1 Introduction

The decision of Swartbooi v Road Accident Fund dealt with a claim by a secondary victim (that is, a person who was not directly involved in the motor vehicle accident) for emotional shock. The legal question was whether a secondary victim’s claim for emotional shock should be limited by the application of section 18(1) of the Road Accident Fund Act 56 of 1996 (hereafter referred to as the “Act prior to the amendments”) or not (31H). Section 17 of the Act prior to the amendments provides for liability of the Road Accident Fund (hereafter referred to as the “RAF”), subject to the Act, to compensate any person “for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from” the unlawful and negligent driving of a motor vehicle within the Republic of South Africa. The two most important provisions to which liability of the RAF is made subservient are section 18(1) (dealing with limitation of liability, see the wording in para 3.3.2(a) below) and section 19(a) (dealing with exclusion of liability – which will not be our focus in this discussion).

In order to fully understand the impact of this decision it is necessary to start this discussion by briefly defining emotional shock and stating its requirements, especially in light of other case law on emotional shock since the landmark decision of Bester v Commercial Union Versekeringsmaatskappy 1973 1 SA 769 (A). This is followed by a discussion of the facts and findings of the decision in Swartbooi. In the discussion the purpose and interpretation of section 18(1), and in particular how this impacts on claims by secondary victims of emotional shock, are analysed in detail. The application of the requirements for emotional shock by the court in casu are investigated by specifically referring to the requirement of reasonable foreseeability. Lastly, the constitutionality of the future of these types of claims against the RAF are commented on in the conclusion.

2 Emotional shock

2.1 Definition

Emotional shock, also identified as “psychological lesion” or “psychiatric injury”, has been described 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” (Potgieter “Emotional shock” 9 LAWSA (2005) para 2; see also Klopper Third party compensation
It is trite law since the decision of Bester (779A–C 782B–C) that “bodily injury” encompasses psychological injuries caused by emotional shock (Swartbooi 33A–B; Neethling and Potgieter 286; Klopper 96 as well as the cases referred to in fn 512; Burchell 1999 SALJ 698; Neethling 2000 TSAR 2–4). Consequently a claim for emotional shock arising from bodily injury (in the sense of injury to the nervous and brain system – Bester 779B) would form part of a possible claim against the RAF in terms of section 17. Such a claim against the RAF based on emotional shock would be included under the commonly known category of general damages.

2.2 Requirements

Generally the courts have awarded compensation for emotional shock sustained in instances where (a) the shock caused serious emotional or psychological conditions (wrongfulness); (b) the shock was reasonably foreseeable (legal causation); and (c) the reasonable person in the position of the wrongdoer could foresee the detrimental consequences of the emotional shock (negligence) (see Neethling and Potgieter 286–289).

In Bester, a decision of the then Appellate Division, it was held that physical injury or personal danger was no longer a requirement to succeed with a claim based on emotional shock (777H 779C). This opened the door to plaintiffs such as the mothers in Masiba and Swartbooi to institute a claim based on the suffering of emotional shock even though they were not in close proximity to the scene of the motor vehicle accident. In both of the above-mentioned cases, the mothers heard of the death of their sons telephonically. In order to limit liability in such instances where the secondary victim was not in personal danger or in close proximity to the scene of the accident, the court in Bester (779H) required that the psychiatric injury should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer and the emotional shock should be significant and have a substantial effect on the health of the plaintiff.

These requirements have been applied in all cases on emotional shock since Bester and it is now regarded as trite law (Masiba v Constantia Insurance Co 1982 4 SA 333 (C) 342B–D; Clinton-Parker 54D–F 59F–G 69A–D; Majiet v Santam Ltd [1997] 4 All SA 555 (C) 568G–J; Sauls 60C–61A; Swartbooi 34G–H; Klopper 96 101). Burchell 1999 SALJ 699, however, feels that the aim to limit liability in these cases by requiring that the psychological harm should have been substantial, could also have been achieved by merely applying the defence of de minimis non curat lex (see also Neethling and Potgieter 287), as well as the judicious use of the limits implicit in the general criterion of...
unlawfulness and legal causation. It is usually the requirement of reasonable
foreseeability, whether applied as part of negligence or legal causation, that
will receive the most attention in case law on these matters (see para 3.3.3 below).

