HH 141-2009
HC 403/08

OLIVER CHIBAGE
versus
KUDZAI SIBUSISO NDAWANA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 10 and 11 June, 14 July, 14 and 15 September and 18 November 2009

TRIAL CAUSE

J Shekede for plaintiff
S Mahuni for defendant.

MAKARAU JP: The plaintiff is a Commissioner in the Zimbabwe Republic Police. The defendant, a duly qualified dental surgeon, was at the material time also a member of the Zimbabwe Republic Police. She practiced her dentistry at the Police Camp Hospital and also at her surgery in town.

In June 2007, the plaintiff consulted the defendant, complaining of sensitivity to his teeth. She examined him at the police hospital and later invited him to her surgery where she carried out some work on him. The work entailed extracting a tooth that was embedded in his gum. The extraction was not successful and she referred him to Professor Chidzonga, a specialist in the field who finally extracted the tooth and also found out that in the process, the plaintiff had suffered a fractured jaw. When the plaintiff's superiors visited him at his house, a decision was made that he be flown to South Africa for further management and treatment. He was duly attended to in South Africa and the fracture was reduced.

On 24 January 2008 the plaintiff issued summons out of this court against the defendant. He alleged that she had been negligent and had caused the fracture in his jaw. He claimed against her the sums of R10 000-00 for pain and suffering, R10 000-00 for loss of comfort and R78 000-00 as special damages.

The suit was defended.

In her plea, the defendant denied that she was negligent as alleged or at all. She further denied knowledge of the injury sustained by the plaintiff and in particular, that she fractured his jaw and suggested that this occurred at Professor Chidzonga's surgery where the tooth was extracted.

At the pre-trial conference of this matter, the parties settled the issues for trail as follows:

1. Whether or not the defendant undertook to perform surgery on the plaintiff with such professional skill as is reasonable for a qualified dentist?
2. Whether or not the defendant carried out the surgery on the plaintiff negligently as alleged by the plaintiff?
3. Whether or not the plaintiff suffered damages as a result of defendant's negligence and if so the quantum thereof.

At the trial of the matter, the plaintiff gave evidence. His evidence was as follows.

In early 2007, he visited the Police Camp Hospital. He was complaining of sensitivity in his teeth. He sought professional assistance from the defendant. She advised him that he required a dental cleaning session and that she needed to examine the exposed roots of his teeth. On the first visit, she applied some medication to his gums. She did not have adequate equipment at the hospital and could offer him treatment at her surgery. He accepted the offer. A week later he visited her surgery and she requested him to have an x-ray. A week later she called him and advised him that she had discovered a buried molar on the right side of his mouth. The tooth had to be extracted. On 26 June, he attended at her surgery for the tooth to be extracted. After taking him through the process, the defendant attempted to extract the tooth using a variety of tools. After some time he grew tired and was also in pain. She advised him that she had almost exposed the tooth. He then felt a sharp pain and told her to stop. He had been on her chair for two and a half hours. She advised him that he now required theater and she would refer him to Professor Chidzonga. She telephoned Professor Chidzonga's surgery and explained to them what she had already done. She wrote his a letter of referral and he left her surgery. He could feel that his jaw was heavy. It was painful.

At Professor Chidzonga's place he was taken into the consulting room and by that time he could not talk. Professor Chidzonga took a small x-ray of the area. He then extracted the tooth in about 20 minutes. He suspected that the plaintiff had fractured his jaw. He could not develop the x-ray at that time and allowed the plaintiff to go home on a prescription for a mouth wash, a pain killer and some antibiotics. As he was driving home, he sent a message on his mobile phone advising the defendant that he was in terrible pain and was suspected of

having fractured his jaw. His mouth was now quite heavy and he had to keep on holding his lower jaw. He was also bleeding profusely.

When he reported back to professor Chidzonga's rooms the following day, the fracture was confirmed. Professor Chidzonga cleaned his mouth and immobilized the jaw. He placed him on a special diet and prescribed more medication.

