

# Claims for “emotional shock” suffered by primary and secondary victims

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## OPSOMMING

### Eise vir “emosionele skok” gely deur primêre en sekondêre slagoffers

Verskillende perspektiewe op die veroorsaking van emosionele skok is sedert die uitspraak in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) in regspraak en deur akademici aangebied. Die gebruik van verskeie terme soos “skok”, “emosionele skok”, “psigiese letsels”, “sielkundige trauma”, “psigiatriese besering” en ander word bespreek. Verder is dit veral die onderskeid tussen primêre en sekondêre slagoffers en hulle verhouding met mekaar wat bespreking regverdig. Die skrywers verkies die beskrywing van primêre en sekondêre emosionele skok en bied ’n omvattende definisie aan vir die moderne toepassing van emosionele skok. Dit word vandag nie betwis dat ’n fisiese besering nie ’n voorvereiste is om met ’n eis op grond van emosionele skok te slaag nie, maar die eiser moet wel aantoon dat die emosionele skok ernstig was en dat dit redelikerwys voorsienbaar deur die verweerder moet gewees het. Eersgenoemde vereiste word ook ondervang deur die stelreël *de minimis non curat lex*. In die geval van primêre emosionele skok lewer laasgenoemde vereiste nie veel probleme op nie, maar wel in die geval van sekondêre emosionele skok. Die toepassing van redelike voorsienbaarheid word ondersoek, met spesifieke verwysing na die verskillende delikselemente waar dit ’n rol sou kon speel. Die moontlikheid word ondersoek om onder andere die “proximity rules”, soos in Engelse regspraak gebruik, as bykomende hulp by die vasstelling van juridiese kousaliteit aan te wend. Daar word aanbeveel dat redelike voorsienbaarheid verskillend toegepas word by die delikselemente onregmatigheid, nalatigheid en juridiese kousaliteit, asook dat getoets moet word vir al die delikselemente in elke geval van veroorsaking van emosionele skok, hetsy primêre emosionele skok of sekondêre emosionele skok.

## 1 INTRODUCTION

A typical instance where a person could suffer “emotional shock” would be as a result of a motor-vehicle accident.<sup>1</sup> The person suffering the “emotional shock” could either have been directly involved in the accident (primary victim), or a

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<sup>1</sup> Other possible incidents leading to the recognised suffering of emotional shock could be workplace accidents or accidents at home, cases of medical negligence, shooting incidents or other instances of violence, etc.

witness to the accident or heard of the consequences of the accident afterwards (secondary victim).<sup>2</sup>

The causing of actionable “emotional shock” is treated in practice as a specific form of delict which may result in patrimonial loss<sup>3</sup> or non-patrimonial loss.<sup>4</sup> Patrimonial loss is claimable with the Aquilian action.<sup>5</sup> For non-patrimonial loss suffered due to the infringement of the personality right to physical-mental integrity, so-called general damages may be claimed with the action for pain and suffering or the *actio iniuriarum*.<sup>6</sup>

The *actio de pauperie* is also available if the emotional shock was caused by the actions of a domestic animal.<sup>7</sup> Both patrimonial and non-patrimonial loss can be claimed with the *actio de pauperie*. The courts have, over time, developed specific rules relating to claims for “emotional shock”.<sup>8</sup> Different perspectives on “emotional shock” have been offered in case law<sup>9</sup> and academic writings<sup>10</sup> since

2 See *infra* para 2 3 for the distinction between primary and secondary victims of emotional shock.

3 The primary example of patrimonial loss is medical and related expenses due to the *sequelae* of the emotional shock suffered.

4 Forms of non-patrimonial loss commonly associated with the suffering of emotional shock are pain and suffering, shock accompanied by psychiatric injury, and loss of amenities of life.

5 In *Bester v Commercial Union* 1973 1 SA 769 (A) 776D–777A 781H it was confirmed that in terms of South African law, a plaintiff who suffers from negligently inflicted “nervous shock” (used as a synonym for “emotional shock”) which results in psychiatric or psychological injuries is also entitled to claim damages for patrimonial loss under the *Lex Aquilia*. See also *Gibson v Berkowitz* 1996 4 SA 1024 (W) 1038C–D; Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010) 5 275; Van der Walt and Midgley *Principles of delict* (2005) 92; Potgieter “Emotional shock” 9 *LAWSA* (2005) paras 11 13; Neethling “Deliktuele aanspreeklikheid weens die veroorsaking van psigiese letsels” 2000 *TSAR* 1–2.

6 The *actio iniuriarum* will be an appropriate remedy in instances where the “emotional shock” was caused intentionally. See Neethling and Potgieter *Law of delict* 16; Potgieter, Steynberg and Floyd *Visser & Potgieter Law of damages* (2012) 110; Loubser *et al The law of delict* (2012) 308–309; Neethling *et al Law of personality* 90–93.

7 Neethling and Potgieter *Law of delict* 357–360.

8 *Idem* 275.

9 See *Creydt-Ridgeway v Hoppert* 1930 TPD 664; *Lutzkie v SAR & H* 1974 4 SA 396 (W); *Boswell v Minister of Police* 1978 3 SA 268 (E); *Muzik v Canzone Del Mare* 1980 3 SA 470 (C); *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C); *N v T* 1994 1 SA 862 (C); *Clinton-Parker v Administrator, Transvaal* 1996 2 SA 37 (W); *Gibson v Berkowitz* 1996 4 SA 1024 (W); *Majiet v Santam Limited* [1997] 4 All SA 555 (C); *Barnard v Santam Bpk* 1999 1 SA 202 (SCA); *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA); *Minister of Safety and Security v Sibili* [2003] 4 All SA 451 (TkD); *Fourie v Naranjo* 2008 1 SA 192 (C); *Potgieter v Rangasamy* unreported, case no 1261/2008 (EC) 16 August 2011; *Mokone v Sahara Computers (Pty) Ltd* 2010 31 ILJ 2827 (GNP); *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC); *Fourie v Road Accident Fund* 2014 2 SA 88 (GNP); *Hing v Road Accident Fund* 2014 3 SA 350 (WCC).

10 Potgieter 9 *LAWSA* paras 1–13; Neethling and Potgieter *Law of delict* 285–290; Klopper *The law of third-party compensation* (2012) 100–101 156–158; Potgieter *et al Law of damages* 508–509; Burchell *Law of delict* (1993) 59–65; Van der Walt and Midgley *Principles of delict* 76–77; Neethling “Gedingsvatbaarheid van senuskok weens die verneem van ’n kind se dood” 1998 *THRHR* 335–343; Neethling and Potgieter “Emosionele skok, juridiese kousaliteit en bydraende nalatigheid” 1997 *THRHR* 548–553; Neethling 2000 *TSAR* 1–11; Burchell “An encouraging prognosis for claims for damages for negligently inflicted psychological harm” 1999 *SALJ* 697–711; Potgieter “Die Hoogste Hof van Appèl

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the landmark decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*.<sup>11</sup> In particular, the terminology used in this field of the law has developed from the most simplistic term “shock”, to include more complex medical terms such as “psychological lesion” and “psychiatric injury”.<sup>12</sup>

Most developments in this field of the law have taken place in respect of the requirements for “emotional shock”. In light of this, the historic influence of English law should be noted. Amendments to third party compensation legislation have also affected claims for emotional shock by road accident victims, but in this contribution we will not focus on third party matters.