3 Swartbooi v RAF

3.1 Facts

The plaintiff’s son (hereafter the “deceased”) was involved in a single motor
vehicle accident on 24 September 2006. This date is important (prior to 1 August
2008) because it means that the RAF Act prior to the amendments is applicable
to all claims arising from this accident. He was a passenger for reward in a taxi
which sustained a burst tyre. As a result of the burst tyre, the driver of the taxi
lost control of the vehicle and it veered off the road and capsized. The deceased
sustained fatal injuries which led to his death. The plaintiff was informed tele-
phonically about her son’s accident and death and this caused her to suffer from
emotional shock. The plaintiff subsequently sued the RAF for compensation as a
result of the emotional shock she suffered (31C–H). The RAF acknowledged that
the plaintiff had a claim and the dispute between the parties lay only in whether
or not the plaintiff’s claim would be limited in terms of section 18(1) of the Act
prior to the amendments (31H–J).

3.2 Findings

The plaintiff’s legal representative argued that the plaintiff’s claim should not be
limited in terms of section 18(1) and further that her claim was based on section
17 (see 31I). The plaintiff’s legal representative agreed that section 18(1) relates
to the assessment of liability of the RAF “on whether to compensate third parties
for losses resulting from . . . the death of a person who was conveyed in an
insured motor vehicle” but submitted that it was not applicable *in casu* (32I).
Mantame AJ found in favour of the plaintiff’s submissions that the plaintiff did
indeed sustain emotional shock and reasoned that she was not a dependant of the
deceased nor was she herself a passenger. Therefore her claim against the RAF
was not subject to any limitation (in terms of s 18(1)) and the liability of the
RAF was based only on section 17 of the Act prior to the amendments (35F–
36A).

3.3 Discussion

3.3.1 Liability of the RAF in instances where a vehicle sustains a burst tyre

In the reported case, it is not mentioned how the negligence of the taxi driver was
determined. It is trite law that in order for the RAF to be held liable, the wrong-
deer driver must be delictually liable, and negligence on the part of the driver is
therefore required (in terms of s 17 of the Act). All that is mentioned in the
reported case is that the taxi was driven at approximately 120km/h when the tyre
burst (31F) and that the RAF acknowledged that the plaintiff had a claim. The
dispute between the parties lay only in whether or not the plaintiff’s claim would
be limited in terms of section 18(1) of the Act prior to the amendments (31H–J).

As a point of interest it can be mentioned that in instances where a vehicle
sustains a burst tyre, a driver could (depending on the circumstances) rely on the
doctrine of “sudden emergency” which excludes negligence and in turn liability
of the RAF. The requirements for sudden emergency are (a) a situation of immi-
nent peril or danger; (b) the wrongdoer must not have caused the perilous sit-
uation by his own negligence or imprudence; and (c) the wrongdoer must not
have acted in a grossly unreasonable manner (Neethling and Potgieter 149–150; Klopper 88–90; Klopper The law of collisions in South Africa (2003) 108–112; see also Raubenbach v De Bruin 1971 1 SA 603 (A) where the brakes of the vehicle had failed and Rex v Moolman 1935 EDL 443 where a defective steering mechanism excluded negligence; but see Arthur v Bezuidenhout and Miery 1962 2 SA 566 (A) where a broken steering shaft resulted in a finding of negligence and South British Insurance Co Ltd v Mkhize 1965 1 SA 206 (A) where a burst tyre resulted in a finding of negligence). If indeed the driver in Swartbooi was faced with a “sudden emergency” as a result of the burst tyre (and with no fault on his part), it may be argued that the court on the face of it held the RAF liable on a no-fault basis. This would then clearly have been a wrong decision. However, from the given facts in the reported case such an assumption cannot be made and we therefore proceed from the premise that the negligence on the part of the driver in Swartbooi was established and acknowledged by both parties.

3 3 2 Section 18(1) of the Act prior to the amendments

(a) Purpose

Section 18(1) of the Act prior to the amendments applies to certain classes of passengers conveyed in a motor vehicle where either their driver was solely negligent or the passenger was involved in a single motor vehicle accident (Klopper 214). It was clearly the intention of the legislature to limit the liability of the RAF in respect of claims relating to the injury or death of certain classes of passengers (see Santam Insurance Ltd v Taylor 1985 1 SA 514 (A)). This is also evident from the fact that the predecessors to the Act prior to the amendments had similar provisions in pari materia to that of section 18(1) of the Act prior to the amendments. The provisions in pari materia differ inter alia in respect of the classes of passengers, the type of damages recoverable and the amount recoverable (eg a single claim relating to a passenger conveyed for reward involved in a single motor vehicle accident was limited to R8 000 in terms of s 11(1)(ii) of the Motor Vehicle Insurance Act of 1942 and R12 000 in terms of s 22(1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972).

