Medical negligence and cerebral palsy: a complex but relatively developed area of the law

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A review of the medical negligence cases from the past couple of years reveals that most of the cases that make it to court are related to birth injuries, and most of those are ones in which the baby has suffered a brain injury which caused cerebral palsy, says Aneesa Bodiat, head of legal at Natmed Medical Defence.

The number of these cases is significant, and the quantum of damages claimed and awarded often amounts to around R20 million. Unsurprisingly, a complex jurisprudence has developed around these types of cases, and evidence presented by expert witnesses is often crucial in determining the outcome. Expert evidence is presented to assist the court in coming to its decision. Complex medical procedures and outcomes are explained by specialists, in order to help the court to assess the probabilities in determining who, if anyone, is at fault when something goes wrong.

The courts are especially careful in cases of alleged medical negligence not to assume fault lightly. In some types of injury cases, the very nature of the injury suggests fault; that is, the injury speaks for itself unless the defendant can prove otherwise. This principle is generally not applied in medical negligence cases; the courts have repeatedly stated that it would be a disservice to the community at large if liability were imposed on hospitals and doctors for everything that happened to go wrong – unless fault could be proved. Determining whether the injury or harm would have occurred regardless of whether a healthcare professional acted properly or not is often determinative of the outcome – that is, did the wrongful action cause the harm or would the harm have ensued anyway? Medical experts delve into explanations of how and when injuries occur, and whether anything could have been done to mitigate such injuries.

The area of medical malpractice relating to cerebral palsy caused by a birth injury is flooded with judgments which deal with the nature of the brain injury, and when it occurred. If the injury occurred suddenly and without warning, then it is likely that healthcare professionals would not be held liable for any negative outcome – since they would probably have been unable to avert the injury. If the injury were prolonged and could have been detected and treated, then liability for the healthcare professional would likely follow.

Some judgments run over 100 pages while the court makes sense of all of the varied expert evidence presented, summarises and weighs the facts and opinions, and considers the relevant legal principles and jurisprudence to come to a reasoned judgment. After assessing a number of these cases, the courts have come to rely on the distinction between prolonged, or partially prolonged and acute profound hypoxic ischemic injuries (injuries caused by lack of blood flow and oxygen to the brain). Experts usually point to MRI scans to determine whether the injury was sudden (and acute), or prolonged – because different parts of the brain are affected depending on how the injury occurs. Acute injuries are often found to be unpreventable (and may even occur in the last few minutes of labour), whereas prolonged injuries have a higher chance of being detected and treated if the patient is properly monitored.

The recent case of *Zodwa Shange obo Mlondli Shange v MEC for Health KZN* highlighted this distinction and the court's familiarity with these types of injuries. The surprising aspect of the case was the proposed introduction of a third type of hypoxic ischemic brain injury as the potential cause for cerebral palsy. In this case, the MRI indicated that the brain injury had been acute. The experts for the plaintiff tried to argue that a "sub-threshold hypoxia" had occurred.

The court was alarmed at the notion that the proposed sub-threshold hypoxia injury could not be detected on an MRI scan, especially because this expert's expertise revolved around the interpretation of MRI scans. The theory presented to court was new and unsupported by peer reviewed articles or other research. A court is not the place to present a new medical theory – courts rely on established theory and practice, in order to guide their decisions. The evidence of experts venturing outside of their areas of expertise is also

not accepted. No matter how eminent an expert may be in a general field, they do not constitute an expert in a particular sphere unless they are properly qualified (by study or experience). Furthermore, the evidence relied on (especially if written evidence is used such as textbooks) must be shown to be reliable, reputable and authoritative. The expert opinion must also be based on the facts of the specific case they are called upon to examine; the opinion must not be purely hypothetical.

Expert evidence is meant to assist the court in understanding the relevant issues, but the court makes the ultimate decision, based on all of the evidence and the relevant legal principles. We can also see, from the large number of cerebral palsy cases, that the courts begin developing and accepting some of the established medical theories relating to certain areas of medicine as they relate to the law. Therefore, while theories relating to the causes of cerebral palsy are to be found in medical journals, the court's view on such theories can also be found in case law. Upending the developed law will require substantial new medical evidence – supported by a solid foundation of accepted research.

The expert evidence for the plaintiff was therefore rejected. The court reiterated that expert witnesses are obliged to assist the court independently and not make out a case for either party. *The expert witness is not a "hired gun"*. Their evidence must be objective, unbiased and based in sound and established principles.