

The Influence of Reasonableness in Determining Delictual or Tort Liability for Psychological or Psychiatric Harm in South African and English Law

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Abstract

Due to a lack of authority in Roman-Dutch law in respect of claims for psychological harm, our courts in South Africa relied on English law for guidance, in particular the tort of negligence, where emphasis is placed on reasonable foreseeability of harm. The courts in both jurisdictions generally face challenges with who exactly is entitled to claim, the quantification of the damages that should be awarded and how to limit delictual or tort liability emanating from these types of claims. South African law also followed English law in making the distinction between primary and secondary victims and as will be shown in this contribution, limiting liability in respect of secondary victims is problematic. The courts generally tread with caution in awarding damages for pure psychological or psychiatric harm and several policy considerations are taken into account when deciding to award damages or not. Nevertheless, as will be shown in this contribution, the courts in South Africa and the United Kingdom acknowledge these claims and have been developing the law around the cases that have come before them. What is rather interesting and prevalent, though, with regard to primary and secondary victim claims for psychological or psychiatric harm in these jurisdictions, is the implicit and explicit influence of "reasonableness" in determining delictual or tort liability for these types of claims. This will be pointed out further in this contribution.

Keywords

Delict; English law; intentionally inflicted psychiatric harm; negligently inflicted psychiatric harm; primary victims; psychiatric harm; psychological harm; reasonableness; reasonable foreseeability; secondary victims; South African law, tort; tort of negligence

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1 Introduction

Due to a lack of authority in Roman-Dutch law in respect of claims for psychological harm, our courts in South Africa relied on English law for guidance,¹ where the broad term "psychiatric illness" or harm is used more commonly but has not been clearly defined.² The courts acknowledge, though, that the harm suffered must be some form of "medically recognised psychiatric illness" which may occur through shock, fear, fright, or other mental suffering.³ In South African law, the majority of delictual claims that have come before the courts relate to claims for psychological harm as a result of nervous or emotional shock.⁴ It has been stated that the term "nervous shock" may be a misleading or obsolete term and that the "relevant question is whether the plaintiff sustained a recognisable psychological lesion."⁵

South African law also followed the approach in English law where a distinction is made between "primary" and "secondary" victims of psychological harm.⁶ The primary victim is one who is typically in some sort of physical danger and a secondary victim

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¹ Neethling and Potgieter *Law of Delict* 344.

² *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 470; Giliker *Tort* 121-122.

³ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 492. See the recent decision by the Canadian Supreme Court in *Saadati v Moorhead* 2017 1 SCR 543 where this requirement was dispensed with.

⁴ See Neethling and Potgieter *Law of Delict* 343; Ahmed and Steynberg 2015 *THRHR* 181ff.

⁵ *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 208-209 (translation by Neethling and Potgieter *Law of Delict* 343). Also see *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) [13], [17] and Ahmed and Steynberg 2015 *THRHR* 183. Also see Zitzke 2021 *Stell LR* 260ff who argues that our South African courts should lower "the requirement of 'recognised psychiatric lesion' to 'grievous mental injury', in line with similar arguments made in England."

⁶ For example, legislation regulating road accident claims refers to primary and secondary victims. See s 19(g) of the *Road Accident Fund Act* 56 of 1996.

is one who typically witnesses or hears of a disturbing event.⁷ The distinction between primary and secondary victims in English law emerged from the decision in *McLoughlin v O'Brian*,⁸ where Lord Wilberforce held that because psychiatric harm was capable of affecting a large number of potential plaintiffs, there was a need "for the law to place some limitation on the extent of admissible claims". Due to this policy consideration, he referred to the following factors that would need to be considered with regard to what we now know as secondary victims. They are the class of claimants whose claims should be recognised, the proximity of such claimant to the incident and how the psychiatric harm was caused.⁹ These control mechanisms were then reformulated and endorsed in *Alcock v Chief Constable of South Yorkshire Police* (hereinafter referred to as "*Alcock*") which is discussed further below.¹⁰

In South African law a generalising approach to determining a delict is followed instead of the approach followed in English law, where there is the tort of negligence and numerous other separate torts which include the intentional torts.¹¹ Even though our law has been influenced by English law, this is a major fundamental difference which should not be overlooked. What is interesting and common with claims for psychological or psychiatric harm in South African and English law is the implicit and explicit influence of "reasonableness" in determining delictual or tort liability for these types of claims. This will be the focus of this contribution.

