Medical negligence and the law often have a difficult and complex relationship. The marrying of the two professions and the doctrines can be a complicated task for the judges to whom these cases are assigned. In medical negligence cases, everything that medical professionals have to evaluate and handle, including diagnosing the patient, treatment, protocol, referring the patient and the manner in which they do so, is assessed against the five elements of delict for the court to make a finding as to whether or not a medical professional was negligent. And as the saying goes, hindsight is 20/20 vision and legal professionals have to be cautious to ensure that the matter is assessed within the parameters of the facts at the time the medical professionals were dealing with the matter, and not based on information that came to light after the incident occurred.

The complexities between the two professions were clearly visible in the Constitutional Court's judgment of Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape [2015] ZACC 33, handed down on 14 October 2015. An understanding of the facts surrounding the matter is imperative before delving into the legal arguments before the court.

Facts

Charles Oppelt, a 17-year-old student, represented Mamre Rugby Football Club in a rugby match on 23 March 2002. At approximately 14h15, he was involved in a scrum that collapsed. During the collapse he struck his head against an opponent's shoulder and sustained a spinal cord injury.

Only 40 minutes after the scrum collapsed, an ambulance was called. The ambulance arrived 10 minutes after the call and Oppelt was taken to the nearest hospital, being Wesfleur hospital. There Oppelt was stabilised, assessed and treated by Dr Venter, a casualty doctor. On his arrival at Wesfleur, Oppelt was already beginning to show signs of paralysis. It was alleged (although never substantiated through testimony) that there were no working x-ray machines at Wesfleur. In order for Dr Venter to diagnose a spinal cord injury, he required an x-ray. He thereafter placed a call to Dr Rothemeyer, a training neurosurgical registrar at the time who worked at Groote Schuur Hospital. At 16h00 Dr Rothemeyer instructed that Oppelt was to be taken to Groote Schuur by helicopter as it was a matter of urgency.
Groote Schuur has specialists in spinal injuries and it was thought that he would be better treated there. While there was no explanation as to why, Oppelt was transported by ambulance and arrived at Groote Schuur at 17h40. Approximately two hours later, Dr Rothemeyer examined Oppelt and thereafter consulted with doctors specialising in spinal cord injuries, being Dr Civitanich, an orthopaedic registrar and Dr Dunn, a spine and orthopaedic surgeon. Within an hour of being consulted, Dr Dunn recommended that Oppelt urgently be transferred to Conradie Hospital where they have a Spinal Cord Injury Unit. Although the call was made for an ambulance at 20h22, an ambulance only arrived to transport Oppelt at 00h24 on the morning of 24 March. Oppelt arrived at Conradie at 01h23 and received a closed reduction procedure two at 03h50 (approximately 12 hours after his injury). Unfortunately, it was then too late for the closed reduction to have been effective and Oppelt was paralysed from the neck down as a result of his injury.

**Cause of action**

The essence of Oppelt's cause of action was that the three hospitals had failed to provide him with prompt and appropriate medical treatment. It was pleaded that the Department of Health owed him a legal duty to ensure that low-velocity spinal cord injuries were treated at Conradie with “the greatest possible urgency, and where possible within four hours after the injury”. It was on this basis that damages for negligence were claimed.

**High Court and Supreme Court of Appeal**

In an order to establish the claim, in the High Court, Oppelt's legal representatives presented the evidence of Dr Newton, an expert in spinal cord injuries, who was employed at Conradie Hospital. Dr Newton gave evidence as to the studies he had performed, over several years, of the success of performing a closed reduction (whereby the dislocated spinal disc was realigned, therefore allowing blood flow to the disc, by the use of decompression and traction) within the first four hours of the injury.

The Department of Health submitted no evidence to contradict the evidence as presented by Dr Newton. Furthermore, the High Court found that there were unreasonable delays on the part of the Department of Health's employees, which justified the conclusion that Oppelt had been denied emergency treatment as provided for in section 27(3) of the Constitution and the claim succeeded in the High Court.

The Department of Health lodged an appeal to the Supreme Court of Appeal. The SCA held that Dr Newton's evidence was founded on too small of a statistical sample and found his approach to be unreliable. The court found that Oppelt had failed to prove that, even if the Department of Health's employees had treated him within four hours, he probably would have recovered. Further, the court found it unnecessary to make a determination on the elements of wrongfulness and negligence as the Department of Health's employees were not the factual
cause of Oppelt’s paralysis. The SCA overturned the decision of the High Court and found in favour of the Department of Health.

