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Medical negligence and *res ipsa loquitur* in South Africa

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The inter-relationship between Medicine and Law is most commonly brought to the fore by cases involving medical negligence. This relationship needs to protect all parties concerned based on the probability of reasonableness in terms of who performs the act as well as the patient affected by the act in question.

The *res ipsa loquitur* (the case speaks for itself) doctrine is currently not being used in the South African courts. This paper discusses what is considered medical negligence and the use of the *res ipsa loquitur* doctrine. A short overview of the international perspective is given, followed by a discussion on how negligence matters are dealt with by the South African courts.

Res ipsa loquitur, sed quid in infernos dicet?

(The facts speak for themselves, but what the hell does it say?)

Hunter S Thompson[1]

The evolution and transformation of medical care is rapidly advancing with newer technologies and treatment modalities, which concomitantly increase the risks related to these new developments. There is also a changing perception of health services among users, which adds to the pressure that professionals are under. This has resulted in the need for ethicists and lawyers to face new issues of medical malpractice and an increase in the number of claims against practitioners.

Medicine and the Law have been strange bed partners since ancient times, with the interrelationship between the two seen in the Hippocratic oath and the Hammurabis code, which contain a number of legal and ethical provisions that guide the behaviour of medical practitioners.[2] In addition, the South African Constitution,[3] the Bill of Rights,[4] the National Health Act[5] and various other Acts provide a legal framework for the practice of medicine. The South African Constitution[3] identifies health as a fundamental right, resulting in a greater demand for health care, which already faces many challenges in terms of resource constraints.

Mistakes can be made in all areas of one's professional life, and following medical mishaps the debates related to these misfortunes, both internally and with others, can be damaging to a doctor's career, reputation and psychological wellbeing. In some instances these mistakes may be considered as negligence and have legal and financial consequences.

Strauss, as quoted by Classen and Verschoor,[6] points out that the USA leads by far with regard to number of malpractice claims and that there has been an increase in these claims in the UK and many European countries. In South Africa it has been stated that numbers are increasing, as are requests for legal advice from protection societies. The Health Minister has also stated that malpractice claims cost the state R42 million during 2007 in compensation for both in- and out-of-court settlements.[7] The Health Professions Council of South Africa (HPCSA) heard 134 cases of negligence during 2006 and 55 cases up to May 2007. These cases were either served with fines of up to R10 000 or received a suspended sentence.[8] It should be remembered that these are only cases that were reported and subsequently acted upon; there are many more that occur every day, but are overlooked or never reported.

Figures of how many cases were tried in the South African courts were not readily available, but the problems noted from experience included lengthy delays from the time of the incident to the actual court case; the massive expenses involved in the litigation process; and a sense that the plaintiff starts off the process at a disadvantage, since practitioners are more likely to find support for their actions from expert testimony, while the plaintiff has to depend on the skill and expertise of the legal team representing the case to help prove negligence.

The maxim *res ipsa loquitur*, which means 'the facts speak for themselves', is being used in other countries for negligence cases, but not in South Africa. This maxim would shift the advantage to the plaintiff in cases of negligence, thereby supporting the patient's constitutional right in terms of section 27(a),[3] and also provide a fair balance of representation in the doctor-patient relationship.

This paper discusses medical negligence and the use of the *res ipsa loquitur* doctrine.

What is negligence?

Professional negligence is considered separately to medical malpractice, which encompasses not only the former, but also intentional or negligent acts, including breach of confidentiality and fiduciary doctor-patient relationships. Sir William Blackstone was the first to use the phrase medical negligence in 1768 when he wrote about how trust is broken between the patient and the practitioner, and tends to the patient's destruction.[9]

The legal consequences of negligent actions could be disciplinary action by the Health Councils, a criminal prosecution, usually where there is gross misconduct causing intentional harm or manslaughter, or civil action, where damages could be claimed for negligent or intentional wrongs.[10]

In essence, negligence is a form of culpable carelessness, where there is a risk of harming another.

According to Herring,[11] there are three components of proof.

1. The professional being sued owed the claimant a duty of care, which is a reasonable standard of care required by the law.
2. The professional breached the duty of care, where the required action should be that acted in accordance with a practice accepted as proper and reasonable.
3. The breach of duty of care caused the claimant loss, where just proving negligence is insufficient to confer blame. The patient needs to have suffered loss or injury as a result.