To begin with in this contribution, the influence of reasonableness in determining tort liability for psychiatric harm in English law will

⁷ Ahmed and Steynberg 2015 *THRHR* 185-186.

⁸ *McLoughlin v O'Brian* 1983 1 AC 410 422.

⁹ See Giliker *Tort* 127.

¹⁰ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310. See para 2.2.2 below.

¹¹ See Ahmed 2019 *PELJ* 2-5 with regard to the main differences and similarities between these legal systems.

be pointed out briefly.¹² This will be followed by a brief discussion of the influence of reasonableness on delictual claims for psychological harm in South African law. The conclusion to this contribution will then highlight the main differences and similarities found between English and South African law in respect of the role of reasonableness in determining delictual or tort liability where psychological, or psychiatric harm has been sustained.

2 English law: psychiatric harm

2.1 *Intentionally inflicted psychiatric harm*

In English law the traditional intentional torts of trespass, assault and battery (involving direct harm) did not cover intentionally inflicted, indirect physical or psychiatric harm but has been covered since the decision of *Wilkinson v Downton*,¹³ under the *Wilkinson v Downton* rule (also referred to as a residual tort).¹⁴ The decision of *Wilkinson v Downton* was the first decision in English law which recognised the tort of the intentional infliction of shock. According to this residual tort, there must be some form of a positive act comprising of either actions or words that is directed to the claimant.¹⁵ There must be an intention to cause severe emotional distress or mental harm subsequently resulting in recognisable psychiatric harm and there must be no ground of justification applicable.¹⁶ Harm must also be proven.¹⁷

¹² Due to length restrictions, it is not possible to go into detail and explain all the elements of tort or delictual liability for psychiatric or psychological harm in English and South African law. The aim of this contribution is to point out the influence of reasonableness in determining tort or delictual liability for psychiatric or psychological harm.

¹³ *Wilkinson v Downton* 1897 2 QB 57.

¹⁴ It is referred to as a residual tort in that it covers indirect intentional harm which is not covered by the other intentional torts. See Deakin and Adams *Markesinis and Deakin's Tort Law*.

¹⁵ *O v Rodes* 2016 AC 219.

¹⁶ *O v Rodes* 2016 AC 219; *Witting Street on Torts* 270-271.

¹⁷ *Giliker Tort* 423.

In *Wilkinson v Downton*¹⁸ the defendant informed the claimant that her husband had been involved in an accident and was seriously injured. This was false. The defendant submitted that it was intended to be a practical joke, but the claimant suffered shock resulting in illness from the shock. She subsequently sued the defendant. The court stated that there is a good cause of action in such an instance where the defendant wilfully undertakes an act to cause physical harm (which includes psychiatric harm) to the claimant and the court allowed the claimant's claim for damages.¹⁹

The *Wilkinson v Downton* rule has been successfully applied in only two cases, *Janvier v Sweeney*²⁰ and *Khorasandjian v Bush*.²¹ In *Janvier v Sweeney*,²² the defendants (private detectives) threatened the claimant that she was in danger of being arrested for her association with a German spy (her fiancé). The claimant suffered psychiatric harm and was entitled to damages based on the *Wilkinson v Downton* rule. In *Khorasandjian v Bush*²³ the claimant was being continuously harassed by her former boyfriend to the point that she suffered considerable stress. The court granted an injunction (interdict) against the former boyfriend and held that even though there was no evidence of psychiatric harm, there was a risk "that the cumulative effect of continued and unrestrained further harassment such as she had undergone would cause"²⁴ psychiatric harm. The *Protection from Harassment Act*²⁵ now covers conduct which amounts to harassment in terms of the act. The harassment may be considered a crime or tort and the claimant may be entitled to an injunction as well.²⁶ The claimant

¹⁸ *Wilkinson v Downton* 1897 2 QB 57.