**Constitutional Court**

Oppelt asked for leave from the Constitutional Court to appeal the SCA’s decision on the basis that his Constitutional right to emergency medical treatment had been infringed and on the basis that this matter deals with a point of law that is of general importance. Oppelt submitted that the SCA had erred in two respects, in that it had found that his right to emergency medical treatment had not been infringed and that there was no causal link between the conduct of the Department of Health’s employees and Oppelt’s paralysis.

Two judgments were handed down by the SCA, a majority and a minority judgment. For the majority, Justice Molemela found that this case had raised certain issues that had to be decided:

a) Should leave to appeal be granted?
b) Has delictual liability been established? This in turn entails a consideration whether the following elements of delict have been established:
   i. Wrongfulness
   j. Causation; and
   k. Negligence

With little discussion, the majority granted Oppelt’s leave to appeal. The majority then proceeded to unpack Dr Newton’s evidence, as presented to the two previous courts. It was explained that a low-velocity spinal cord injury (such as the one sustained by Oppelt during his rugby match), where a cervical spinal dislocation was sustained and the spinal cord was not severed, caused compression on the spinal cord and ischaemia (deprivation of oxygen to the cells).

Permanent damage caused to a patient would be as a result of the ischaemia as once cells have been deprived of blood flow and oxygen for a certain amount of time, they die and cannot be revived. Dr Newton submitted that spinal decompression is absolutely necessary in order to relieve the pressure on the spine. Dr Newton submitted that based on the manner in which Oppelt had sustained the injury he was a viable candidate for a closed reduction.

A closed reduction is a method of treatment whereby the patient’s compressed spine is subjected to incremental traction by applying heavy weights to a pulley system. The movement of the bones is monitored by an x-ray and manipulated so that the dislocated vertebrae could be re-aligned with the spinal column. Dr Newton’s theory is that should a closed reduction be performed within four hours after the injury is sustained, the neurologic recovery is significantly improved. The crucial element of Dr Newton’s theory is that the closed reduction had to take place within four hours of the injury occurring. This theory was supported by a study that Dr Newton had conducted at Conradie Hospital from 1988 to 2002 on patients who had sustained
spinal injuries while playing rugby. The study concluded that patients who sustained a low-velocity spinal cord injury have a 64% chance of complete recovery if the reduction is performed within four hours.

The Department of Health had adduced the testimony of Dr Welsh, a neurosurgeon at Groote Schuur Hospital, where he indicated that Dr Newton's theory was not supported by medical literature, as there was no consensus that there was indeed a relationship between the time of the decompression and the neurologic recovery.

The court reviewed the element of causation first. The court had regard to the but-for test and indicated that “the vital question is whether, as a matter of probability, the applicant's paralysis would not have occurred or been rendered permanent had the reduction procedure been performed promptly and within a time that was reasonably likely to prevent permanent quadriplegia”. The majority found that the SCA had indeed erred in failing to find that there was a causal link due to the incorrect manner in which they applied the test in Linksfield.

The test in Linksfield is for expert evidence. Where the court is faced with expert evidence, it is for the court to decide on the question of reasonableness and negligence, but for the various expert opinions presented. The court must evaluate the evidence, not as a statistical analysis, but more on a basis of logical reasoning. Expert opinion must be logically supported and this is for the court to decide, whether the opinion is supported or not. A judge must assess the evidence on a balance of probabilities as a whole and should not apply the same standard that an expert himself would apply to the evidence. The SCA deviated from the Linksfield case in that it concluded that the scientific evidence provided by Dr Newton was questionable. The principle is that where the logic of the medical evidence is not in dispute, the court must assess the evidence on the legal standard of a balance of probabilities, not assess the evidence by scientific standards.

Furthermore, the majority noted that the Department of Health had not provided any evidence to dispute the acceptability of the data collected by Dr Newton, yet the SCA based its decision on the evidence of Dr Welsh that Dr Newton's theory was not the medical norm. The majority held that based on the but-for test, the evidence demonstrated that the Department of Health had denied Oppelt a 64% chance of a full recovery and therefore found that there was causation between the Department's conduct and the paralysis suffered by Oppelt.

