REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 1084/2012

IN THE MATTER BETWEEN:

CECILIA GOLIATH **PLAINTIFF**

AND

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH IN THE PROVINCE OF THE EASTERN CAPE **DEFENDANT**

Coram: **Lowe J**

Date Heard: **20 May 2013**

Date Delivered: **14 June 2013**

JUDGMENT

LOWE, J

INTRODUCTION:

[1] The plaintiff in this matter, an adult female born on the 13 November 1967, instituted action against the defendant in his capacity as the authority responsible for the Department of Health and Hospitals in the Province of the Eastern Cape, claiming damages suffered by her rising from the alleged negligence of the doctor/doctors and

nursing staff on duty and involved in an operation upon her for a routine hysterectomy, on 8 April 2011 at Dora Nginza hospital in Port Elizabeth.

[2] The matter proceeded before me on both merits and quantum.

[3] Plaintiffs claim (which proceeds in delict) in essence alleges that the doctors and nursing staff involved in her hysterectomy operation owed her duty of care in accordance with generally accepted standards, and acting negligently allowed the operation wound to be closed before removing all surgical swabs from her abdomen. She alleges that one swab had been left in her abdomen which required to be subsequently surgically removed by Dr Muller on the 15 July 2011.

[4] Plaintiff claims damages as follows:

4.1 Estimated future loss of earnings R50 000-00;

4.2 Estimated future medical expenses R150 000-00;

4.3 General damages in respect of shock, pain and suffering, disability, disfigurement and loss of the amenities of life R300 000-00.

[5] In the minute of the resumed pre-trial conference dated 20 May 2013 the defendant admitted plaintiff's photographs (to the extent that they could be adduced in

evidence) without the necessity of formal proof, admitting the hospital records but persisted in his denial of liability and damages.

[6] Defendant had raised a special plea, which the parties recorded at commencement of the trial would not proceed costs attached thereto to be costs in the cause.

[7] I was further informed at the commencement of the trial that the parties had agreed upon the quantification of plaintiff's claim for future loss of earnings in the sum of R5 000-00 (the event of liability being established). Future medical expenses had fallen away.

[8] Accordingly at the trial what remained for determination was:

8.1 The merits of the matter relevant to liability;

8.2 The quantification of general damages in the event of liability being established;

8.3 The ancillary orders in the event of liability being established;

8.4 Costs.

THE EVIDENCE:

[9] Plaintiffs evidence consisted of two witnesses, herself and general surgeon Dr S. P. Muller.

DR MULLER:

[10] Dr Muller qualified himself as a specialist surgeon of considerable experience and stated in evidence (in summary) the following:

10.1 He treated the plaintiff for complications arising from sepsis in the abdomen and surgical wound following upon a total hysterectomy done at Dora Nginza hospital on the 8 April 2011;

10.2 The sepsis was a complication of the hysterectomy operation in which he was not involved;

10.3 Prior to being seen by Dr Muller she was treated at Settlers Hospital Grahamstown for wound infection, particularly on the 5 July 2011, when she was admitted for a painful abdomen, abdominal distension, wound infection and a draining wound sinus;

10.4 She was treated with a mixture of high potency antibiotics despite which the infection did not clear up and Dr Muller was called in;

10.5 He saw her for the first time on 13 July 2011 and suspected a deep foreign body in the wound or abdominal cavity and operated on plaintiff on the 15 July 2011;

10.6 This was a major operation under anaesthetic being an open laparotomy he finding an abdominal swab left in the pelvic cavity at the time of the hysterectomy operation;

10.7 The swab was removed and appropriate antibiotic treatment given, the abdominal cavity being washed out and closed with an internal drain;

10.8 Plaintiff recovered well, the drains were removed on the fifth post-operative day and she was discharged on the ninth post-operative day;

10.9 She was subsequently seen at out patients on a number of occasions and had fully recovered by November 2012;

10.10 She had no problems with the scar nor abdominal pain subsequent to the second operation after a recovery period;

10.11 The swab which had been left behind at the hysterectomy operation delayed her recovery and gave her pain and agony from abdominal

and wound sepsis she being fortunate to make a subsequent full recovery without further complications and even potentially death;

10.12 He reported that she would have been unable to work following an uncomplicated hysterectomy for approximately a month but as a result of the complications she experienced this was extended to some 6 months;

10.13 She had months of suffering in the form of pain, severe anxiety and fear the general inability to enjoy life and obviously the need to undergo a second and dangerous operation;

10.14 Apart from some potential for internal abdominal adhesions she has made a remarkable recovery since the second operation;

10.15 Now that more than a year has passed since the second operation the chance of abdominal adhesion has much diminished and has dropped to proximately 20 % in respect of an adhesion requiring re-admission to hospital;

10.16 Of those re-admitted about 10 % required at least one operation to relieve obstruction which may be required 20 years and longer after the initial operation;

10.17 In South Africa approximately five hundred people die per annum from obstructions due to internal adhesions;

10.18 The retained swab complication now put her at increased risk of severe or dense adhesions, at increased risk of intestinal obstruction requiring an operation, he estimating however that she had a 90 % chance of escaping it at this time;

10.19 If in the unlikely event of an intestinal obstruction at this stage she would be off work for two weeks (if no operation was required) and for six weeks or more if one was.

[11] During the trial when Mr Cole for plaintiff attempted to lead Dr Muller on matters relevant to the facts surrounding the potential negligence in respect of the retained swab, Mr Ruganan for respondent objected as this aspect of the matter had not been covered in the doctors expert notice, that objection being upheld.

[12] In his evidence in chief, however, Dr Muller explained that swabs are part of the instruments kept by the nursing sister responsible therefore, the so called swab sister. He explained that abdominal swabs were used to swab up body fluids, and it was internationally accepted that there had to be a rigid protocol for these to be counted by the sister and surgeon involved, explaining this counting requirement and method briefly.

