ESTERHUIZEN v. ADMINISTRATOR, TRANSVAAL

TRANSVAAL PROVINCIAL DIVISION *

1957 *February* 28, *March* 1, 4-8, 11-12, *May* 21, *Bekker J.*

J. C. Steyn, Q.C. (with him George Colman) for the defendant.
J. H. Snyman, Q.C. (with him M. W. Friedman and C. J. van Zyl) for the plaintiff.

BEKKER, J.: In the present action plaintiff claims damages against defendant in his capacity as the Administrator of the Transvaal Province, representing as such the Provincial Administration, under whose jurisdiction Public Hospitals in the Province are vested by the provisions of Ord. 19 of 1946, of which the Johannesburg General Hospital happens to be one.

In her declaration plaintiff alleges that in or during October 1949, at the Johannesburg General Hospital, servants of the defendant, acting in the scope and course of their employment, wrongfully, unlawfully and intentionally assaulted her in that they subjected her to radium treatment which caused her serious injuries; she also introduces an alternative cause of action, it being alleged that these servants were unskilled or negligent in the application of that treatment and that defendant is accordingly liable for the resultant injuries. The defence to the claim based on the assault is one of consent. Defendant relies on an 'implied consent' to the treatment,

> 'in that her (plaintiff's) father, or alternatively her mother or alternatively both her father and her mother caused or permitted her to be admitted to the hospital . . . for the purpose of receiving such treatment as might by the medical practitioners working in the said hospital, be deemed necessary or proper for the purpose of curing, arresting or alleviating the disease from which plaintiff was suffering or mitigating the consequences thereof and the implied consent of plaintiff was given in that she entered the hospital for the said purpose and permitted the administration to her of such treatment . . . '

In so far as the alternative cause of action is concerned, defendant pleaded that his servants were neither unskilled nor negligent. I propose dealing immediately with the cause of action based on assault, and will thereafter consider the alternative claim.

It is common cause that in 1945, when plaintiff had reached the age of ten years, a small nodule showed itself immediately below the ankle of her right leg, which she then injured. As a result she experienced some discomfort, whereupon her father took her to interview Dr. J. J. Gouws, a medical practitioner of Volksrust. He treated the injury, but also excised the nodule which he submitted for analysis to the South African Institute for Medical Research, where it was identified by Dr. J. F. Murray, a witness for plaintiff, as a manifestation of a disease known as Kaposi's haemangiosarcoma, something which I propose referring to, for present purposes, as Kaposi's disease, and which, in the words of Dr. Murray,

> 'is a malignant tumour or new growth which tends to occur on the extremities, the feet and the hands, and from there to spread centrally towards the trunk and other parts of the body. It originates in more than one centre at the same time; we therefore call it multi-centric in origin. As the nodules of the disease grow, they eventually coalesce and form larger tumours which are destructive to the neighbouring tissues and lead to ulceration of the skin, destruction of the underlying tissues, infection and ultimately, if not checked in its progress, to death of the patient either by infection, some other incidental disease, haemorrhage or spreading of the disease to vital organs. It is a disease which is very intimately related to the blood vessels and the cells of which it is composed . . . it is a slowly but relentlessly progressive disease . . . and the general consensus of opinion is that the average expectation of life of a patient is five to ten years, but cases of death occurring in a shorter period than a year have been recorded and others are on record in which the patient has survived for as long as forty years.'

Needless to say, many other details and qualities of the disease were canvassed during the hearing of the case, but, for the moment, the aforegoing suffice.

Plaintiff's mother stated that Dr. Gouws then advised her (and it is reasonable to infer that her husband, who subsequently died in May 1948, was similarly advised) that the plaintiff suffered from 'bloedkanker' and that as he was not equipped to treat plaintiff, it was necessary for her to proceed to the Johannesburg General Hospital for treatment. She was informed that the site where the nodule had been excised would receive X-ray treatment—'om daardie plekkie te laat brand'. She thought that if it was 'bloedkanker, dan sou sy (plaintiff) baie gou doodgaan', and whilst not knowing anything about X-ray therapy, or dangers connected with such treatment, she was in complete agreement then that plaintiff should proceed to the Johannesburg General Hospital. Her own state of mind was one of contentment to leave the actual treatment entirely in the discretion of the medical authorities.