The majority went on to assess the element of wrongfulness and reiterated that the test for wrongfulness “ultimately depends on a judicial determination of whether, assuming all other elements of delictual liability are present, it would be reasonable to impose liability on the defendant for damages flowing from specific conduct”. Oppelt pleaded that the Department owed him three legal duties:

1. To ensure that patients with a low-velocity spinal cord injuries were transferred to Conradie in time for them to be treated within four hours of the injury;
2. To ensure that all patients received the correct treatment with the greatest possible urgency; and
3. To ensure that all hospital personnel were instructed to transfer patients with low-velocity spinal cord injuries with the greatest possible urgency and, where possible, they were to be treated at Conradi within four hours of the injury.

The majority found that spinal cord injuries were severe injuries that cause permanent damage and therefore are emergencies that require emergency treatment as enshrined in section 27(3) of the Constitution. The court found that there was a delay in the treatment received by Oppelt as a result of the delayed transport (he was transported by ambulance to Groote Schuur as opposed to helicopter) and that no reason was provided by the Department as to why urgent and appropriate treatment was not dispensed to him.

The Department did not provide any evidence as to why Oppelt was kept at Wesfleur for nearly two hours before transferring him to Groote Schuur. The court found that appropriate remedial treatment needs to be administered promptly in cases of emergency and in this instance, the correct remedial treatment was that of a closed reduction as advised by Dr Newton. The only reason submitted for the delay by the Department, was that it was precluded from transferring Oppelt directly to Conradi due to protocol. As a result, the court held that the Department “constructively” refused to provide Oppelt with the necessary emergency medical treatment and therefore acted unlawfully.

Lastly, the majority assessed whether the omission on the part of the Department to provide Oppelt with emergency medical treatment was, in fact, negligent. The majority made use of the classic test for negligence as found in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) wherein it must be found that the reasonable person (in this case, the reasonable specialist doctor) would have foreseen that his or her conduct would have caused injury or loss to a person and that a reasonable person would have taken steps to prevent such harm from occurring, and in the specific situation, the defendant failed to do so.

The critical question was whether the Department’s employee knew, or ought to have known, that spinal cord injuries had to be treated as a matter of urgency and not later than four hours subsequent to the injury. Dr Welsh conceded that with spinal cord injuries a doctor would want to “intervene quickly” to transfer a patient and decompress their dislocation.

The court stated that Conradi Hospital was well-known for treating patients with acute spinal cord injuries and given that widespread knowledge, a reasonable doctor in the position of the Department’s employees would have known to transfer the patient to Conradi. The court took issue with the Department’s protocol in that Oppelt should have been transferred to Conradi from Wesfleur directly.

The majority found that it was the general foreseeability of the possibility of harm that had to be established, and this was not dependant on specific knowledge of Dr Newton’s four-hour theory.
The majority ruled that “The conduct of the [Department’s] employees coupled with their slavish adherence to transfer protocols was substantially short of standard practice that a member of the public is entitled to expect from a reasonably proficient hospital and reasonably proficient doctors”. The majority was satisfied that the conduct of the Department’s employees resulted in Oppelt’s paralysis and therefore ruled in his favour.

The minority judgment by Justice Cameron (Acting Justice Jappie concurring) indicated that he would have dismissed the appeal. The minority found that Oppelt pleaded that had he been treated within four hours of the injury occurring by means of a closed reduction, which he alleged was routinely performed at the Conradie Hospital Spinal Cord Unit, he would not have been a quadriplegic. He alleged that the Department’s staff was negligent in that they failed to transfer him to the Conradie hospital within four hours after the injury and further alleges that the Department’s employees followed the protocol blindly.

Although the minority agreed that the SCA had not applied the test established in the Linksfield matter for expert evidence when assessing Dr Newton’s theory and that, in fact, causation had been established. The minority took issue with the elements of wrongfulness and negligence. It was stated that there is an inextricable link between Dr Newton’s four-hour theory and the assessment of the liability on the part of the Department, which the minority explained to mean that finding wrongfulness and negligence outside of the four-hour period would not assist the plaintiff’s case and “no negligent conduct would be causally related to the harm [Oppelt] suffered”.

While the minority did not debate the element of wrongfulness, as they agreed with the majority, however, the minority disagreed on the point that Oppelt’s section 27 right had been infringed and that negligence had been established. Oppelt was assessed, stabilised and treated while in the care of the Department’s hospitals. He was given the requisite treatment at the time while his injury was being assessed. Therefore, the minority found that Oppelt had not been refused emergency medical treatment.

When assessing the negligence of those employees of the Department in this matter, the minority stated that their negligence must be evaluated in light of the surrounding circumstances of the matter. The question is whether the medical professional in the same circumstances as the doctors in this matter would have foreseen the harm and taken the necessary steps to avoid that harm.