Proof of negligence

The proof of negligence rests with the plaintiff in civil cases and must be based on a preponderance of probabilities. In criminal cases, the onus of proof rests with the state, and this has to be proven beyond any reasonable doubt. Expert evidence can be offered from both sides and for the practitioner can assist in determining what would be considered reasonable under the circumstances.[6]

Other than expert evidence, an exception to proving negligence can be used by the plaintiff to show that the defendant deviated from standard medical practice. This exception is based on the maxim *res ipsa loquitur*. The doctrine allows the plaintiff to infer negligence of the alleged wrongdoer merely from the fact that the incident, which was under the exclusive control of the defendant, actually happened, that the incident would not have happened in the absence of negligence, and that the plaintiff did not contribute to the harm by his own negligence. The burden of proof then falls on the defendant to refute this *prima facie* inference of negligence that has been created.[1]

Res ipsa is a rule of evidence, not a rule of substantive law, which permits a supposition of probable cause based on circumstantial evidence. The concept was first advanced in 1863 by Baron Pollock,[1] when a barrel of flour rolled out of a second story warehouse window and fell upon a passing pedestrian. With no other explanation for the occurrence, the defendant was found to be negligent under *res ipsa loquitur*. The concept was then applied to other cases involving injury.

Medical negligence in the courts

The American (USA), Australian and British (UK) legal systems by far exceed all other countries in medical negligence claims being heard in courts. A culture of compensation has resulted in increasing insurance premiums for practitioners, increasing lawyers' fees as well as a tendency for the practitioner to practise defensive medicine.

In the USA, cases may go through either the State system or the Federal system. In the UK, the county courts deal with low-level civil disputes and the High Courts with the more serious cases, and then appeals are heard in the Court of Appeal and ultimately the House of Lords. The end result is more often than not a cost war, with legal and administrative fees accounting for 60% of the overall costs of the process.[12] The system fails patients and providers in that the cases take a long time to compensate patients and jury verdicts differ with respect to the patient's needs or the quality of care of the practitioner, sometimes resulting in a 'blame and shame' situation. It is felt that the approach to litigation should include learning from one's errors in order to prevent harm in the future.

Professor Peters[13] examined numerous studies of malpractice cases from 1989 to 2006 in the USA and showed that contrary to popular belief, the defendants and their experts were more successful at persuading juries in their favour than the plaintiffs.

Most courts in the USA and the UK recognise the use of the *res ipsa loquitur* doctrine, which then creates an inference of negligence but in most cases does not necessarily lead to a guilty verdict. The most common application of the doctrine is in cases where a swab, sponge or piece of instrument was left inside a patient's body following surgery. The jury, however, is still free to reject the inference created by the doctrine and the plaintiff carries the burden of proof, especially if the defendant does not produce evidence to rebut the inference.[14]

In Canada, on the other hand, Neff and Cook[15] showed in a study of malpractice cases from 1975 to 1988 that judges rejected the liberal use of the *res ipsa loquitur* evidentiary rule. Of 142 cases the rule was proposed in 37, but it was only applied to 14 cases and the defendants were found liable in only 9 of the cases in which it was applied.

Information from other developing countries within Africa was not readily available from the research sources used.

The international courts therefore vary in their approach to medical negligence cases in terms of the verdict, the use of the *res ipsa loquitur* doctrine and the amount of compensation given.

Medical negligence in the South African courts

The evolution of medical malpractice in South Africa according to von Dokkum would require progressive change, but this has not been evident in South African law.[16] Some changes have related to an emphasis on informed consent, thereby moving away from the paternalistic approach. Despite the changes to the South African law, the expectation that this would result in an increase in medical negligence cases has not been fulfilled in comparison with the annual trend in other countries. Reasons for this may be that the citizens are not aware of their rights or that the process of litigation is too expensive for them to pursue.

At our hospitals, mistakes are being made on a daily basis, sometimes resulting in the death of the patient. Procedures are followed and patients are counselled, but very few of these cases are taken forward as acts of negligence. Incidences of note are, for example, when a medical officer injected calcium chloride into a neonate intravenously instead of saline. The vessels immediately crystallised, resulting in the death of the baby. In another incident, a pregnant paraplegic woman who was only expected to deliver after 2 weeks was sent home because there were no available beds. She delivered that night, and the baby died because the cord was around the neck. A third incident was when a nursing sister unclipped the nasogastric tube in order to change a baby's feed and at the same time unclipped the intravenous line in order to give it medication. The lines were switched when replaced, and this was only noticed 7 hours later. The baby subsequently died as a result of clogging in the blood vessels. Many more similar incidences can be quoted from experience, but very few of the patients even consider litigation and when they do, settlements are more often than not reached out of court with small payouts in compensation.