[13] He amplified that the plaintiff in this matter, when he operated upon her, had been extremely sick with high fever and peritonitis. He gave evidence concerning the admitted photographs that had been taken by the anaesthetist (present at the operation) and he explained that photographs A3 to A6 demonstrate the swab removed during the second operation (which is quite a substantial sized piece of gauze swabbing) and that the photographs (part of his expert notice) demonstrated the swab in a plastic bag also showing the quite substantial scar relevant to plaintiffs abdomen.

[14] In cross-examination Dr Muller said that it was a very rare situation to have a swab left in during or after an operation.

[15] This evidence which is certainly relevant to potential negligence was further dealt with in re-examination (arising from the cross-examination) the doctor saying further that it would be a rare occasion to have a swab left in at an operation, having regard to the rigid procedures to be followed relevant to swab counting, and that this should not occur. There was no further detail or medical evidence of any nature relevant to the above or the circumstances of this particular hysterectomy operation. There were no hospital or medical records placed before me or referred to in evidence relevant to the first operation.

THE PLAINTIFF:

[16] The plaintiff herself gave evidence that she was forty five years old, married with two children presently working as a caterer at the Brookeshaw home for the aged, earning R5 000-00 per month.

[17] Generally she deposed to the fact that she had not been aware at any time of the fact that the swab had been left in her stomach and had not been told that this was the case nor had she consented thereto. Subsequent to the operation she made a poor recovery still having a sore stomach finding it extremely difficult to perform appropriately at her former employment at Fruit & Veg in Grahamstown, feeling thoroughly ill with temperatures and the like. She returned to Dora Nginza in June 2011 where she was told she would have to have a second operation, but after an abscess on her stomach wound burst she was discharged without such an operation. Subsequently she continued to feel extremely ill returning to Dora Nginza for further examination she being again sent home. In July 2011 she went to the local clinic and was referred to Settlers Hospital where she was treated as already described above.

[18] She confirms that she was informed that a swab had been found in her stomach during the operation, and that subsequently she made an uneventful recovery, is now able to resume her activities of walking and occasional bike riding which she had previously been unable to do subsequent to the first operation. She had completely recovered at this time and conceded that by November 2011 she was effectively fit again.

[19] The second operation apparently has not worsened the scar, being performed in the same region.

[20] She takes the occasional tablet but clearly nothing of great importance in this regard.

[21] In cross-examination she confirmed having seen the swab which she was told had been removed from her stomach after the operation and that she was shocked. While saying that she felt unhappy about her scar, it does not seem that this can be attributed to the second operation.

[22] The plaintiff closed her case. The defendant lead no evidence and also closed his case.

THE ARGUMENTS:

[23] In argument Mr Cole suggested that there was sufficient evidence to establish negligence of itself, alternatively, that the *res ipsa loquitur* doctrine applied, and in the absence of rebutting evidence, plaintiff had discharged the onus it bore in respect of the merits.

[24] In respect of quantum he suggested that an appropriate sum would be R300 000-00, arguing that this should be treated on a rand per day basis similar to the approach adopted in police assault and detention matters.

[25] Mr Ruganan argued in respect of the merits that wrongfulness had not been sufficiently established nor the test therefore satisfied on the one hand and on the other that there was no or insufficient evidence to establish negligence, and that the doctrine of *res ipsa loquitur* was of no application in the matter at all.

[26] In respect of quantum he suggested that the approach adopted by Mr Cole was inappropriate and that general damages between R120 000-00 and R 150 000-00 should be considered with the additional R5 000-00 for loss of earnings as agreed.

[27] In respect of costs he argued that the qualifying expenses of Dr Jameson should not be allowed.

THE LEGAL ISSUES:

WRONGFULNESS:

[28] In pleading the matter plaintiff (at paragraph 7 of her particulars of claim) alleges that the doctors and medical staff treating the plaintiff owed plaintiff a duty of care to ensure that she was provided with *"..... proper and skilled medical treatment including hospital, health services, supervision and care in accordance with generally accepted standards."*

[29] At paragraph 8 of the particulars of claim it is alleged that the said doctors and medical nursing staff, who treated plaintiff, acted negligently and in breach of the

pleaded duty of care, particularly in failing to see to it that a surgical swab was not left behind when the wound was closed.

[30] In this regard, and in my view correctly, defendant admitted that the doctors and medical staff owed plaintiff a duty of care as pleaded. The plea then goes on to deny the negligence alleged, defendant pleading that plaintiff's hospitalisation and treatment was consistent with *"..... a duty of care owed to the plaintiff having due regard to conditions and standards prevailing at the time."*

[31] Having regard to counsel for defendants argument surrounding wrongfulness it is necessary to set out the following.

[32] In order to establish liability in delict the conduct of the defendant must have been wrongful, being the conclusion of law that a court draws from the facts before it. See: **Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 797**. The element of wrongfulness is a distinct requirement for delictual liability. This is a requirement quite apart from the negligence of the defendants conduct.

[33] The wrongfulness issue is logically anterior to the fault enquiry and only when it is established that defendant acted wrongfully does the question arise as to whether the objectively wrongful conduct can be imputed to the defendant. **Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para 12**. Fault does not presuppose the existence of wrongfulness and is irrelevant unless wrongfulness is established.

[34] Put otherwise negligence is unlawful and actionable only if it occurs in circumstances that the law recognises as making it unlawful.

[35] In broad terms conduct is wrongful if it infringes a legally recognised right of the plaintiff or constitutes a breach of a legal duty owed by the defendant to the plaintiff. See: **Law of South Africa: Second Edition vol 8 part 1 paragraphs 59 and 60**.

[36] The imposition of a legal duty depends on the particular circumstances of the case.

[37] The enquiry as to whether defendant has contravened the duty is objective.

[38] In this matter having regard to the defendant having admitted on the pleadings that a particular duty of care was owed by the doctors and nurses to plaintiff, and as that duty is certainly recognised in law, it follows clearly that a breach of that duty (if it is established) for the purposes of liability is wrongful. See: **Minister of Law & Order v Kadir 1995 (1) SA 303 (A) at 317**.