Plaintiff was accordingly taken by her father to the Johannesburg General Hospital in or about July 1945, and there received superficial X-ray treatment over the site of the excision and was then sent home. The X-ray machine used on this occasion for that purpose was referred to as the Chaoul Unit. Plaintiff experienced no pain or discomfort; a week or two later the skin peeled off over the site which had been treated and the wound healed completely. Some three months later, however, that is to say during or about October 1945, further nodules appeared on her right leg, foot and toes, under the left foot, and on the *dorsum* of the right hand. Once more, accompanied by her father, she was taken to the same institution and there received superficial therapy treatment from 8 to 13 October, again by means of the Chaoul Unit, whereafter she was sent home without any ill-effects. She was given instructions, however, to report back from time to time, but in any event to do so immediately on new or fresh nodules making their appearance.

During the period 1945 to 1949 she reported back on about

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ten occasions—but received no treatment, from which I infer that treatment was not necessary. By October 1949, however, fresh nodules once more appeared on all plaintiff's extremities. Her father and natural guardian had of course died previously. Her mother was then living with a second husband in Swaziland, whilst plaintiff resided with her grandfather at Volksrust in order to enable her there to attend school. When plaintiff's mother was advised of the reappearance of these nodules, she instructed the grandfather to remove plaintiff to the Johannesburg General Hospital for treatment—and in so far as plaintiff's mother was concerned once more to receive such treatment as might be deemed best by the institution's medical authorities.

I should add, however, that her state of mind was never known or communicated to the latter; the mother experienced no concern because—so it emerged from her evidence—

> 'Ek het geweet sy was nooit siek as daardie goed aan haar was nie, en as sy die behandeling gekry het, was sy ook nie siek nie, en ek was nie bekommerd daaroor nie.'

She also expected that the treatment on this occasion would be the same as on the two previous occasions, and never thought or entertained any idea that it might carry any risk or danger to plaintiff.

I accept it as a fact that plaintiff's mother did not realize that X-ray treatment might be dangerous; and I believe her when she says that she never anticipated any danger or possible harm when she caused plaintiff to be taken for further X-ray treatment on this occasion; indeed all she knew at this stage was that plaintiff had been treated on two previous occasions without having suffered any harm or discomfort; nor did she know that X-ray treatment as such, might vary in technique—e.g. that a patient might receive superficial as opposed to deep therapy treatment—and I have no reason to doubt her evidence when she says that she expected or believed that plaintiff would receive the same treatment on this occasion as she had received on the two previous occasions, even although she was content to leave the treatment to the discretion of the medical authorities of the Johannesburg General Hospital.

In October 1949, plaintiff was admitted as a patient in that institution; shortly thereafter one of the nodules was surgically excised after an aunt of plaintiff had duly signed and completed a document consenting to operative treatment being carried out on plaintiff. The nodule was once more examined by Dr. J. F. Murray of the South African Institute for Medical Research, and it is common cause that plaintiff was then still suffering from Kaposi's disease.

At the hospital Dr. L. Cohen took charge of plaintiff, i.e., for purposes of administering X-ray treatment to her. At the time he had held the Diploma in Medical Radiotherapy (London University) for some six months, having qualified in April of that year; he had graduated as a doctor at the University of the Witwatersrand in 1942, and after doing further medical and surgical practice in various hospitals in the Union, proceeded to America in 1946, where he gained some therapy experience—without graduating or obtaining any degree—at the Bellevue Hospital; he then attended the London University, where he studied for the Diploma, which he obtained after some sixteen months. He stated in evidence that having examined plaintiff, he concluded that she required 'radical' treatment; although aware of the fact that she had received superficial therapy treatment from a certain Dr. Krige on two previous occasions, he decided—as, in his opinion, the disease was rapidly progressing, leaving plaintiff with an estimated expectation of life of one year—that she required not only deep therapy treatment but of a dosage measured in 'r' (roentgen) units which, it is common cause, could only be described as 'radical'.

For present purposes it suffices to state that he admitted that the dosage and manner of treatment which he worked out and decided to apply to plaintiff was of such a nature or order that he knew beforehand that plaintiff would:

(i) Suffer severe irradiation of the tissues in the treated areas and could possibly sustain ulceration of these tissues.

(ii) Become disfigured or deformed in the sense that permanent harm would be done to her epiphyses (growing bone ends) in the treated areas, causing a shortening of the limbs; furthermore that cosmetic changes would set in—a feature described by Dr. Cohen as 'permanent visible damage to the skin—a change in pigmentation—causing the skin to become lighter or darker or blotchy with light and dark patches; the skin might become drier and thinner, stopping sweating in the affected area'.

(iii) Run a risk and be subjected to a possibility of having to suffer amputation of the treated limbs.