The Commissioner- General of police visited him at home. At this time his entire face was swollen. He was incoherent. Arrangements were made for him to be flown to South Africa where he was accompanied by his wife.

In South Africa, the wires that had been used by Professor Chidzonga to immobilize his lower jaw were removed and replaced by bracelets. He was placed on a liquidized diet. On 29 July, he returned to the clinic in South Africa where a few of the bands holding his jaw together were removed. He could open his mouth by a fraction and could now use a spoon to eat porridge and yoghurt. In August, all the bands were removed and he was referred for physiotherapy. Around September, he returned to have all the bracelets removed. He was still on physiotherapy. He had to return for reviews in September and December 2007. In January 2008, he attended the final physiotherapy session here in Zimbabwe.

At the time of testifying, he could not chew hard tings with his right hand side. He still felt some numbness in the side which he hoped would go away after some time.

The witness then applied to have affidavits by the three medical practitioners who attended to him in South Africa adduced into evidence. Also adduced were various documents, including air tickets from Harare to Johannesburg and invoices for the services rendered him in South Africa.

The witness gave his evidence well. He is fairly articulate. His responses to questions put to him under cross- examination were forthright. He did not seek to exaggerate. It is my finding that the witness was honest and truthful.

The plaintiff called Professor Median Chidzonga. He holds qualifications in dentistry and is a professor in maxillo-facial, oral and dental surgery. He has specialized in facial surgery and has thirty years experience under his belt. His evidence was as follows.

The plaintiff was referred to him to him by the defendant who wrote a note to him explaining that he should continue with the removal of a wisdom tooth that she had started working on as the plaintiff was now in severe pain.

After sitting the plaintiff in the chair, he took a radiograph of the site and then proceeded to examine him. He saw a socket where an incision had been made. He attempted to remove the tooth and it was during this process that he noticed that the jaw was not moving in unison. He requested the plaintiff to go for an x ray of the jaw. The following day the plaintiff brought back the x- ray and it showed that there was a fracture passing through the socket where he had removed the tooth. He reduced the fracture by wiring. He also obtained the results of the first radiograph he had taken when the plaintiff first visited him. It also showed that there was a fracture. Based on that radiography, he was of the view that the jaw was fractured before he started working on the plaintiff.

He further testified that it is not normal for jaws to be broken during tooth extractions. It is however possible. The possibility of this happening can be assessed through x-rays of the area taken before the extraction.

He was aware that the plaintiff later sought medical attention in South Africa. He was also aware that what was done in South Africa is similar to what he did on the plaintiff in reducing the fracture. The equipment used in South Africa is not available in this country but the expertise is.

Under cross-examination, the witness testified that the breaking of a jaw during a tooth extraction does not in itself denote negligence. Each case must depend on its facts. Even where a practitioner exercised all due care, at times, a jaw could still break.

Regarding the plaintiff's subsequent visit to South Africa to seek medical attention, he was of the view that this was not necessary as he could have attended to the plaintiff himself had the deteriorating condition of the plaintiff been brought to his attention.

The evidence of this witness was of great benefit to the court and great reliance shall be placed upon it in the resolution of the matter. He is an expert in his field and I would have been unable to form some of the conclusions I formed in this matter without his expert opinions.

After the evidence of this witness, the plaintiff closed his case.

The defendant testified. She narrated most of the facts that are common cause in this trial as to how the plaintiff approached her for assistance and what she did up to the time she referred the plaintiff to Professor Chidzonga.

Regarding the allegation that she was negligent, her evidence was as follows.

The plaintiff's tooth was a difficult one. She did the best that she could to extract it without resorting to surgery. During the process, the plaintiff did not bleed profusely as he alleges. She however was putting water into his mouth during the process.

She was not aware that she had fractured the plaintiff's jaw during the extraction. Had she known, she would have put it in her referral letter to Professor Chidzonga. She only received a report from Professor Chidzonga who stated that during the time he was extracting the tooth, he felt an abnormal movement to the jaw. She personally did not feel such movement.

