Esterhuizen v Administrator, Transvaal: a case review

Poonitha Naidoo N Dip Rad (D); B Tech Rad (T); Current study: LLM (Medical Law), University of KwaZulu Natal

Abstract

According to South African law, a patient must be informed of risks that may arise after any medical intervention, especially in cases where the proposed treatment may imply drastic consequences [1]. The plaintiff in *Esterhuizen v Administrator, Transvaal* [2] was subjected to x-ray treatment without the required consent having been obtained.

Key words: *informed consent, radiotherapy, paternalism.*

Introduction

The case of *Esterhuizen v Administrator, Transvaal* is of great importance in South African law, where judgement in this case paved the way for a number of later cases, and will definitely be part of a reservoir of case law in this country, concerning human rights and the new Constitution. The case also expressly rejects paternalism in medical practice.

A review of the case is presented in a manner that the case was heard. In a Court of Law, the choice of words used by witnesses must be simple enough for non-medical individuals to understand, and should not need interpreting. This is significant to the case as certain words and phrases are analysed by the Court to identify the issues, and the rule of law that applies to the relevant facts.

Review

In 1945, the plaintiff patient, a ten-year-old female, noticed a small nodule below her right ankle. Shortly afterwards, she injured her right ankle. Her concerned father took her to Dr. Gouws, a medical practitioner in Volksrust. He treated the injury and excised the nodule, which he sent to the South African Institute for Medical Research for histological analysis. Dr Murray, a pathologist who appeared as a witness for the plaintiff, informed the Court that he identified a disease known as Kaposi's haemangiosarcoma in the nodule. He further explained that: the nodule was a malignant tumour, which tends to initially occur on the feet and hands before spreading centrally towards the trunk and other parts of the body. As the nodules grow, they eventually coalesce to form larger tumours, which are destructive to adjacent tissue, and lead to ulceration of the skin, infection and ultimately death of the patient by either infection, or spread to vital organs if the disease is not checked in its progress. Also, it is a disease that progresses slowly but relentlessly, and is related to the blood vessels. The general consensus of opinion is that the average expectation of life of a patient is five to ten years, but there were cases where death occurred within a year, whilst some patients survived for as long as forty years.

The plaintiff's mother testified that Dr. Gouws then advised her that the plaintiff suffered from 'blood cancer' and that he was not equipped to treat such a disease. It was therefore necessary for the plaintiff to be referred to the Johannesburg General Hospital, where she will receive x-ray treatment to 'burn' the area where the nodule was excised. The mother informed the Court that at this stage she did not know anything about x-ray therapy or the dangers associated with such treatment. However, she was in complete agreement that the plaintiff should have the treatment because the word 'cancer' meant that she would soon die. The mother's state of mind was one of contentment to leave the treatment entirely to the discretion of the medical authorities. The plaintiff's father could not testify because he died in May 1948.

In July 1945, the plaintiff received superficial x-ray treatment over the site of the excision and was sent home. The x-ray machine used was referred to as the 'Chaoul Unit'. The plaintiff did not experience any discomfort from the treatment. Two weeks later, her skin peeled off over the site of treatment. However, in October 1945, nodules appeared on her right leg and foot. She was taken to Johannesburg General Hospital where she received superficial x-ray treatment on the Chaoul Unit from the 8th to 13th October. She was instructed to report back to the hospital regularly for routine examination, which she did during the period 1945 to 1949. In October 1949, fresh nodules appeared on the patient's extremities and the plaintiff's mother instructed the grandfather to accompany the plaintiff to the hospital for treatment as might be deemed best by the hospital's medical authorities. The mother expected the treatment to be the same as was received previously.

It can be accepted as a fact that the plaintiff's mother did not realise that x-ray treatment may be dangerous, or that such treatment can vary in technique. She therefore did not anticipate any danger or possible harm, especially that her daughter did not suffer any major discomfort on the two previous occasions that she was treated.

At the hospital, Dr. Cohen took charge of the plaintiff. He stated in his evidence that he examined the plaintiff on this occasion and concluded that she required 'radical' treatment which he described to the Court as 'deep x-ray therapy measured in rads'. He was aware of the fact that the plaintiff previously received superficial x-ray therapy on two occasions whilst in the care of Dr. Krige. Dr Cohen also stated that he was of the opinion that the plaintiff's disease was progressing rapidly, and estimated that the plaintiff will only live for another year. During the period 1st to the 5th November 1949, the plaintiff received deep x-ray therapy under the 'Maximar Unit', in accordance with the technique and dosage prescribed by Dr. Cohen. Both the plaintiff's feet and legs were treated up to the knees, and both her hands were treated up to the wrists. Ten days after receiving treatment, the plaintiff presented with blisters on the treated areas, and complained of a burning sensation. Her condition became worse, with a 'foul stench' emanating from the affected areas. On 17th May 1950, her right leg was amputated just below the knee. This was followed by a similar amputation of the left leg. In 1954 two fingers of the left hand were amputated, and an additional amputation of the right leg stump was done. In August 1955, the right hand was amputated at the wrist. Dr Murray, who examined the amputated legs, stated that he found no evidence of Kaposi's haemangiosarcoma, but found a condition called 'radiation necrosis', which he explained to the Court was death of tissue caused by a high dose of x-rays, which necessitated the eventual amputation of the limbs. Dr Murray also convinced the Court that in his expert opinion, the plaintiff was not cured of the disease as the disease is multi-centric in origin, and may recur at any moment.