These consequences and risks arising from the treatment and dosage worked out by Dr. Cohen were known only to himself and no-one else; plaintiff's mother—as mentioned earlier on—had no knowledge of any danger and anticipated none. Plaintiff, who had been admitted to a ward under the charge of a certain Dr. Adno, enquired from him—before treatment was administered—what was going to happen to her, and was told 'Moet nie "worry" nie'. She, a child aged fourteen years, certainly had no occasion to anticipate any danger.

It is furthermore common cause that the danger, if any, accompanying superficial therapy treatment such as plaintiff received on the two earlier occasions by means of the Chaoul Unit was infinitely less than that attendant on the proposed or contemplated treatment and dosage, for which purpose the Maximar Unit was to be used.

It is also common cause that there was ample time and opportunity on hand to have procured the consent of plaintiff's guardian to the proposed treatment. Dr. Cohen, the only person with knowledge of the danger and consequences which might or would ensue, was asked in cross-examination whether he did not think that he should have afforded the parents an opportunity to consider the situation—he replied:

> 'It was my function to cure the disease if it was possible . . . I was fully aware that there would be cosmetic changes under any circumstances after radiotherapy. I did not consider it necessary to discuss these details with the patient and I had never met the patient's parents . . . it is not the usual procedure in the radiotherapy department to ask the parents to come.'

and then intimated that as it was not the practice to obtain the parents' permission or consent to the treatment, he gave the question no consideration.

During the period 1 to (and including) 5 November 1949, plaintiff received deep therapy treatment under the Maximar Unit, in accordance with the technique and the dosage evolved by Dr. Cohen. Her two feet and legs were treated up to approximately the knees whilst both hands were treated up to the wrists.

Ten days after the end of the treatment plaintiff noticed blisters forming on the treated areas and experienced a burning sensation. Her condition became worse and according to her mother, who had in the meantime been summoned by plaintiff's aunt, a foul stench hung about plaintiff's bed. Constant efforts were of course made in the Hospital to effect a cure, but these were not successful. In any event on 31 December 1949, Plaintiff, at the request of her mother was transferred to the Volksrust Hospital; later to the Piet Retief Hospital and finally was readmitted to the Johannesburg General Hospital, where on 17 May 1950, her right leg was amputated just below the knee. This was followed by a similar amputation of the left leg, necessitated by post-radiation malignant ulcers, and an additional amputation of portion of the stump of the right leg. In 1954 two fingers of the left hand were amputated for the same reason, and the evidence is abundantly clear that it will be necessary to amputate the whole of the left hand. In August 1955, the right hand was amputated at the wrist, resulting in plaintiff now being minus legs, a right hand and faced with the certain prospect of having to lose her left hand—which in any event is presently useless.

Dr. Murray, a specialist pathologist who it is common cause is an expert in his own sphere of the highest standing and order, examined the amputed legs, and whilst finding no evidence or trace of Kaposi's disease in these sections, expressed the opinion that the condition of the leg followed on and was due to radiation treatment which she had received for the disease. At a later stage in his evidence he said that the immediate cause of the condition of the legs was radiation reaction and necrosis (death of tissues)—and it is not disputed that this condition necessitated the eventual amputation of the limbs. Indeed, the evidence satisfies me that plaintiff sustained the loss of these limbs directly as a result of the X-ray treatment, and the dosage which was applied to her in an endeavour to cure her of the disease. I should perhaps add that it is quite clear that she is not 'cured' in the ordinary sense of the word. The evidence shows that as the disease is multi-centric in origin it may re-occur at any moment in plaintiff, notwithstanding the fact that she has lost her limbs. Dr. Murray

stated that whilst there is a reasonable prospect that the disease will not re-occur, he cannot say, nor is he prepared to say, that plaintiff has been permanently cured of the disease. I accept this opinion without hesitation.

I have endeavoured to relate the more salient features on which plaintiff advanced her claim for damages based on an alleged assault, and I must now consider whether defendant is liable.

WATERMEYER, J., in the matter of *Stoffberg* v. *Elliot*, 1923 C.P.D. 148, directed a jury as follows:

> 'In the eyes of the law every person has certain absolute rights which the law protects. They are not dependent on statute or upon contract, but they are rights to be respected, and one of the rights is absolute security to the person . . . Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law or consented to, is a wrong and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference.'