We begin the contribution by referring to the different terminology applied in this field of law, in particular the different modern terms used for what was traditionally known as “shock” or “nervous shock”. The courts have made a distinction between primary and secondary victims of “emotional shock” and there are different academic opinions on this distinction which validates a discussion. The requirements for a successful claim for “emotional shock” based on recent case law and academic writings will also be discussed. The requirement that the “emotional shock” must be “reasonably foreseeable” is the most contentious and will therefore be discussed in more detail.

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brei die aksie vir emosionele skok en psigiatriese letsel tot verloofdes uit” 2004 *Obiter* 497–505; Potgieter “Skuldlose aanspreeklikheid vir psigiatriese besering en gedagtes oor die rol van beleid by deliktuele aanspreeklikheid” in Boezaart and De Kock (eds) *Vita perit, labor non moritur. Liber memorialis: PJ Visser* (2008) 209–220; Stoll “Delictual liability for mental shock suffered by bystanders at a traffic accident: A landmark decision by the German Federal Court” in Boezaart and De Kock (eds) 221–230.

11 1973 1 SA 769 (A).

12 For example, in *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 591 631–J the plaintiff suffered shock and trauma and was entitled to compensation for the psychiatric injury she sustained. According to the medical experts, she was diagnosed with post-traumatic stress disorder which had become chronic (59C–D). In *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1038G 1048G–H the plaintiff was successful in her claim for damages where she suffered from “a nervous and psychological disorder known as a major depressive disorder coupled with anxiety”. The court (1050E) found the defendants liable for all forms of nervous shock and psychological trauma. In *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 51I–J the swopping of the babies at birth and the notification of the mistake twenty-one months later resulted in the mothers of the natural children suffering “a psychiatric disorder, viz a mixed anxiety depressive disorder”. The mothers were successful in their claim for damages as a result of their psychiatric injury. In *Bester v Commercial Union* 1973 1 SA 769 (A) a young boy after witnessing his brother involved in an accident which led to his death sustained “psychiatric injury” and a change in personality. The father was successful in his claim for damages in respect of the psychiatric injury and change in personality of his son. In *Boswell v Minister of Police* 1978 3 SA 268 (E) the plaintiff suffered “shock” and succeeded in a claim relating to such shock. In *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 343G–H the court acknowledged that the deceased died due to the “shock” he sustained and the plaintiffs were entitled to damages resulting from the death of the deceased. Van der Walt and Midgley *Principles of delict* 92 refer to the term “psychiatric injury”; Neethling, Potgieter and Visser *Neethling’s Law of personality* 354 refer to “psychological harm”; Neethling and Potgieter *Law of delict* 285 refer to “psychological lesions (emotional shock)”; and Potgieter *et al Law of damages* 110 refer to “shock (psychiatric injury)”.

## 2 TERMINOLOGY ASSOCIATED WITH “EMOTIONAL SHOCK”

### 2.1 Different terminology<sup>13</sup>

Since the decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*<sup>14</sup> terminology relating to “emotional shock” has developed and expanded to include: “shock”, “nervous shock”, “psychological lesion”, “psychological trauma”, “psychological disorder”, “psychiatric disorder” and “psychiatric injury”.<sup>15</sup> Clearly, some of the terminology mentioned here can only be clarified by psychiatrists (medical experts) and psychologists. In *Barnard v Santam Bpk*,<sup>16</sup> Van Heerden DCJ stated that “nervous shock” is not only an antiquated term without any specific psychiatric meaning, but it could also be misleading. The only relevant question is whether the plaintiff sustained a recognisable psychological lesion.<sup>17</sup>

Although our courts have until recently been faced mainly with claims for “emotional shock”, it does not mean that psychological lesions or psychiatric injury caused by something other than “emotional shock” may not lead to a delictual claim.<sup>18</sup> It is clear that at least some kind of psychological or psychiatric injury is required for a successful claim based on “emotional shock” and that such a claim should be supported by psychiatric evidence.<sup>19</sup> We prefer to refer to the term (actionable) “emotional shock” as a term which is analogous to “shock” or “nervous shock” and which results in psychiatric or psychological injuries. From here on, we will refer to the term “emotional shock” in this sense.

### 2.2 Defining “emotional shock”

This brings us to the question, what is a suitable definition for “emotional shock”? Neethling and Potgieter<sup>20</sup> describe “psychological lesion” or “emotional shock” as “any recognisable harmful infringement of the brain and nervous system of a person”. This definition refers to the nature of a psychological lesion.

“Emotional shock” was described by Mantame AJ in the recent decision of *Swartbooi v Road Accident Fund*<sup>21</sup> as

“shock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an

13 In the English decision of *Attiar v British Gas* 1998 QB 304 CA 317, Bingham LJ preferred the term “psychiatric damage” over nervous shock and stated that the term “nervous shock” is inaccurate and misleading. Of interest too, the English Law Commission Report no 249 (1998) relating to such claims is headed “Liability for Psychiatric Illness”. See McGregor *McGregor on damages* (2009) 58–59.

14 1973 1 SA 769 (A).

15 See fn 10 *supra*.

16 1999 1 SA 202 (SCA) 208J–209A.

17 See Neethling and Potgieter *Law of delict* 286; Loubser *et al The law of delict* 307.

18 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 208I–J; Neethling and Potgieter *Law of delict* 285–286; Neethling 2000 *TSAR* 1.

19 Neethling and Potgieter *Law of delict* 285; Neethling 1998 *THRHR* 342; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 216F; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 61I 63H–I; *Clinton-Parker v Administrator, Transvaal* 1996 2 SA 37 (W) 46G–50E; *Muzik v Canzone Del Mare* 1980 3 SA 470 (C) 474G–H; Burchell 1999 *SALJ* 701; Potgieter 9 *LAWSA* para 2; *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 21.

20 *Law of delict* 285.

21 2013 1 SA 30 (WCC) 34F–G.

unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close emotional relationship”.

This definition is more descriptive of the type of conduct that could lead to a claim for compensation in respect of “secondary emotional shock”, but in this definition not enough emphasis is placed on the mental or psychological consequences. This definition will also not be suitable for instances of “primary emotional shock”.<sup>22</sup> In *Fourie v Road Accident Fund*<sup>23</sup> counsel for the defendant used this definition presented by Mantame AJ as authority to argue in favour of the exclusion of the claims by the plaintiffs. In applying this definition counsel argued that if the victims suffered emotional shock due to witnessing the death of the two children with them in the car, their claims for emotional shock against the Road Accident Fund would be precluded in terms of section 19(g).<sup>24</sup> In effect, counsel for the defendant assumed that by witnessing the deaths of the two children, the plaintiffs became secondary victims, even though they were also occupants in the motor vehicle and personally exposed to the danger. This illustrates the practical importance of clearly distinguishing between suffering primary emotional shock and secondary emotional shock.

