

VONNISSE

REVISITING CRIMINAL MEDICAL NEGLIGENCE RESULTING IN DEATH

S v Van Heerden 2010 1 SACR 529 (ECP)

1 Introduction

Cases dealing with criminal medical negligence in South Africa are relatively rare, and rarer still are those that are *reported*. In fact, the last *reported* case dealing explicitly with criminal negligence (of specifically medical specialists) resulting in the death of a patient is *S v Kramer* 1987 1 SA 887 (W) (see also *R v Van Schoor* 1948 4 SA 349 (C); *R v Van der Merwe* 1953 2 PH H124 (W); *S v Mkwetshana* 1965 2 SA 493 (N); *S v Lombard* 1979 Pretoria Magistrate's Court, unreported, discussed by Strauss *Doctor patient and the law* (1991) 265 fn 6 and Carstens and Pearmain *Foundational principles of South African medical law* (2007) 756; *S v Bezuidenhout* 1985 (A) unreported, discussed by Strauss 272; *Pierce v Fine* 1986 (D) unreported, discussed by Strauss 273; *S v Nel* 1987 (T) unreported, discussed by Strauss 280; *S v Shivute* 1991 1 SACR 656 (Nm) (dealing with nursing negligence); *S v Van Almenkerk* 2006 (T), unreported, referred to by Carstens and Pearmain 621 fn 140; cf Barlow "Medical negligence resulting in death" 1948 *THRHR* 173; McCall Smith "Criminal or merely human?: The prosecution of negligent doctors" 1995 *J of Contemporary Health Law and Policy* 131; Lanham "Principles of causation in criminal law" in Freckleton and Mendelson (eds) *Causation in law and medicine* (2002) 211ff). It is for this reason that the reported case under discussion, more than two decades after the *Kramer* decision, is of interest. Of particular interest would be a principled assessment of the judgment, in context of criminal medical negligence with reference to the crime of culpable homicide. In this case, it is specifically some of the elements of criminal liability, namely the *actus reus* (in the form of an omission), causation and fault that attract academic attention, albeit by way of a deconstruction of the judgment.

2 The facts

The salient facts appear from the judgment of Liebenberg J: The first accused, a specialist obstetrician and gynaecologist, and the second accused, an anaesthetist, were charged with culpable homicide following the death of M, a 47-year old patient, after a hysterectomy performed upon her by the first accused. The second accused was the attending anaesthetist during the operation. The deceased, a very fit and athletic woman (herself the wife of a specialist radiologist), died after the operation as a result of haemorrhagic shock due to bleeding from the left uterine artery subsequent to the operation. It is common cause that the operation itself went without complication, but that the patient developed/experienced complications post-operatively. The attending nursing sister, observing

the vital signs of the patient in hospital, telephoned the first accused to inform him that the patient's blood pressure had dropped significantly and gave him the blood pressure and heart rate readings. The first accused, who was on his way to attend to another patient at his fertility clinic, received the telephone call, but claimed that the nursing sister did not give him any blood pressure readings and he consequently assumed that the patient was slightly hypovolaemic. He therefore only instructed the nursing sister to change the fluid administration to the patient, without himself attending to the patient (531g–532h). The patient, however, did not recover and subsequently died as a result of haemorrhagic shock due to internal bleeding.

3 The judgment

It is to be noted that both accused pleaded not guilty to the charge of culpable homicide and elected not to tender any explanation of plea. More in particular, all the elements of the offence were disputed (530g). For this reason, although it was not specifically articulated by the court, the judgment may be viewed on various levels. The first level refers to the element of the act/conduct in that the first accused failed (in context of an omission) to attend to the patient when he was telephoned by the nursing sister who informed him about the patient's blood pressure; the second level refers to the question whether the failure to attend to the patient was *causally* connected to her death; the third level refers to the unlawfulness of the first accused's omission; the fourth level pertains to the element of fault (the first accused's criminal medical negligence); the fifth level pertains to the professional liability of the second accused (in concert with the liability of the first accused); and the last level refers to considerations of evidence (notably the onus of proof and the meaning of "beyond reasonable doubt" as well as the assessment of expert medical evidence).

