NOT REPORTABLE
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11194/08
DATE: 16/11/2010

In the matter between:

ANNE CHARMAINE HARMSE N.O. **Plaintiff**
obo SNYMAN JOSEPHUS JACOBUS

and

THE MEC FOR HEALTH: GAUTENG PROVINCE **Defendant**

JUDGMENT

MATHOPO J:

[1] This is an action for damages arising out of the alleged negligence of the doctors and staff at Yusuf Dadoo Hospital which led to an above knee amputation of the left leg of the original Plaintiff Mr Jacobus Josephus Snyman (now deceased).

[2] Ms Ann Charmain Harms was appointed as executrix to the deceased estate. This action is proceeded by her in representative capacity.

[3] By agreement between the parties the case proceeded on both merits and quantum.

[4] The quantum of the claim was limited to special damages for past losses (funeral expenses, past medical expenses, past loss of earnings and general damages for pain and suffering), it being common cause between the parties that since *litis contestatio* was reached, such a claim was still available to be pursued notwithstanding the death of the plaintiff.

[5] It is common cause that the deceased was seen at the casualty department of the Yusuf Dadoo hospital in Krugersdorp, at approximately 12H16 on the 18th of June 2005. He was thereafter admitted to the ward with a complaint of a sudden onset of acute pain in his left leg. His leg was elevated and he was given analgesics. At 11H40 on the 18th of June 2005, he was attended to by a doctor or nurse who made the observation that the deceased suffered numbness in his leg. At 12H16 on the 18th of June 2005, the deceased was seen by a doctor in casualty who noted tenderness and weakness of the leg, but no swelling. He recorded a full range of movement of the leg and intact neurovascular parameters. On the following day, being the 19th of June 2005 the deceased was seen by one Dr Nquanda at approximately 19h00. On the 20th October 2005, the deceased was found to have numbness in his legs, cyanosis (blue from lack of blood supply) and an absence of pedal pulses. On the 21st of June 2005, the deceased was diagnosed with a "dead limb" which was required to be amputated.

[6] The plaintiff's case is that the doctors at Yusuf Dadoo hospital failed to diagnose an occluded femoral artery on the deceased's leg or to take timeous effective action to deal with the occlusion appropriately when the provisional diagnose has been made. The plaintiff further avers that the doctors and nurses failed to notice or consider the fact that the deceased had an underlying vascular condition and that he had previous surgery to his right femoral artery for the vascular problem. Had they done so,

plaintiff avers the deceased would not have suffered the amputation of his leg.

ISSUES

[7] The issues that the court has to determine are:

7.1 Whether the defendant's employees were negligent in that they failed to reasonably diagnose and treat the plaintiff's acute arterial occlusion of his left leg which led to the left leg being amputated.

7.2 Whether Mr Snyman (the deceased) contributed to this injury (the amputation) by

7.3.1 Not informing the defendant's employees (doctors and nurses) that he had a previous femoral-femoral bypass graft surgery to his right leg as a result of arterial disease of the right leg; and

7.3.2 Continuing to smoke despite this previous surgery

[8] The plaintiff called Dr M de Kock, a vascular and general surgeon on the merits, he did not examine or consult with the deceased but gave evidence on the basis of the clinical notes and the executrix and family friend of the deceased, Ms Ann Harms on the aspects pertaining to the quantum. The defendant called Sister Liza Jansen, a registered nurse and unit manager of ward 1 of Yusuf Dadoo Hospital where the deceased was admitted for treatment which led to his amputation.

[9] Dr de Kock relying on the interpretation of the clinical notes testified that the deceased attended the casualty department of Yusuf Dadoo Hospital in Krugersdorp on the 18th June 2005 with a complaint of the sudden onset of acute pain in his left leg.

[10] At 11H40 on the 18th of June 2005, he was attended to by a doctor or nurse who made the observation that the deceased suffered numbness in his leg. At 12H16 on the 18th of June 2005, the deceased was seen by a doctor in casualty who noted tenderness and weakness of the leg, but no swelling. He recorded a full range of movement of the leg and intact neurovascular parameters. Dr de Kock expressed the opinion that it was not correct to say that the deceased intact from a neurovascular point of view.

[11] During cross examination he conceded that neurovascular compromise may be a subjective diagnosis and dependant on the degree to which it is present, but also testified that findings of “weakness” and “numbness” were not really compatible with a diagnosis of being intact from a neurovascular point of view.