[39] In a matter such as this that enquiry is a simple one, as harm has clearly been established on the evidence. The duty having been admitted, the breach of that legal duty is implicit with the finding that harm was caused. Put otherwise the existence of the legal duty (which is admitted) and its breach (the harm caused against the legal duty) rendered the defendants conduct wrongful. Again put differently if it is

established that a legal duty not to harm the plaintiff exists (which is clearly so in this matter) the enquiry into the possible breach of that duty follows, this not surrounding the negligence issue, but the harm caused to plaintiff. The question is not whether the defendant was at fault but whether the defendant complied with a legal duty imposed upon him.

[40] Wrongfulness and the breach of the duty seldom causes problems in cases that involve positive conduct causing bodily injury or damage to property such as is the case in this matter.

[41] In the circumstances, there is no assistance to be found for defendant in the wrongfulness issue.

NEGLIGENCE:

[42] The real issue in this matter is whether plaintiff has discharged the onus of establishing negligence.

[43] In **Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at par 21** the appeal court reiterated that the benchmark for negligence is what a reasonable person would have done in the same circumstances as the defendant experienced. The most usually quoted test is that set out in **Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E -F** reformulated in **Mukheiber v Raath 1999 (3) SA 1065 (SCA) at 1077 E - F.**

[44] Whilst the test for negligence has been separated into stages, this constitutes only a guideline. The ultimate analysis is whether in the particular circumstances the conduct complained of fell short of the standard of a reasonable person or, in this matter, the appropriate standard for the relevant medical personnel applicable. In respect of medical practitioners and nurses this is a profession that demands special knowledge, skill and care and the measure is the standard of competence that is reasonably expected of a member of that profession. See **Mukheiber** (supra) at par 32. The relationship between doctors, nurses and the patient treated, involves the duty to act with reasonable care and skill and is a duty imposed by the law of delict. In **Van Wyk v Lewis 1924 AD 438 at 456** Wessels JA said the following on the standard of competence of a surgeon *"… the surgeon will perform the operation with such technical skill as the average medical practitioner in South Africa possesses and that he will apply that skill with reasonable care and judgment…(he) is not expected to bring to bear on a case entrusted to him the highest possible professional skill but is bound to employ reasonable skill and care and is liable for the consequences if he does not."*

[45] In this matter on the facts which stand unchallenged, it is clear that a surgical swab utilised to mop up bodily fluids during the operation was left in plaintiff when finally closed at the end of the operation, and remained in the operation field. It is also undisputed that it is this swab that caused plaintiff's difficulties, and that subsequently had to be removed in dangerous circumstances which could easily have been life threatening.

[46] The question is whether on the appropriate test (viewed in the circumstances set out above) the surgeon, the theatre staff and swab sister (or any one of them) conducted themselves in a manner constituting negligence.

[47] In this respect I bear in mind that the reasonable expert criterion does not require the highest skill and expertise but only the general level of skill and diligence possessed by members of that branch of the profession. In **Van Wyk v Lewis** (supra), Lewis was a surgeon who performed an urgent and difficult abdominal operation on Van Wyk. A swab was overlooked and remained in Van Wyk's body for something like a year. In that matter evidence showed that it was general practice that it was the attending nursing sister that was responsible for checking and counting swabs. In that particular matter it was the evidence of Lewis that the operation, having regard to the patients critical condition, had dictated the kind of search that was undertaken for swabs and that he and the sister believed that all the swabs were accounted for. In short the court concluded that the mere fact that the swab had been left behind was not of itself proof of negligence on the part of Lewis. The court held that it was the general practice that the attending nursing sister carried the responsibility to ensure that all swabs were accounted for and that Lewis was not negligent in complying with that general practice.

[48] In this matter, Mr Cole conceded that he did not look to the surgeon to establish negligence in leaving a swab behind but to the theatre staff and swab sister whose responsibility it was. This approach accorded with Dr Muller's evidence that the swab sister was to see to it that the swabs were carefully counted both in and out

and were all removed. In the circumstances I must measure the reasonableness of the theatre staff's conduct against that of the expertise of similarly qualified people (the reasonable theatre sister and swab sister.) I will, notwithstanding Mr Cole's concession, also consider the surgeons roll and potential liability flowing therefrom.

[49] In this matter it must be accepted that this was an operation upon a plaintiff who was healthy before she was admitted, that it was not an emergency operation, and that it was performed in a fully equipped major public hospital (Dora Nginza), at least commencing in ordinary circumstances. Apart from this there is not one word of evidence which deals with what happened during the operation or any of the circumstances surrounding same. The hospital records were not referred to in evidence relevant to Dora Nginza.

[50] In my view negligence is to be judged along the lines of the three element test referred to above. This constitutes the reasonable foreseeability of harm; the taking of reasonable precautions to guard against the occurrence of such foreseeable harm; the failure by defendant to take the reasonable precautions. The plaintiff has the out and out onus of proving negligence on a balance of probabilities. See **Molefe v Mahaeng 1999 (1) SA 562 (SCA) at 568 H – 569 B**. It is not sufficient in those circumstances to establish a *prima facie* (save possibly as discussed later in this judgment) case nor in so doing ordinarily does the burden of adducing evidence shift to the defendant. Whether, should the defendant produce no evidence, plaintiff has discharged the onus is judged on the ordinary application of these generally accepted principles and the court would have to decide on the appropriate test whether the

plaintiff had succeeded in demonstrating negligence on the balance of probabilities, thus plaintiff has the onus of proving negligence on a balance of probabilities.

RES IPSA LOQUITUR:

[51] In some instances, the facts of a case are such that an inference of negligence may be drawn in accordance with the *res ipsa loquitur* doctrine.