Potgieter<sup>25</sup> describes “emotional shock” as a “sudden, painful emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief”.<sup>26</sup> This definition describes what “emotional shock” is and how it is caused, but it does not significantly emphasise the resultant psychological or psychiatric injuries (apart from mentioning fear, anxiety or grief).

We are of the view that the following definition more appropriately reflects the causing of actionable “emotional shock” in the current South African legal context, whether suffered by a “primary victim” or a “secondary victim”, and whether accompanied by physical injuries or not: “Emotional shock sustained by a person (victim) is a prolonged, serious, negative emotional reaction to an unexpected disturbing event resulting in psychological or psychiatric injuries which must be proven.”

### **2.3 Distinguishing between primary and secondary victims who suffer emotional shock**

In the case of claims for emotional shock suffered by primary victims of the accident, the emotional shock is usually accompanied by physical injuries sustained. On the other hand, in the case of claims for emotional shock suffered by secondary victims, the emotional shock is not usually accompanied by physical injuries (although the secondary victim may have been in physical danger). A

<sup>22</sup> See *infra* para 2.3 for the distinction between primary and secondary emotional shock.

<sup>23</sup> 2014 2 SA 88 (GNP) 931.

<sup>24</sup> S 19(g) of the Road Accident Fund Act 56 of 1996 (as amended by Act 19 of 2005): “The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage . . . (g) suffered as a result of an emotional shock sustained by the person when that person witnessed or observed or was informed of the bodily injury or death of another person as a result of the driving of a motor vehicle.”

<sup>25</sup> 9 *LAWSA* para 2.

<sup>26</sup> See also Potgieter *et al Law of damages* 508–509.

secondary victim is one who typically witnessed or heard of a disturbing event.<sup>27</sup> In *Barnard v Santam Bpk*,<sup>28</sup> Van Heerden ACJ referred to the category of secondary victims who heard of the disturbing event as “hoorsê slagoffers” or “hearsay victims”. These are secondary victims who only heard from a third party of the shocking news and did not experience the traumatic scene of the accident or the condition of the primary victim personally, not even in the aftermath of the incident.<sup>29</sup> In the recent decision of *Fourie v RAF*,<sup>30</sup> Pillay AJ also referred to “secondary emotional shock” as emotional shock sustained by someone who witnessed or heard of the disturbing event.

We prefer to refer to the term “primary emotional shock” as covering instances where the “primary victim” suffers emotional shock. Compensation may be claimed whether or not the primary victim may have been in physical danger or physically injured.<sup>31</sup> Consequently, we also prefer to refer to the term “secondary emotional shock”<sup>32</sup> as covering instances where a “secondary victim” suffers emotional shock.<sup>33</sup> The “secondary victim” would typically not have been directly physically injured in the incident, but may or may not have been in physical danger. Usually the secondary victim would have witnessed or been informed of the injury or death of the “primary victim”.<sup>34</sup>

27 See the discussion in *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 16 on the distinction drawn between primary and secondary victims in English law.

28 1999 1 SA 202 (SCA) 209C–D.

29 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 212B–C.

30 2014 2 SA 88 (GNP) 97D.

31 See *Hauman v Malmesbury Divisional Council* 1916 CPD 216, 219 where a doctor sustained “nervous shock caused by fright and apprehension of danger, or personal injury to himself, which ha[d] impaired his physical health”; *Creydt-Ridgeway v Hoppert* 1930 TPD 664 where the plaintiff was bitten by a dog and subsequently suffered “nervous shock”; *Bester v Commercial Union* 1973 1 SA 769 (A) where the boy who suffered emotional shock could be regarded as the primary victim, because his own life was in danger, but he was not physically injured; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1049B where the primary victim’s psychological *sequelae* “stemmed from actual physical injury to herself. It was not a case of merely witnessing a traumatic event which induced shock causing subsequent psychological *sequelae*”; *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 64B–C where Navsa J stated that if we were to borrow from English (legal) terminology, the plaintiffs and their children were “primary victims”, although neither were physically injured; *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 343G–H, where the primary victim actually died as a result of the shock sustained and the court acknowledged that if he survived he would have been entitled to claim damages stemming from such shock.

32 See also Visser and Potgieter *Law of damages* 509 fn 90.

33 See Van der Walt and Midgley *Principles of delict* 92 who also refer to this distinction.

34 See *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) where the secondary victim was not in physical danger but heard about her son’s (primary victim’s) accident and subsequent death resulting in her sustaining emotional shock; *Bester v Commercial Union* 1973 1 SA 769 (A) where the secondary victim (who may have been in physical danger) witnessed his brother (the primary victim) being hit by a motor vehicle and subsequently dying; *Boswell v Minister of Police* 1978 3 SA 268 (E) where the plaintiff (secondary victim) suffered “shock” after hearing news that her nephew had been shot; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) where the secondary victim heard of her son’s accident and death; *Majiet v Santam Ltd* 1997 4 All SA 555 (C) where the secondary victim suffered emotional shock after seeing her dead son at the scene of an accident; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) where the plaintiff (secondary victim) suffered emotional shock after seeing her fiancé (primary victim) being hit by a motor vehicle; *Minister of*

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Klopper<sup>35</sup> does not refer to the distinction between “primary victims” and “secondary victims” or “primary emotional shock” and “secondary emotional shock” in the sense that we do. Instead, he is of the view that a road accident victim who is injured physically (primary victim) and experiences “anxiety, change of personality, depression and withdrawal from social activities” suffers “psychological trauma resulting from physical injury” and not “emotional shock”. On the other hand what we refer to as secondary emotional shock, he refers to as “emotional shock”. Klopper<sup>36</sup> submits that “[e]motional shock is distinguished from psychological trauma by the fact that the person who suffers the shock is usually neither personally injured . . . nor necessarily present at the scene of the accident”.

Klopper’s distinction and use of terminology therefore do not cover instances of actual “emotional shock” suffered by a “primary victim” who may or may not have been physically injured or at risk of physical injury. As mentioned, in *Fourie v RAF*,<sup>37</sup> Pillay AJ stated that the plaintiffs had been directly involved and injured in the accident, they were not “secondary victims” and according to the agreed facts, they had sustained “emotional shock”. In *Gibson v Berkowitz*,<sup>38</sup> Claasen J held that the defendants are liable for all forms of “nervous shock and psychological trauma” following the physical injury to the plaintiff.<sup>39</sup> In this case, the psychological consequences of the physical injury to the primary victim were also identified as “nervous shock”.

Our courts have acknowledged the effect of the relationship between primary and secondary victims of an unfortunate incident thus entitling them to compensation as a result of such emotional shock sustained.<sup>40</sup> For example, Pillay AJ in *Fourie v RAF*<sup>41</sup> stated that “secondary emotional shock” is shock suffered by a person who witnessed, or observed, or was informed of the injury or death of another. He was of the view that a “secondary victim” is one who is not directly involved or injured in the accident. Thus one can deduce that according to Pillay AJ’s view, a primary victim is typically one who is directly involved or injured

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*Safety and Security v Sibli* 2003 4 All SA 451 (Tk) where the mother (secondary victim) suffered post-traumatic stress disorder (PTSD) after hearing that her daughter had been shot and killed; *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 55 where the daughter suffered from emotional shock after receiving news of her mother’s injuries in a motor-vehicle accident and sitting next to her bedside for a few days until she died. See also Van der Walt and Midgley *Principles of delict* 92; Stoll in Boezaart and De Kock (eds) 221–230.

