

**THE SUPREME COURT OF
APPEAL OF SOUTH AFRICA**



JUDGMENT

Case No: 214/2010

In the matter between:

**THE PREMIER OF THE WESTERN CAPE PROVINCE
DR K DU PLESSIS**

**FIRST APPELLANT
SECOND APPELLANT**

v

JOHANNES HENDRIK LOOTS NO

RESPONDENT

Neutral citation: *The Premier of the Western Cape Province v Loots NO*
(214/2010) [2011] ZASCA 32 (25 March 2011)

Coram: Streicher, Brand, Maya, Shongwe and Theron JJA

Heard: 11 March 2011

Delivered: 25 March 2011

Summary: Medical negligence – unsuccessful sterilisation operation – unforeseen complications during birth process leaving mother severely disabled – liability of medical doctor and his employer – issues relating to negligence and remoteness of damage.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Traverso DJP sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

BRAND JA (STREICHER, MAYA, SHONGWE and THERON JJA concurring)

[1] This appeal has its origin in a delictual claim for damages arising from an unsuccessful sterilisation operation. But the claim is not for child-raising expenses that ensued from unwanted conception as could be anticipated from precedent in matters of this kind.¹ Instead, it resulted from the harm suffered by the mother during the subsequent birth process that went terribly wrong.

[2] The respondent brought the claim in the Western Cape High Court as *curator ad litem* for Mrs Johanna Cecilia Erasmus. He was appointed in that capacity because the tragic events giving rise to the claim left Mrs Erasmus brain damaged and unable to manage her own affairs. The first appellant is the Premier of the Western Cape who takes delictual responsibility for medical practitioners employed by the Department of Health in that province. On 21 January 1999 the second appellant was so employed as a clinical assistant in the Department of Obstetrics and Gynaecology at the Tygerberg Hospital. On that day he performed the sterilisation operation on Mrs Erasmus which ultimately led to these proceedings.

¹ See eg *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA).

[3] In the High Court the matter came before Traverso DJP. By agreement between the parties she was asked to determine the issues pertaining to the appellants' liability first while the quantum of damages allegedly suffered by Mrs Erasmus, stood over for later determination. At the end of the preliminary proceedings she decided that the appellants were liable for such damages as the respondent may prove at the resumed hearing of the matter. The present appeal against that judgment is with the leave of this court.

[4] The background facts are quite straightforward and largely undisputed. In fact, the appellants presented no evidence at the trial. At the time of the sterilisation operation on 21 January 1999, Mrs Erasmus was one month short of her 38th birthday. She and her husband already had three children and they decided that they could not financially afford any more. She therefore went to the Tygerberg Hospital to be sterilised. The operation performed by the second appellant involved a laparoscopic occlusion of both fallopian tubes. It was later discovered, however, that the second appellant had mistakenly occluded the round ligaments of the patient instead of her fallopian tubes. This meant, of course, that she had not been sterilised at all.

[5] As a result of second appellant's mistake, the patient fell pregnant soon thereafter. When this was confirmed in April 1999, Mrs Erasmus was about eight weeks pregnant. At that time Tygerberg Hospital presented her with the option to terminate the pregnancy, which she and her husband refused for religious reasons.

[6] The pregnancy was uneventful until 5 November 1999. On that date, however, the tragic train of events started which left the patient in a permanent vegetative state, completely unable to care or think for herself. First she was admitted to Tygerberg Hospital for high blood pressure. Then followed an emergency Caesarean section because of foetal distress. The baby was severely compromised and did not survive.

[7] Wisdom of hindsight revealed that either shortly before, during or after the Caesarean section, Mrs Erasmus must have developed what is known to medical experts as amniotic fluid embolism (AFE). It occurs when foetal antigens entered the maternal circulation. It is an unpredictable and unpreventable event which occurs about one in 8 000 to 30 000 deliveries. Neither the exact mechanism of the complication nor its clinical presentation requires elaboration, because it is not in issue that in this case the AFE caused severe haemorrhaging and cardiac arrest, which in turn led to brain anoxia and eventually to the irreversible brain damage that Mrs Erasmus suffered.