The witness also gave her evidence well. Her evidence was in the main common cause with that of the plaintiff up to the time the plaintiff left her surgery. I have no reason to disbelieve her.

The defendant also called one Lewis Chidzambwa. He is a Dentist, holding a degree from a university in Finland. He has ten years experience.

The testimony of this witness was of a very general nature. He gave the court his views on what can cause pain to a patient undergoing tooth extraction, how each case is unique and how fractures can occur in patients.

I found the evidence of this witness to be educative in a very general way.

After this witness was stood down, the defendant closed her case.

In his declaration, the plaintiff alleged that he concluded an agreement with the defendant in terms of which the defendant agreed to render to him services, performed with such professional skill as is reasonable for a qualified dentist. He further alleges that despite this agreement, the defendant performed her services negligently.

It appears to me that in so doing, the plaintiff was trying to lay the basis of a duty of care owed to him by the defendant which duty of care was breached giving rise to the claim in delict.

The issue of whether to bring claims of professional negligence against doctors in delict or in contract is not new. It arose in *Van Wyk v Lewis* 1924 AD 438. In that case, the defendant, a surgeon, performed an urgent and difficult operation on the plaintiff and at the end of the operation, one of the swabs used was overlooked in the plaintiff's abdomen. It passed out after 12 months. The plaintiff sued the defendant for damages, alleging that the

defendant had been negligent in failing to ensure that the swab was removed after the operation. In absolving the defendant from liability, the court held that negligence could not be inferred simply because the accident had happened.

In deciding the whether the plaintiff's claim was delictual or contractual, INNES CJ had this to say on page 443:

"There was some discussion during the argument as to whether the action had been framed in contract or in tort. One of the appellant's contentions indeed assumed that the basis of her claim was contractual. Now the line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of tort. Cases are conceivable where it may be important to decide on which side of that line the cause of action lies. But the present is not such a case; no mere omission is relied on, nor is the basis upon which damages should be calculated in dispute."

It was held in a subsequent case that although there was a contract between the parties in the *Van Wyk* case, Dr Lewis would have been liable to his patient for professional negligence even in the absence of a contract between the parties, for instance, if he had operated on a person found unconscious in the streets or if he had contracted with a third person to perform an operation on the patient. The wrongfulness of his conduct would have arisen (at least prima facie) from his infringement of the patient's bodily integrity; and if then other elements of the *actio legis Aquilia* had been present (more particularly culpa and resultant damage) an action by the patient would have been competent. (See *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A)).

Thus, in my view, it was not necessary for the plaintiff to plead a contractual relationship between the parties to enable him to bring an action in delict against the defendant. Our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue. (See *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); *Durr v Absa Bank* Ltd 1997 (3) SA 448 (SCA) and *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA)).

The position appears to me to be that where the conduct of the defendant medical practitioner towards a plaintiff, who may not be his or her patient, is unlawful and causes injury to the plaintiff, the medical practitioner is liable if his conduct was negligent.

The plaintiff alleges that the defendant fractured his jaw during a tooth extraction. He further alleges that the fracturing of the jaw was as a result of negligence on the part of the defendant. Finally, the plaintiff alleges that as a result of the fracture to his jaw, he suffered the various damages whose heads appear in his summons. The factual issues that fall for determination in this matter present themselves to me as firstly, whether it was the defendant who fractured the plaintiff's jaw and if so whether such fracturing was as a result of negligence on her part, and again if so, what damages did the plaintiff suffer?

I now turn to the first issue. It is to determine whether the fracture in the plaintiff's jaw was caused by the defendant.

I do not have any direct evidence in answer to this issue. The x-ray that was taken of the tooth area after the defendant had referred the plaintiff to Professor Chidzonga was not produced to show whether or not the jaw was fractured before Professor Chidzonga started working on the plaintiff. What was adduced into evidence was a photocopy of the x-ray which did not show anything. The copy of the x –ray was not accompanied by any report explaining the picture and as was correctly stated by Professor Chidzonga in his evidence in chief, the photocopy was not useful at all.

