Inference of negligence – is it time to jettison the maxim *res ipsa loquitur*?

By Pat van den Heever and Natalie Lawrenson

Some accidents occur in circumstances where the evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is, or should be, to the defendant. The maxim of *res ipsa loquitur* is generally considered to be no more than a convenient label to describe situations where notwithstanding the plaintiff's inability to establish the exact cause of the accident the fact of the accident by itself is sufficient to justify the conclusion that the defendant was probably negligent, and in the absence of an explanation by the defendant to the contrary that such negligence caused the injury to the plaintiff (P van den Heever and P Carstens *Res Ipsa Loquitur &* Medical Negligence: A Comparative Survey (Cape Town: Juta 2011) at 2). In *Horner v Northern Pacific Benefitial Association Hospitals Inc* (1963) 382 P.2d 518 at 523 Hale J expressed the following instructive thoughts on the maxim: 'The rule is a good one, and it ought not to be muddled with over-refinement and the casuistry so frequently the by-product of overwriting and overtalking about the same subject'.

In *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) Ponnan JA, writing for an undivided Bench (Leach JA, Saldulker JA, Mbha JA and Mathopo AJA concurring) referred to the judgment in *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) where Brand JA, after referring to the seminal case of *Van Wyk v Lewis* 1924 AD 438 pointed out that the maxim of *res ipsa loquitur* 'could, rarely, if ever, find application to a case based on alleged medical negligence.' Ponnan JA explained that the evident reluctance of our courts to apply the maxim in cases of this nature is the fact that things do sometimes go wrong in surgical operations and medical treatment due to misadventure. To hold a medical practitioner negligent simply because something went wrong would be to 'impermissibly reason backwards from effect to cause' (para 9).

The court then provided the following exposition of the maxim with reference to relevant authorities (which authorities are trite and therefore not repeated here): 'The maxim is no magic formula ... . It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified … . It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself … – where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading … – it being trite that the onus resting upon a plaintiff never shifts … . Nothing about its invocation or application, I dare say, … is intended to displace common sense' (para 10). The court also pointed out that it is inappropriate to resort to piecemeal processes of reasoning and to split up the inquiry regarding proof of negligence into two stages. The court does not adopt the piecemeal approach of first drawing the inference of negligence from the occurrence itself (regarding this as *prima facie* evidence) and then considers whether this inference has been rebutted by the defendant's explanation. There is only one inquiry, namely whether the plaintiff, having regard to all the evidence in the case, has discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant. In this regard, Ponnan JA

opined that it would be better to leave the question in the realm of inference than to 'become enmeshed in the evolved mystique of the maxim' (para 11).

The defendant against whom the inference of negligence is sought to be drawn may produce evidence in order to explain that the occurrence was unrelated to any negligence on her part. The defendant's explanation will be tested by considerations such as probability and credibility. At the end of the case, the court has to decide whether, on all the evidence, probabilities and inferences, the plaintiff has discharged the *onus* of proof on the pleadings, on a preponderance of probability, just as the court would do in any case concerning negligence. The court then concluded that in every case, including one where the maxim of *res ipsa loquitur* is applicable, the inquiry at the end of the case is whether the plaintiff has discharged the onus resting on her in connection with the issue of negligence. In this regard, the court suggested that the time may well have come for our courts to jettison the maxim from our legal lexicon.

Although medical negligence cases sometimes involve questions of factual complexity and difficulty, possibly requiring evaluation of technical and conflicting expert evidence, the trial procedure, which is essentially the same as in other cases, is designed to accommodate those issues and thus no special difficulty ought to be encountered to deal with them. When an inference of negligence would be justified and to what extent expert evidence would be required would depend on the facts of the particular case. A court is not called on to decide the issue of negligence until all of the evidence is concluded (see *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573 H). Any explanation offered by the defendant will thus form part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the injury was caused by the negligence of the defendant (see *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd* 1982 (4) SA 890 (A) 897 G – H).