[8] On behalf of the respondent, three witnesses were called at the trial. They were Mrs Erasmus' husband and two medical experts. The one was a neurologist, Dr Flemming, who testified about the patient's present condition. What it amounted to is that among other things, she suffers from dementia with poor memory and cognitive disability; she is virtually blind; and unable to walk and talk. This evidence as to her present condition was confirmed in lay terms by her husband. As to the future, Dr Flemming's prognosis is that her condition is permanent. The other medical expert was a specialist obstetrician and gynaecologist, Dr Dalrymple, who testified about the laparoscopic sterilisation procedure performed by the second appellant; what he was supposed to have done; and what he actually did. Ultimately Dr Dalrymple expressed the opinion that the second appellant's failure to perform a successful sterilisation must be ascribed to negligence.

[9] Though the appellants also indicated their intention to call a gynaecologist, Dr Van Helsdingen, by filing a summary of his expert evidence, he was in fact not called. Neither did the second appellant give evidence himself. In the event, Dr Dalrymple's evidence stood largely uncontroverted. It can therefore be conveyed without elaboration. According to Dr Dalrymple's testimony, the round ligaments are organs lying physiologically adjacent to the fallopian tubes. They are distinguishable from the latter by two features. First, the fallopian tube is free at one end while the round ligament is not. Secondly, the free end of the fallopian

tube resembles the petals of a flower that are known in medical parlance as fimbriae.

[10] Dr Dalrymple further testified that one of the potential difficulties that may confront a surgeon during the performance of a laparoscopic tubal occlusion, is an obstructed view. But in this case, the second appellant's contemporaneous notes indicated that 'visualisation was good' and that he was able to identify the 'fimbrial end of the fallopian tubes'. Accordingly, so Dr Dalrymple testified, the second appellant had no reason to place the fallopian rings on the round ligaments. Nor did he have any reason not to verify, after the procedure, that the occluding rings were indeed inserted in the right place.

[11] Dr Dalrymple agreed with the diagnosis expressed by Dr Van Helsdingen in his expert summary that Mrs Erasmus' condition came about as a result of AFE. He also agreed with Dr Van Helsdingen that AFE is an extremely rare condition. In fact, he explained that though he knew about the condition, it was so rare that he did not consider it as a possible cause when he prepared his own expert report. That is why he did not at that stage refer to AFE at all, but mistakenly ascribed the calamity suffered by Mrs Erasmus to maternal hypertension instead. In response to a direct question in cross-examination he conceded that a doctor in the position of second appellant would probably not have foreseen the complications of AFE as a consequence of a failed sterilisation. This concludes the factual narrative.

[12] Of the various defences raised by the appellants in the high court they persisted in only two on appeal. The first is that the second appellant was not negligent with regard to the consequences of the failed sterilisation for which the respondent seeks to hold him liable. The court a quo rejected this defence essentially on the basis of Dr Dalrymple's expert opinion that the second appellant was indeed negligent. If the question posed is confined to whether the second appellant applied the degree of professional skill and diligence expected of

members of his profession² the correctness of Dr Dalrymple's opinion can, on the facts that he described, hardly be open to doubt.

[13] But the argument relied upon by the appellants in support of this defence was somewhat more nuanced. For its legal basis the argument rested on the so-called concrete or relative approach to negligence. According to this approach it cannot be said that someone acted negligently because harm to others in general was reasonably foreseeable.³ A person's conduct can only be described as negligent with reference to specific consequences. Yet, the relative approach does not require that the precise nature and extent of the actual harm which occurred was reasonably foreseeable. Nor does it require reasonable foreseeability of the exact manner in which the harm actually occurred. What it requires is that the general nature of the harm that occurred and the general manner in which it occurred was reasonably foreseeable. At some earlier stage there was a debate as to whether our courts should follow the relative approach as apposed to the so-called abstract or absolute approach to negligence. But it now appears to be widely accepted by academic writers, on good authority, that our courts have adopted the relative approach to negligence as a broad guideline, without applying that approach in all its ramifications.⁴