The plaintiff was of the firm belief that he suffered the fracture whilst receiving attention from the defendant. He is of this belief because he felt a sharp pain after an hour of drilling and wedging and he stopped the defendant from further proceeding. When he left the defendant's place, he was now holding his lower jaw. He urges me to infer that the sharp pain marked the point when his jaw fractured. This is a reasonable belief on the part of the plaintiff but it is not the only reasonable inference that one can draw from the facts. It is common cause that the plaintiff was under a local anesthetic that was now wearing off. The tooth extraction was causing him a lot of pain. The sharp pain could have been pain from the process which would have otherwise been masked by the anesthetic had it been working.

Professor Chidzonga testified that it was during the process of extracting the tooth that he noticed that the jaw was not moving in unison. He did not notice this during the examination of the plaintiff before he commenced the extraction. He then informed the plaintiff that he suspected a fractured jaw. The fracture was only confirmed the following day from x- rays.

As indicated above, it would have made my task easier had the plaintiff produced the original x-ray that was taken prior to Dr Chidzonga commencing work on him. The absence of the x- ray and the evidence by Dr Chidzonga that he only noticed the irregular movement of the jaw during the extraction places me in a position where I cannot confidently hold that the jaw was broken at the defendant's surgery. This is compounded by the fact that neither professor Chidzonga nor the plaintiff asked for leave to and opportunity to replace the useless photocopy with the original x-ray and no explanation was tendered for this omission.

Further, it was Professor Chidzonga's evidence that the x –ray that he took would only show the tooth and nothing much. He was not asked whether it would show the jaw and the fact that he referred the plaintiff to another facility for a bigger picture that would show the jaw seems to suggest to me that the radiograph that he took did not. In any event, neither the plaintiff nor Professor Chidzonga asked for time and opportunity to have the original radiograph adduced into evidence and no explanation was tendered for this omission.

I am unable to come to a conclusion as to where and when the fracture occurred from the evidence adduced before me. It could have occurred at the defednant's surgery. It could have occurred at Professor's Chidzonga's.

On the one hand, I have the testimony of the plaintiff feeling the sharp pain and the testimony of Professor Chidzonga that when he looked at the radiograph that he had taken in his surgery, he observed a fracture. This evidence seems to suggest that the fracture may have occurred at the defendant's. On the other hand, I have the missing radiography and the testimony of the defendant that she did not notice the irregular movement of the plaintiff's jaw when she was working on his tooth or else she would have included that in her written report to Professor Chidzonga. Further, I have the testimony of Professor Chidzonga that he only noticed the irregular movement of the plaintiff's jaw when he was in the process of extracting the tooth. I also have his evidence that the x-ray he took in his surgery is of a localized nature, showing the tooth area hence his request to the plaintiff for him to attend the Avenues Clinic for a bigger picture showing the jaw area as well. The learned professor was not asked on whether the localized x-ray he took would show the jaw area as well and to what extent. In my view, the fact that he referred the plaintiff for a bigger picture tends to suggest his one would not show the fracture to the jaw.

I have no crystal ball to gaze into for an answer to this issue. In my view, the balance of probabilities tilts in favour of no party and remains even to the detriment of the plaintiff who bears an onus to establish the facts that he relies on for his claim.

Assuming that I have erred and there is ample evidence upon which a superior court will find that the defendant did indeed fracture the plaintiff's jaw, I will proceed to give my opinion on the next issue which arises. This is to determine whether the defendant was negligent as alleged or at all, assuming she did fracture the plaintiff's jaw.

In his declaration, the plaintiff alleged that the defendant was negligent in that she failed to remove the tooth with such skill as is reasonable for a qualified dentist, that she tried to remove the tooth in a way that caused the plaintiff to suffer severe bleeding and unbearable pain and that she fractured plaintiff's lower jaw.

In his testimony, the plaintiff confined himself and correctly so in my view, to narrating the events leading to his visit to Professor Chidzonga's surgery and thereafter to him seeking treatment in South Africa. When asked how the defendant had been negligent, he simply gave his opinion that she must have been unprofessional by failing to extract the tooth in 2 hours when Professor Chidzonga managed to do so in about 20 minutes.