Can these three cases be considered to represent negligence, and how would the courts respond if any claims were made?

Medical negligence in South Africa, according to Carstens and Pearmain,[17] started with an Old Cape decision in *Lee v Schönnberg*.[18] The details of the case are unclear except that the plaintiff lost both his legs in an accident and a physician was consulted. Judge C J de Villiers brought medical negligence to the fore when he stated that:

'*There can be no doubt that a medical practitioner, like any professional man, is called upon to bring to bear a reasonable amount of skill and care in any case to which he has to attend: and that where it is shown that he has not exercised such skill and care, he will be liable in damages*.'

The case was referred to again only in 1910, in *Kowalsky v Krige*,[19] when the courts demanded that surgeons should display a reasonable amount of care and skill that would be considered reasonably competent in treating patients.

The South African courts, in contrast to other countries, have declared that *res ipsa loquitur* is not applicable in medical situations. One such case, *Mahon v Osborne*,[20] where the surgeon left a swab in the patient's stomach after an abdominal operation, was heard in the English Court of Appeal and a decision upholding the *res ipsa* principle was taken. The basis of this as explained in the judgement was that the surgeon did not exercise due care to prevent the swab from being left there and that the action itself could be considered negligent.

In a similar case in South Africa, *Van Wyk v Lewis*,[21] an appendicectomy and gallbladder drainage was performed. Owing to sepsis, the area had to be packed with swabs. There was some urgency for the patient to be removed from the operating table, and the surgeon proceeded to close up the wound once he was satisfied (and the theatre sister had confirmed) that all the swabs were accounted for. Some months later, the patient pulled out a cloth similar in size to a swab with the tape still attached. In this case, the courts did not apply the doctrine of *res ipsa loquitur*, since the judge felt that the surgeon could not be held liable and it was the duty of the theatre sister to ensure that the swab count was correct. The courts felt that in determining negligence, all circumstances need to be considered. In rejecting the *res ipsa* principle, Judge A J Wessels stated that '*The mere fact that a swab was left in a patient is not conclusive of negligence*.'

These cases clearly show how two similar incidents can have a different outcome if the doctrine is applied, and raise questions about whether or not the South African courts are protecting the medical professionals and thereby perpetuating the power imbalance that is present in the doctor-patient relationship. While the swab count was the responsibility of the theatre sister, the doctor also had a responsibility to exercise due care to ensure that reasonable measures were taken in the performance of the operation.

The doctrine was again explicitly rejected in *Mitchell v Dixon*,[22] where a doctor inserted a needle into the chest of the patient in order to aspirate a left-sided pneumothorax. During the procedure, the needle broke off and all attempts at retrieval, including an incision, were fruitless. The physician however exercised due care by ensuring that there were no puncture wounds as a result of the broken needle and the *res ipsa* principle was not applied because it was felt that there was no *prima facie* proof of negligence on the part of the doctor concerned.

There have been other South African cases where the courts were unwilling to apply the *res ipsa loquitur* principle for medical negligence.[23-26]

In *Castell v de Greef*[27] the judgment made by J Scott reflected an appreciation for duty of care, diligence and skill, as well as the recognition that mishaps could occur. A plastic surgeon performed bilateral mastectomies and prosthetic breast implants, but subsequent infection resulted in necrosis and the need for repeat procedures to correct the problem. Despite the judge's view of the lack of duty of care, he noted that since infection is a known risk of any surgical procedure, the fact that it happened (*res ipsa loquitur*) did not imply negligence on the part of the practitioner.

Where there are different schools of thought or opinion related to specific therapeutic or diagnostic procedures, the accepted standard would be that generally accepted by that particular school of thought. In the case of *Pringle v Administrator*,[26] the surgeon said that he had 'tugged too hard' when trying to remove a lymph node on the trachea during a mediastinoscopy procedure, and in the process punctured the superior vena cava. The court relied heavily on expert testimony and the problem arose when the experts could not agree with one another, resulting in the courts deciding in favour of the defendant. This highlights that different practices do not necessarily indicate negligence, but that cases must be viewed in the context within which they occur. The *res ipsa loquitur* principle could be applied to this case if it could have been shown that the outcome in question would not have resulted if there were not negligence.