¹⁹ Giliker *Tort* 422-423.

²⁰ *Janvier v Sweeney* 1919 2 KB 316.

²¹ *Khorasandjian v Bush* 1993 QB 727.

²² *Janvier v Sweeney* 1919 2 KB 316.

²³ *Khorasandjian v Bush* 1993 QB 727.

²⁴ *Khorasandjian v Bush* 1993 QB 727 736.

²⁵ *Protection from Harassment Act*, 1997.

²⁶ See ss 1 and 2 of the *Protection from Harassment Act*, 1997.

may claim damages *inter alia* for anxiety, but it falls "short of a recognised category of psychiatric harm such as post-traumatic stress disorder".²⁷

In respect of this residual tort, stemming from *Wilkinson v Downton*, the reasonableness of the defendant's act of intentionally infringing the claimant's right to personal safety²⁸ is called into question, thus it may be concluded that at the very least, the influence of reasonableness is implicit on the lawfulness and reasonableness of the defendant's act.

It should be noted that after the decision of *Wilkinson v Downton*, in 1901, English law recognised liability for psychiatric harm in the tort of negligence in the case of *Dulieu v White & Sons*.²⁹

2.2 Negligently inflicted psychiatric harm

In English law a claimant who sustains negligently inflicted psychiatric harm is entitled to claim damages under the tort of negligence. In general, in order to succeed in a claim for negligence, the elements of duty (of care), breach (of that duty of care), causation and harm or damage must be present.³⁰ Often, adjudicators do not clearly differentiate between the first three elements and there is an overlap between these elements due to the role of reasonable foreseeability which is relevant to the inquiry in all three elements.³¹

In *White v Chief Constable of the South Yorkshire Police* (hereinafter referred to as "*White*") Lord Steyn stated that:

[n]owadays courts accept that there is no rigid distinction between body and mind. Courts accept that a recognisable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no

²⁷ See Deakin and Adams *Markesinis and Deakin's Tort Law* 366; s 3(2) of the *Protection from Harassment Act*, 1997.

²⁸ Deakin and Adams *Markesinis and Deakin's Tort Law* 364.

²⁹ *Dulieu v White & Sons* 1901 2 KB 669. This will be discussed further under para 2.2.1.

³⁰ Deakin and Adams *Markesinis and Deakin's Tort Law* 85-86.

³¹ Jones "Negligence" 441.

qualitative difference between physical harm and psychiatric harm. And psychiatric harm may be far more debilitating than physical harm.³²

Psychiatric illness is generally regarded as a type of personal injury³³ but is assessed more restrictively due to policy considerations when compared with other forms of personal injury.³⁴ Most of the cases that have come before the courts have involved physical events subsequently leading to post-traumatic stress disorder.³⁵ Thus, even though conduct is not explicitly mentioned as a requirement in English law, some form of conduct, either in the form of an omission or a commission, is implicitly required.³⁶

The concept of duty is used to "demarcate the range of people, relationships, and interests that receive the protection from the law."³⁷ It is submitted that out of all the elements of liability in the tort of negligence, the element of duty receives the most attention in English law because it is the first element which controls who is a primary or secondary victim entitled to claim damages for the psychiatric harm sustained. The three elements of duty that must be determined are the foreseeability of harm; proximity; and whether it is fair, just and reasonable to impose a duty of care. This is often referred to as the three-fold test stemming from *Caparo Industries plc v Dickman*.³⁸ Once it has been established that the defendant owed the plaintiff a duty of care, it must then be established if the defendant did indeed breach that duty.³⁹ The standard of reasonableness is used and the defendant's conduct is judged against the standard of the hypothetical reasonable person.⁴⁰ Thus, if the psychiatric harm towards the claimant was reasonably foreseeable, the risk of psychiatric harm materialising was significant, and the reasonable person in the circumstances would have taken steps to prevent the risk of psychiatric harm materialising – then the defendant breached the duty of care owed to the claimant.⁴¹

³² *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 492.

³³ *Page v Smith* 1996 AC 155 190.

³⁴ Deakin and Adams *Markesinis and Deakin's Tort Law* 108.