35 100–101. Klopper’s views seem to be in line with Allen’s view (English commentator), see <http://bit.ly/XLvzB0>, accessed on 9 December 2013. Their views are based somewhat on the rules of *inter alia* proximity found in English law and foreseeability of harm.

36 See *supra* 101.

37 2014 2 SA 88 (GNP) 92B–H.

38 1996 4 SA 1024 (W).

39 *Supra* 1050E–F.

40 See Lord Lloyd’s judgment in *Page v Smith* 1995 2 All ER 736 755 and Lord Olivier’s judgment in *Alcock v Chief Constable of the South Yorkshire Police* 1991 4 All ER 907 922–932 for authority from English law. See also *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 560h–j.

41 2014 2 SA 88 (GNP) 97D–G.

in the accident. Mantame AJ in *Swartbooi v Road Accident Fund*<sup>42</sup> made reference to the “primary victim” (the person who dies) and the “secondary victim” (the person who suffers a “detectable psychiatric injury when a person close to him or her dies as a result of an accident”).<sup>43</sup> In *Road Accident Fund v Sauls*,<sup>44</sup> Olivier JA also referred to the relationship of the primary victim and secondary victim “such as parent and child, husband and wife, etc” and stated that in determining limitations “a court will take into consideration the relationship between the primary and secondary victims”.<sup>45</sup> Olivier JA made it clear that it will not be justifiable to limit liability to only defined relationships, but rather to use open-ended norms such as reasonableness, fairness and justice.<sup>46</sup>

In all reported cases in South Africa in which compensation was awarded to secondary victims of emotional shock, a strong emotional bond or close relationship between the secondary victim and the injured or deceased had existed.<sup>47</sup> In spite thereof, the courts have not expressly restricted claims for emotional shock to only blood relatives or close acquaintances.<sup>48</sup> A blood or legal relationship between primary and secondary victims could be indicative of such a strong emotional bond or close relationship.<sup>49</sup> It is, of course, also possible that such a bond may be absent even where the primary and secondary victims were related.

42 2013 1 SA 30 (WCC) 341. See Ahmed and Steynberg “Claims for emotional shock arising out of the death of a passenger who is subject to section 18(1) of the Road Accident Fund Act 56 of 1996 – *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCHC)” 2014 *THRHR* 306–312.

43 See also *Barnard v Santam Bank Bpk* 1997 4 SA 1032 (T) 1069H where Swart J held that it is no longer necessary to distinguish between primary and secondary victims because of the decision in the *Bester* case. In *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 55 Binns-Ward J described the third appellant as a “secondary victim” rather than a “hearsay victim”.

44 2002 2 SA 55 (SCA) 591–J.

45 *Supra* 62J. In *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215C the relationship between the primary and secondary victim was described as intimate (“innige verhouding”). In *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 568f Cleaver J stated that the “plaintiff would not have been able to claim had she not had so close a relationship with her son”. In *Boswell v Minister of Police* 1978 3 SA 268 (E) 274H the plaintiff had “close ties of kinship” with the primary victim.

46 *Supra* 63A–B.

47 Potgieter 9 *LAWSA* para 12(d); *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 63B. See, eg, *Lutzkie v SAR&H* 1974 4 SA 396 (W) 398C–D where damages for emotional shock were not awarded by the court in an instance where the plaintiff witnessed an acquaintance being injured and killed in a motor vehicle accident.

48 In *Potgieter v Rangasamy* unreported case no 1261/2008 (EC) the court awarded damages for emotional shock and trauma to a school teacher, who witnessed the dead and injured bodies of her school pupils after a horrific bus accident; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 341: “[T]he relationship between the primary and secondary victims is not necessarily the prime consideration”; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 62J: “It is not justifiable to limit the sort of claim now under consideration . . . to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc”. See also Stoll in Boezaart and De Kock (eds) 221–230 on mental shock suffered by bystanders at a traffic accident.

49 *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 63A.

### 3 REQUIREMENTS IN RESPECT OF A CLAIM FOR CAUSING EMOTIONAL SHOCK

If the causing of emotional shock should result in a successful delictual claim, all five elements of a delict must generally be present,<sup>50</sup> namely: conduct; wrongfulness; fault;<sup>51</sup> causation; and harm or loss.<sup>52</sup> In South African law a generalising approach in comparison to the casuistic system of the English law of torts is followed.<sup>53</sup> It is therefore, not common to specify or name different delicts as is the case in English law, but due to the influence of English law the causing of emotional shock is nowadays recognised in the South African law as a specific form of delict.<sup>54</sup>

The courts have adapted the general principles of delictual liability with regard to a claim for the causing of emotional shock (as a specific form of a delict) and developed the yardstick that the causing of emotional shock must have been “reasonably foreseeable” for liability to ensue.<sup>55</sup> This requirement of “reasonable foreseeability of harm” is contentious<sup>56</sup> in the sense that the explicit influence of “reasonableness” itself is evident in determining the individual delictual elements of wrongfulness, negligence and (legal) causation.<sup>57</sup> In particular, in respect of the requirement of “reasonable foreseeability” in causing emotional shock, it is uncertain whether one is dealing with the question of negligence only (insofar as the generally accepted test for negligence requires harm to be *reasonably foreseeable* and preventable by the reasonable person), or legal causation (where reasonable foreseeability of harm is used as a criterion), or both simultaneously.<sup>58</sup> A look at how the delictual elements are determined in practice in cases of emotional shock sustained is therefore necessary.

50 In the case where primary emotional shock was suffered due to a motor-vehicle accident, the claim will be instituted against the Road Accident Fund and not the wrongdoer driver. The five elements of a delict must still be proven and additional thereto, the specific requirements as set out in the Road Accident Fund Act 56 of 1996 (as amended).

51 See *infra* para 3.3 for a brief discussion on strict liability for emotional shock.

52 Neethling and Potgieter *Law of Delict* 4.

53 See *Perlman v Zoutendyk* 1934 CPD 151 155; Neethling and Potgieter *Law of delict* 4; Van der Walt and Midgley *Principles of delict* 15.

54 Neethling and Potgieter *Law of Delict* 5.

55 *Mulder v South British Insurance Company Limited* 1957 2 SA 444 (W) 780H–781A; *Bester v Commercial Union* 1973 1 SA 769 (A) 779H; *Boswell v Minister of Police* 1978 3 SA 268 (EC) 273H; *Masiba v Constantia Insurance Co* 1982 4 SA 333 (C) 342B–D; *Majiet v Santam Limited* [1997] 4 All SA 555 (C) 568g–j; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214F; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60B–F; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 34H.