[52] This doctrine does not create a presumption of negligence nor does it transfer the onus from plaintiff to defendant. It is simply an aid afforded plaintiff in appropriate circumstances to argue, by inferential reasoning, that the facts established allow the inference of negligence. In those circumstances it is then for the defendant to displace this prima facie inference by means of an explanation. There is no onus on the defendant to establish the correctness of the explanation on a balance of probabilities however. **Arthur v Bezuidenhout & Mieny 1962 (2) SA 566 (A); Swartz v Delport [2002] 2 All SA 309 (A).**

[53] In **Ntsele v MEC for Health Gauteng Provincial Government 2013 [2] All SA 356 (GSJ)** the court considered the *res ipsa loquitur* doctrine in a medical negligence matter. The plaintiff sued the defendant for damages arising from the alleged negligent medical treatment received at a state hospital. The plaintiff alleged that the nursing staff at the hospital, in the negligent breach of their duty of care during the period of her ante-natal pregnancy care at the clinic, failed to properly monitor and treat the plaintiff during her pregnancy. The court held that due to the

exceptional nature of the circumstances of the matter the plaintiff had to establish a *prima facie* case of negligence against the defendant's employees, which in turn cast an evidential rebuttal burden on the defendant to destroy the probability of negligence by giving a reasonable explanation that the child's injury occurred without negligence being attributable to the defendants employees. The court held alternatively that the plaintiff had to show that the factual injurious eventuality happened in a manner which, when explained by implication, carries a high probability of negligence regarding the defendant's employees' conduct.

[54] In so concluding the court (at 359 a – e) essentially held that for the plaintiff to succeed in her claim:

54.1 She had to establish a *prima facie* case of negligence which, so said the court cast an evidential rebuttal burden on the defendant to destroy the probability of negligence by giving a reasonable explanation;

54.2 Alternatively, that the injury occurred in a manner which "when explained by implication" carried a high probability of negligence;

54.3 <u>And</u> if the evidence showed that the defendant did, but the plaintiff subjectively did not, completely have within her grasp the means of knowing how the clinic and hospital staff administered treatment to her and her child, this being within the exclusive knowledge of the defendant's employees', the court was permitted to draw an inference of negligence by applying the doctrine of *res ipsa loquitur*.

[55] The court held (at para 37 -38) that defendant's counsel misconceived the nature of the incidence of the onus resting on plaintiff, finding that a *prima facie* establishment of negligence transferred an evidential burden to defendant.

[56] In some matters, as pointed out above, the *res ipsa loquitur* doctrine assists a plaintiff in certain instances ie where the plaintiff is not in a position to produce evidence on a particular aspect which is normally but not necessarily peculiarly in the knowledge of the defendant. This too does not affect the onus of proof and is usually invoked when the occurrence itself is the only known fact from which a conclusion of negligence can be drawn and the incident does not ordinarily occur in the absence of negligent conduct. See **Mostert v Cape Town City Council 2001 (1) SA 105 (SCA); Madyosi v SA Eagle insurance Co Ltd 1990 (3) SA 442 (A) at 444 D – 445 G**. **Lawsa (supra 118)** states correctly in my view that *"the conclusion must be self evident from the facts and the maxim comes into operation only if the facts suggest that the defendant might have been negligent."* See also **Monteoli v Woolworths (Pty) Ltd 2000 4 SA 735 (W) at para 31 - 35; Macleod v Rens 1997 (3) SA 1039 (E)**.

[57] This creates no more than an inference in appropriate circumstances. Particularly as pointed out in **Lawsa (supra 118)** it is not a short cut to a finding of negligence, and it does not permit a court to gloss over deficiencies in the plaintiffs evidence. See **Macleod (supra) at 1048 G**.

[58] It has been widely accepted that the majority judgment in **Van Wyk v Lewis (supra)** eschewed the application of *res ipsa loquitur* maxim in medical negligence actions. Indeed it has been stated that our courts have declined to apply the doctrine in such cases because it has been argued, accepted and held that in the medical context, the requirement that the occurrence must fall within the scope of the ordinary knowledge and experience of the reasonable man cannot be met.

[59] It is trite that in medical negligence cases, a lower court is bound by the stare decisis legal precedent system and simply cannot invoke the *res ipsa loquitur* doctrine. See: ***"Should res ipsa loquitur speak for itself in medical accidents:"* Patrick Van Den Heever De Rebus: November 2002.** There is no South African authority which overrules **Van Wyk (supra)** on this issue, at least that I was referred to and I was unable to find any in my own research. On the contrary the work **Res *Ipsa Loquitur* and medical negligence: A comparative survey: Van Den Heever & Carstens : Juta 2011**: whilst accepting that *res ipsa loquitur* was rejected as having application in medical negligence cases by the majority of the court in **Van Wyk** argue that this should be reconsidered for many reasons. They suggest that following the High Court judgment in **Pringle v Administrator Transvaal 1990 (2) SA 379 (WLD) at 384 H** the door has not closed on the possible application of the maxim in medical negligence cases, with the caveat that it can only be applied if the alleged negligence is derived from something absolute, and the occurrence could not reasonably have taken place without negligence. The authors go on to state "*If regard must be had to the surrounding circumstances to establish the presence or absence of negligence, the doctrine does not find application.*" (at 27)

[60] In **Ntsele (supra)**, the court having examined **Van Wyk v Lewis (supra)** concluded that a careful consideration of the ratio showed that the court did not totally prohibit the application of the maximum in medical negligent cases where there *"are exceptional circumstances justifying such application"*. (at para 107).

[61] Respectfully I cannot agree with this construction of **Van Wyk (supra).**

[62] In **Van Wyk (supra)** there were three judges, Innes CJ; Kotze´ JA; and Wessels, JA.