[14] For the factual basis of their argument the appellants relied on the proposition that the harm which the patient actually suffered was not of a general kind reasonably foreseeable. That proposition, in turn, rested mainly on the concessions by Dr Dalrymple as to the unforeseeability of AFE. The general harm consequent upon a failed sterilisation, so the argument went, was pregnancy and

² See eg *Van Wyk v Lewis* 1924 AD 438 at 444; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 221A.

³ Which would be sufficient on the so-called abstract or absolute approach. See eg *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1112H-J.

⁴ See eg *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) paras 21-22; *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) paras 19-22; Neethling, Potgieter & Visser *Law of Delict* 5 ed (2006) 126-129; 8(1) *Lawsa* 2 ed sv 'Delict' (J R Midgley and J C van der Walt) para 117; Jonathan Burchell *Principles of Delict* 92 et seq; Neethling & Potgieter 'Die toets vir deliktuele nalatigheid onder die soeklig' 2001 *THRHR* 476 at 483-484; J Scott 'The Definition of Delictual Negligence Revisited: Three Recent Judgments of the Supreme Court of Appeal' 2000 *De Jure* 362.

the general risks associated with that condition. But the harm that actually occurred resulted from AFE which was not reasonably foreseeable. Consequently, so the argument concluded, neither the harm suffered by the patient nor the manner in which it occurred, are included in the category of what can be regarded as generally foreseeable consequences.

[15] I do not agree with this argument. As the appellants readily conceded, pregnancy was a generally foreseeable consequence of a failed sterilisation. According to Dr Dalrymple's testimony – which remained unchallenged – pregnancy is a dangerous condition associated with a myriad of potential complications. One of these complications was AFE. Although the particular complication is rare, it must be included under the general rubric of complications which was reasonably foreseeable. It follows that, in my view, the second appellant was negligent with regard to the harm that Mrs Erasmus had suffered.

[16] The second defence advanced by the appellants was founded on the contention that the causal link between the second appellant's negligence and the harm suffered by Mrs Erasmus was too tenuous to justify the imposition of delictual liability on them for that harm. In this regard it has by now become well settled that in the law of delict, causation involves two distinct enquiries. First there is the so-called factual causation which is generally conducted by applying the 'but for' test as described by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley*.⁵ As to the harm suffered by Mrs Erasmus, it is common cause that it resulted from her pregnancy. 'But for' the failed sterilisation, the inherent likelihood is that she would not have fallen pregnant. It follows that 'but for' the second appellant's negligence, Mrs Erasmus would not have suffered the harm. Factual causation is therefore not the real issue.

[17] The real issue turns on the second enquiry under the rubric of causation, namely, whether the second appellant's negligent conduct is linked sufficiently

⁵ 1990 (1) SA 680 (A) at 700E-G.

closely or directly to the harm suffered by Mrs Erasmus for legal liability to ensue. This matter is referred to by some as remoteness of damage and by others as legal causation. Regarding this issue it has been held by this court that the criterion in our law for determining remoteness is a flexible test, also referred to as a supple test.⁶ In accordance with the flexible test, issues of remoteness are ultimately determined by broad policy considerations as to whether right-minded people, including judges, would regard the imposition of liability on the defendant for the consequences concerned as reasonable and fair.