[12] He testified that following the initial examination in casualty the deceased was taken from casualty at 13H55 and immediately admitted to a ward. It was suspected that he had a deep vein thrombosis (“DVT”). This evidence was not contested.

[13] He further testified that because the deceased had an underlying vascular condition and previous surgery to his right femoral artery it was necessary and important for an admission doctor to do a proper physical examination to elicit a proper history. According to his evidence, had the doctors at the casualty done so or any doctor who treated or examined the deceased thereafter, they would have noticed the surgical scars in the deceased left

and right groins and asked the question “What happened here?”. According to him this would have assisted the treating doctor to make a proper or appropriate diagnosis.

[14] It was his evidence further that on the 19th June 2005 there was no note made by the doctor in the hospital records thus indicating poor examination especially because on that day according to Sister Jansen, the deceased was complaining of extreme pain in his leg and a doctor was called. The notes indicate that instead of examining the deceased, the doctor prescribed strong pain killers in the form of pethidine and valium. Dr de Kock further gave evidence that on the 20th June 2005 after being seen by a doctor who performed a proper examination diagnosed him to be having an occluded femoral artery and recommended that the deceased be transferred to a better equipped hospital for a Doppler study of his arteries and urgent opinion. According to his evidence once the artery is occluded action must be taken within six (6) to eight (8) hours to ensure that the damage to the tissue does not occur. Sadly for the deceased, he was transferred to Charlotte Maxeke Hospital in Johannesburg on the 21 June 2005 i.e some twenty four hours (24hrs) late. His undisputed evidence supported by clinical records is that it was not possible to salvage the deceased’s leg at that time and he was then transferred back to Yusuf Dadoo hospital and subsequently amputated on the 23rd June 2005 at Leratong Hospital. The defendant did not adduce any evidence why there was an unreasonable delay in referring the deceased to Charlotte Maxeke Hospital. The evidence of Mr de Kock stand unchallenged.

[15] It was put to Dr de Kock during cross examination that the deceased was contributory negligent because he failed to disclose to the treating doctors and nurses his previous surgery. He responded by saying that if the doctors had properly examined him, physically, they would have noticed

the surgical scars on the right femoral leg and also the fact that some of his right toes on the right foot were amputated. The failure to notice this aspect is further evidence that no proper examination was done by the defendant's medical staff. He further opined that in the absence of medical evidence, no person could ever say whether and to what extent, if any, the deceased smoking in the previous five years had contributed to the occlusion in his left femoral artery. Again the defendant did not call any witnesses to assert their defence that the deceased was warned about the effects of smoking and continued regardless.

[16] As regard quantum Dr de Kock testified further that very little bleeding was noted at operation from the ischaemic muscles as a result of the amputation being performed at a too low a level, as a result this led or contributed to the prolonged post operation course of recurrent wound infection, purulent discharges resulting from further muscles necrosis. This necessitated a further amputation in the form of stump revision prior to the fitting of a prosthesis. He testified further that the deceased suffered further necrosis, multiple abscess formation in the stump, discharges and poor or delayed healing. According to him during this period the deceased endured severe pain and delayed his use of a prosthetic limb until the stump had stabilised. He reiterated that during this period the pain suffered by the deceased would have been very severe more particularly because of the second amputation and the delay in fitting the prosthesis.

[17] Mrs Harms, who is the executrix of the deceased estate and who was a friend of the deceased testified that she had visited the deceased in hospital, on a day which she could not recall before the deceased was transferred for the tests mentioned above. On that day, Mrs Harms testified that she saw the deceased's leg and that it was already a terrible

colour and to have to pushed by a fellow patient using a wheel chair to go outside and smoke.

[18] She also testified that she organised and paid for the funeral of the deceased which costs R4 500.00 and bought a prosthesis limb for the deceased which costs her R15 000.00. Mrs Harms also testified that the deceased was unemployed at the time he was admitted to hospital, but that he worked on cars for a bit of money and had a job lined up at Oryx Tanning (where he had worked previously). She testified further that her husband had informed her that the deceased was going to earn a salary of between R6 000,00 and R7 000,00 per month. The defendant objected to this latter evidence on the basis that it was hearsay. Ms Munro for the plaintiff argued that this part of evidence was one of the exceptions under Section 3(1) of the Law of Evidence Amendment Act 45 of 1998. I will deal with this aspect later in my judgment.