Returning to the cases described in our hospitals – all three cases could be considered as negligent if the *res ipsa* principle is applied, since the actions were not those which a reasonable person in the same position would have done as standard practice. All cases resulted in the death of a baby. The only credible explanation would be that of an honest error. Another reason was the shortage and tiredness of the staff, but would a court consider this sufficient not to prove negligence? I believe that in these cases the South African courts would have difficulty in proving negligence based on the balance of probabilities, but if the *res ipsa* was used, the defendant would probably not be able to defend the claim.

Criticism of *res ipsa loquitur*

The South African courts have been applying *res ipsa loquitur* to other delictual claims for over a century, but on the basis of a ruling that the doctrine was not applicable in the *Van Wyk v Lewis*[21] trial of 1924, it has not been used in medical negligence claims. Van den Heever,[28] in his thesis comparing the legal systems and the application of the doctrine of *res ipsa loquitur* in South Africa, the UK and the USA, showed that the three systems differ substantially. The US system he notes as being too liberal and unstructured. The South African system shows more legal clarity, while the English approach appears to be one we can accept. He states further that the Constitutional principle of equality supports the application of *res ipsa* to medical negligence cases.

The above-quoted cases such as *Van Wyk v Lewis*,[21] *Mitchell v Dixon*,[22] *Pringle v Administrator*[26] and *Castell v de Greef*[27] all provide *prima facie* evidence of negligence that would not have occurred as a standard practice. All that would be required in addition would be evidence, either exculpatory or from experts, in order to confer blame, without losing the maxim of *res ipsa loquitur*. However, it should also be noted that any surgical procedure carries with it inherent risks and the mere occurrence of an adverse event following such a procedure does not necessarily confer negligence.

Law, in general, is based on logic and common sense. As such, the application of *res ipsa loquitur* to cases of medical mishaps is a commonsense approach to using the facts of the event and, from early on in the process, circumstantially calling it negligent. This further allows the defendant to then clarify the context of the event.

Van den Heever[28] mentions that the setting of the precedent concerning *res ipsa loquitur* shifts the balance of power towards the provider in the doctor-patient relationship. Allowing the doctrine of *res ipsa* to enter into the equation gives the plaintiff some advantages and hence satisfies the right to equality in terms of section 9 of the South African Constitution and the right to fairness in litigation as stipulated in section 34.[3]

This however falters when the dimension of limited resources is considered. The South African health systems cannot sustain all citizens' rights to health and health care. The *res ipsa* principle requires that the practitioner functions in terms of his duty of care as would a reasonable doctor. The test that will be used will consider what the reasonable standard was under those particular circumstances, thereby creating a 'slippery slope', where the practitioner

could argue that due to resource constraints and inadequate facilities there was no duty of care. The practitioner can only explain what happened at the time as would be reasonably expected and would have difficulty explaining any latent effects, which could have been caused by other reasons.

A further problem may arise for the plaintiff, where if the defendant provides a reasonable explanation of not being negligent, the burden of proving that a negligent action caused the event still rests with the plaintiff. The scales that according to *res ipsa loquitur* were supposed to place the burden of proof on the defendant once again are tipped towards the plaintiff having to prove negligence, thereby defeating the purpose. The plaintiff has the additional burden of finding an expert who is willing to speak against his peers in a court of law.

Conclusion

In South Africa, the population profile is such that the majority of the population depends on public health care. The burden of disease is rapidly changing, with practitioners often having to decide who will receive this treatment, thus opening up a host of ethical and legal dimensions to the debate. Ultimately, the law is developed to protect the citizens of the country and its content should reflect this.

Medical negligence will always be a part of medical practice, and just as our health services need to be regulated and policy driven, so should our legal system. Where they interlink, these policies must be jointly developed so that practitioners do not end up practising defensive medicine, so that malpractice insurance does not cripple the profession, with cost often being passed onto the patients, and so that litigation is not viewed as a quick means of making money.

The *res ipsa loquitur* principle has its merits in that it will protect the plaintiff by assisting to introduce the claim of negligence based solely on an inference, but on the other hand it could become another means of blocking the courts because of the demand that may be created. Its implementation in our legal system may be logistically more difficult than simply inferring negligence and therefore has to be considered cautiously. Despite this, the implementation of the *res ipsa* principle could facilitate a more equitable legal platform for the plaintiff, which ultimately is what the South African Constitution[3] is meant to uphold.

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