BOOK REVIEWS / BOEKRESENSIES

Res Ipsa Loquitur & Medical Negligence: A Comparative Survey by P van den Heever & P Carstens. Juta & Co Cape Town 2011. xxx & 194 pp. ISBN 9780702185977. Price R365.00 (soft cover)

The Appellate Division in the case of *Van Wyk v Lewis* 1924 AD 438 held that the doctrine of *res ipsa loquitur* does not apply in medical negligence cases in South Africa. *Res ipsa loquitur* is a doctrine or maxim that functions in the realm of the Law of Evidence and gives rise to a permissible inference which may be drawn if it is sustained by the proven facts. (It was suggested in *Macleod v Rens* 1997 3 SA 1039 (E) 1048 that *res ipsa loquitur* is not a doctrine but rather a maxim as it propounds no principle but is rather a particular form of inferential reasoning.) The maxim applies in those instances where a plaintiff proves an injurious result caused by an instrumentality which was in or under the exclusive control of the defendant or an injurious result following upon the happening of an occurrence solely under the defendant's control. It is furthermore said that the maxim can only be applied where the negligence alleged depends on absolutes and not relatives. And, it does not apply to cases that fall outside the knowledge and understanding of an ordinary, reasonable person. The book *Res Ipsa Loquitur & Medical Negligence: A Comparative Survey* purports to establish conclusively that the approach of the South African courts, that the doctrine should never find application in medical negligence cases, is untenable and out of touch with modern approaches.

It is firstly, not clear who the target audience for this publication is. It is written in the style of a monograph or research project and is presumably largely based on the unpublished LLD thesis of Adv Patrick van den Heever. The topic is, however, very specific and of a specialist nature, but the authors sometimes go about very seemingly with foundational principles of the Law of Evidence, which is not apt for a specialist publication on the topic at hand. Throughout the whole publication extensive attention is, for example, given to the fact that the plaintiff in medical negligence cases bears the onus/burden of proof. This is trite; the one who avers must prove. While it is understandable that the authors are trying to build their argument – that the inclusion and acceptance of the doctrine of *res ipsa loquitur* in medical negligence cases will assist plaintiffs in proving their claims and that it will place an evidentiary burden on the defendant – an extensive exposition on the onus/burden of proof in civil cases is superfluous. What would have been very helpful, however, is a short exposition on the meaning and effect of each of the evidentiary concepts relevant to the discussion and the authors' argument: the burden/onus of proof, evidentiary burden, factual inference, a presumption of law and a presumption of fact.

The primary reason why the authors did not include such an exposition on the evidentiary concepts relevant to their argument is in fact stated on page 29

of chapter 2. The authors claim that the effect of the maxim *res ipsa loquitur* has, in fact, very little to do with the Law of Evidence:

> "[The maxim *res ipsa loquitur*] does not really impact on the ordinary rules of evidence. Its application merely assists the plaintiff with regard to the onus that he or she bears."

This statement is then contradicted on page 43 where the maxim is discussed in terms of its application in medical negligence cases in England. There it is said that "the doctrine of *res ipsa loquitur* is considered to be a part of the law of evidence". And on page 80 where it is said that the doctrine is considered to be a form of circumstantial evidence and thus forms part of the Law of Evidence in the USA, England and South Africa. The statement on page 29 is further contradicted by the authors' use of and reference to a wide range of concepts from the Law of Evidence in order to advance their argument, without recognising it as such. This is probably also the main flaw in the authors' argument for the acceptance and inclusion of the maxim in medical negligence cases.