[63] A proper analysis of the judgment of Innes CJ demonstrates that his lordship specifically considered the argument (at 444) that the mere fact that a swab was sewn up in the appellants body was *prima facie* evidence of negligence, which shifted the onus to throw upon the respondent the burden of rebutting the presumption raised, which was said his Lordship a difficult task. Immediately following his Lordship referred expressly to the maxim *res ipsa loquitur* as having being invoked in support of the above mentioned contention. Acknowledging that the maxim meant simply that in certain circumstances the occurrence spoke for itself his Lordship held that this was really simply a question of inference. His Lordship pointed out that the plaintiff's allegation of lack of reasonable care and skill had to be determined on all the facts there being no absolute test, this dependent upon the relevant circumstances. His Lordship said that the nature of the occurrence whilst an important element had to be considered along with the other evidence in the case. His Lordship ended by stating that the onus of establishing negligence rested throughout upon the plaintiff.

Read carefully, there can be no doubt, that Innes CJ at least impliedly (and directly relevant to the decision) rejected the application of the doctrine in the circumstances of that matter – a swab case.

[64] There is no doubt in my view that having referred expressly to the doctrine his Lordship rejected the application of same in the context of at least that kind of negligence claim. **Van Der Heever (supra)** has the view (at 24) that it is not clear from the judgment of Innes CJ whether he thought that there was room for the application of the doctrine in the case – but rather a reluctance to apply it.

[65] That this was the approach of the majority of the court was put completely beyond doubt by the judgment of Wessels JA (at 462 - 463). His Lordship carefully considers the applicability of the doctrine and rejects same explicitly in the following words:

> "The maxim *res ipsa loquitur* cannot apply where negligence or no negligence depends upon something not absolute but relative. As soon as all the surrounding circumstances are to be taken into consideration there is no room for the maxim. The plaintiff asserts negligence and basis his claim upon it and this can only be determined by an examination of all the circumstances." At 462.

[66] His Lordship stated thus having first referred particularly to the fact that if the surgeon was only liable for reasonable skill and care and if the question of whether he acted reasonably or not depended upon on all the accompanying circumstances, the question of whether he acted reasonably or not (consistent with the need to apply

reasonable skill and care) depended on all the surrounding circumstances rendering the term "reasonable" relative to the circumstances. His Lordship then puts it beyond doubt that this was the ratio of his decision making it clear that if at the end of the plaintiffs case the scales were evenly balance plaintiff could not succeed. Had the doctrine become applicable, the position would have being otherwise his Lordship stated at 464:

> "The mere fact that a swab is left in a patient is not conclusive of negligence. … Hence it seems to me that the maxim *res ipsa loquitur* has no application to cases of this kind".

[67] It is true that Kotze´ J takes a different approach concluding that a placing of a foreign substance in a patient's body and leaving it there when sewing up the wound, unless satisfactorily explained, established a case of negligence. (451 - 452). In concluding that the maxim did not shift the onus his lordship found effectively that if leaving the swab in the wound was not satisfactorily rebutted or explained the conclusion may reasonably be drawn that there had being an absence of the necessary care or skill rendering defendant liable for damages.

[68] His Lordship although rejecting plaintiffs claim, did so on the basis that a satisfactory rebuttal had been put up.

[69] There can be no doubt whatsoever, that until **Van Wyk v Lewis (supra)** is reconsidered and overturned by a court of appropriate status, a lower court (such as this) is bound to accept that in medical negligence cases, and certainly in cases

involving swabs, the doctrine cannot be applied and that a conclusion must be reached without regard thereto.

[70] **Van Wyk v Lewis (supra)** was dealt with extensively in a doctoral thesis on the subject of the applicability of the maxim in the health care context by **Van Den Heever:** ***"The application of the doctrine of res ipsa loquitur to medical negligence actions: a comparative survey".*** The author revisits Van Wyk in extensive detail as is pointed out in: Foundational Principles of South African Medical Law: Carstens /Pearmain Lexis Nexis 2007), Van Den Heever reaches the conclusion that there was no reason in Van Wyk as to why the maxim should not have been applied and that the court erred in finding that it was not applicable in the medical context.

[71] It is clear that Van Den Heever is of the view that the majority of the court rejected the maxim in medical negligence matters.

[72] Whilst there has been criticism of the non-application of the doctrine in medical negligence cases, I am unable to find any satisfactorily reasoned decision (apart from **Ntsele (supra)**) supporting the conclusion that the finding of **Van Wyk** was limited specifically to that matter and that there were other matters where exceptional circumstances may well justify such application in a medical negligence case.

[73] The *res ipsa loquitur* situation can only arise where the occurrence is one which in common experience does not ordinarily happen without negligence, at least

as our law currently stands. The question is what this actually means. In South Africa as Van Den Heever points out (at 136) the alleged negligence for the maxim to be applicable must depend on so-called "*absolutes*". This means that the occurrence itself (in this case the leaving behind of the swab) must be of such a nature that if "*the common knowledge or ordinary standard*" is applied, it (the occurrence) would not have happened without negligence.

Van den Heever continues:

> "Thus, if the aforegoing assessment cannot be made by having regard to the occurrence alone, so that the surrounding circumstances must also be considered in order to arrive at a conclusion, *res ipsa loquitur* does not find application. This appears to be the reason why South African courts decline to apple the doctrine to medical negligence cases, based on the notion that the medical interventions that form the subject of the dispute do not fall within the ordinary experience of mankind, because a court usually be unable to draw a conclusion without the benefit of expert medical evidence." (at 136)

Whether this is erroneous, dogmatic and outdated as Van Den Heever suggests is not for me to decide for reasons already set out.

[74] **Zeffertt and Paizes** in the South African Law of Evidence Second Edition conflating the issues of *res ipsa loquitur* and *prima facie* proof in special circumstances referred to hereafter (under *the res ipsa loquitur* heading) state as follows at 221:

> "How strongly the facts of the occurrence must point to negligence depends upon the extent to which they can be supplemented by inferences from the defendant's failure to give an explanation. Less evidence will be necessary when the causes of the accident are peculiarly within the defendant's knowledge and there is no apparent reason why he or she should not be able to explain them; more in cases in which he or she cannot be reasonably expected to know what happened."