[19] Sister Jansen a witness for the defendant testified that she saw the deceased walking in and out of the ward to smoke and disputed the evidence of Mrs Harms that the deceased could not walk and had to be pushed by a fellow patient whenever he wanted to go outside to smoke. According to Mrs Jansen, there were no wheelchairs in the ward. She also gave evidence that when the deceased was seen by a doctor at 19H05 on the 18th June 2005 she had called him but could not elaborate on other days especially since the clinical notes were not of assistance.

[20] This is the conspectus of the evidence which I must evaluate. The test to be applied in an action for damages alleged to have been caused by the defendants negligence has been stated in two decided cases of the Supreme Court of Appeals in **Groenewald v Groenewald 1998 (2) SA at 1112G-J** the court said the following:

"In delictual claims of the nature involved in the present case two separate questions arise:

1. *Was the defendant at fault?*

2. *For what consequences caused to the plaintiff in consequence of the defendant's conduct is the defendant liable in damages to the plaintiff?*

For the purpose of answering the first question the defendant would be held to be at fault as long as he intended to cause harm to the plaintiff, even if did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if a reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by such conduct even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the very harm he actually suffered or harm of that general nature".

In Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000(1) SA 827 (SCA) at 838I-839C, Scott JA writing for the majority of the court said the following:

> *A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in Kruger v Cotzee 1966 SA 428(a) at 430E-F it reads:*
>
> *"For the purpose of liability culpa arises if-*
>
> *(a) a diligent paterfamilias in the position of the defendant-*

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[21] In the light of the above approaches and having regard to the present matter, two main questions need to be considered

21.1 whether there was negligence on the part of the medical staff at the Yusuf Dadoo Hospital who treated the plaintiff injury to his left leg;

21.2 whether such negligence caused or contributed to the loss of the left leg (i.e. amputation).

[22] The plaintiff's action as formulated in the particulars of claim is based on contract, it being a term of the agreement between the parties that the defendant's medical staff would treat and render such care, skill and expertise to the plaintiff, as could reasonably be expected from medical staff in the circumstances. The plaintiff contends that it was a term of the agreement that the defendant's medical staff would not act negligently in their treatment and management of the plaintiff. The defendant did not seriously dispute the negligence of its medical staff or call any witnesses to support its case and sought to rely on the alleged contributory negligence of the deceased.

[23] Ms Munro for the plaintiff on the merits submitted that the defendant through its agents or servants were negligent because following the evidence of Dr de Kock, the deceased was not properly examined by the medical staff on admission at the casualty and that there were delays in the diagnosis and treatment of the occluded femoral artery. She further argued that according to the clinical notes, no proper examination was done on the 18th and 19th June 2005. Again even after the doctor had performed a proper examination on the 20th June 2005, the defendant's agents took a further 24hours before the deceased was transferred to an appropriate hospital for a Doppler ultrasound examination and at the time it was too late to save the deceased's leg and this led to his amputation on the 23rd June 2005.

[24] She further submitted that following the evidence of Dr de Kock once the artery is occluded, action must be taken within the golden six to eight hours to ensure that the damage to the tissue does not occur. The defendant's agents/servants having failed to act properly, their conduct shows lack of proper care and skill and amounts to negligence.

[25] Regarding the defence of contributory negligence it was rightly submitted on behalf of the plaintiff that absent evidence that the deceased was asked and he refused to inform the doctors and staff about his previous medical history, the defendant's defence must fail. The second alternative ground that the deceased continued smoking despite his medical condition must also fail due to lack of evidence on the part of the defendant.

[26] In view of the evidence by Sister Jansen that the deceased was able to walk and did walk outside to smoke frequently. Mr de Kock conceded that the deceased did not have a totally occluded femoral artery on admission and stated that given the aforegoing factors, the doctors would have had a

period longer than six to eight hours to examine the plaintiff and operate him and save the leg. In my view their failure to examine the deceased properly and timeously from the 18th June 2005 until approximately 10h00 on the morning of 20th June 2005 when the clinical notes indicate that he had to be helped to the toilet indicates that at that time the artery had totally occluded. The unreasonable delay in properly examining him and attending him constitutes negligence.

