed the gloves in his pocket;

48.9. His version that Enslin took over the treatment of the plaintiff without being requested to do so, is highly suspicious. It is also improbable that Enslin would have inserted an IV-line when they were mere minutes away from the clinic. It is more probable that Messrs Dayal and Dookie struggled with the insertion of the IV-line into the plaintiff and that Enslin was called to assist them therewith.

48.10. His concession that he touched the deceased in order to check for vital signs was initially disputed by the defendant. In the cross-examination of Dr Spencer, it was denied that the defendant's employees had any physical contact with the deceased.

[49] In my view, Messrs Dayal and Dookie attempted to put an IV-line into the plaintiff's arm when they were not qualified to do so. The

evidence to the contrary by Dayal is the result of a realization that they did not follow the correct protocols. The rejection of Dayal's evidence means that there is no credible evidence that the necessary protocols were followed by the defendant's employees.

[50] From the above, and based on both the credibility of the respective witnesses and the inherent probabilities of this matter, I believe the following to be more probable:

50.1. When arriving at the scene, the ambulance first stopped at the deceased and the personnel handled the body by, *inter alia*, checking for the vital signs;

50.2. The ambulance arrived at the body of the deceased at 19h24 and at the scene where the plaintiff was at 19h30;

50.3. They found the plaintiff on the ground where one of her friends was holding a towel to the bleeding laceration on her head;

50.4. The ambulance personnel thereafter put a dry dressing on the bleeding head of the plaintiff after moving a bit of the hair out and trying to clean the wound;

50.5. The ambulance personnel also attempted to put an IV-line into the arm of the plaintiff at the scene. They struggled with this to such an extent that they had to call in the

assistance of a more qualified paramedic on the way to the hospital;

50.6. They then assisted the plaintiff onto a trauma board and placed her in the ambulance.

[51] As properly conceded by Prof. Smith, the witness for the defendant, if Dayal's evidence is not to be believed and the infection had to come from the scene of the accident, then Dayal would have been indeed negligent. However, the enquiry does not end there. The requirement of foreseeability cannot present much of a problem because Dayal must have foreseen that with the incidence of AIDS as testified to by the experts, the plaintiff would be infected if he did not properly observe the required protocols.

[52] However, the causation element of delictual liability presents a challenge for the plaintiff in this case as it does in most delictual cases where delictual liability has to be established. This element of delictual liability though simple on the face of it, in application becomes a complex element. This is because there has been too much theorising about it, and secondly, many theories which have been established have been the subject of controversy by many commentators.

[53] In *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-F Corbett JA stated:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one 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. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote."

[54] Both factual and legal causation has to be established by the plaintiff. Of course, factual causation will be present in a given case if it has been proved on a preponderance of probabilities that the act concerned has caused the relevant consequence; that is to say that the damage flowed from the unlawful act. Conversely, legal causation concerns the question whether a particular defendant or tortfeasor should be held liable for the damage he has caused in a wrongful and culpable manner. Corbett JA expressed this distinction as follows in *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832G-I :

> "(i)t is generally recognised that causation in the law of delict gives rise to two distinct enquiries. The first, often termed 'causation in fact' or 'factual causation', is whether there is a factual link of cause and effect between the act or omission of the party concerned and the harm for which he is sought to be held liable; and in this sphere the generally

> recognised test is that of the *conditio sine qua non* or the 'but for' test. This is essentially a factual enquiry. Generally speaking no act or omission can be regarded as a cause in fact unless it passes this test. The second enquiry postulates that the act or omission is a *conditio sine qua non* and raises the question as to whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue; or whether the harm is, as it is said, 'too remote'. This enquiry (sometimes called 'causation in law' or 'legal causation') is concerned basically with a juridical problem in which considerations of legal policy may play a part."

[55] In my view the best known theories for determining causation and legal causation in particular is a flexible approach, based on policy considerations, reasonableness, fairness and justice. This flexible approach was given judicial imprimatur by Van Heerden JA in *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39 when he held that there is no single and general criterion for legal causation which is applicable in all instances. He further stated that the basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. He commented as follows on this approach at 40-41:

> "Ek betwyfel dan ook of 'n regstelsel sonder 'n oorheersende elastiese maatstaf vir die bepaling van juridiese oorsaaklikheid kan klaarkom…Soos blyk uit die passasies wat hierbo uit *Skosana* en *Daniëls* aangehaal is, kom beleidsoorwegings ter sprake en moet daarteen gewaak word dat 'n dader se aanspreeklikheid nie die grense van redelikheid, billikheid en regverdigheid oorskry nie… Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie".