The difficulty that the plaintiff had in articulating the particulars of defendant's alleged negligence is in my view understandable. He is not a dental surgeon. I understand the plaintiff to have taken the simple approach to this whole matter that because an accident occurred whilst the defendant was in charge, she must have been negligent.

In my view, the particulars of negligence alleged against the defendant can only be validating by making reference to the standard operating procedures of dentists. This is so because to test the negligence of a professional, one has to first establish what an average reasonable professional in the shoes of the defendant would have done. (See *S v McGowan* 1995 (1) ZLR 4 (HC). The average reasonable professional is not one who is an ace or an expert in his or her field. Thus, the skills exhibited by Professor Chidzonga cannot be used to measure whether or not the defendant was negligent. She may not have been as adept at extracting teeth as the professor was. This however does not automatically translate into negligence on her part.

An average professional is not one who is so careful that he or she will weigh each and every risk attendant upon the task at hand and advise the client of all such risks before proceeding. He or she will weigh the obvious risks and advise the client of same.

In *casu,* it was Professor Chidzonga's testimony that the likelihood of a fracture during a tooth extraction can sometimes show in an x-ray taken before the extraction. It is not in dispute that the defendant caused an x-ray of the plaintiff's mouth to be taken before she started working on him. It was not suggested that this x-ray showed that possibility of the plaintiff fracturing his jaw and notwithstanding clear evidence of this likelihood, the defendant proceeded with the extraction without taking any steps to guard against the occurrence.

It further appears to me that the reasonable professional is one who will bring their training to bear on the task at hand to assess the attendant risks and proceed with alertness. He or she has a certain degree of confidence in their capacity and skill that allows them to proceed without undue timidity and is to a large extent a practical person who wishes to achieve a specified result.

As I have indicated above, to establish what a reasonable dentist would have done in the circumstances of this matter, the evidence of the plaintiff was not material. It would only have been material in showing what the defendant actually did. The evidence of another dentist was imperative to set the standards that are average in the profession and against which the conduct of the defendant would have been measured to show the deviation relied upon to form a cause of action in delict.

The evidence of Professor Chidzonga, called by the plaintiff, did not sufficiently set out the average professional standards expected of a dentist extracting a tooth. His evidence was also largely narrative of the steps he took to extract the tooth after the defendant refrred the plaintiff to him. He did not testify that what the defendant had done prior to her referring the plaintiff to his surgery was negligent. He was not examined on this aspect of the matter. The only portion of his evidence- in -chief that I regard as relevant on this issue is when the professor testified that it is not normal that a jaw will fracture during a tooth extraction. He qualified that by testifying that the possibility of a fracture can be assessed by taking an x- ray before the extraction. As stated above, the defendant did cause an x-ray to be taken before she discovered the embedded tooth. The x-ray so taken was not adduced into evidence. The issue that may have exercised my mind is whether the defendant was negligent in not noticing from

this x –ray that the plaintiff's jaw was likely to fracture during the extraction had the plaintiff so pleaded. He did not.

Of significance in my view is the evidence of the professor under cross-examination that the fracturing of a jaw during a tooth extraction does not necessarily denote negligence on the part of the dentist. He agreed with *Mr Mahuni's* suggestion that sometimes even where the dentist was careful, a jaw could still break. His explanation was that a lot depended on the circumstances surrounding the case.

Faced with such colourless evidence as to what a reasonable dentist would have done in the circumstances, I have no basis for holding that what the defendant did deviated from that norm and was thus negligence.

Again assuming that I have erred in holding that there is insufficient evidence before me to hold the defendant negligent I proceed to determine whether the plaintiff has proved that he would have been entitled to damages in this matter and if so , the quantum thereof.