[18] But, as also appears from the authorities to which the flexible approach owes its origin and development, its adoption did not result in a total discard of the variety of tests, such as foreseeability, adequate causation or direct consequences that were applied in the past. These tests still operate as subsidiary tests or pointers to what is indicated by legal policy. Stated somewhat differently, according to the flexible test, the existing criteria of foreseeability, directness and so forth should still be applied, but in a flexible manner so as to avoid a result which most right-minded people will regard as unjust and unfair.⁷

[19] In line with this general approach, the appellants first relied on the direct consequences theory. As developed in English law, a key element of this theory is the concept of a *novus actus interveniens*. For this element alone can break the causal link between cause and consequences.⁸ By its nature, a *novus actus interveniens* or independent intervening event, can take many forms, including conduct on the part of the plaintiff following upon the wrongful act of the defendant. The independent intervening cause relied upon by the appellants for its argument

⁶ See eg *International Shipping Co (Pty) Ltd v Bentley supra* at 701A-F; *S v Mokgethi* 1990 (1) SA 32 (A) at 40I-41D; *Smit v Abrahams* 1994 (4) SA 1 (A) at 15A-G; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 847D-G; 8(1) *Lawsa* 2 ed para 132; Neethling, Potgieter and Visser *op cit* 171 *et seq.*

⁷ See eg *Fourway Haulage SA (Pty) Ltd v National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 34.

⁸ See eg P Q R Boberg *The Law of Delict* 440-442; Neethling Potgieter and Visser *op cit* 189 *et seq.*; J C van der Walt & J R Midgley *Principles of Delict* 3 ed paras 134-135.

was the decision by Mrs Erasmus not to accept the offer of an abortion tendered by the Tygerberg Hospital when she was about eight weeks into her pregnancy.

[20] The appellants rightly accepted that the decision not to have an abortion could not eliminate the second defendant's negligence as a factual cause of the harm. It has already been determined that, but for that negligence, the harm would not have ensued. The fact that the refusal of an abortion became another factual cause of the same consequence does not detract from this reality. Yet it is recognised in principle that even where the plaintiff's conduct does not break the factual chain, it can still interrupt legal causation. But in order to qualify as a *novus actus interveniens* in the context of legal causation, the plaintiff's conduct must be unreasonable. Reasonable conduct on the part of the plaintiff cannot free the defendant from the imputation of liability. Even unreasonable conduct on the part of the plaintiff will not always absolve the defendant. Whether it will do so, depends on the facts of the particular case.⁹

[21] The initial question is thus whether the decision by Mrs Erasmus and her husband to refuse an abortion can be described as unreasonable. The appellants contended that it was.¹⁰ I do not agree with this contention. Because of their financial position, Mrs Erasmus and her husband tried to prevent another pregnancy by seeking a sterilisation. As a direct result of the second appellant's negligence, they were confronted with an option they tried to avoid. That option was between having another child that they could no afford or to have an abortion. For religious reasons they found the latter choice unacceptable, so they opted for the former. Had Mrs Erasmus been advised that for medical reasons the continuation of the pregnancy could be dangerous to her own health and that of her unborn child, the position might have been different. But according to the

⁹ See eg *Mafesa v Parity Versekeringsmaatskappy Bpk (in likwidasie)* 1968 (2) SA 603 (O) at 605D-E; *S v Mokgethi* 1990 (1) SA 32 (A) at 44B-47H; *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) paras 20-25; *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1114.

¹⁰ The appellants sought to find support in the decision of the English Court of Appeal in *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044 CA. Save that the decision also related to the refusal of an abortion – which was incidentally held to be reasonable – I find very little in common between the two cases on their facts.

evidence of her husband, this was not the case. On the contrary, Mrs Erasmus experienced no health problems with her previous three pregnancies and she had been advised of no medical reason to think that this one would be different. In these circumstances I find nothing unreasonable about the decision of the Erasmus couple to continue with the pregnancy. It follows that application of the direct consequences test seems to point to liability on the part of the appellants for the harm that Mrs Erasmus suffered.

[22] Next, the appellants relied on the reasonable foreseeability test. Their argument in this regard rested on the concession by Dr Dalrymple that the complication of AFE that led to the harm was so rare that it would not have been foreseen by the reasonable surgeon. The respondent's answer to this argument was that although the occurrence of AFE was not reasonably foreseeable, it formed part of a reasonably foreseeable harm of a general kind.