In this Division, MILLIN, J., in *Ex parte Dixie*, 1950 (4) S.A. 748 (W) at p. 751, held with reference to a surgical operation, that, as a matter of law,

> 'such an operation cannot lawfully be performed without the consent of the patient, or, if he is not competent to give it, that of some person in authority over his person. The fact that he is a patient in this hospital does not entitle those in charge of it to perform any surgical operation upon him which they may consider beneficial. They would only be justified in performing a major operation without consent where the operation is urgently necessary and cannot with due regard to the patient's interests be delayed.'

In the light of these decisions, and as it is common cause that there was not that degree of urgency present in plaintiff's case which would have justified the treatment even without consent, the sole question to be answered is whether it has been shown that the treatment to which plaintiff was subjected in November 1949, took place without lawful consent—a matter which, in my view, gives rise in itself to yet a further question, viz. what constitutes consent.

On behalf of defendant Mr. *Colman* contended that it has not been shown by plaintiff that the treatment took place without such consent, and whilst considerable argument was advanced on the question as to where the *onus* rested of proving consent, or absence of consent, I shall assume, without deciding however, that the *onus* lay on plaintiff to prove absence of consent.

The contention proceeded on the following lines: Dr. Gouws of Volksrust informed the parents that 'X-ray treatment' at the Johannesburg General Hospital was essential; it was proved that the mother at the time thought that unless plaintiff received such treatment, death would ensue within a short length of time; and it was reasonable to accept that the father of plaintiff must have shared in that state of mind. The mother, originally and also in 1949 at a time when she was plaintiff's legal guardian, was content to leave the choice and manner of treatment to the medical authorities at the hospital—and although there was no express consent to the treatment, these circumstances coupled with the fact that the father originally, and the grandfather in October 1949, at the request of the mother, brought plaintiff to the institution for the very purpose of receiving X-ray treatment, constituted proof of lawful consent to the treatment which plaintiff in fact received in November 1949. It was conceded that neither the guardian nor the patient was aware of any possible danger or risk attaching to the treatment—a feature, so the argument proceeded, entirely irrelevant and of no consequence to the determination of defendant's liability. The facts show, so it was contended, that plaintiff's guardian, if not originally, then certainly in 1949, in effect stated to the defendant's servants: 'Do what you think best—preserve life regardless of consequences', which was consent wide enough to cover the treatment meted out to plaintiff and which negatived any idea of an unlawful assault on her.

I am not prepared to uphold this contention. In the first instance it is clear that

> 'it is usual to include in the defence *volenti non fit injuria* or as I call it for convenience, consent—cases of voluntary acceptance of risk as well as cases of permission to inflict intentional assaults upon oneself, as in the case of surgical operations.'

(per SCHREINER, J.A., in *Lampert* v. *Hefer, N.O.*, 1955 (2) S.A. 507 (A.D.) at p. 508).

Generally speaking, all the numerous authorities without exception, indicate, that to establish the defence of *volenti non fit injuria* the plaintiff must be shown not only to have perceived the danger, for this alone would not be sufficient, but also that he fully appreciated it and consented to incur it. Furthermore, in the matter of *Rompel* v. *Botha* (T.P.D., 15 April 1953, unreported), NESER, J., held:

> 'There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient. In such cases where it is frequently a matter of life and death I do not intend to express any opinion as to whether it is the surgeon's duty to point out to the patient all the possible injuries which might result from the operation, but in a case of this nature, which may have serious results to which I have referred, in order to effect a possible cure for a neurotic condition. I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent—it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment.'

I have seen fit to quote extensively from the judgment of NESER, J., because this appears to be the only authority dealing specifically with the point in issue. Support for the view that assent without knowledge of the dangers involved, is not in reality consent, is further to be found in *American Restatement of the Law* (vol. I, Chap. 3, para. 59) in the sense that

> 'if the person whose interest is invaded is at the time by reason of his youth or defective mental condition incapable of understanding or appreciating the consequences of the invasion'—

(and I would add—'or any person in fact shown to be ignorant thereof')—

> 'the assent of such a person to the invasion is not effective as a consent thereto.'

Indeed if it is to be said that a person consented to bodily harm or to run the risk of such harm, then it presupposes, so it seems to me, knowledge of that harm or risk: accordingly mere consent to undergo X-ray treatment, in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consequent harm.

Turning now to a consideration of the facts the following are, in my opinion, relevant:

The two X-ray treatments which plaintiff received in 1945 left her completely unscathed. These, it is known, were superficial treatments under the Chaoul Unit. Plaintiff's mother, acting in the belief that she would be similarly treated in October 1949, admittedly caused her to be sent to the Hospital and although content to leave the choice of and the actual treatment to defendant's servants, was unaware of any risk or danger attaching thereto, or in connection with the use of the X-ray machine. On the contrary, she expected the same results as emerged from the two previous treatments.