³⁵ *Witting Street on Torts* 72.

³⁶ Ahmed 2019 *PELJ* 9ff.

³⁷ Deakin and Adams *Markesinis and Deakin's Tort Law* 88.

³⁸ *Caparo Industries plc v Dickman* 1990 2 AC 605 and has subsequently been endorsed by the courts (see *Marc Rich & Co v Bishop Rock Marine* 1996 AC 211 235).

³⁹ *Giliker Tort* 157.

⁴⁰ See *Blyth v Birmingham Waterworks* 1856 11 Ex 781 784.

⁴¹ In assessing risk of harm, the degree of probability of the risk materialising and the gravity of the risk is considered. This is then weighed against the cost of the prevention of the harm (see Jones "Negligence" 563-573; *Bolton v Stone* 1951 AC 850 867-868).

In establishing whether the breach of duty caused the psychiatric harm, factual causation as well as legal causation is considered. In determining factual causation the "but for" test is usually applied.⁴² The question is whether the psychiatric harm would have occurred but for the defendant's conduct.⁴³ An alternative cause, a supervening cause or a *novus actus interveniens* would break the causal link between fault and damage, and the defendant would not be held liable.⁴⁴ With regard to legal causation, the question is whether the damage or harm "fell within the scope of the risk that it was the defendant's duty to safeguard the claimant against."⁴⁵ Thus the defendant cannot be held liable for damage that was too remote from his or her original breach of duty.⁴⁶ In establishing legal causation, generally, the foreseeability of the psychiatric harm is required but not the manner in which it occurred.⁴⁷

In order to obtain compensation the claimant must prove that he or she sustained some form of medically recognisable psychiatric illness as mere grief, distress, fear or other emotion is not sufficient.⁴⁸ In English law, grief and sorrow sustained as a result of a person's death is not compensable but a claim for bereavement is allowed by a spouse or parents and the amount claimable is capped by legislation.⁴⁹ Successful claims have been made for post-traumatic stress disorder,⁵⁰ chronic fatigue syndrome,⁵¹ hysterical personality disorder,⁵² pathological grief disorder,⁵³ and morbid

⁴² *Barnett v Chelsea and Kensington Hospital Management Committee* 1969 QB 428.

⁴³ The "but for test" is applied in the majority of cases except where there are multiple causes (see Deakin and Adams *Markesinis and Deakin's Tort Law* 207-218).

⁴⁴ Deakin and Adams *Markesinis and Deakin's Tort Law* 218-221, 225-234.

⁴⁵ Deakin and Adams *Markesinis and Deakin's Tort Law* 225.

⁴⁶ *Wagon Mound (No 1) Overseas Tankship (UK) Ltd v Morts and Dock Engineering Co Ltd* 1961 AC 388.

⁴⁷ It is sufficient to ground liability where the kind of damage is established such as damage by burning (kind of damage) and there is no need to distinguish how the damage by burning was caused, for example, if it was caused by the flame of a lamp or an unforeseeable explosion (see *Hugh v Lord Advocate* 1963 AC 837; *Wagon Mound (No 1) Overseas Tankship (UK) Ltd v Morts and Dock Engineering Co Ltd* 1961 AC 388; Giliker *Tort* 226-228).

⁴⁸ See *McLoughlin v O'Brian* 1983 1 AC 410 431; *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 465, 491.

⁴⁹ Section 1(1)(a) of the *Administration of Justice Act*, 1982.

⁵⁰ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁵¹ *Page v Smith* 1996 AC 155. In this case, the plaintiff did not sustain any physical injury but a few hours after the accident from which his claim arose, he felt exhausted, and the exhaustion continued thereafter.

⁵² *Brice v Brown* 1984 1 All ER 997.