[27] Again after the proper diagnosis was made on the 20th June 2005 the deceased was only transferred some twenty four hours (24hrs) later on the 21st June 2005 to the Charlotte Maxeke Hospital. At that time nothing could be done to save his already "dead leg" hence he was transferred back to Yusuf Dadoo hospital with diagnosis of non-viable limb and with a recommendation of amputation which was done on the 23rd June 2005 at Leratong Hospital. I fail to understand why the defendant's agents took so long before referring the deceased to an appropriate hospital. The conduct of the defendant's agent is totally unacceptable and this lack of appreciation of the urgency of the matter constitutes negligence. I must also add that the defendant's counsel on the issue of the delay did not contend otherwise. I consider the concession to have been properly made.

[28] It is trite law that a patient in a hospital is entitled to be treated with due and proper care and skill. The degree of care and skill that is required is that which a reasonable practitioner would ordinarily have exercised in South Africa under similar circumstances.

[29] The standard of care, skill and diligence exhibited by a medical practitioner must be in accordance with the test of reasonableness which has clearly been set out in two important decisions of the Supreme Court of Appeal, **Mitchell v Dixon** and **Van Wyk v Lewis.** In this regard Chief

Justice Innes set out the legal principle relating to the standard of care, skill and diligence exhibited by a medical practitioner as follows in **Van Wyk Lewis:**

> *"It was pointed out by this court, in **MITCHELL v DIXON (1914 AD at 525)** that 'a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."*

[30] I accept as reliable and correct the evidence of Dr de Kock that the conduct of the doctors fell below the standard expected and that if the proper and timeous diagnoses were made the deceased leg would have been saved and amputation avoided. The inexplicable delay in referring him to Charlotte Maxeke Hospital is unconscionable and this delay led to the leg been non-viable and ultimate amputation. Every member of society has a constitutional right to expect the doctors and medical staff to treat him/her promptly with respect and dignity. The defendant's agents failed the deceased in this matter.

[31] I now turn to deal with the defendant's allegation of contributory negligence. Its case was based on the fact that the deceased ought to have informed the doctors and nurses of his previous surgery and also that he continued smoking after the previous surgery. This argument is ill-conceived. In seeking to support it Mr Latib submitted that the deceased should have told the doctors about his previous history and that his failure

to disclose it amounts to the concealment of the facts constituting contributory negligence. That is not so, no evidence was led by the defendant that the deceased did not in fact inform the doctors and medical staff of his previous surgery neither was evidence elicited by the defendant that the deceased was in fact asked about his previous medical history and elected to conceal it. The defendant's argument is unsustainable because the fact that the doctors were unaware of the deceased previous history and surgical scars is indicative of their failure to properly and physically examine him. In my view members of the society expects that once they are admitted at the hospital the doctors would treat them with the necessary skill and care that is required of a reasonable practitioner.

[32] I therefore conclude on the merits that the plaintiff has succeeded in proving on a balance of probabilities that the defendant's doctors were negligent and as a result of that negligence the deceased's leg was amputated on the 23rd June 2005.

[33] I now turn to deal with the quantum of the plaintiff's claim.

Past loss of Income

[34] The deceased was unemployed at the time of his death and he worked on cars to make a little money. Mrs Harms testified that she was told by her husband who was not called as a witness that he had a job lined up at Oryx Tanning where he had previously worked. She testified that her husband told her that the deceased was going to earn a salary of between R6 000,00 and R7 000,00. Mrs Harms stated that her husband was in Cape Town and did not furnish or gave us reason why he was not called to give evidence on this aspect. This is clearly hearsay evidence. Ms Munro urged upon me to consider this head of damages on the basis of

being one of the exceptions to the hearsay rule and that I should admit this evidence in the interest of justice in terms of Section 31(c) of the Law of Evidence Amendment Act 45 of 1998.

[35] The defendant rightly objected to the admission of this evidence on the basis that Ms Harms testified that the deceased was retrenched from his previous job at Oryx Tanning on the basis that he could no longer cope due to the injury to his right foot and according to the certificate of service from Oryx Tanning the deceased's employment was terminated on the 22nd October 2001 and the reason was stated as retrenchment. Mr Latib submitted correctly in my view that the failure by the plaintiff to provide a letter of employment or intention to rehire the deceased by his previous company militates against the admission of his evidence, this is especially so because it is the same company that retrenched him years ago on account of disability. I agree. Another plausible submission by Mr Latib is that the Oryx Tanning had seized trading according to the plaintiff and no evidence was submitted when it seized trading.