On the other hand, the Hospital authorities knew that plaintiff had been treated on previous occasions with the Chaoul Unit—which in itself was infinitely less dangerous than deep therapy treatment under the Maximar Unit; Dr. Cohen realized that plaintiff would suffer serious consequences and be subjected to risks, not by virtue of X-ray treatment as such, but rather because of the dosage he had decided upon and the technique he intended employing in administering that dosage to plaintiff. He realized too, that this was essentially a different form of treatment than that which plaintiff had previously received—and a form of treatment with its attendant dangers and risks, of which he and he alone, for the reason mentioned, was aware. The question of discussing the situation or obtaining the consent of the guardian was not present to his mind, as it was not the practice to do so.

Nor could it even be pretended by anyone that this happened to be the case suggested by defendant's counsel during argument, viz., 'Cure—regardless of consequences'. Even if that had been the guardian's frame of mind—which it was not—it was never

disclosed to any of defendant's servants. All they knew was that plaintiff, a patient suffering from Kaposi's disease, was admitted to the institution for further X-ray treatment—a fact which did not, especially in view of the type and nature of the two previous treatments, imply the necessary consent to subject her to a dosage and form of X-ray treatment which differed from the former, and which had known and serious consequences and possible risks.

I would in this regard respectfully associate myself with the remarks of WATERMEYER, J., in *Stoffberg* v. *Elliot*, *supra* at p. 149, viz.,

> ' . . . a man by entering a hospital does not submit himself to such surgical treatment as the doctors in attendance upon him might think necessary; . . . by going into hospital he does not waive or give up his right of absolute security of the person . . . he still has the right to say what operation he will submit to, and unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body . . .'

With reference to a contention advanced on behalf of the defendant that the Hospital authorities were entitled to assume consent, because plaintiff had been previously treated, it must be emphasized that the 1949 treatment was vastly different in form, substance and more dangerous than the earlier treatments. In this connection

> 'it is not sufficient to protect the actor, that the invasion is of the same general sort as that assented to . . . an assent to a particular operation does not permit a surgeon to perform another operation no matter how necessary to the other's cure.'

(Cf. *American Restatement of the Law*, *supra* para. 54, p. 104).

In all the circumstances I have come to the conclusion, even assuming that plaintiff is burdened with the *onus* of proving absence of consent, that that *onus* has been discharged and that defendant is liable to plaintiff for the damage she sustained as a result of an unlawful assault committed on her by his servants.

Mr. *Colman*, however, suggested that it would render the position of surgeons, therapists, dentists—indeed the whole of the medical profession—intolerable if it were to be held that they owed a duty to patients of having to inform them, prior to any operation or treatment, of all the consequences, the dangers and the details of the risks, accompanying the operation or treatment—and reference was made to certain observations of DENNING, L.J., in *Hatcher* v. *Black and Others* (Q.B. 30 June 1954, apparently unreported).

I do not pretend to lay down any such general rule; but it seems to me, and this is as far as I need go for purposes of a decision in the present case, that a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient—no matter how laudable his motives might be—and should he act without having done so and without having secured the patient's consent, he does so at his own peril.

With reference to the remark of SCHREINER, J.A., *supra*, appearing in the case of *Lampert* v. *Hefer*, *N.O.*, Mr. *Colman* said that the problem in that case was not the problem in the present matter. He contended that in a case where a patient in his sound and sober senses gave his permission to a surgical operation or 'consent proper', as counsel termed it, there was no need that the patient should in addition be informed or be aware of any attendant dangers or risks. It was competent for the patient, so the argument proceeded, to enter into an agreement with the surgeon, whereby the former waived his right to sue for an assault and latter 'contracted out' of any liability for an assault. In such a case, counsel said, in the light of which the observation of SCHREINER, J.A., should be viewed and to which it could never apply, there simply is no need nor any reason to commend itself to one, why the patient should in addition be made aware of the dangers in order to furnish an 'effective' consent. Mr. *Colman* contended that the situation was much the same as the airways passenger on whose ticket it was stated that the airline would not be responsible for loss or injury occurring to the passenger during the flight—and of course who was never informed and in fact was unaware of all the risks which he entertained during the flight. Accordingly, so counsel said, the remarks of SCHREINER, J.A., are to be limited to cases purely of the 'voluntary assumption of risk' type and do not deal with the present situation where there was 'consent proper' to the reception of X-ray treatment. It would be absurd, so it was said, to allow a plaintiff to succeed in an action against a therapist who had taken the precaution of arming himself with a document signed by plaintiff, reading, e.g. as follows:

> 'I present myself, a sufferer from Kaposi's disease for X-ray treatment. I am unaware of any dangers connected with the treatment, but I leave the treatment entirely to your discretion'—

yet, said counsel, such a document would presumably not suffice to protect the therapist in an action based on an assault, because he had not explained the dangers of his proposed treatment to plaintiff.