With regard to the first level, whether it can be said that the first accused failed (omitted) to attend to the patient, the court ruled that there was a duty on the first accused, after receiving the phone call, to "immediately go and see the patient and deal with the situation" (531i–j). Although the first accused disputed the evidence of the nursing sister that she did in fact inform him about the blood pressure and heart rate readings telephonically, the court made a ruling on credibility in accepting the nursing sister's version of the events, and rejected the version of the first accused (532h). As to the second level, the element of causation, the court had to assess the question whether the deceased's life could have been saved had appropriate steps been taken immediately to deal with the internal bleeding. In this regard expert medical evidence was tendered to the effect that there was a risk of death even if timeous and proper action had been taken, although death was not the likely outcome. It was contended on behalf of the accused, that no matter how slight the possibility, the deceased would have died in any event or, put differently, by the time the first accused had received the nursing sister's telephone call, the deceased was beyond the point of no return. It was therefore contended that the State had failed to prove the charge (in context of the element of causation) against the accused beyond reasonable doubt. The court, however, dismissed this argument and ruled that it was not an acceptable proposition, as such an argument would have the effect that it would never be possible in a case such as the present to show beyond reasonable doubt that a life would have been saved if proper and timeous action was taken (538i). In support

of this ruling the court relied on *S v Clegg* 1973 1 SA 34 (A) 38–39 where Rumpff JA (as he then was) stated the following:

“Wanneer die Staat sy saak op so ’n manier moet bewys dat die *judex facti* oortuig moet wees dat die misdryf gepleeg is, word dit nie van die *judex* verwag dat sy oortuiging gebaseer moet wees op ’n sekerheid wat daarin bestaan dat ’n onbepaalde aantal geopperde moontlikhede wat denkbeeldig is of op blote spekulasie berus, deur die Staat uitgeskakel moet wees nie. Die begrip redelike twyfel kan nie presies omskryf word nie, maar dit kan wel gesê word dat dit ’n twyfel is wat bestaan weens waarskynlikhede of moontlikhede wat op grond van algemene gangbare menslike kennis en ondervinding as redelik beskou kan word. Bewys buite redelike twyfel word nie gelyk gestel aan bewys sonder die allerminste twyfel nie, omdat die las om bewys so hoog gestel te lewer, prakties die strafregsbedeling sou verydel.”

Consequently, the court held that the possibility that the deceased would have died in any event, although from a medical perspective always present, was remote and speculative (539c–d). This ruling by the court effectively had the result that the element of causation (required for a conviction on a charge of culpable homicide), specifically assessed in context of expert medical evidence and the State’s burden of proof, were dispensed with.

Having found that the element of causation had been proven by the State, the court then ruled (with reference to the element of fault (negligence) that it followed that the first accused did not act reasonably by failing to attend to the patient (presumably because a reasonable competent specialist obstetrician and gynaecologist would have acted differently in the same circumstances – although the test for criminal medical negligence is nowhere articulated as such in the judgment), and consequently that the State had established the necessary nexus between the negligence of the first accused and the death of the patient (539d–e).

Although the accused disputed all the elements of the charge at the beginning of the trial, the element of unlawfulness (in terms of possible grounds of justification for the first accused’s omission to attend to the patient), was not addressed or discussed in the judgment. As to the possible medical negligence of the second accused (the attending anaesthetist), the court found that his actions/omissions were limited to the period in which the deceased spent in the recovery room and that no negligence on his part was proven. Consequently, the second accused was acquitted, while the first accused was convicted as charged. It is to be noted that the sentence imposed on first accused is not reported in the judgment (539e–f).

4 Assessment

On a primary level the judgment in this case is of interest as it focuses on criminal liability for medical negligence resulting in the death of a patient. Due to the grave consequences of this judgment for the professional reputation/career of the first accused involved, as well as the unfortunate demise of the patient with the concomitant trauma for her family, this case was undoubtedly a “hard case” to adjudicate. It is precisely for this reason that one would have expected the trial court to have determined the criminal liability of the accused with reference to all the salient elements of the particular crime (culpable homicide), as well as the judicial scrutiny of relevant case law and authority, specifically *S v Kramer supra*. The latter case, where a surgeon and anaesthetist were also charged with culpable homicide following the death of a young girl after a tonsillectomy, is critically comparable and relevant to the judgment under discussion, as a