⁵³ *Vernon v Bosley* 1997 1 All ER 577.

depression.⁵⁴ It is also settled in English law that the psychiatric illness need not be accompanied by physical injury.⁵⁵

English law makes a distinction between primary victims, who were in some way directly involved in the accident,⁵⁶ and secondary victims,⁵⁷ who were not directly (physically) involved in the accident but sustained psychiatric harm as a result of witnessing injury to another, hearing of an injury to another, or witnessing the "immediate aftermath" of an accident.⁵⁸ The award of compensation, particularly with secondary victims, depends on policy considerations.⁵⁹ In respect of primary victims, the requirement of the reasonable foreseeability of physical injury or endangerment is considered sufficient as a control mechanism whereas with regard to secondary victims additional control mechanisms are imposed by the courts in order to limit claims.⁶⁰

There have been instances where claims for psychiatric illness not related to personal injury succeeded, illustrating that the courts have adopted a flexible approach in developing the law relating to psychiatric harm in general. For example, in *Attia v British Gas Plc*⁶¹ the claimant succeeded in a claim for psychiatric harm where she witnessed her property being destroyed by fire.⁶² In 1998 the Law Commission reviewed liability for psychiatric harm⁶³ and acknowledged that this area of the law is controversial in both the medical and legal fields. It has, however, not developed enough for complete codification.⁶⁴

The report recommended minimal reform to the common law and provided a draft bill, mainly aimed at remedying the law relating to secondary victims who suffer psychiatric injury stemming from the injury or death of a loved

⁵⁴ *Hinz v Berry* 1970 2 QB 40.

⁵⁵ *Page v Smith* 1996 AC 155.

⁵⁶ See *Page v Smith* 1996 AC 155 184; *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 455.

⁵⁷ See *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 407, 410-411 where Lord Oliver referred to these two categories of victims.

⁵⁸ *McLoughlin v O'Brian* 1983 1 AC 410 422.

⁵⁹ See *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 407; *Page v Smith* 1996 AC 155 189.

⁶⁰ Jones "Negligence" 492. See para 2.2.2 below.

⁶¹ *Attiar v British Gas* 1998 QB 304. In *Owens v Liverpool Corporation* 1939 1 KB 394, the relatives of the deceased succeeded in a claim for psychiatric injury as a result of seeing the hearse carrying the coffin crash and overturn.

⁶² McBride and Bagshaw *Tort Law* 326.

⁶³ Great Britain Law Commission 1998 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/LC249.pdf>.

⁶⁴ Jones "Negligence" 485-486.

one. Thus far no legislation has been promulgated and the courts are at liberty to continue developing the law relating to psychiatric harm.⁶⁵

2.2.1 Primary victims

Liability for psychiatric harm (negligently caused) in respect of primary victims was recognised as early as 1901, in *Dulieu v White & Sons*.⁶⁶ In this case the claimant was allowed damages for the nervous shock she sustained. Kennedy J stated⁶⁷ that the shock "must be a shock which arises from a reasonable fear of personal injury to oneself."⁶⁸ In *Hambrook v Stokes Bros*⁶⁹ Lord Atkin dismissed Kennedy J's restriction to a claim for shock when one fears injury to oneself only (primary victim). He stated⁷⁰ "it would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not." In effect, the court recognised the claim for shock of a secondary victim.

The status of primary victims is regulated by the decision of *Page v Smith*⁷¹ (hereinafter referred to as "*Page*").⁷² In this case, the claimant, a victim of a motor vehicle accident,⁷³ did not sustain any physical injury but was frightened by the experience and suffered nervous shock. Approximately three hours after the accident, he suffered from severe chronic fatigue syndrome due to the nervous shock. The plaintiff had been suffering from this condition⁷⁴ of a mild nature on and off for over twenty years prior to the accident. He alleged that as a result of the accident, his pre-existing condition "had become chronic and permanent and that it was unlikely that he would be able to take full-time employment again."⁷⁵ Of importance, the House of Lords in this case extended liability for the psychiatric injury of primary victims to include victims with inherent susceptibilities ("thin-skull" rule)⁷⁶ and held that in respect of primary victims the exact type of psychiatric injury need not be reasonably foreseeable, whereas for

⁶⁵ Jones "Negligence" 485-486. See para 2.2.2 below in respect of the problems faced in English law with secondary victims who suffer psychiatric harm.

⁶⁶ *Dulieu v White & Sons* 1901 2 KB 669.

⁶⁷ *Dulieu v White & Sons* 1901 2 KB 669 675.