The facts before me are however different. Not only were defendant's servants in fact unaware of plaintiff's mother's contentment to leave the treatment to their discretion, but if they had enquired they would have ascertained, not only that she was completely unaware of any risks connected with X-ray treatment, but that she, on the contrary, because of what had happened in the past, believed that plaintiff would receive the same treatment as on previous occasions, which caused no harm to her daughter at all, and for which reason she assumed it was safe.

With reference to the decision of NESER, J., in *Botha* v. *Rompel*, *supra*, it was suggested that the case was wrongly decided. I am far from satisfied that the suggestion is correct; on the contrary I would respectfully associate myself with the views and remarks of NESER, J.

It was next suggested that that decision could be distinguished on the facts. In that case it was not a question of 'life or death', whereas, so counsel said, in the present case it was; plaintiff only had one year to live, according to Dr. Cohen. The answer, however, is that it is common cause that there was sufficient time to have obtained the consent of plaintiff's guardian if that had been thought desirable or necessary. It was further sought to distinguish the facts on the basis that in that case there was no 'consent proper', whereas in the present there was—a matter with which I have dealt.

There remains for consideration on this branch of the inquiry a final submission made by Mr. *Colman*. He said that an assault is only actionable if there was a wrongful intent or *dolus* present to the aggressor, and I was referred to Melius de Villiers on *Injuries* (pp. 26, 27) and various other authorities. On the facts, so the argument proceeded, there was no *dolus* proved as Dr. Cohen, in administering the treatment to plaintiff, did so with the laudable motive of endeavouring to cure her. In my view, however, intent and motive are different concepts, and the fact that the motive for an assault might be laudable does not negative the fact that the intention to assault or the assault itself might nevertheless be wrongful. On the facts before me he had no right to subject plaintiff to the particular treatment without her consent. That he intended doing just that, is, of course, common cause, and the contention that there was no 'wrongful intent' must accordingly fail.

In the nett result I have come to the conclusion that defendant is to be held liable in damages for an assault committed on plaintiff. The *quantum* thereof I shall consider at a later stage since it remains necessary to deal with the alternative cause of action based on negligence.

Plaintiff's case is that Dr. Cohen was negligent and treated her unskilfully. In this connection counsel for the defence stressed that

> ' . . . in a hospital when a person goes in who is ill and is going to be treated, no matter what care you use, there is always a risk. Every surgical operation involves a risk. It would be wrong, indeed bad law, to say that simply because a misadventure or mishap occurred, thereby the hospital and doctors are liable. Indeed it would be disastrous to the community if it were so. It would mean that the doctor examining the patient, or a surgeon operating at a table, instead of getting on with his work, would forever be looking over his shoulder to see if someone was coming up with a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence

can wound his reputation as severely as a dagger can his body. You must not therefore find him negligent simply because something goes wrong, as for instance, if one of the risks inherent in an operation actually takes place, or because some complication ensues which lessens or takes away the benefits that were hoped for, or because in a matter of opinion he makes an error of judgment. You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man. In short, when he is deserving of censure—for negligence in a medical man is deserving of censure.'

(*per* DENNING, L.J., instructing the jury in *Hatcher* v. *Black and Others, supra*).

But the test to be applied in the determination of the question whether a doctor acted negligently or unskilfully in any given case emerges clearly from the decision of WESSELS, J.A., in *van Wyk* v. *Lewis*, 1924 A.D. 438 at p. 456, who held that

'the surgeon (must perform) the operation with such technical skill as the average medical practitioner in South Africa possesses and (must) apply that skill with reasonable care and judgment . . . (he) is not expected to bring to bear on a case entrusted to him the highest possible professional skill but is bound to employ reasonable skill and care and is liable for the consequences if he does not.'