determination was also made with regard to a *negligent omission* on the part of the attending specialists *causing* the death of the patient. A principled determination, in the judgment under discussion, would have required the court to ultimately assess whether the State has indeed proven beyond reasonable doubt that the *first accused's omission unlawfully and negligently caused the death of the patient* (for a discussion on the requirements for the crime of culpable homicide see Burchell *Principles of criminal law* (2006) 667ff; Snyman *Criminal law* (2008) 451ff). The judgment, however, does not reflect on such an explicit assessment/consideration of the salient elements of the crime, and focuses mainly on the issue of causation (albeit a very limited focus on *factual* causation only). It is also apparent, apart from the reference to *S v Clegg supra* (in context of the definition of "reasonable doubt"), that the judgment does not refer to any other legal precedent or legal authority (not in the context of the material criminal law/medical law or the test for criminal medical negligence). In this regard the judgment, viewed against that of *S v Kramer supra* 893E–895I (as a case where these aspects were fully considered), is with respect, disappointing. The judgment, with academic hindsight, comes across predominantly as a determination of the facts from which certain judicial inferences are drawn without such inferences necessarily resonating in the application of the material criminal law/medical law. It is as though there is no appreciation for the fact that the case deals with the determination of criminal negligence in the context of medical law and that medical law now transcends the traditional boundaries of criminal law (see Carstens and Pearmain 3ff). To illustrate these apparent constraints or *lacunae* in the case it is submitted that a deconstruction of the judgment, with particular reference to the salient elements of the crime of culpable homicide, as borne out by the reported evidence and the requirements of the material criminal law/medical law, is called for as it might be instructive.

By applying a deconstructive approach with regard to the finding of the court that the first accused failed to attend to the patient after he was telephonically alerted, the court found that there was a duty on the first accused to render immediate assistance to the patient. It is to be noted that this finding, in a deconstructive mode (in terms of the material criminal law *and* medical law), amounts to a sanctionable omission, as there was a duty on the first accused to act positively towards the patient, such duty emanating from the special doctor-patient-relationship (cf *S v Kramer supra* 889F; Strauss and Strydom *Die Suid-Afrikaanse geneeskundige reg* (1967) 175ff; Strauss 28; Carstens and Pearmain 506ff; Strauss "Medical law in South Africa" in Blanpain (ed) *International encyclopaedia of laws* (2007) 66ff). The element of sanctionable criminal conduct on the part of the first accused is thus satisfied, although this aspect seems to be intertwined in the judgment with negligence. It is to be emphasised that a clear distinction should be drawn between an omission and negligence: the first is a form of conduct and denotes a *failure* to act positively in the face of a legal duty to do so; the latter is a form of fault and denotes a *failure* to comply with the standard of the reasonable person in the same circumstances (in this case the standard of the reasonable medical specialist in the same circumstances). It is to be noted that no such clear distinction is drawn in the judgment.

In context of the element of causation (whether the first accused's omission *caused* the death of the patient), the court only applied the test for factual causation by ruling that the evidence overwhelmingly showed that the patient had not yet reached the point of no return and her life would have been saved, *but for the*