(b) Interpretation

It is apparent from the wording of section 18(1) prior to the amendments, that what is limited is the RAF’s liability (to a maximum of R25 000) to compensate a third party (see Constantia Insurance Co Ltd v Hearne 1986 3 SA 60 (A) 67). Therefore the balance of the claim could still be recovered from the wrongdoer in terms of common law (see Rose’s Car Hire (Pty) Ltd v Grant 1948 2 SA 466 (A); Da Silva v Coutinho 1971 3 SA 123 (A); Klopper 215).
A passenger (subject to s 18(1)) who was personally injured in a motor vehicle accident may be entitled to claim up to a maximum of R25 000 from the RAF (see Du Plessis v Road Accident Fund 2001 4 SA 1140 (N) where the court held that the passenger who was injured was entitled to claim up to R25 000 from the RAF and so was the father of the passenger, who was also considered a third party, and entitled to claim up to R25 000 from the RAF). In cases where the third party suffers as a result of injury to a passenger (subject to s 18(1)), such third party may also be entitled to claim up to a maximum of R25 000 from the RAF (see Du Plessis and Taylor). In Taylor the court held that the father and natural guardian of a minor who was a passenger subject to section 22(1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (in pari materia to s 18(1) of the Act prior to the amendments) was entitled to claim a limited amount of R12 000.

In instances where a passenger subject to section 18(1) dies, a third party may also be entitled to claim a maximum of R25 000 from the RAF (see the following cases which dealt with limitation provisions in pari materia to s 18(1) prior to the amendments: Jensen v Williams Hunt and Clymer Ltd 1959 4 SA 583 (O); Du Plooy v SA Onderlinge Brand en Algemene Versekerringsmaatskappy 1975 1 SA 791 (O); and Hearne).

(c) Application of section 18(1) by the court

According to the facts, the plaintiff was notified of her son’s death telephonically. She was not as referred to by the plaintiff’s representative “an innocent bystander who suffered from emotional shock” (33A). The plaintiff’s legal representative predominantly relied on Barnard where the mother was informed of her son’s involvement in an accident and death resulting in her suffering emotional shock (33D). The mother in that case was indeed successful in her claim for compensation for emotional shock. The defendant’s legal representative, however, correctly argued that Barnard and Sauls did not deal with the applicability of section 18(1) of the Act prior to the amendments (see 34A) or any provision in pari materia in terms of any preceding legislation which may have been applicable at the time. In Sauls the plaintiff was a pedestrian and in Barnard the claimant’s son was not a passenger involved in a single motor vehicle accident, nor was his driver solely negligent. The defendant’s legal representative therefore correctly reasoned that the plaintiff’s claim was subject to section 18(1)(a). He further correctly submitted that in casu, or in a dependency claim, or where a parent or guardian has incurred expenses resulting in the death of a dependent minor (who was a passenger as contemplated in s 18(1)), all of these claims should be limited to R25 000 (33E–F, see Du Plessis; Taylor; Jensen; Du Plooy; and Hearne referred to in para 332(b) above).

Mantame AJ stated that the two sections are “independent and capable of being interpreted separately . . . [and] even if one were to employ the ordinary grammatical meaning of the two sections, each one of them is independent of the other” (34C–D 35C). As mentioned, section 17 provides for liability of the RAF (subject to the Act) and section 18 is one of the provisions to which liability of the RAF is made subservient. Section 18 limits the claims of certain passengers and the deceased fell within one of the passengers listed in section 18(1), namely, a passenger for reward. If one looks at the wording of section 18, both sections 17 and 18 are mentioned in one breath. Section 18 at the outset clearly
states that the liability of the RAF in compensating a third party “for any loss or
damage contemplated in section 17 which is the result of . . . the death of any
person” who at the time of the accident was being conveyed, would be subject to
a limited claim of R25 000. Mantame AJ stated that, in his view, section 18(1)
was set to operate in a situation where the claim is for compensation of third
parties for losses resulting from bodily injuries or the death of a person who was
conveyed” (our emphasis) as a passenger and that the plaintiff is not a third party
subject to section 18 but a person who suffered emotional shock as a result of the
negligent driving of a motor vehicle (34E–F). He clearly disassociated the two
sections, misinterpreted the provisions and came to an incorrect conclusion (see
para 3 3 2(b) above).