56 *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 14: “The recovery of compensation in delictual damages for ‘nervous shock’ or psychiatric injury has proven a contentious subject internationally. Because of the crucial role of policy considerations, especially due to concerns about potentially limitless liability, the development of the law in this area has been treated in some judgments as analogous, to the development of the law of delict in respect of the recovery of damages for pure economic loss.”

57 See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 225D–F.

58 See Potgieter 2004 *Obiter* 501–505.

### 3 1 Conduct

The conduct (in the form of an omission or commission) of the wrongdoer would typically lead to the death or injury of the primary victim,<sup>59</sup> which could result in the primary victim suffering emotional shock or a secondary victim suffering emotional shock upon hearing of the accident or seeing the effects of the accident.

### 3 2 Wrongfulness

The conduct (as referred to above) must cause harm or prejudice in a legally reprehensible or unreasonable manner to be regarded as wrongful.<sup>60</sup> When someone suffers emotional shock, the wrongfulness would typically lie in the infringement of the plaintiff's right to his or her physical-mental integrity.<sup>61</sup> The infringement could result in either physical or non-physical injuries (mental or psychological injuries), or result in both. In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*<sup>62</sup> it was stated that the brain and nervous system are as much part of the physical body as an arm or leg and it is therefore no longer a requirement that physical injuries should accompany emotional shock to be recoverable. Previously our courts (influenced by English law) required a plaintiff to have been physically injured or in personal danger of physical injury, and the emotional shock must have stemmed from the physical injury.<sup>63</sup>

Since the decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*,<sup>64</sup> a psychiatric or psychological injury (caused by the emotional shock sustained) is treated in the same manner as a physical injury. Neethling and Potgieter<sup>65</sup> point out that as a result of equating physical and psychological injury, the slightest emotional shock sustained will, in principle, infringe one's "personality right to physical integrity" which is *prima facie* wrongful. It has also been stated that the harm caused by the emotional shock must be reasonably serious<sup>66</sup> and the courts have often reiterated that the emotional shock must be of a serious nature, of a particular duration and must affect a person's health.<sup>67</sup> For example, in *Majiet v Santam Limited*<sup>68</sup> the plaintiff suffered "major depressive disorder which was an accepted medical illness". In *Bester v Commercial Union*

59 This could be caused by the driving of a motor vehicle, performance of medical procedures, or omission on the part of the defendant to fulfil a legal duty towards a plaintiff, etc.

60 Neethling and Potgieter *Law of delict* 33; Van der Walt and Midgley *Principles of delict* 67.

61 Neethling and Potgieter *Law of delict* 325–326.

62 1973 1 SA 769 (A) 777G–H 779B–C.

63 See Neethling and Potgieter *Law of delict* 286. See also *Mulder v South British Insurance Co Ltd* 1957 2 SA 444 (W) 449H.

64 1973 1 SA 769 (A).

65 *Delict* 286.

66 Neethling and Potgieter *Law of delict* 287.

67 See *Hauman v Malmesbury Divisional Council* 1916 CPD 216, 219; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 34G–H 35I–36A; *Bester v Commercial Union* 1973 1 SA 769 (A) 769G; *Majiet v Santam Limited* [1997] 4 All SA 555 (C) 558g; *Klopper* 157. See criticism by Burchell 1999 *SALJ* 699. See also *Layton and Layton v Wilcox and Higginson* 1944 SR 48 51 where the court held that even though the mother may have suffered shock from hearing of her child's death, there "was no evidence of any impairment of bodily health, which could be definitely attributed to the shock she received".

68 [1997] 4 All SA 555 (C) 555h–i 566d–e.

*Versekeringsmaatskappy van SA Bpk*<sup>69</sup> a brother sustained “serious shock which affected him psychologically and gave rise to an anxiety neurosis which had required medical treatment”.<sup>70</sup> The brother also underwent a change of personality. In *Clinton-Parker and Dawkins v Administrator, Transvaal*,<sup>71</sup> the plaintiffs suffered severe psychological damage which required treatment. In *Boswell v Minister of Police*,<sup>72</sup> the plaintiff suffered shock which had a substantial effect on her health persisting for weeks. She collapsed and lost consciousness which caused her health to be impaired.<sup>73</sup>

The courts will not entertain insignificant “emotional shock” of a short duration with minimal effect on the person’s health. This is simply an application of the well-known rule *de minimis non curat lex*.<sup>74</sup> Whether such a claim will be unsuccessful because the infringement is not regarded as wrongful or because the quantification of the loss is insignificant, is not always that clear.

### 3 3 Fault

Fault in the form of either negligence<sup>75</sup> or intention<sup>76</sup> is usually required to succeed with a claim for the causing of emotional shock. There are, however, instances where fault is not required (strict liability), for example with the *actio de pauperie*.<sup>77</sup>

In respect of negligence what must be established is whether the reasonable person in the position of the wrongdoer would have foreseen the reasonable possibility of the conduct causing the emotional shock and would have taken reasonable steps to prevent such harm from occurring – if such wrongdoer failed to take those reasonable preventative steps, his or her conduct is regarded as negligent.<sup>78</sup>

Neethling and Potgieter<sup>79</sup> state that in order to establish whether reasonable foreseeability of harm relates to the element of negligence or to the element of legal causation depends on whether the emotional shock is the only, or at least one of the first harmful consequences of the wrongdoer’s conduct, or whether it is a subsequent or more remote consequence of the wrongdoer’s (already) established negligent conduct. If we consider this reasoning, the question of reasonable foreseeability of harm would more appropriately relate to the element of negligence in the case of a primary victim of emotional shock, whereas in the

69 1973 1 SA 769 (A).

70 *Supra* 769H.

71 1996 2 SA 37 (W) 40B.

72 1978 3 SA 268 (E).

73 *Supra* 273D–H.

74 Neethling and Potgieter *Law of delict* 287.

75 See *Bester v Commercial Union* 1973 1 SA 769 (A) 776F; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 209D; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60B–J; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 33G.

76 *Boswell v Minister of Police* 1978 3 SA 268 (E); *N v T* 1994 1 SA 862 (C).

77 See Neethling and Potgieter *Law of delict* 357–360. In *Fourie v Naranjo* 2008 1 SA 192 (C), the respondent who witnessed her husband being attacked and bitten by the appellant’s dog, succeeded with a claim for emotional shock based on the *actio de pauperie*. See Potgieter in Boezaart and De Kock (eds) 209–220 for a discussion on the case.

78 See *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F; Neethling and Potgieter *Law of delict* 131–132.

79 *Delict* 287–290.

case of a secondary victim of emotional shock (where the wrongdoer's negligent conduct towards the primary victim has already been established), the question of reasonable foreseeability of harm would more appropriately relate to the element of legal causation.<sup>80</sup> Thus, in the latter instance, the question would depend on whether the wrongdoer's already established negligent conduct could be regarded as the legal cause of the emotional shock towards the secondary victim.