I was also referred, generally on the question of negligence, to the remarks of VAN DER HEEVER, J.A., in *Herschel* v. *Mrupe*, 1954 (3) S.A. 464 (A.D.) at p. 490, who stated:

'The concept of the *bonus paterfamilias* is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances.'

It was contended on behalf of defendant that the facts show, not only that Dr. Cohen was not negligent, but at most, or at the highest, that he took 'a reasonable chance' which he was obliged to have done in the circumstances of this case, and that if any error was committed, it was an error of judgment 'in a matter of opinion'.

I now turn to the facts of the case.

I have had the benefit of opinions expressed by Drs. Cones, Weinbren and Osler on the one hand, and Dr. Cohen on the other. On certain matters they all agree, and on others the former three are in opposition to the views entertained by Dr. Cohen. There is no question about the fact that these gentlemen, all registered specialists, are fully qualified to express expert opinions and that I must be guided by their views:

In this connection allowance must be made for the fact that more is known today about Kaposi's disease and the treatment thereof, than was the case in 1949. Furthermore, that the test to be applied is

'not what a specialist would or would not do under the circumstances . . . because a general practitioner is not expected to have the same degree of knowledge and skill and experience as a specialist has . . . The question is what is the common knowledge in the branch of the profession to which the accused belongs.'

(*per* ROPER, J., in *R.* v. *van der Merwe* (W.L.D. 20 May 1953, unreported.)

In 1949 Dr. Cohen of course was not a specialist radio-therapist. He had only qualified in April of that year. Accordingly I must consider his actions in relation to what common knowledge and practice was at the time and not what a specialist might have known or have done in 1949. But evidence by specialists as to what was common knowledge in the profession is evidence on which reliance may be placed

'because the general practitioner is expected to be possessed of knowledge which is common in the profession.'

(*per* ROPER, J., in *R.* v. *van der Merwe, supra*).

Facts which are common cause and which were matters of common knowledge in 1949, are the following:

Firstly in regard to X-ray treatment generally: The intensity of reaction on tissues, both healthy and tumour tissue, and consequently risk of necrosis, depends in the main, on the dosage (calculated in units of 'r'); on the time interval and dosage rate, i.e., the period of time over which the dosage is administered, including the time which is allowed to elapse between each individual administration, when merely a fraction of the predetermined dosage is given to the patient; on the size of the field employed; and finally on the particular part of the body which is to be subjected to treatment.

In order to decide the issue as to whether Dr. Cohen employed reasonable care and skill in his treatment of plaintiff it becomes necessary to elaborate somewhat on these matters—and in so doing I shall confine myself to matters which are common cause. Generally speaking, the very foundation of radio-therapy rests on the fact that, after tissues have been irradiated, both the healthy and tumour tissues start recovering from the effect thereof, in many instances, not without exception however, the rate of recovery of healthy tissue is more rapid than that of tumour tissue. The fact enables the therapist to administer with safety, a dosage of an order sufficient to eradicate the tumor, but which would in itself normally exceed the limits of skin tolerance. By allowing a lapse of time between each individual treatment during which the tissues recover, the healthy of course more rapidly than the tumour tissue, the further application on each subsequent treatment of X-rays eventually results in the complete death of the tumour tissue, whilst the healthy tissue, although damaged, nevertheless remains alive and is then allowed to recover. This process of fractionation may be varied in the sense that the interval between each treatment may be a matter of hours or days. It is clear, however, that a dosage e.g. of 1,000 r, administered over twenty days in say ten fractions, is less intense than the same dosage administered in a lesser number of days, even although in the same number of fractions. By the same token, if the dosage required to eradicate the tumour is, say, 1,000 r in five days, and it is decided to fractionate it over ten or twenty days, it will be necessary in order to obtain the same order or strength of dosage, to increase or step up the number of r-units to be administered over the longer period. In other words, whatever the dosage may be, if administered over a shorter length of time it becomes more intensive than that dosage administered over a lengthier period.

Furthermore, all are agreed that to 'under-dose' a patient is bad practice, not only because it is inefficacious, but because once tissues have been irradiated, and herein lies the importance, the application of any subsequent X-ray treatment is rendered not only difficult but hazardous—as previously treated tissues are, due to some permanent change in or damage to the tissues or tissue-formation, more sensitive to the reception of subsequent X-rays, thereby increasing the risk of necrosis. At the same time, however, all agree that the limits of skin or tissue tolerance must never be exceeded.

The problem confronting the therapist is accordingly to strike a proper balance between a dosage which will destroy the tumour tissue without irretrievably damaging the healthy tissue.