⁶⁸ Lunney, Nolan and Oliphant *Tort Law* 341.

⁶⁹ *Hambrook v Stokes Bros* 1925 1 KB 141.

⁷⁰ *Hambrook v Stokes Bros* 1925 1 KB 141 157.

⁷¹ *Page v Smith* 1996 AC 155.

⁷² Giliker *Tort* 132.

⁷³ Due to the negligent driving of a motor vehicle driven by the defendant.

⁷⁴ Myalgic Encephalomyelitis, post-viral fatigue syndrome or chronic fatigue syndrome.

⁷⁵ *Page v Smith* 1996 AC 155 165.

⁷⁶ *Page v Smith* 1996 AC 155 182.

secondary victims it is necessary.⁷⁷ Regarding primary victims it is sufficient if physical injury is reasonably foreseeable although such physical injury need not actually occur.⁷⁸ A claim for psychiatric injury by a primary victim depends on what was reasonably foreseeable by the defendant *ex ante* (before the event) but a claim for psychiatric injury by a secondary victim depends on what was reasonably foreseeable by the defendant *ex post facto* (taking into account the surrounding circumstances and what actually transpired with hindsight) in respect of a claim for psychiatric injury by a secondary victim. The question is whether the reasonable person would have foreseen that the secondary victim might suffer psychiatric injury taking into account what transpired in the circumstances.⁷⁹ The reasoning in *Page* has been found difficult to understand. In particular, the differential requirement for primary and secondary victims with regard to reasonable foreseeability has been criticised.⁸⁰

There are several examples in case law where the limits have been tested as to who qualifies as a primary victim and the categories of primary victim claims continue to expand.⁸¹ Of significance, the primary victim must sustain psychiatric illness from a reasonable fear of harm or belief of harm to himself or herself. The claimant need not actually be in danger due to the defendant's negligence.⁸² If physical injury to the claimant is reasonably foreseeable, he or she is entitled to recover compensation for physical and or recognised psychiatric injury.⁸³

A discussion of a few cases will suffice in order to illustrate the explicit influence of reasonableness with regard to the criterion of reasonable foreseeability of harm in recognising a duty of care to primary victims. The cases discussed below include the categories of rescuers, employees and close family members.

⁷⁷ *Page v Smith* 1996 AC 155 190.

⁷⁸ *Page v Smith* 1996 AC 155 190.

⁷⁹ *Page v Smith* 1996 AC 155 188-189. In support of his submission Lord Lloyd referred to *Bourhill v Young* 1943 AC 92 110 and *McLoughlin v O'Brian* 1983 1 AC 410 420, 432, where an *ex post facto* approach was alluded to but stated that it was applicable to claims of secondary victims and did not make sense applied to primary victims.

⁸⁰ In *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 477-480 Lord Goff (dissenting) stated that this decision was a departure from generally accepted principles. It "dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of law" by making this distinction between primary and secondary victims. Also see Handford 1966 *Tort L Rev* 5; Trindade 1996 *LQR* 22; Giliker *Tort* 133-134.

⁸¹ See Steele *Tort Law* 315-326 and the authority cited therein.

⁸² Jones "Negligence" 485.

⁸³ Witting *Street on Torts* 77.

In *White*⁸⁴ the claimants (police officers) who rescued the victims at a football stadium were not regarded as primary victims because they were not within the reasonably foreseeable range of harm.⁸⁵ Furthermore, they did not qualify as secondary victims as the close tie of love and affection (closeness or proximity of the relationship) was missing.⁸⁶ The court submitted that it was part of a policeman's job to assist citizens and during their employment they would come across such dangerous incidents.⁸⁷ They were therefore denied claims for psychiatric harm.⁸⁸ In *Cullin v London Fire & Civil Defence Authority*⁸⁹ the claimants (firefighters) succeeded in their claims for psychiatric harm after attending to fires where their colleagues were killed. It has been argued that the approach of the courts in respect of claims of rescuers (where firefighters and policemen may fall in this category) is arbitrary as the treatment applied to them, is inconsistent. It seems that the main concern is to limit liability in particular cases.⁹⁰