The English translation reads:

> "I doubt whether a legal system can do without a dominant elastic criterion for determining legal causation. As is clear from the passages quoted above, policy considerations are relevant, and [the Court must guard] against the alleged wrongdoer's liability exceeding the boundaries of reasonableness, fairness and justice. The various criteria [for

> legal causation] seem to me not to be significantly more exact than a criterion (the flexible criterion) according to which [the Court determines] whether a sufficiently close link exists between an act and a consequence with reference to policy considerations. I am not saying that one, or even more than one, of the criteria may not be employed on a subsidiary level in the application of the flexible criterion to a specific type of factual situation but merely that none of the criteria can be used [exclusively] as a more concrete measure of limitation in all types of factual situations, and for the purpose of any form of legal liability". (See HB Klopper, *The Law of Collisions in South Africa*, 7th ed, p 15, footnote 128).

[56] All the experts readily conceded that the theories advanced by them are very hard to apply to individual cases because of the variable factors which come into play. My task is to determine the existence of a causal relationship on a balance of probabilities. As is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence each piece of which does not in itself rise above the level of possibility. However, all of the experts conceded that with the scientific knowledge then extant, the window period for infection to be determined was between 4 to 6 weeks. In this case, the plaintiff bearing the onus has led all evidence reasonably available

to her and it is therefore for the Court to determine an inference of probable connection.

[57] The plaintiff has at least at a *prima facie* level made out a case that the deceased may have had HIV or for that matter full blown AIDS. In his notebook, it was shown in the deceased's own handwriting that he had noted various HIV/AIDS helpline numbers. In cross-examination, Prof. Smith conceded that only two inferences may be drawn from these notations in the deceased's diary, namely, that either he was an AIDS Councillor or was himself infected with the virus. No evidence was presented that he was an AIDS Councillor nor did defendant's Counsel canvass this possibility with the deceased's father when he testified. People are not in the habit of carrying these numbers unless they have a particular interest. Mthalane having any academic interest in the matter is far fetched and can be easily discounted.

[58] In my view and in the absence of evidence providing an alternative explanation, the only reasonable inference in the circumstances is that Mthalane was HIV positive at the time of the accident. The inference is further strengthened by the incidence of HIV in this province as testified to by Prof Smith and Dr Webber and alluded to hereinbefore.

[59] I now advert to the question of the viability of the virus outside the human body. Of course, medical science if it is unequivocal in saying that there is no possible connection between an event and a result, in which case, if the facts stand outside the area in which common experience can be the touchstone, then the Judge cannot act as if there were a connection. But if medical evidence is prepared as is the case here to say that it is a possible view, then, a Judge after examining any other evidence tendered may decide that it is probable. All the experts, that is Prof. Smith, Dr Webber and Prof. Martin conceded that viable HIV could still have been found in clotted blood. Thus, in the present case medical evidence does say that it is possible that the plaintiff could have been infected if the HIV in any clotted blood was transferred to the plaintiff. I have already adverted to the relevant evidence of these experts. Thus the probabilities viewed as a whole favour the conclusion that the plaintiff was infected with HIV at the scene of the accident through the intervention of Dayal and his colleague.

[60] From the conspectus of evidence, I am satisfied that the servants of the defendant, that is Dayal in particular, failed to perform the treatment of the plaintiff with the degree of care and skill required of a reasonable paramedical professional, in that he failed properly or at all to ensure that no contamination occurred in the handling of Mthalane and the plaintiff. Dayal should have been aware that

with the high incidence of HIV infection prevailing in KwaZulu-Natal in particular and South Africa in general at the time and with two patients each having open wounds which were bleeding and/or were exposing fresh human blood, he should have foreseen the risk of cross contamination of blood and should have taken all necessary precaution to avoid such contamination. This he failed to do.

Order:

[61] I therefore make the following order.

The Defendant is liable for any damages that the plaintiff may be found to have suffered as a result of her contamination with Human Immuno Deficiency Virus (HIV).

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PATEL J

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