If we follow this line of thinking, it could technically result in the wrongdoer being held strictly liable for causing emotional shock to the secondary victim, as the question regarding the negligent conduct is not tested again in respect of the secondary victim, and is only applied in respect of the primary victim. Or, one could argue that it is assumed that the negligent conduct towards the primary victim will automatically also be regarded as negligent conduct in respect of the secondary victim. Preferably, negligence should be established as a separate element of a delict in each instance of primary or secondary emotional shock. For example, it is possible that harm towards a primary victim could have been reasonably foreseeable by the reasonable person in the position of the wrongdoer, but that similar or even different harm was not reasonably foreseeable by the wrongdoer towards a secondary, distant, victim. It is therefore preferred that the test for negligence (as a form of fault) should be repeated in the case of the secondary victim of emotional shock, and should not be assumed to be automatically present if negligence towards the primary victim has already been determined.

A further explanation for the particular application of the test for reasonable foreseeability of harm in cases of emotional shock being suffered could be found in the distinction between the abstract and the concrete approaches to negligence.<sup>81</sup> With the abstract (or absolute) approach the question to be answered is whether harm in general was reasonably foreseeable by the wrongdoer. The precise nature and extent of the harm need not be foreseeable, nor a particular consequence that actually occurred; it suffices if damage in general was reasonably foreseeable.<sup>82</sup> It would therefore, according to this approach, not be necessary for the plaintiff to prove that the wrongdoer should reasonably have foreseen emotional shock being suffered by the plaintiff, but it would suffice to prove that the wrongdoer should have foreseen harm in general being suffered.<sup>83</sup> This approach seems to be in line with the suggestion made by Neethling and Potgieter, as discussed above, that in cases where negligence in terms of the primary victim has already been determined, it is not required to test for negligence in relation to a specific consequence towards the secondary victim. It is assumed that harm in general towards the secondary victim has been reasonably foreseen by the wrongdoer.

According to the concrete (or relative) approach to negligence a person's conduct may only be described as negligent in respect of a specific consequence(s).

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80 In *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 210C, Van Heerden ACJ made the observation that it is irrelevant from a practical point of view whether reasonable foreseeability is tested within the context of negligence or legal causation. We cannot agree with this general observation.

81 See Neethling and Potgieter *Law of delict* 141–143.

82 *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 59E; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1050E.

83 See Neethling 2000 *TSAR* 9 and fn 65.

In other words, the occurrence of a particular consequence and not damage in general, must be reasonably foreseeable for negligence to be present.<sup>84</sup> If this approach is followed in cases of secondary emotional shock being sustained, it would be required to prove reasonable foreseeability of the specific consequence of the wrongdoer's conduct towards the secondary victim. It would not suffice to state that negligence towards the primary victim automatically includes negligent conduct towards the secondary victim. Even though a specific consequence (some kind of emotional reaction due to the disturbing event) must be foreseeable with this approach, it is still not required that the precise nature and extent of the harm, or the precise manner in which the damage was caused, must be reasonably foreseeable.<sup>85</sup> This approach has been repeatedly applied by our courts as a requirement for liability in cases of emotional shock being suffered.<sup>86</sup> In the most recent Supreme Court of Appeal decision on the causing of emotional shock, *Road Accident Fund v Sauls*,<sup>87</sup> Olivier JA applied the concrete approach to negligence by referring to a specific consequence and not just damage or harm in general:

“As far as negligence and the foreseeability test are concerned, foresight of the *reasonable* possibility of harm is required. Foresight of a mere possibility of harm will not suffice ... The general manner in which the harm will occur must be reasonably foreseeable, though not necessarily the precise or exact manner in which the harm will occur ... The plaintiff must prove, on a balance of probabilities, that *Saddick should have foreseen as a reasonable possibility that she would be harmed*. As stated above, this does not mean that she must prove that Saddick should have foreseen the precise or exact manner in which the harm to her would or could occur, but she must prove that the general manner of its occurrence was reasonably foreseeable” (our emphasis).

84 Neethling and Potgieter *Law of delict* 142.

85 *Idem* 143.

86 See *Bester v Commercial Union* 1973 1 SA 769 (A) 781B–C: “Indien die moontlikheid van die aan Deon en sy vader veroorsaakte leed en skade in die omstandighede van hierdie saak voorsien sou gewees het deur ’n redelike bestuurder in die plek van die bestuurder van die verassureerde motorvoertuig, dan is genoegdoening en vergoeding verhaalbaar, al kon die presiese aard en omvang van die leed en skade nie voorsien gewees het nie”; *Boswell v Minister of Police* 1978 3 SA 268 (E) 273H: “[T]he plaintiff is entitled to damages for the impairment to her health resulting from the shock sustained because of the deliberate false and unjustifiable statements of the second defendant, provided only that the effect of these statements could and should have been foreseen by the second defendant”; *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 342C–D: “[I]f the driver of the motor vehicle insured by second defendant should have foreseen that first plaintiff’s husband could have sustained psychiatric injury as the result of his (the driver’s) negligence, second defendant will be liable for such injury, even though the driver might not have foreseen, nor been able to foresee, the further consequences of that injury”; *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 568h–j: “I conclude that it was reasonably foreseeable to the driver of the insured vehicle that a parent of a child knocked down by the vehicle in a residential suburb would come upon the aftermath of the accident and in the result would suffer emotional trauma or depression of sufficient severity to have a substantial effect on the well-being of the parent. It is not necessary that the precise nature or extent of the loss suffered or the precise manner of the harm occurring should reasonably have been foreseen”; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214F: “In die lig van die voorgaande moet nou besin word of die senuskok wat die appellant in die onderhawige geval opgedoen het [specific consequences] as ’n redelike moontlikheid voorsienbaar was.”

87 2002 2 SA 55 (SCA) 60C–F.

In accordance with the concrete approach to negligence, the plaintiff must thus prove that the wrongdoer should have foreseen the reasonable possibility of damage or harm to the specific plaintiff and the reasonable person in the position of the wrongdoer would have taken preventative steps to avoid this harm. If the negligent conduct of the wrongdoer directly placed the plaintiff in personal danger, it should not be too difficult to prove that the harm to the plaintiff was reasonably foreseeable by the wrongdoer,<sup>88</sup> and more so in the case of intentionally inflicted harm.

In *Boswell v Minister of Police*,<sup>89</sup> based on a claim for general damages under the *lex Aquilia*,<sup>90</sup> the court held that fear of personal injury may “be decisive in respect of foreseeability when the action is based on *culpa*. However when one deliberately frightens or shocks a person one does so with the intention of shocking or frightening . . . the wrongdoer must foresee the natural consequences of his intentional act”. In *Masiba v Constantia Insurance Co Ltd*,<sup>91</sup> Berman AJ in dealing with this requirement held that a reasonable man ought to and would have foreseen that the owner of the car might well suffer considerable shock at the sight of his car being hit in the rear.