[36] I am therefore not persuaded that a proper case has been made for the admission of the hearsay evidence. In my view I fail to understand why the plaintiff elected not to call the husband of Mrs Harms, obtained the relevant information from the company. The deceased had been unemployed since October 2001. His prospects of securing another job at age 52 years in 2005 were bleak primarily because of his advanced age and disabilities. I agree with the defendant that the probabilities are that he could have remained unemployed until his death.

[37] Regarding the claims for funeral expenses and past medical expenses, the defendant did not adduce any contrary evidence save contending that these amounts appear unreasonable. I accept as unchallenged the

evidence of Ms Harms the executrix that these expenses were incurred and proved by the plaintiff.

General Damages

[38] On the evidence of Sister Jansen, the deceased was able to walk and did walk in and out of the ward to go and smoke. This clearly shows that he presented to the hospital with a partially occluded artery which got worse after admission. He also had a previous arterial by pass to his right leg thus a chronic arterial disease and also was a chronic smoker.

[39] The deceased leg was first amputated at too low a level and wound infection and purulent discharges ensued resulting in further muscle necrosis with the result that there was a necessity for a further amputation in the form of a stump revision prior to the fitting of a prosthesis. According to Dr de Kock the deceased suffered further necrosis (tissue death) multiple abscess formation in the stump, further purulent discharges, painful dressing changes and this delayed the wound to heal. During this period so the evidence goes, the deceased would have been in severe pain particularly with regard to the sequelae post-operatively. He could not move without the aid of crutches. According to Ms Harms, during this period, he was depressed and lost his will to live. This disability lasted a period of four years and 2 months until his death. There is no doubt that he must have suffered severe pain, discomfort and loss of amenities of life.

[40] Ms Munro for the plaintiff submitted that taking into account all the complications and sequelae, the correct value for general damages is R450 000.00. She relied on the judgment of this court in **Van Deventer v Premier of Gauteng 2005 JOL 16070 (T)** where the plaintiff, a 49 year old female, healthy, extremely active and independent who was engaged

in dancing, walking, like playing pool and darts and loved socialising was awarded R300 000,00 because the injury caused her to be withdrawn and avoided socialising due to her disabled appearance. Mr Latib for the defendant argued that the Van Deventer case was clearly distinguishable from the present matter and submitted that because the deceased died just over four years after amputation the amount should be reduced. He urged upon me to award the sum of R130 000.00 as a fair and reasonable amount for general damages.

[41] It is trite that in considering general damages a trial court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. Previous awards serve as guiding parameters. In the matter of **Wright v Multilateral Vehicle Accident Fund 1997** decision of the Natal Provincial Division – Corbett and Honey The Quantum of Damages in Fatal and Bodily injury Cases vol 4 at E3-E4, it was held by Broome DJP:

"I consider that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standard of living and the recognition that our awards in the past have been significantly lower than those in most other countries".

[42] Taking into account all the pain which the deceased endured after the first operation especially when the wound delayed to heal. In my view he must have suffered severe discomfort disability and loss of amenities of life. During the period of four years his pain must have been unbearable. I say this because Ms Harms uncontested evidence is that he was depressed and appeared to have lost the will to live. I however accept that the injuries which he suffered are clearly distinguishable from the one in the

Van Deventer's case. Having regard to the aforesaid it is my view that the correct value of general damages should be the sum of R180 000.00

I therefore make the order in the following terms:

1. The defendant is ordered to pay to plaintiff, in her capacity as executrix of the deceased estate the following sums in respect of the claims for damages:

1.1	Funeral expenses	R 4 500,00
1.2	Cost of the prosthetic limb	R 15 000,00
1.3	In respect of general damages for pain and suffering, and the loss of amenities of life.	R250 000,00
		R269 500,00

2. The defendant is ordered to pay to plaintiff, in her capacity as executrix of the deceased's estate, costs on the party and party scale, such costs to include

    2.1 The reasonable costs of Dr de Kock in respect of his preparation and qualify fees and in respect of his attendance at trial

3. Interest on the said amount of R269 500.00 at a rate of 15,5% per annum, calculated from date 14 days hereof to date of payment.

_____

R MATHOPO J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Adv. Munro
Instructed by	:	Malcom Lyons & Brivik Inc
For the Respondent	:	Adv. Latib
Instructed by	:	The State Attorney
Date of hearing	:	18 October 2010
Date of Judgment	:	16 November 2010