In *Farrell v Avon HA*⁹¹ the father of a new-born baby was incorrectly told by the hospital staff that his new-born son had died and was given a corpse to hold. His son was in fact alive. The father alleged that he sustained shock and subsequently developed post-traumatic stress disorder. The father asserted that "since grief at the death of a child was a reasonably foreseeable occurrence, he was entitled to recover damages for a reasonably unforeseeable but recognised psychiatric disorder if this subsequently developed."⁹² It was held that the father was a primary victim and "the relevant test was whether [the defendant] ought reasonably to have foreseen that its conduct would expose [the father] to the risk of a recognised psychiatric disorder".⁹³ The father had proven that his post-traumatic stress disorder even though it manifested at a later stage, had been caused by the incident at the hospital.⁹⁴

⁸⁴ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁸⁵ Jones "Negligence" 488.

⁸⁶ This refers to the closeness or proximity of the relationship between the primary and secondary victim. See Giliker *Tort* 137.

⁸⁷ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 511.

⁸⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁸⁹ *Cullin v London Fire & Civil Defence Authority* 1999 PIQR 314.

⁹⁰ It may be considered arbitrary because as in *Chadwick v British Transport Commission* 1967 1 WLR 912 the court allowed liability for psychiatric injury sustained by a rescuer, but a different approach was applied in *White*, mainly to limit liability (see Todd 1999 *LQR* 347).

⁹¹ *Farrell v Avon HA* 2001 Lloyd's Rep Med 458.

⁹² *Farrell v Avon HA* 2001 Lloyd's Rep Med 458 458.

⁹³ The court in *Farrell v Avon HA* 2001 Lloyd's Rep Med 458 458 applied the test referred to in *McLoughlin v O'Brian* 1983 1 AC 410 and the principles in *Page v Smith* 1996 AC 155.

⁹⁴ *Farrell v Avon HA* 2001 Lloyd's Rep Med 458.

A crane driver in *Dooley v Crammell Laird*⁹⁵ succeeded in claiming compensation for psychiatric harm after witnessing a defective sling on the crane snapping and causing the crane to drop its load onto the hold of the ship where he and his colleagues were working. Even though no one was injured, the claimant suffered psychiatric harm as a result of thinking he was about to cause injury or death to another.

In *Walker v Northumberland County Council*⁹⁶ a social services officer suffered a nervous breakdown from stress (psychiatric harm not induced by shock) because of being overburdened with work.⁹⁷ He took three months leave and before his return to work was assured by his employer that assistance would be provided to ease his workload. According to the facts he was provided with limited assistance and subsequently suffered a second breakdown, whereafter he left work. Coleman J stated:

It is clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employer as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care or from the co-extensive implied term in the contract of employment. That said, there can be no doubt that the circumstances in which claims based on such damage are likely to arise will often give rise to extremely difficult evidential problems of foreseeability and causation.⁹⁸

Coleman J found the employer liable in that the employer owed a duty to take reasonable steps to avoid exposing the employee to a workload which endangered his health. The duty was not breached at the first nervous breakdown which was unforeseeable but at the second breakdown.⁹⁹

In *Rothwell v Chemical and Insulating Co Ltd*¹⁰⁰ a primary victim had been exposed to asbestos dust for about eight years and over time developed plural plaques. His physical health was not affected but he developed anxiety neurosis from the fear that he might in future contract a disease stemming from the pleural plaques present in his body. The claimant was informed by his doctor about thirty years after the exposure that there was

⁹⁵ *Dooley v Crammell Laird* 1951 1 Lloyd's Rep 271.

⁹⁶ *Walker v Northumberland County Council* 1995 PIQR 521.

⁹⁷ Hale LJ in *Hatton v Sutherland* 2002 2 All ER 1 approved of the approach in *Walker v Northumberland County Council* 1995 PIQR 521 stating that the question to be asked is whether a reaction to stress resulting in harm was reasonably foreseeable in the particular employee.

⁹⁸ *Walker v Northumberland County Council* 1995 PIQR 521 532.