[23] Under the rubric of negligence I have already agreed with the respondent's proposition that the occurrence of AFE forms part of the complications associated with pregnancy that were foreseeable as harm of a general kind. I do not believe, however, that the foreseeability criterion in the context of legal causation can be exactly the same. Once we accept, as we must,¹¹ that foreseeability plays a role in determining both negligence and legal causation, logic dictates that the same criterion cannot find application in both instances. After all, repetition of exactly the same tests on two occasions can serve no purpose other than to confuse. Moreover, the different roles performed by the enquiries into fault, on the one hand and imputability of harm on the other, are so fundamentally different, that the appropriate criteria can hardly be the same.¹² Unfortunately our law as it stands does not provide a clear picture of the content of the foreseeability criterion in the

¹¹ See eg *Sea Harvest Corporation v Duncan Docks Cold Storage* supra paras 21-22.

¹² Cf the reasoning by Streicher JA in *Sea Harvest Corporation* supra para 3.

context of legal causation.¹³ But as I see it, if it means anything, it must mean foreseeability of the actual harm as opposed to harm of a general kind.¹⁴

[24] On this basis, I accept that because of the unforeseen intervention of AFE, the actual harm suffered by Mrs Erasmus was not a reasonably foreseeable consequence of second respondent's negligence. On the other hand, AFE is not unknown to the medical science. Although it is rare, it has happened before and will probably happen again. It is therefore not the kind of 'freakish occurrence' that has never happened before, as was the case, for instance, in *S v Bochriss Investments (Pty) Ltd*,¹⁵ *Sea Harvest Corporation*¹⁶ and *Mkhatswa v Minister of Defence*¹⁷ where the consequences were held too remote for the imputation of liability.

[25] A further argument raised by the appellants as to why they should not be held liable for the harm suffered by Mrs Erasmus, is that even if the sterilisation operation had been performed without negligence, it was not a failsafe operation. According to the medical evidence, the risk of pregnancy remained. If Mrs Erasmus became pregnant under these circumstances the appellants would not have been liable for the consequences. Accordingly, so the appellants argued, it is unreasonable and unfair to hold them liable for consequences which might have occurred in any event. I think there are two answers to this argument. First, the fact that Mrs Erasmus was not sterilised obviously resulted in a marked increase in the risk of pregnancy. Second, it hardly lies in the mouth of a defendant whose wrongful conduct caused a particular harm, to argue that the harm could in any event have resulted from other causes. If it were otherwise, the defendant who

¹³ See eg *Sea Harvest Corporation* (Scott JA) para 22; Neethling Potgieter and Visser supra 188.

¹⁴In this context ADJ van Rensburg, 'Normatiewe Voorsienbaarheid as aanspreeklikheidsbegrensmasmaatstaf in the Privaatreg' 1972 *THRHR* 56 suggests the criterion that, in order to be imputed to the wrongdoer the actual harm must have been foreseeable with a 'genoegsame graad van waarskynlikheid' ie a sufficient degree of probability.

¹⁵ 1988 (1) SA 861 (A) at 867D.

¹⁶ Supra para 27.

¹⁷2000 (1) SA 1104 (SCA) para 25.

negligently caused a motor vehicle accident could argue that accidents happen every day.

[26] Despite the arguments to the contrary raised by the appellants, I therefore conclude that in all the circumstances, considerations of reasonableness, justice and fairness dictate that they should be held liable for the harm suffered by Mrs Erasmus. Since that is also the conclusion arrived at by the High Court, the appeal cannot succeed.

[27] It follows that the appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:

R T WILLIAMS SC (with her C McDonald)

Instructed by: The State Attorney, Cape Town
The State Attorney, Bloemfontein

RESPONDENTS:

J S SANER

Instructed by: De Vries Shield Chiat, Cape Town
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