The judgment of Sibisi NO v Maitin 2014 (6) SA 533 (SCA) (see also See 2015 (Jan/Feb) DR 54) saw the issues of medical negligence and the absence of informed consent once again considered by the Supreme Court of Appeal (SCA). This article focuses on the nature and requirements underlying the two grounds of liability and aims to show that the court’s decision are untenable.

Facts and decision in the Sibisi case

The plaintiff in this matter instituted a claim on behalf of her minor daughter, who had suffered bodily injuries following natural birth. The injuries and sequence included damage to the infant’s brachial plexus (a network of nerve fibres that run from the spine through to the shoulder and down the arm and hand) as a result of traction during childbirth, resulting in Erb’s palsy.

The claim was based on medical negligence, and absence of informed consent in the alternative. The defendant was absolved from liability on both grounds. The court reasoned that once the plaintiff has established medical negligence, the question of informed consent and of wrongfulness automatically became moot: The plaintiff ‘…would still have to establish negligence on the part of [the defendant] to succeed in the action … [based on absence of informed consent]’ (at para 22). Ironically this court refers to Castell v de Greef 1994 (4) SA 408 (C) with regard to informed consent, but like others before it (Rex v Jolly and Others 1923 AD 176) at 721B – D). Without informed consent, the doctor should be liable based on common law assault, defined in law as the ‘… intentional application of force or violence … to the person of another’ (Rex v Jolly and Others 1923 AD 176). In the case of assault, the fault element is measured against the standard of the reasonable skill and care, foreseeability and preventability of ensuing harm, and is measured against the standard of the reasonable expert in the circumstances (Mitchell v Dixon 1914 AD 519 and Van Wyk v Lewis 1924 AD 438). It is essentially a matter of unskilful or incompetent medical treatment (Lymbery v Jeffries 1925 AD 236; NJB Claassen and T Ver- schoor Medical negligence in South Africa ( Pretoria: Digma Publications 1992)).

The failure to obtain informed consent has occasionally been deemed medical negligence (Lymbery; Richter and Another v Estate Hammann 1976 (3) SA 226 (C) and the Broude matter). Technically though, the act of administering medical treatment, however favourable the outcome, or laudable the doctor’s motives, is nothing but an act of violence or physical force on the patient’s person (Strauss ‘Bodily injury and the defence of consent’ (1964) SAJ 187; SA Strauss and MJ Strydom Die Suid-Afrikaanse geneeskundige reeg (Pretoria: Van Schaik 1967) at 180 – 181 and Esterhuizen v Administrator, Transvaal 1957 (3) SA 710 (T) at 721B – D). Without informed consent, the doctor should be liable based on common law assault, defined in law as the ‘… intentional application of force or violence … to the person of another’ (Rex v Jolly and Others 1923 AD 176). In the case of assault, the fault element is measured against the standard of the reasonable skill and care, foreseeability and preventability of ensuing harm, and is measured against the standard of the reasonable expert in the circumstances (Mitchell v Dixon 1914 AD 519 and Van Wyk v Lewis 1924 AD 438). It is essentially a matter of unskilful or incompetent medical treatment (Lymbery v Jeffries 1925 AD 236; NJB Claassen and T Ver- schoor Medical negligence in South Africa ( Pretoria: Digma Publications 1992)).

The common law proof of negligence and absence of consent

Common law requires that the five elements of a delict (conduct, causality, wrongfulness, capacity and fault) must be proven in order to succeed with a delictual claim. The fault element may take either the form of dolus or culpa.

If a claim is based on medical negligence as ground of liability, negligence rather than intent, must be proven. The test for medical negligence relates to reasonable skill and care, foreseeability and preventability of ensuing harm, and is measured against the standard of the reasonable expert in the circumstances (Mitchell v Dixon 1914 AD 519 and Van Wyk v Lewis 1924 AD 438). It is essentially a matter of unskilful or incompetent medical treatment (Lymbery v Jeffries 1925 AD 236; NJB Claassen and T Ver- schoor Medical negligence in South Africa ( Pretoria: Digma Publications 1992)).

The court’s decision are untenable.

The court’s approach in Sibisi NO v Maitin failed to take cognisance of the fact that Sibisi NO v Maitin 2014 (6) SA 533 (SCA) has conflated the issues of negligence and intent, and that applying the Sibisi judgment in future would almost certainly result in legally unsound consequences.

Conclusion

This test for medical negligence is distinct from that for common law assault. While it was not traditionally required, in order to successfully institute a claim on account of an absence of informed consent, to prove negligence on the part of the attending physician, following the Sibisi judgment one must prove all five elements of the delict and, including both possible forms of fault (first negligence, and then also intent), rather than just intent.

Medical negligence and the absence of informed consent are and should be acknowledged as independent alternative claims. I submit that the court in Sibisi has conflated the issues of negligence and intent, and that applying the Sibisi judgment in future would almost certainly result in legally unsound consequences.

Comments on the Sibisi judgment

The court’s approach in Sibisi seemingly fails to take cognisance of the fact that wrongfulness is evaluated separately from fault, and that the form of fault in absence of informed consent (which amounts to common law assault) is that of dolus rather than culpa, as is the case in medical negligence. From the facts of the case, it appears that Mrs Sibisi would not have discharged the onus of proof on either ground of liability in any event, if the court had applied the common law correctly. The practical outcome would have remained the same. The common law has been re-written to make the proof of negligence prerequisite to the proof of intent. The plaintiff who wishes to prove an absence of informed consent faces a new ‘dual burden’ of proof.

By

Liezl Zwart

BA LLB (UP)

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