In this regard, all agreed that the tumours in Kaposi's disease are 'radio-sensitive'. Indeed Dr. Cohen made an entry on a report concerning plaintiff (exhibit 15) prior to her treatment, that 'Kaposi's disease is extremely radio-sensitive', and agreed with the definition given to that term by Ralston Patterson at p. 4 in his work on *The Treatment of Malignant Disease by Radium and X-rays*, in which it is said:

'Sensitive tumours are those in which the therapeutic ratio is high, the normal tissues tolerating doses of several times the magnitude of the tumour lethal dose.'

I should add immediately, however, that during cross-examination Dr. Cohen stated that *Patterson's* statement, although correct.

'does not apply to Kaposi's disease, because Kaposi's is a tumour which is radio-sensitive, but as a rule it arises in a tissue which would not tolerate even moderate doses that are required . . . the tumour arises in the extremities and those are tissues which are not tolerant of radiation.'

I shall return to this evidence at a later stage, but for present purposes it serves to introduce a further admitted and known fact in connection with X-ray treatment, viz., that the limit of skin or tissue tolerance is *inter alia* governed by the supply of blood: the feet, ankles and hands of the human body, served with a lesser blood supply than other parts, are accordingly less capable of tolerating irradiation—a fact for which due allowance must be made by the therapist.

In deciding upon the technique to be employed in administering the dosage to a patient, but nevertheless a factor which in itself has a bearing on the determination of the required tumour lethal dose, the therapist must give consideration to the 'fields' he intends employing in treating the patient, i.e., the size of the area which he intends subjecting to X-rays at any given time.

(The learned Judge then dealt with this factor and other evidence and proceeded.)

On the probabilities before me, coupled with the expressions of opinion by Drs. Weinbren, Osler and Cones, I find as a fact that the dosage and technique employed in plaintiff's case resulted in the administration to her of X-rays of too high an order, and which exceeded the limits of skin or tissue tolerance, so in the end causing the necrosis and leading to the amputation of these limbs. I have mentioned that Dr. Cohen in 1949 was confronted with an extremely difficult task, for reasons I need not repeat again. I have given due consideration to the question whether he merely 'erred in a matter of opinion', but cannot persuade myself to subscribe to that view. For reasons mentioned I have found that he acted without ordinary or reasonable care in a number of respects, which again as a matter of probability, either individually or conjunctively, contributed towards the dosage which exceeded the limits of skin or tissue tolerance. In this connection I may state that the size of the fields employed, the fact of opposing fields having been used, and the short interval of time over which the dosage was administered, appear to me to have been the main contributing factors—and although Dr. Cohen stated that ten per cent of Kaposi's disease cases appear to be unlucky in the sense that they may suffer amputation of a limb or limbs, and that 'Plaintiff was one' of the ten per cent of these cases, I am unable to agree with the latter portion of that view. Plaintiff's misfortune was, in my opinion, not occasioned by chance, or by 'an error of judgment in a matter of opinion', but by actions on the part of the therapist which fell short of ordinary care and diligence.

In the nett result therefore, I find that defendant is liable to plaintiff on both the main and the alternative cause of action.

I must now attempt to assess the *quantum* of damages. I use the word 'attempt' advisedly, as I, too, now find myself confronted with so many 'unknown factors and *data*' that an assessment of damages in these circumstances may well, in many respects, be regarded—and justifiably so—as 'guess-work'. That, however, does not relieve me of the duty to assess damages as best I can, on the material before me.

The first and most difficult question to answer, but nevertheless an important one, is whether on the evidence before me, it would be correct to find, on a balance of probabilities, that plaintiff could have been 'cured' of the disease without entailing a loss of limbs—cured, not permanently, but in the sense in which she presently finds herself—that is to say, although a Kaposi's disease patient in whom the disease may remanifest itself in an active form at any given moment, nevertheless is a patient enjoying, in the words of Dr. Murray, 'a reasonable prospect that the disease will not re-occur again'. If it does not, and she is to be allowed her normal expectation of life, she will, according to the calculations of an actuary, one Erikson, live for 42·8 (forty-two point eight) years.

(The learned Judge then considered the evidence and concluded.)

In the nett result, thereof, plaintiff obtains judgment with costs against defendant in the following amounts:

(i)	In respect of artificial limbs	£1,250
(ii)	In respect of future medical expenses ..	£1,250
(iii)	In respect of procuring the services of an assistant	£1,500
(iv)	In respect of loss of amenities, disfigurement, pain and suffering	£6,000
	Total	£10,000