In respect of a secondary victim or secondary emotional shock, the reasonable foreseeability of harm to the secondary victim could sometimes be more difficult to prove.<sup>92</sup> If the secondary victim was not in close proximity to the scene of the accident and therefore not placed in personal danger, it must be proven how the wrongdoer would have been able to foresee this victim as a possible victim suffering emotional shock from his or her negligent conduct.<sup>93</sup> In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*,<sup>94</sup> Botha JA acknowledged that where the victim is in personal danger, one is more likely to come to the conclusion that the possibility of harm should have been foreseeable to the wrongdoer, than in cases where the victim saw harm inflicted to someone else or only heard of it. It is, however, also true that the mere fact that something is unlikely to occur, does not necessarily mean that it is not foreseeable.<sup>95</sup> Burchell<sup>96</sup> explains that “the fact that an occurrence is statistically unusual does not necessarily mean that the defendant will escape liability for negligence in disregarding the risk of its occurrence”. In the end, what is required of the court

88 *Bester v Commercial Union* 1973 1 SA 769 (A) 777F–G 781A; *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 343D–E; *Boswell v Minister of Police* 1978 3 SA 268 (E) 274F–G; Neethling 1998 *THRHR* 336.

89 1978 3 SA 268 (E) 274F–H.

90 The action for general damages in respect of negligent infringement of physical integrity lies with the action for pain and suffering and not the *actio legis Aquiliae* (which is an action for patrimonial loss). Elsewhere, (in *Boswell* 273A–B) the court in referring to the development of the *actio legis Aquiliae* probably had the action for pain and suffering in mind.

91 1982 4 SA 333 (C) 342H.

92 See *Mulder v South British Insurance Company Limited* 1957 2 SA 444 (W).

93 See *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 343D–E: “It is not necessary that the shock follow on a fear of personal injury, although this may well, depending on the circumstances of the case, be decisive in respect of foreseeability.”

94 1973 1 SA 769 (A) 781A.

95 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214A–C: “Die blote feit dat so ’n gevolg slegs selde intree, bring egter nie mee dat dit nie as ’n redelike moontlikheid voorsienbaar is nie”; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60H–J.

96 1999 *SALJ* 705; see also *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 213H–I.

is “to evaluate all the relevant facts in order to decide whether the harm caused was foreseeable as a reasonable possibility”.<sup>97</sup>

In *Majiet v Santam Limited*,<sup>98</sup> Cleaver J concluded that “it was reasonably foreseeable to the driver of the insured vehicle that a parent of a child knocked down by the vehicle in a residential suburb would come upon the aftermath of the accident and in the result would suffer emotional trauma or depression of sufficient severity to have a substantial effect on the well-being of the parent”.

Irrespective of whether the abstract<sup>99</sup> or the concrete<sup>100</sup> approaches to negligence is followed, causation must still be determined in each case before liability can ensue.

### 3 4 Causation<sup>101</sup>

In *Barnard v Santam Bpk*,<sup>102</sup> Van Heerden ACJ clearly stated that not only must it be proven that the conduct of the wrongdoer was negligent, but also that the negligent conduct of the wrongdoer was the legal cause of the harm suffered. Factual causation must obviously also be present, but it is mostly assumed and not directly proven.<sup>103</sup> According to Olivier JA in *Road Accident Fund v Sauls*<sup>104</sup> the question of legal causation is to determine whether the harm or loss suffered is not too remote to be recognised in law: “[t]he test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play their part.”<sup>105</sup> In determining legal causation in the case of emotional shock (in particular, secondary emotional shock) the flexible approach as advanced in *S v Mokgheti*<sup>106</sup> should be applied.<sup>107</sup> In terms of this approach there is no single criterion for legal causation but what must be determined is “whether there is a close enough relationship between the wrongdoer’s conduct and its consequence for such consequence to be imputed to the wrongdoer in view of

97 *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60J; see also *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214D–E; *Bester v Commercial Union* 1973 1 SA 769 (A) 780H; *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 558a.

98 [1997] 4 All SA 555 (C) 568i–j.

99 Neethling and Potgieter *Law of delict* 141: “The question of whether a defendant is liable for a *specific consequence* is, in terms of the abstract approach, answered with reference to *legal causation* rather than by inquiring whether the defendant was negligent with regard to that specific consequence.”

100 *Idem* 143: “However, it must be emphasised that acceptance of the concrete or relative approach does not obviate the important role of legal causation as a criterion to limit liability, especially where ‘remote consequences’ are concerned.”

101 *Bester v Commercial Union* 1973 1 SA 769 (A) 777C–E, 779H; *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 54E; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 34G–H; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215D; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 61A. See Klopper 157; Potgieter 9 *LAWSA* para 12; Potgieter 2004 *Obiter* 502.

102 1999 1 SA 202 (SCA) 215D–E.

103 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215D: “Dit is nouliks nodig om te sê dat feitelike veroorsaking nie altyd voldoende is om ook as regsorsaak van die betrokke gevolg aan die dader toegereken te word nie.”

104 2002 2 SA 55 (SCA) 61F–G.

105 61G.

106 1990 1 SA 32 (A) 39D–41B.

107 See *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215E–F.

policy considerations based on reasonableness, fairness and justice”.<sup>108</sup> The reasonableness of the defendant’s conduct is determined with “reference to the proximity or remoteness of the act to its consequence or consequences”.<sup>109</sup>

As a guideline in assisting with the question of legal causation (and in particular with establishing reasonable foreseeability of harm as one of the tests for legal causation) in the case of secondary emotional shock, the “proximity rules” as referred to by Lord Wilberforce in the English case of *McLoughlin v O’Brian*<sup>110</sup> could be useful. According to these rules “a court should satisfy itself as to the proximity of the tie or relationship between the plaintiff and the injured person, the proximity of the plaintiff to the accident in time and place, and the proximity of the communication of the accident through sight or hearing of the event or its aftermath”.<sup>111</sup>

Lord Wilberforce’s first rule of proximity refers to the relationship between the primary and secondary victim suffering the “emotional shock”. The closer the relationship between the primary and secondary victim, the more likely it is that the harm to the secondary victim should have been foreseeable. It has now been settled in our law that there is no defined list of relationships that will be recognised,<sup>112</sup> but rather that the “question is one of legal policy, reasonableness, fairness and justice (legal causation), that is, was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration”.<sup>113</sup> Relationships that have been recognised are that of parent and child,<sup>114</sup> brothers (which should include sisters),<sup>115</sup> husband and wife,<sup>116</sup> aunt and nephew,<sup>117</sup> fiancé and fiancée,<sup>118</sup> and between school teacher and pupils.<sup>119</sup>

The second rule of proximity relates to not only how close the secondary victim was physically to the scene of the accident, but also how long it took the secondary victim to get to the scene of the accident if he or she was not there at the time of the accident.<sup>120</sup> If the secondary victim was at the scene of the accident, and especially if he or she was in personal danger, it is almost assumed that

108 *Supra* 40–41.

109 Knobel “Thoughts on the functions and application of the elements of a delict” 2008 *THRHR* 650.

110 [1982] 2 All ER 289 (HL) 303–305.

111 See *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 559f–g.

112 See para 2 *supra*.

113 *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 62J–63A; see also *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 34I–J.

114 *Majiet v Santam Ltd* [1997] 4 All SA 555 (C); *Barnard v Santam Bpk* 1999 1 SA 202 (SCA); *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W); *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC); *Fourie v Road Accident Fund* 2014 2 SA 88 (GNP).

115 *Bester v Commercial Union* 1973 1 SA 769 (A).