They describe on pages 15 and 35, for example, the effect of *res ipsa loquitur* as requiring "some degree of proof in rebuttal of that inference" (that is the inference drawn in terms of the *res ipsa loquitur* maxim) where they should have instead articulated the inference drawn in terms of the evidentiary burden that is placed on the defence. (Also see sections 2.4.4 and 3.2 in this regard.) The concepts circumstantial evidence, onus of proof, burden of proof and evidentiary burden are used very loosely and sometimes incorrectly. The authors also do not recognise the complexity and interrelatedness of these concepts within the realm of the Law of Evidence. In chapters 3 and 4 the authors continue to confuse the onus of proof with the evidentiary burden. The onus of proof can never change, the plaintiff carries the onus/burden of proof, while the evidentiary burden can, however, shift between the parties due to and based on the application and effect of doctrines/maxims like *res ipsa loquitur*.

Because the authors are themselves not clear on the difference between and effect of the onus/burden of proof, evidentiary burdens, factual presumptions and presumptions of law, it is also not clear to the reader where the authors stand on this in their argument.

The legal comparative part of the text could also have been dealt with in a more sophisticated manner. The comparative sections of this publication currently read as stand-alone narratives of the law in different jurisdictions. Case law is listed one below the other with short paragraphs on the relevant facts and judgments. (See sections 3.7 and 4.8.) It is not clear what the purpose of these lists is other than just a list of all the cases the authors could find on the particular topic at hand. Academic and other scholarly commentary on these cases is also dealt with separately. (See sections 3.8 and 4.9.) In chapter 5 the differences and similarities between the three jurisdictions (South Africa, England and the USA) are again dealt with in a piecemeal manner, except for section 5.6 where an integrated analysis of some of the relevant concepts is provided. There is unfortunately a lot of unnecessary repetition over the six chapters, due to the structure of the discussion and the piecemeal manner in which the topics, case law, scholarly commentary and research on the three jurisdictions are presented. Overall, an integrated and in-depth comparative

analysis is lacking. The final chapter on the constitutional principles and application of *res ipsa loquitur* is, probably due to the haphazard nature of the authors' argument, not convincing.

Despite the conceptual problems in which the material in this publication is dealt with, the authors do make an important (and long overdue) submission with regard to the use of the maxim *res ipsa loquitur* in medical negligence cases. The decision in *Van Wyk v Lewis* to not extend the application of the maxim, *res ipsa loquitur*, to medical negligence cases should not be viewed as a blanket denial of the application of this maxim in the realm of medical law. The notion that all medical procedures fall outside the common knowledge or ordinary experience of the reasonable man is indeed completely outdated. And, the most important advantage for a plaintiff who seeks to invoke *res ipsa loquitur* is that it prevents a defendant who knows what happened from avoiding liability simply by electing not to tender any evidence (66). The comparative chapters of this book (chapters 3 and 4) furthermore provide interesting material that is certainly useful as a reference guide. A notion that is briefly touched upon in section 4.12 is the risk that the application of *res ipsa loquitur* in medical negligence cases can, in some instances, impose a liability without fault (strict liability) on the defendant. This risk could have been explored in more detail and specifically in terms of South African jurisprudence.

Andra le Roux-Kemp

A Guide to Intellectual Property by P Ramsden. Juta & Co Cape Town 2011. 458 pp. ISBN 9780702185526. Price R 495.00 (soft cover)

A Guide to Intellectual Property is clearly aimed largely at the uninitiated in the field of intellectual property law and it is therefore primarily suited for use by students, practitioners first venturing into the field and possibly lay persons involved with the use of intellectual property who seek to come to grips with, and acquire a better understanding of, the subject matter with which they are involved.

Although the book purports to be a guide to intellectual property law, this description is to an extent a misnomer as intellectual property law is generally recognised to comprise patents, designs, trade marks and copyright. The book omits to deal with design law at all, but it does deal briefly with aspects of the wider area of intellectual property law, namely unlawful competition, traditional knowledge and counterfeit goods.

Chapter 1 of the book gives a useful introduction to intellectual property law and chapter 2 concisely examines the international treaties and conventions in the field to which South Africa is a party. Chapters 3, 4 and 6 successively deal in some detail with the laws of copyright, trade marks and patents, respectively, while chapter 5 deals with the offences and remedies in terms of