Mantame AJ further stated that by enacting section 18 “the legislature could
not, and did not, intend to limit the claim and thereby alter the common-law
position” (35E–F). This statement is incorrect on two grounds. Firstly, there
were historic reasons for limiting the claims of certain passengers (see Suzman et
al Compulsory motor vehicle insurance in South Africa (1982) 190ff). Secondly,
the plaintiff’s common law position is not altered; it is only her claim against the
RAF that is limited. In Mvumvu v Minister of Transport 2011 2 SA 473 (CC),
section 18(1) of the Act prior to the amendments was eventually found unfair by
the Constitutional Court. Swartbooi, however, was decided before the decision of
Mvumvu, as well as the enactment of The Road Accident Fund (Transitional
Provisions) Act 15 of 2012 (hereafter referred to as the “Transitional Act”) and
the applicability of the Road Accident Fund Amendment Act 19 of 2005 (here-
after referred to as the “RAF Amendment Act”) which removed the R25 000
limitation. Even though the RAF Amendment Act removed the limitation in
regard to certain passenger claims, it put other limitations in place and specific-
ally excluded the liability of the RAF in cases where secondary victims suffer
emotional shock.

3 3 3 Application or non-application of requirements for emotional shock
As was pointed out in para 2 2 above, the courts are clear on the requirements set
for succeeding with a claim based on emotional shock. It is in particular required
that the emotional shock suffered by the plaintiff should be of a serious nature
and must have been reasonably foreseeable by the wrongdoer. In Swartbooi the
court referred (35J–36A) to the medico-legal report compiled by the psychiatrist
to come to the decision that the consequences of the emotional shock was of
such a serious nature that the loss suffered could be recovered. In principle we
cannot fault this part of the court’s conclusion. On the other hand, the other
important requirement of reasonable foreseeability of the harm suffered was in
our opinion not investigated in sufficient detail by the court. Furthermore, we are
of the opinion that the court incorrectly linked the question of legal causation
with whether section 18(1) should apply to the test of reasonable foreseeability.

Mantame AJ mentioned (34I–35B) the role of the relationship between the
primary and secondary victims of the accident and that it will not be the prime
consideration when deciding whether the emotional shock suffered by the
secondary victim should have been reasonably foreseeable by the wrongdoer.
Surprisingly, he then linked this to the question of whether the claim in this case
should be limited. Mantame AJ stated that “[i]n determining such limitations
[our emphasis] the court will take such relationship into consideration, but it
remains a question of legal policy, reasonableness, fairness and justice, in which reasonable foreseeability should also be a guide” (34I). He then listed a few cases in which different types of relationships were relevant, but never applied the principles from those cases to the case at hand. In the very next paragraph he discussed the relatedness of section 18(1) and section 17(1) and came to the conclusion that “the legislature could not, and did not, intend to limit the claim and thereby alter the common-law position” (35F). In the next sentence he stated that according to the law of delict, loss is recoverable if it was reasonably foreseeable. From these quoted statements the conclusion can be drawn that Mantame AJ decided not to limit the plaintiff’s claim in terms of section 18(1) because the loss suffered by her was severe in nature and should have been reasonably foreseeable by the wrongdoer. This conclusion can furthermore be justified by the following statement made by him (36C–D): “In my opinion, given the plaintiff’s personal circumstances and what she has gone through, it would be unreasonable to cap the damages. The imposition of a cap would be demonstrably unnecessary, unjustifiable and unreasonable in the circumstances” (our emphasis).

The legal question of whether her claim against the RAF should have been limited depended on the interpretation of section 18(1) of the RAF Act, not reasonableness or other criteria related to legal causation. Mantame AJ confused the questions in respect of determining liability and the effect of section 18(1). The value judgement on whether it is reasonable, fair and just to hold a defendant liable forms part of the flexible approach to determine legal causation (see S v Mokgheti 1990 1 SA 32 (A) and International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A)) and therefore relates to liability.

4 Conclusion

As mentioned, Swartbooi was decided before the application of the RAF Amendment Act, as the accident in casu occurred before 1 August 2008. If the provisions of the RAF Amendment Act were applicable, the plaintiff’s claim against the RAF would have been specifically excluded (see s 19(g)). The plaintiff would, however, have been entitled to claim her damages for emotional shock from the wrongdoer in terms of common law.