[75] The *res ipsa* inference of negligence can only occur where the cause of the nature of the incident remains unknown. Once cause is known the foundation for the doctrine falls away.

[76] The basis for the rejection of the doctrine in medical negligence cases was fairly and squarely set out in **Van Wyk (supra)** most clearly by Wessels JA as follows at (461-462):

> "We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he falls short he is negligent … If the surgeon is only liable for reasonable skill and care and if the question of whether he acted reasonably or not depends upon all the accompanying circumstances it seems to me that in as much as the term 'reasonable' is relative, the onus of proof must necessarily lie upon the plaintiff all the time."

[77] His Lordship then went on (as I have already pointed out) to deal with the fact that the doctrine cannot apply where negligence or no negligence depends upon something not absolute but relative. As Wessels JA pointed out you cannot judge (at least in medical negligence cases) whether reasonable care has or has not been exercised until you know all the circumstances of the case. His Lordship went on (at 462):

> "It is therefore necessary for a plaintiff who seeks to recover compensation for the damage done to him to show that the defendant was in all the circumstances of the case in the wrong when he left the swab in the abdomen after he sewed it up and that in so doing he had failed to use that reasonable skill, care and judgment which it was incumbent upon to him employ. 'If at the end he leaves the case in even scales and does not satisfy the Court that it was occasioned by the negligence or fault of the other party he cannot succeed …'"

[78] He continued at 464 as follows:

> "The mere fact that a swab is left in a patient is not conclusive of negligence."

[79] Going on to discuss certain instances which demonstrated the proposition his Lordship ended up by holding: at (464)

> "Hence it seems to me that the *maxim res ipsa loquitur* has no application to cases of this kind."

[80] This inapplicability of the maxim to medical negligence cases was reaffirmed in **Pringle v Administrator, Transvaal (supra) at 384H**, save in the suggested limited circumstances referred to above.

[81] I remain of the view, that whilst much may be said for revisiting the application of res *ipsa loquitur* in the medical negligence field, as is eloquently set out by Van den Heever in the De Rebus article referred to above and in the **Foundational Principles of South African Medical Law (supra)**, I am bound by the principles set out in **Van Wyk v Lewis (supra)**.

[82] In the result, and whilst much can be said for the fact that in due course and in an appropriate case the matter may be revisted by the Supreme Court of Appeal, along the lines pointed out in the Van Den Heever article and thesis referred to, I am presently bound thereby and this matter must be determined solely on the ordinary principles applicable to negligence which I have set out above.

PRIMA FACIE CASE OF NEGLIGENCE WHERE THE MATTER IS PECULIARLY IN DEFENDANT'S KNOWLEDGE:

[83] Sometimes however a plaintiff is not in a position to produce evidence on a particular aspect and it is trite that in those circumstances less evidence will suffice to establish a *prima facie* case were the matter is peculiarly in the knowledge of the defendant. See: **Gericke v Sack 1978 (1) SA 821 (A); Macu v Du Toit 1983 (4) SA 629 (A) at 649; Monteoli (supra) at 742; Lawsa (supra) para 118**. This is not

the same as the *res ipsa loquitor* situation which pertains in different circumstances. It is put thus by Diemont JA in **Gericke (supra) at 827:**

> "However, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by INNES, J., in *Union Government (Minister of Railways) v. Sykes,*1913 AD 156 at p. 173, that
>
> "less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required."
>
> But the fact that less evidence may suffice does not alter the *onus* which rests on the respondent in this case."

[84] It is in limited cases that in those circumstances bearing in mind the relative ability of the parties to lead the evidence, that the law places an evidentiary burden upon the defendant to indicate for example what steps were taken to comply with the appropriate legal standard. See: **Ex parte the Minister of Justice in re R v Jacobson and Levy 1931 AD 466 at 473; Durban City Council v SA Board Mills Limited 1961 (3) SA 397 (A); Marine and Trade Insurance Company Limited v Van Der Schyff 1972 (1) SA 26 (A) at 37A - 38B; Rabie v Kimberley Munisipaliteit 1991 (4) SA 243 (NC) at 259; Jamneck v Wagener 1993 (2) SA 54 (C) at 65 – 66.** These cases do not transfer the onus from plaintiff to defendant put otherwise the defendant does not have to prove the absence of negligence. It is put thus in Lawsa: Negligence Vol 8 Second Edition.

> "The plaintiff retains the onus, but once the plaintiff has produced all the evidence available to him or her, the defendant may be required to complete the factual picture, if able to do so."

[85] In this matter of course defendant simply closed its case leading no evidence. **The Law of Evidence Schmidt (Butterworths)** points out that in these circumstances it remains necessary to apply the relevant standard of proof to all the facts of the case to reach a final conclusion as to whether the plaintiff has discharged the onus as follows (at para 3.2.4.1):

> "When a litigant fails to adduce evidence about a fact in issue, whether by not giving evidence himself or by not calling witnesses, it goes without saying that he runs the risk of his opponent's version being believed. If he bears an evidential burden and does nothing to discharge it he will necessarily suffer defeat. The fact that the evidence is not adduced to contradict an opponent's version does not necessarily mean, however, that that version will be accepted. Whether it is accepted depends on the probative strength of the opponent's evidence, that is to say on whether it really was strong enough to cast an evidential burden on the side failing to present evidence.
>
> Ultimately, therefore, it is the application of the relevant standard of proof to all the facts of the case that determines whether a party's failure to give evidence will be fatal.
>
> It stands to reason that failure to give evidence does not shift the burden of proof."

SUMMARY OF THE RELEVANT PRINCIPLES:

[86] In summary the position relevant to negligence in the matter, the onus of proof and any presumptions or inferences that may exist, is as follows.

[87] The plaintiff clearly has the onus of proving negligence on the usual balance of probabilities. See: **Arthur v Bezuidenhout and Mieny (supra) at 574; Madyosi v SA Eagle Insurance Company Limited (supra) at 444; Molefe (supra) at 568 to 569**.