The question that arose, as a result of Oppelt’s pleadings, was whether he should have been transferred to Conradie Hospital within the four-hour period. A further question raised by the minority was whether the Department’s employees foresaw the possibility of Oppelt being paralysed as a result of his injury and whether any steps were taken to prevent this outcome. The answer to the latter question was yes and the court found that the medical professional involved did take the necessary steps to try and prevent Oppelt from being paralysed as was seen by the
urgency by which the doctors ordered things to be done.

Oppelt had to prove that the Department’s staff was negligent on a balance of probabilities and in order to do this, he had to show that the doctors involved should have acted differently. In this regard, Oppelt relied heavily on the evidence of Dr Newton. The minority took issue with this. Although they accepted Dr Newton’s theory that there is a 64% chance that a substantial, if not full, neurological recovery can be achieved with a closed reduction within four hours after the injury occurred. However, the minority took issue with whether or not this theory, in 2002, was protocol that the Department should have put in place and whether the medical practitioners involved had any knowledge of this theory involving these crucial four hours.

It was found that at the time of Oppelt’s injury, there was no consensus regarding the time period in which a spinal cord injury should be decompressed. An expert witness testified that at the time an “early” decompression of a spinal cord injury was anywhere between eight and 24 hours. Dr Newton admitted in his testimony that in 2002, the theory was new and there were no medical publications supporting his theory. Dr Newton’s theory was published for the first time in December 2011. He did, however, attempt to convince the court that his theory was well-known in the Western Cape. Dr Rothemeyer testified that at the time she was treating Oppelt, she had never heard of the four-hour theory. Neither had any of the other experts at Groote Schuur.

The minority further criticised the majority’s judgment in that the employees of the Department had followed rigid protocol and this prevented Oppelt from being transferred directly to Conradie. The Department indicated that the referral pathway between Dr Venter to Wesfleur, to Dr Rothemeyer at Groote Schuur and to Dr Stander at Conradie, was not as result of protocol and no evidence had been presented to this effect. The minority referred to evidence that had been adduced by Dr Rothemeyer wherein she indicated that when called by Dr Venter, it was not as a result of protocol that she recommended that Oppelt be referred to Groote Schuur, but rather as a result of her opinion as a doctor that Groote Schuur was the correct place for Oppelt to be treated as Groote Schuur also had specialists who were able to treat spinal cord injuries such as Dr Dunn.

The minority found that, based on the evidence before it and disregarding hindsight, at the time that the incident occurred, Dr Newton’s four-hour theory had not been published nor was it widely known or used. Dr Rothemeyer testified that at the time, she was completely unaware of Dr Newton’s four-hour theory. The minority found that as the four-hour theory was only an emerging school of thought, it was not a known practice nor protocol to send patients with spinal cord injuries to undergo the closed reduction within four hours. Should it have been a protocol, then Dr Rothemeyer would have been negligent in not advising that Oppelt should be transferred directly to Conradie. However, she did not know of this procedure and therefore, how could she be found negligent.
The final point addressed by the minority was whether, the Department should have ensured that all of its personnel were aware of Dr Newton's four-hour theory and should have had protocol in place that all patients who had suffered a spinal cord injury be transferred directly to Conradie. The minority found that if the four-hour theory was unknown, even by an expert such as Dr Dunn who did not perform closed reductions, then how could it be said that the Department was negligent in failing to adopt Dr Newton's theory. The minority indicated that they would have dismissed the appeal.

Having regard to the judgments set out above, one may favour the judgment as drafted by the minority. Based on the manner in which Oppelt pleaded his case, his entire case hinged on Dr Newton's four-hour theory which was virtually unknown by both doctors and experts within the field. Dr Newton's theory was only published and established in 2011, nine years after the incident in question. Based on the factual evidence before the court, and the fact that the doctors did not follow the protocol blindly, but instead acted in the best interests of the patient, can they really have been found to have been negligent based on a theory that they could not have been expected to have any knowledge of.

While there may be differing views on the outcome of the matter, it certainly can be seen that the courts scrutinise every inch of medical malpractice cases and emergency room staff, hospital administrators and medical personnel need to ensure that the correct protocols are in place when transferring a patient. When a patient is deemed to be an emergency case, they need to be transferred as quickly as possible and each medical facility must ensure that it is aware which cases it has the expertise to handle. Each of these aspects must be clear so that, if questioned, there is no doubt as to how each case is dealt with.