During cross-examination, Dr. Cohen was asked why he did not think that he should have afforded the parents an opportunity to consider the situation to which 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 have never met the patient's parents...it is not the usual procedure in the radiotherapy department to ask the parents to come". He also stated that it was not the practice to obtain the parent's consent to such treatment, and that he gave the question no consideration. The argument was advanced that it would render the position of the medical profession intolerable if it were to be held that they owed a duty to patients in having to inform them of all the consequences and details of the risks inherent in the treatment. In his judgement, Bekker J dealt with this argument as follows: " 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 employ a particular technique for that purpose, which he knows before hand 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". Bekker J explicitly declared in Court that there could be no question of consent to any procedure where the patient had not been informed of the risks, and quoted Neser J [3]:
" I have no doubt that a patient should be informed of the serious risk 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".

An action for damages was instituted against the Provincial Administration, the employer of the medical practitioner concerned. The plaintiff succeeded in her claim.

Conclusion

Radiotherapy, although physically non-invasive in nature, presents with certain adverse events that vary according to the technique and ultimate dose that is administered to the patient. Although the ultimate goal of treatment will be to rid the patient of the disease, it must not be taken for granted that the patient is willing to take the risk. A patient may prefer to live with the disease rather than without limbs, as is understood in the case reviewed. In addition, where a patient attends a hospital on a regular basis, the initial consent to treatment must not be extended to include any variation in such treatment.

The case also suggests that radiotherapy should not be viewed as emergency treatment, and that patients must be afforded time to reflect on the risks that they will take. Patients may need to discuss their situation with family and friends to secure their support during a vulnerable time in their lives.

The case of *Esterhuizen v Administrator, Transvaal* will no doubt be used as a benchmark to judge similar circumstances that may occur in our oncology departments.

References

1. Strauss SA. Doctor, *Patient and the Law*, 3rd ed. Pretoria: J van Schaik, 1991: 8
2. Esterhuizen v Administrator, Transvaal 1957 (3) SA 710 (T)
3. Rompel v Botha 1953 TPD (Unreported)

awards & grants for members

Joyce Runnalls Memorial Trust Fund
It is the aim of the fund that any grants given be used in a field related to and for the benefit of oncology including:

1. All aspects of oncology and the cancer patient;
2. The advancement of radiotherapy;
3. Assistance for attending oncology or postgraduate courses/congresses/seminars/visits to other radiotherapy research/oncology centres.

For further information on the Joyce Runnalls Memorial Trust Fund including application forms please contact the Administrative Office of the Society.
Note the successful applicant will be required to publish and/or present a paper at a suitable radiographers' congress/seminar. Applications for the fund must reach the Administrative Office by 1 June each year.

Tyco Healthcare Award
The aim of the award is to confer on the recipient a grant for the professional advancement in any field of radiography. The award is available to persons with suitable qualifications registered with the Health Professions Council of South Africa (HPCSA) and who are members in good standing with the Society of Radiographers of SA.
Application forms, obtainable from regional branches and/or the Administrative Office of the Society must be returned to the latter on or before 1 June each year.
Applications will be considered by the Executive Committee, who will submit motivations to National Council. Successful candidates will be required to submit a paper for publication in *The South African Radiographer* and to present a paper on their subject at a meeting of radiographers and must fulfil any other criteria stipulated by the sponsor.

The Education Fund
The aim of the National Education Fund is to encourage members to attain further qualifications for the purpose of professional advancement in any category of radiography. Education bursaries are available to persons with suitable qualifications registered at the Health Professions Council of South Africa and who have been paid up full (ordinary) members of the Society of Radiographers of South Africa for at least three years.
The following courses can be considered:

1. Higher qualifications in radiography, for example: Higher National Diploma; Honours; B Tech; Masters in Radiography (e.g. M Tech).
2. Recognised teaching qualifications through either a technikon or university.
3. Technikon or university short course for which a certificate is awarded.

Under certain circumstances the following may also be considered:

4. Informal courses, providing they have direct relevance to the practice of radiography.
5. Attendance at seminars and congresses.

Application procedure
Applications must be completed on the Education Fund application form to reach the Administrative Office: Society of Radiographer of SA, P O Box 6014, Roggebaai 8012 before 31 July each year.
All applications will be screened by both Branch Education Representatives and the National Council Education Representative for approval by the Executive Committee who will submit recommendations to National Council at its next meeting. The bursary will be paid upon proof of successful completion of the course and the names of successful applicants will be published in *The South African Radiographer* on receipt of the required proof. The total amount available for awards will be derived from the interest of the capital investment only. The amount awarded per application is at the discretion of National Council, and will depend on the number of applications and type of course.

Note:
Application forms are available from regional branches.
Since the Education Fund is intended for use by full members, the Society actively encourages all regional branches to make available bursaries for students studying for their first qualification.