[88] It must, however, be pointed out that in appropriate circumstances where a plaintiff is not in a position to produce evidence on particular aspect less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant. See: **Union Government (Minister of Railways) v Sykes 1913 AD 156 at 173 - 174; Gericke v Sack (supra); Macu v Du Toit (supra) at 649; Rabie v Kimberley Munsipaliteit (supra) at 259; Monteoli v Woolworths (Pty) Ltd (supra) at 742**.

[89] Over and above this, and again in appropriate circumstances the maxim *res ipsa loquitur* may assist a plaintiff where that plaintiff is not in a position to produce evidence on a particular aspect which usually, but not necessarily, is peculiarly within the knowledge of the defendant. See **Monteoli v Woolworths (Pty) Ltd (supra) at 742**.

[90] Again it is important to point out that none of the above in any way shifts the onus from plaintiff to defendant.

[91] It is important to draw a distinction between the concept that in certain circumstances were a plaintiff is not in a position to produce evidence as the evidence is particularly within the knowledge of the other party, less evidence may suffice, to establish a prima facie case, and the situation where *res ipsa loquitur* applies.

[92] The former issue is perhaps best illustrated an explained in the judgement of Van Blerk JA in **Durban City Council v SA Board Mills Ltd (supra) at 405 A** where the following appears:

> "Although the onus was on respondent to prove negligence this onus is, to use the expression by De Villiers JA, in *Molteno Brothers and Others v SA Railways and Others* 1936 AD 321 at p 333, "lightened" where, as here the facts lie peculiarly within the knowledge of the appellant."

[93] As was held in **Union Government (supra)** at 173 - 174:

> "The important point is that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required."

[94] In commenting on the concept of *prima facie* proof and *prima facie* evidence it is helpful to have regard to the words of Stratford JA in **Ex Parte Minister of Justice**: In re **R v Jacobson and Levy 1931 (supra) at 478**:

> "P*rima facie* evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus."

[95] This in my view is nothing more than a *prima facie* inference. It does not mean that a plaintiff may obtain judgment without satisfying the requirement to prove his case on the balance of probabilities. However in deciding whether or not a plaintiff has discharged the onus a court may in appropriate matters take a parties failure to adduce evidence into account.

[96] **Zeffertt and Paizes in the South African Law of Evidence (supra)** refer to this in the context of this placing a "*tactical risk"* upon the opposing party if the evidence in the circumstances makes out a *prima facie* case, and should that party elect not to lead any evidence – a tactical election not an evidentiary burden. (at 131 to 133).

[97] It is put as follows, "*For the purposes of the present discussion one may repeat that, where the expression "prima facie case" is used to indicate something which merely imposes a tactical election, that the evidence adduced by the party bearing the onus, and in the inferences which can properly be drawn from the silence of the opponent, are two variables which are acquired to add up to the same answer:*

that there is proof beyond reasonable doubt, or on a preponderance of probability, as the case may be. The greater the significance which can be attached to failure to give an explanation, the less the evidence which the onus – bearing party will be required to produce. A party's failure to give an explanation, or the giving of a false explanation, may have an evidentiary effect but is not an item of evidence in itself and does not justify an inference which could not reasonably be drawn from the other evidence." (at 133)

[98] On this point I should finally say that in a civil case where a defendant adduces no evidence that failure cannot justify a finding for plaintiff unless there is enough evidence to enable the court to conclude that having regard to the absence of an explanation the plaintiff's version is more probable than not. See: **Marine and Trade Insurance Company Limited v Van der Schyff (supra)**.

[99] Again in summary the above comes down to no more or less than following:

> "The courts recognise that a litigant will be handicapped when facts are within in the exclusive knowledge of his opponent and they hold, when that is so, that less evidence will suffice to establish a *prima facie* case; and where facts are within the exclusive knowledge of one party, his failure to give an explanation of evidence may weigh very heavily against him, but this does not alter the onus."
>
> (Zeffert and Paizes at 137)

[100] The authors point out that this statement is based on **Gericke v Sack (supra)**, and is undoubtedly a correct reflection of the South African law. It has recently been

carefully analysed by Steenkamp J in **Rabie v Kimberely Munsipaliteit (supra) at 259D-E** and approved and applied by Swain J in **Strut Ahead Natal (Pty) Ltd v Burns 2007 [3] All SA 190 (D) at 197**.

[101] Turning to the so-called presumptions, it must be pointed out that although the *res ipsa loquitur* principle is usually dealt with under the heading of presumptions it does not depend upon any rule of law and is simply an exercise of common sense and is not a true presumption of law at all. It creates merely a permissible inference which the court may employ if upon all the facts this appears to be justified. There is no question of the shifting of the onus. See: **Sardi v Standard and General Insurance Company Limited 1977 (3) SA 776 (A) at 780D**; **Osborne Panama SA v Shell and BP South African Petroleum Refineries (Pty) Ltd and Others 1982 (4) SA 890 (A) at 897H-898A**.

[102] It must be remembered and as was pointed out in **Madyosi and Another v SA Eagle Insurance Company Limited (supra)** in this regard things are different in England and the English authorities must be regarded with great caution as they could be misleading in South Africa: See also (Zeffertt (supra) at 219).

[103] Wessels JA in Osborne (supra) at 897H explains the position, as follows:

> "It is no doubt correct that in any every case, including where the *maxim res ipsa loquitur* is applicable, the enquiry at the end of the case is whether the plaintiff has discharged the onus resting upon him in connection with the issue of negligence."

[104] However, it should be pointed out that where the *maxim res ipsa loquitur* applies, and as was pointed out by Oglivie-Thompson JA in **Arthur v Bezuidenhout** (supra) at 574 H:

> "… once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story, or take the risk of judgment being given against him."

[105] As is set out in **Zeffertt and Paizes supra (at 220)** Wessels JA in **Osborne Panama SA (supra at 898B):**

> "… the 'remainder of the story' must consist of more than mere 'theories or hypothetical suggestions'; the defendants' explanation 'must be based on fact, not on fancy'".