Under the first head of damages, the plaintiff claims against the defendant the sum of R10 000-00 for pain and suffering. It is common cause that the plaintiff was attended to by two medical practitioners on the same day and was thereafter attended to in South Africa. In his evidence, it is clear that he wishes to be compensated for the pain that he endured not only whilst in the defendant's surgery but thereafter and through his entire ordeal until the braces were removed from his face. But it is trite that the defendant can only be liable for the pain that she factually and legally caused. The issue that immediately arises and one that *Mr Shekede* did not address fully is how I am to apportion the pain and suffering between that caused by the defendant and that caused by the other medical professionals who attended to the plaintiff. It would appear to me that the plaintiff has again taken the simplistic approach that since the defendant set the whole train in motion, she must be held liable for all the pain that followed her contact with the defendant.

In my view, the attention given to the plaintiff by the professor was clearly *novus actus interveniens* that broke the chain of events and thus the liability of the defendant. In this regard, I have asked myself what was the active or direct cause of the pain that the plaintiff suffered in this matter. It appears to me that the tooth extraction, started by the defendant but finished by the Professor was the direct cause of the pain. Thus, the defendant did not cause all the pain. She may have contributed to the subsequent pain. Some of the pain may have been

naturally associated with a tooth extraction and may not have been actionable. I have no way of knowing the pain that the plaintiff suffered unlawfully at the hands of the defendant for no medical evidence was adduced as to the pain that the plaintiff experienced prior to the extraction of the tooth.

Due to the manner in which the events of this matter unfolded, it appears to me that the plaintiff had a mammoth task in proving pain and suffering attributable to the defendant alone.

Legal causation is usually problematic where a whole chain of consecutive or remote consequences results from the wrongdoer's alleged negligence and where it is alleged that he or she should be held legally responsible for all the consequences. I am of the view that the efforts of the professor to assist the plaintiff neutralizes the causative force of the defendant's original conduct. In any event, it has not been argued that a reasonable dentist would have foreseen the entire chain of events that unfolded in this matter and would have taken steps to guard against same.

Had I found the defendant liable, I would have assessed damages under this head modestly and may have awarded a sum of not more that R 2 000-00 in view of the inadequacies that I have highlighted above.

Regarding damages for loss of comfort, which I believe ought to be correctly reflected as “loss of amenities”, and the special damages of expenses incurred in South Africa, I would have absolved the defendant from liability on the basis that the damage is remotely connected to her conduct in that there was an *novus actus interveniens* in the form of the services rendered to the plaintiff by Professor Chidzonga. The attention given to the plaintiff by Professor Chidzonga was the ultimate cause for the discomfort that he suffered and the expenses that he incurred in seeking treatment in South Africa. Had he sought treatment in South Africa immediately after consulting the defendant, my finding on this issue would have been different.

Regarding costs, it is my view that the plaintiff’s approach to court was reasonable and was prompted by a desire to be compensated for damages flowing from alleged professional negligence. Tested against a reasonable man, the plaintiff’s case has merit. No one expects to have their jaw broken when they request for a tooth extraction from a dentist and where this occurs, there should be redress. Unfortunately, the law does not allow the judge, using the test

of the paterfamilias to substitute his or her own standards for those of a reasonable professional such as a dentist. The stringent test for establishing the negligence of a professional requires that the allegedly defaulting professional be judged by the standards set by his or her peers. Cases of professional negligence are in my view difficult to successfully prosecute in this jurisdiction where most professions are still small and closely knit and members of the profession know each others on personal levels. Testifying against a fellow professional is still frowned upon as being in itself unprofessional and thus, evidence of negligence is difficult to come by. From the above, I am not suggesting that Professor Chidzonga chose not to testify against the defendant as he is personally known to her. He was simply not led on the critical issues of negligence and I do not know what his responses would have been. The testimony of Dr Lewis Chidzambwa on the other hand was clearly meant to absolve the defendant from all professional liability.

While he is not succeeding, I see no reason to mulct the plaintiff with an order of costs on the basis of the above observations.

In the result, I make the following order

1. The defendant is absolved from the instance.
2. Each party shall bear its own costs.

Wintertons, plaintiff's legal practitioners.
Mantsebo & Compay, defendant's legal practitioners.