116 *Masiba v Constantia Insurance Co* 1982 4 SA 333 (C).

117 *Boswell v Minister of Police* 1978 3 SA 268 (E).

118 *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA).

119 *Potgieter v Rangasamy* unreported case no 1261/2008 (EC) 16 August 2011.

120 See *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 55 where Binns-Ward J remarked that the third appellant came upon the presence of the deceased shortly after the collision (which should be noted was after she had travelled all the way from Canada). He concluded that the negligence was the legal cause of the resultant damage.

harm to him or her should have been foreseen.<sup>121</sup> In circumstances where the secondary victim was close enough to the scene of the accident to be able to experience the aftermath very soon thereafter, the likelihood of proving reasonable foreseeability is also very good.<sup>122</sup> It has been stated that the wrongdoer, when driving negligently in a residential suburb and knocking down a child, should reasonably have foreseen that a parent of that child could come upon the aftermath of the accident and suffer emotional shock.<sup>123</sup>

According to the third rule of proximity, the mode through which the accident is communicated to the secondary victim could determine whether the harm was reasonably foreseeable. A distinction is made between “sight” and “hearing” of the event and its aftermath. The number of secondary victims that could hear of the accident is limitless, whereas the number that will actually see the accident happen or come upon the aftermath of the accident is more limited. The fear of opening the floodgates of liability has been expressed by Navsa J in *Clinton-Parker and Dawkins v Administrator, Transvaal*:<sup>124</sup> “An infinite number of people could claim for nervous shock upon viewing an accident and its consequences. So too with relatives or friends to whom an accident and its consequences are communicated.”

The requirement of legal causation, as applied within the flexible approach, is perfectly suited to establish and limit liability in the case of secondary emotional shock. It is suggested that the courts could have regard to the three proximity rules to assist in determining a legal causal link between the negligent conduct of the wrongdoer and the resultant psychological or psychiatric injury of the secondary victim as part of the flexible approach to legal causation. Policy considerations should indeed play a role in deciding in such instances and also taking into account the specific facts of the case.<sup>125</sup>

Lastly, it is worth mentioning the application of the thin skull-rule in emotional shock cases. An important observation was made in *Hing v RAF*<sup>126</sup> by Binns-Ward J on the application of the thin-skull rule:

“I do not consider, however, that the respondent should be liable to compensate the appellant for the aggravating effect of extraneous factors unconnected to the insured driver’s negligence. The connection by the appellant’s counsel that the respondent should be liable in this respect on the basis of the principle that a wrongdoer takes his victim as he finds him suggests a misunderstanding of the principle. The effect of the principle is not to make a wrongdoer liable for harm he did not cause.”

From this statement, it is clear that the thin skull-rule should only be applied once it has already been determined that liability must ensue.<sup>127</sup> The severity of the

121 *Bester v Commercial Union* 1973 1 SA 769 (A) 781A; *Masiba v Constantia Insurance Co* 1982 4 SA 333 (C) 342H 343D–E; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 62A; *Boswell v Minister of Police* 1978 3 SA 268 (E) 274F–G.

122 See *Bester v Commercial Union* 1973 1 SA 769 (A) 781C–F.

123 *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 568i.

124 1996 2 SA 37 (W) 63B–C; see also *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 558c–g.

125 *Barnard v Santam Bank Bpk* 1997 4 SA 1032 (T) 1034C.

126 *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 56.

127 *Masiba v Constantia Insurance Co* 1982 4 SA 333 (C) 342D–F; *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 567b–d; *Boswell v Minister of Police* 1978 3 SA 268 (E) 272G; *Gibson v Berkowitz* 1996 4 SA 1024 (W) 1050E–G; *Neethling and Potgieter* 1997

resulting psychological harm or psychiatric injury and the susceptibility to harm of the secondary victim (applying the thin skull-rule) are both issues relating to the quantum of the claim for emotional shock, and not to the question of whether liability should ensue or not.<sup>128</sup>

### 3 5 Damage

The harm or loss suffered due to the occurrence of the delict (causing of emotional shock) include patrimonial loss (for example, medical, hospital and related expenses, loss of income, etc) and/or non-patrimonial loss (for example, pain and suffering, shock, loss of amenities of life, etc). In practice, compensation for emotional shock, which may or may not be accompanied by physical injury, is usually claimed together with compensation for pain and suffering under the head of general damages.<sup>129</sup>

It should be highlighted that damages are not awarded for causing “emotional shock” in a wrongful and culpable manner<sup>130</sup> but rather for the mental (psychological) and physical consequences<sup>131</sup> flowing from the emotional shock suffered and therefore some form of psychological or psychiatric injury needs to be proven.<sup>132</sup> Actual physical force or physical violence need not be the cause of the injury.<sup>133</sup>

## 4 CONCLUSION

What is apparently clear with regard to the increasing number of claims for emotional shock, especially in third party matters, is that there is a need to define “emotional shock” clearly and to distinguish between claims of primary and secondary victims who suffer emotional shock. Of importance, not only in practice but also from an academic point of view, is the question of how to apply the requirements set for a successful claim based on the causing of emotional shock. Our courts have clearly distinguished its requirements from the requirements in English law and in so doing have extended liability especially in instances of what we refer to as “secondary emotional shock”. Reasonable foreseeability of harm as a requirement to establish liability must be applied differently when part of the test for negligence (reasonable foreseeability and preventability

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THRHR 551; Neethling 1998 THRHR 342; Burchell 1999 SALJ 699; Neethling 2000 TSAR 10.

128 *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 35D–E.

129 See, eg, *Creydt-Ridgeway v Hoppert* 1930 TPD 664; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) 35E; Potgieter *et al Law of damages* 508–509. See also the comments by Burchell 1999 SALJ 703 on the blurring of the distinction between “compensable pain and suffering” and “compensable psychological harm”.

130 As stated by Kotze J in *Hauman v Malmesbury Divisional Council* 1916 CPD 216 219.

131 *Hing v Road Accident Fund* 2014 3 SA 350 (WCC) para 18: “[I]ts [psychiatric injury] organic basis lying in the effect of the wrongdoer’s conduct on the claimant’s nervous or neurological system.”

132 See *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 61I–J: “It must be accepted that in order to be successful a plaintiff in the respondent’s position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury”; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA): “Tweedens moet ’n eiser natuurlik bewys dat hy ’n erkende psigiatriese letsel opgedoen het en sal hy dus in die reël op ondersteunende psigiatriese getuienis aangewese wees”; Potgieter 9 *LAWSA* para 2.

133 *Hauman v Malmesbury Divisional Council* 1916 CPD 216, 219.

of harm), or when applied as one of the tests to determine legal causation. Furthermore, our courts should be cautious in casting the net of liability too wide and in this regard the rules of “proximity” found in English law may be useful in assisting with the determination of legal causation. The well-established application of the flexible approach to legal causation is more than sufficient to be effectively applied to cases of emotional shock, in particular secondary emotional shock.

Lastly, it is obvious that all the elements of a delict should be proven in order to succeed with a claim based on the causing of emotional shock, whether it is suffered by a primary victim or a secondary victim.