[106] Again in this matter it is important to appreciate in the context of the authorities and the reference in Van Wyk (at 462) by Wessels JA to the following:

> "The *maxim res ipsa loquitur* cannot apply where negligence or no negligence depends upon something not absolute but relative. As soon as all the surrounding circumstances are to be taken into consideration there is no room for the maxim. The plaintiff asserts negligence and basis his claim upon it and this can only be determined by an examination of all the circumstances."

[107] *Res ipsa loquitur* is of no application in medical legal cases as explained above.

THE RESULT:

[108] That being so, and in this matter, I find that the *maxim res ipsa loquitur* is of no application.

[109] It remains then only to consider whether the principle set out above might assist plaintiff if it is accepted that she is not in position to produce evidence on the aspect of the surgeons alleged negligence and if that evidence is particularly within the knowledge of defendant, in which event less evidence will suffice to establish a prima facie case, and in the absence if evidence from defendant the burden upon defendant is lightened.

[110] As pointed out above, even in that event, I would still have to be satisfied that plaintiff had discharged the onus. On the evidence, there is nothing before me relevant to what occurred in the operating theatre or of the circumstances surrounding the alleged negligence whatsoever.

[111] There is the general statement of Dr Muller relevant to the fact that swabs should not be left in patients and that this rarely occurs, but no reference whatsoever to the circumstances of this actual operation or of the actions or inaction of the surgeon or nursing staff applicable.

[112] Whilst the Settlers Hospital Records were admitted in the Rule 37 minute as being factually correct these were not produced or placed before me in any shape or

form. The remaining Hospital records (being those of Dora Nginza) were referred to in an earlier minute (Para 11.10) and were admitted. These were however not referred to in trial at all and were not placed before me or referred to in evidence.

[113] Plaintiff's expert evidence in his expert notice did not deal with his opinion on factors relevant to the first operation and such evidence on this aspect as there is, was limited to that elicited briefly in cross-examination and further briefly explored in re-examination.

[114] There is not a word of evidence relevant to the nurses' role in the particular matter or the nurses duty, standard of care or obligation in this regard relevant to this actual operation, other than the very general statements of Dr Muller.

[115] It is not established (on the evidence) that the occurrence is something upon which plaintiff is not in a position to produce evidence or that this was particularly in defendants knowledge. I accept obviously that the plaintiff was anesthetised at the time of operation, but she subsequently had access not only to the hospital and medical records (which could conceiveably have produced support for her case). It was not established that she had no access to the medical personnel relevant and certainly she could have had access to experts on the subject who could have been led (at least on the Dora Nginza records) and on the actual or probable circumstances of the occurrence.

[116] In respect of the approach that less evidence is required of a plaintiff to establish a *prima facie* case where a defendant is particularly in possession of the relevant evidence, I have been unable to find any direct authority for the application of this to medical legal claims, and it seems to be an idea that on occasion becomes conflated with the application of the *res ipsa loquitur* maxim. It is of course a matter of general principle and perhaps the point is that in medical negligence cases it is often the case (if not always) that various avenues of enquiry, evidence gathering and consequent expert evidence make the principal inapplicable as I have found to be the case in this matter.

[117] In this matter it is certainly foreseeable that leaving a swab in a wound that is not meant to be left behind (which Dr Muller suggests is the case) would cause harm to the patient, there is no detail in the evidence, and mostly no evidence at all, as to the reasonable steps that should have been taken in this operation to guard against this happening or that the surgeon or nursing staff failed to take such reasonable steps in this matter. Put otherwise to reach the conclusion that those referred to were negligent I must examine the surrounding circumstances of this particular operation itself but am unable to do so as this is insufficiently before me. The occurrence itself, which has certainly been established, is wholly insufficient for this purpose.

[118] There is nothing before me which enables me to place myself as nearly as possible in the exact position in which the surgeon and nursing staff found themselves when conducting the particular operation, or the circumstances relevant to determine whether they acted or failed to act with reasonable care or negligently.

[119] In the circumstances of this matter, and absent virtually any evidence at all on this aspect of the matter, bar the fact that a swab was found in the wound and the doctor's evidence that this should not occur, I am unable to find that plaintiff has discharged the onus which fell upon her to establish the negligence of either surgeon or nursing staff in the theatre relevant to the swab being left behind.

[120] As was pointed out by Innes CJ (at least at that time) the danger of an undiscovered swab has been described as one of the bugbears of abdominal surgery. Whilst no doubt, and as Dr Muller pointed out, there are internationally accepted procedures in place to guard against this, there is virtually no medical or factual evidence before me in which to assess the suggested negligence on the part of the medical staff concerned.

[121] I should say that had the *maxim res ipsa loquitur* been applicable to this matter and had I been able to rely thereon, the result in this matter may well have been completely different and in those circumstances the absence of an explanation by the defendant may well have been sufficient, by way of inferential reasoning, to establish negligence on the part of the medical staff concerned. I am unable, however, in the circumstances discussed above to make such a finding as I regard myself bound by **Van Wyk (supra)** and I respectfully consider the contrary view taken in **Ntsele (supra)** at paras [105-121] relevant to *res ipsa loquitur* to have been incorrectly decided.

[122] In the circumstances I am of the view that plaintiff's case fails to demonstrate sufficient factual evidence to satisfy the negligence test and has failed to show not only the reasonable steps that the medical staff nurses and surgeon should have taken in the circumstances of the operation she underwent but also that they failed to take such steps. This is a factual question upon which there is simply no evidence relevant to the operation itself the plaintiff has thus failed to discharge the onus resting upon her in this regard.

THE ORDER:

[123] In the circumstances I make the following order:

> **Plaintiff's claim is dismissed with costs, such costs to include those occasioned by the special plea.**

_____

M.J. LOWE
JUDGE OF THE HIGH COURT

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