negligence of the first accused (539c–d). In a deconstructive mode, without articulating the material test for criminal causation, the court in fact, by implication, applied the *conditio cum qua non* test (as opposed to the *conditio sine qua non* test) to determine factual causation in context of an omission, the question to be posed being as follows: would the patient have survived/lived if the first accused had in fact attended to her after receiving the telephone alert of the nursing sister? Thus, instead of *thinking away* the act, one must *imagine a positive act* in the place of the omission (see *S v Van As* 1967 4 SA 594 (A); *S v Poole* 1975 1 SA 924 (N); cf Snyman 89 para 19). Applying this test for factual causation, there can be no doubt, on the accumulative assessment of the expert medical evidence, that the conduct of the first accused was indeed the *factual* cause of the patient's death. However, factual causation is not sufficient to establish causation in criminal law and should be limited. In addition, it is required that the factual cause of death should also be the *legal* cause of the patient's death. Legal causation is primarily determined by way of policy considerations where the court enquires whether it is fair, just and reasonable to find that the act/omission which is the factual cause of death, should also be noted as the legal cause of death (see *S v Daniels* 1983 3 SA 275 (A); *S v Mokgethi* 1990 1 SA 32 (A); *S v Counter* 2003 1 SACR 143 (SCA); *S v Tembani* 2007 1 SACR 355 (SCA); cf Burchell 209ff; Snyman 88ff). The problem with the case under discussion is that the court did not determine *legal* causation and merely assumed that because the first accused's failure to attend to the patient was the factual cause of the death, he therefore was indeed the full cause of the patient's death. In hindsight, it is difficult to speculate and to imagine what the court's ruling would have been with regard to the crucial element of causation, had the court in fact specifically determined *legal* causation with reference to the required criteria, or that the outcome of the case would have been different. One can only gather that the court was influenced or guided by the concession of the first accused's counsel that "if the readings were given to accused 1 by the nursing sister, then, in view of the fact that he did not go and see the deceased in order to deal with the problem, he must have been negligent" (531j–532b). It is submitted that this finding and concession (in a deconstructive mode), are problematic as both the court and counsel for the first accused apparently assumed that causation has fully been proven, and as a consequence it just followed that the first accused's negligence was the cause of death. It is to be noted that the causal *nexus* must be proved between the *consequence* (the death) and the *conduct* (the omission), not between the consequence and the *negligence* (which is the form of fault) (see the court's finding 539d–e that "it follows that the State established the necessary nexus between the *negligence* of accused 1 and the death of the deceased"). To put it differently, the State must prove that the conduct (omission) which caused the death was also accompanied with fault on the part of the first accused (in the form of negligence (*culpa*)) – thus a *negligent* omission, as (a) the reasonable competent obstetrician and gynaecologist in the same circumstances would have foreseen that failure to attend to the patient at the given time would have caused her death; and (b) the reasonable competent obstetrician and gynaecologist would have taken steps to prevent her death – the test for criminal medical negligence being one of reasonable foreseeability of death and preventability of death (see *S v Kramer supra* 893E; Snyman 452ff Carstens and Pearmain 621ff 643ff; Barlow 1948 *THRHR* 173ff, Labuschagne "Nalatigheid en voorsienbaarheid by strafbare manslag" 1994 *SACJ* 221). One has to interpret the court's understanding of the first

accused's negligence to be inclusive of the omission as this is not explicitly stated by the court.

It is to be noted that the court nowhere in the judgment explicitly states the test for criminal medical negligence as enunciated in the material criminal law/medical law, and no reference is made to any authority or legal precedent in this regard. Some observations by the court to the effect that the yardstick of "reasonableness" was employed as a determinant for the first accused's inaction are where the court states that "expert evidence was also presented to show that accused 1 acted *reasonably* when he did not go to see the deceased after he received the phone call" (536d–e), and further "the question which then arose was whether at approximately 14h00, when he could have been expected to arrive at the bedside of the deceased, *her life could still have been saved if appropriate steps to deal with the internal bleeding were immediately taken*" (536c–f). These observations are, with respect, all but summaries of the factual manifestations in the judgment of the test for medical negligence in criminal law, but do not fully resonate in the actual and full test of reasonable foreseeability and reasonable preventability. It is therefore difficult to glean from the judgment what the principled stance would be in context of medical negligence in criminal law. The absence of a principled stance in the judgment is in stark contrast with the judgment in *S v Kramer supra* 893E–895I, which is a sterling example of the judicial application of the test for medical negligence in criminal law (incidentally by applying the test for medical negligence as established in civil law which is the same as in criminal law (apart from the onus of proof) (see *R v Van der Merwe supra* 124; *R v Van Schoor supra* 349; cf *Mitchell v Dixon* 1914 AD 519 525; *Webb v Isaac* 1915 EDL 273 276; *Van Wyk v Lewis* 1924 AD 438 444; Strauss and Strydom 281ff; Carstens and Pearmain 622ff).

Ultimately the case was decided predominantly with reference to the element of causation in context of the onus of proof. However, the judgment, for the reasons advanced, is regrettably disappointing as it does not offer any progression since *S v Kramer supra*, and cannot be regarded as a principled restatement of medical negligence resulting in death. In this regard, *S v Kramer supra* remains the guiding principled precedent.

PIETER CARSTENS
University of Pretoria