Klopper 134 correctly predicts that it is doubtful whether the exclusion of claims of secondary victims of emotional shock (s 19(g)) will remain constitutional mainly because it “arbitrarily discriminates between victims who sustain psychological deficits arising from their injuries and other persons who suffer the same injury albeit that the mechanism of the injury may differ”. Ironically this is exactly the opposite to the outcome of the decision in Swartbooi, in which the court actually favoured secondary victims of emotional shock to primary victims of physical injury by allowing the former to have an unlimited claim.

Furthermore, the Road Accident Benefit Scheme Bill of 2013 was published in Government Gazette 30138 of 8 February 2013. This Bill, if implemented, will totally exclude claims for general damages and claims for emotional shock suffered by victims will no longer be actionable in third party matters. If history determines the future, the Law Society of South Africa or another concerned organisation will most probably challenge the constitutionality of some of the provisions of the Road Accident Benefit Scheme and the uncertainty regarding the position of road accident victims will start all over again. Even if this does
not happen, the controversy over the application of the requirements for emo-
tional shock as a head of damage will continue in other types of damage-causing
events, such as wrongful arrest or medical malpractice.

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ONTEIENING VAN ONBENUTTE OU-ORDE REGTE:
HET IETS NIETS GEWORD?

Agri South Africa v Minister of Minerals and Energy 2013 4 SA 1 (KH)

1 Inleiding
By die inwerkingtrede van die Wet op die Ontwikkeling van Mineraal- en
Petroleumhulpbronne, 28 van 2002 (hierna “MPRDA” na aanleiding van die
Engelse titel van die wet naamlik, die “Mineral and Petroleum Resources
Development Act”) het sogenaamde onbenutte ou-orde regte (“unused old order
rights”) vir ’n tydperk van ’n jaar bly voortbestaan (item 8(1) van die oorgangs-
maatreëls in Bylae II tot die MPRDA (hierna “oorgangsmaatreëls“)). Onbenutte
ou-orde regte was hoofsaaklik mineraalregte, prospekteerregte en mynregte ten
aansien van grond waarop geen prospektering of mynbou onmiddellik vir die
inwerkingbrenging van die MPRDA plaasgevind het nie (vgl die definisie van
“unused old order right” in item 1 van die oorgangsmaatreëls). Die houers van
sodanige regte was uitsluitlik geregtig om binne ’n tydperk van ’n jaar vir pros-
pekteer- of mynregte ingevolgde die MPRDA aansoek te doen (item 8(2)). By
die versuim om aldus aansoek te doen, is die onbenutte ou-orde regte beëindig
(item 8(4)). Die oorgangsmaatreëls maak vir die betaling van vergoedingsgeld
deur die staat voorsiening, indien h persoon kan bewys dat sy eiendom kragtens
die bepalings van die MPRDA onteien is (item 12(1)). Dit is aanvaar dat houers
van onbenutte ou-orde regte wat nie vir nuwe regte aansoek gedoen het nie,
onteien is en derhalwe op vergoeding geregtig is (Badenhorst, Mostert en Dendy
“Mining and Minerals” 18 LAWSA (2007) par 68; sien ook Badenhorst en
Mostert “Revisiting the transitional arrangements of the Mineral and Petroleum
Resources Development Act 28 of 2002 and the Constitutional property clause:
An analysis in two parts” 2004 Stell LR 22 44–45).

Die feite in hierdie dispuut was kortlik soos volg: Voor die inwerkingbrenging
van die MPRDA was Sebenza Mining (Pty) Ltd (hierna “Sebenza”) die gereg-
streerde houer van steenkoolregte ten aansien van twee eiendomme wat in
Mpumalanga geleë is. Tydens die oorgangstydperk het die maatskappy nie, soos
geregistreer, nie prospekteer- of mynregte ten aansien van steenkool aansoek
gedaan nie. Die maatskappy, wat op daardie stadium in likwidasie verkeer het, kon
nie enige nuwe regte aansoek doen nie omdat die regte vanweë likwidasie beëindig
sou word. ’n Vergoedingseis is, derhalwe, kragtens item 12(1) van die oorgangsmaatreëls
ingedien waarin aangevoer is dat die maatskappy se steenkoolregte deur die
MPRDA onteien is. Die eis is deur die Departement van Mineraalehulpbronne