In the *Goliath* matter Ponnan JA found that the court of first instance allowed itself to be diverted away from the inference of negligence displayed by the evidence in this case from its 'heightened focus on the applicability of the maxim *res ipsa loquitur* to cases based on alleged medical negligence'. In this regard the court held that the important destinction between onus of proof and an obligation to produce evidence had become blurred. At the close of the plaintiff's case in *Goliath* the plaintiff had produced sufficient evidence to support an inference of negligence on the part of one or more of the medical staff in the employ of the defendant who treated the plaintiff. The court pointed out that it was important to bear in mind that in a civil case it was not necessary to prove that the inference she requests the court to draw is the only reasonable inference. It would suffice for her to persuade the court that the inference that she advocates is 'the most readily apparent and acceptable inference from a number of possible inferences' (see *AA Onderlinge Assuransie- Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) and *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA)). In *Goliath* the defendant, in failing to produce any evidence whatsoever, took the risk of judgment being granted against it. The defendant had been at liberty to adduce evidence to show that reasonable care had been exercised towards the plaintiff by the defendant's employees intra-operatively, which it declined to do. No version was put

during cross-examination to either the plaintiff or her expert witness. No reasons were offered by the defendant to explain why the medical staff who treated the plaintiff were not called as witnesses (para 19). In *Ratcliffe v Plymouth and Torbay Health Authority* [1998] EWCA Civ 2000 (11 February 1998) Lord Justice Brooke observed that: 'It is likely to be a very rare medical negligence case in which the defendants take the risk of calling no factual evidence, when such evidence is available to them, of circumstances surrounding a procedure which led to an unexpected outcome for a patient. If such a case should arise, the judge should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence: The defendants' hypothesis must have the ring of plausibility about it' (para 48).

The *Goliath* judgment provides authority for the proposition that a plaintiff in a medical negligence action is now at liberty to allege that the facts, as known to the plaintiff at the time he or she pleads his or her case, give rise in themselves to a *prima facie* case of negligence. This may or may not be upheld at the end of the trial, but at the pleading stage it has the effect of compelling the defendant to provide an exculpatory explanation or run the risk of judgment being granted against him. Once the defendant has produced an explanation the question will be whether the court has been satisfied that in the light of all the evidence at the trial that negligence and causation have been proved. In the course of reaching that conclusion the judge may or may not be prepared to draw the inference originally invited by the plaintiff (see *Hussain v King Edward VII Hospital* [2012] EWHC 3441 (QB) and *Thomas v Curley* [2013] EWCA Civ 117).

The occurrence giving rise to the *prima facie* inference of negligence should be one that in common experience does not ordinarily happen without negligence. The inference of negligence must be derived from the facts of the occurrence alone. The inference of negligence is only permissible while the cause remains unknown. The instrumentality that causes the harm or damage must be within the exclusive control of the defendant or of someone for whom the responsibility or right to control exists. The *prima facie* inference of negligence may call for some degree of proof in rebuttal of the inference. In general the explanation must comply with the following principles:

- In cases where the taking of a precaution by the defendant is the initial and essential factor in the explanation of the occurrence, and the explanation is accessible to the defendant but not the plaintiff, the defendant must produce evidence sufficient to displace the inference that the precaution was not taken. The nature of the defendant's reply is, therefore, dependent on the relative ability of the parties to contribute evidence on the issue.
- The degree of persuasiveness required by the defendant will vary according to the general probability or improbability of the explanation. If the explanation is regarded as rare and exceptional in the ordinary course of human experience, much more would be required by way of supporting facts.
- Probability and credibility are considerations that the court will employ to test the explanation.
- There is no onus on the defendant to prove his explanation. (See P van den Heever and P Carstens *op cit* 34-35 and the authorities referred to.)

‘Lawyers are often accused of using Latin tags to befuddle the public and demonstrates that the law is far too difficult to be left to mere laymen. Some Latin phrases, seem to befuddle the lawyers themselves. *Res ipsa loquitur* is a case in point’ (see van den Heever and Carstens *op cit* at 183) .

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