⁹⁹ Steele *Tort Law* 322-323. Also see discussion of cases dealing with stress resulting in psychiatric injuries by Lunney, Nolan and Oliphant *Tort Law* 365-373.

¹⁰⁰ *Rothwell v Chemical and Insulating Co Ltd* 2008 1 AC 281.

a risk of developing an asbestos-related disease in future. The court found that the risk of the disease materialising or the psychiatric illness caused in expecting the disease to materialise was not actionable based on the notion that a person of reasonable fortitude would not react in the way the claimant did. Academic writers¹⁰¹ highlight the reference to the person of reasonable fortitude in this case, which is a departure from the extension of liability offered to the primary victim with the "thin skull" in *Page*.¹⁰² It may be argued that in this case, the chain of causation was stretched rather far as compared to that in *Page*. Perhaps the court would have reached a different conclusion if the pleural plaques had indeed affected the primary victim's physical health.

2.2.2 Secondary victims

In *White*¹⁰³ Lord Steyn acknowledged that policy considerations have influenced the law relating to compensation for pure psychiatric injury and secondary victims.¹⁰⁴ He referred to the following four factors: deciding what falls within the ambit of recognisable psychiatric injury is complex and the "classification of emotional injury is often controversial" requiring expert medical evidence which is time-consuming and costly; the opening of the floodgates to potential numerous claims; the risk of "litigation is sometimes an unconscious disincentive to rehabilitation"; and the imposition of liability for pure psychiatric injury "may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, e.g. in a motor car accident."¹⁰⁵

A secondary victim, besides meeting the requirements for liability in the tort of negligence, will have to meet further requirements in order to succeed in a claim for pure psychiatric injury:¹⁰⁶ These further requirements are that the claimant must fall within the class of persons whose claim should be recognised;¹⁰⁷ proximity must be present – "not only proximity to the event in time and space, but also proximity of relationship between the primary and secondary victim;"¹⁰⁸ the psychiatric injury must be induced by shock;¹⁰⁹ there must be a reasonable foreseeability of psychiatric injury to

¹⁰¹ See for example, Jones "Negligence" 503-504 and Steele *Tort Law* 319-322.

¹⁰² *Page v Smith* 1996 AC 155.

¹⁰³ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 493-494.

¹⁰⁴ Where physical injury does not accompany the psychiatric injury.

¹⁰⁵ See Deakin and Adams *Markesinis and Deakin's Tort Law* 112-113, who are not convinced by Lord Steyn's reasons referring to counter arguments for the four reasons.

¹⁰⁶ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

¹⁰⁷ *Mcloughlin v O'Brian* 1983 1 AC 410 422.

¹⁰⁸ *Page v Smith* 1996 AC 155 189.

¹⁰⁹ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 401.

the claimant of normal fortitude by the defendant and the thin-skull rule is not applicable.¹¹⁰

In respect of the proximity requirement of the relationship – there must be a close relationship of love and affection between the secondary victim and the endangered person. Therefore, a bystander with no close relationship of love and affection with the victim would not have a claim for psychiatric harm.¹¹¹ The type of relationships is not limited for example to familial relationships. It is presumed that there is a close relationship of love and affection between spouses, children and parents, but this may be rebutted with evidence to the contrary. Such presumption does not apply to other relationships, including siblings.¹¹²

Regarding sufficient proximity in time and space between the event and the resulting psychiatric injury, the limits of this requirement can be gleaned from referring to two cases on opposing ends. For example, in *Taylor v A Novo (UK) Ltd*¹¹³ a daughter claimed compensation for psychiatric harm sustained after witnessing her mother collapse and die. The mother had been injured a few weeks prior to her death and the court held that the relevant event causing the harm was the accident and not the death of the mother. The daughter had not witnessed the incident which led to her mother's injury, nor the immediate aftermath. The court found that the

¹¹⁰ See *McLoughlin v O'Brian* 1983 1 AC 410 418-419, 422; *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 402, 419-420; *Page v Smith* 1996 AC 155 187,189.

¹¹¹ For example, in *Bourhill v Young* 1943 AC 92, a woman heard an accident occur and immediately went to the scene of the accident. She subsequently sustained nervous shock, which allegedly led to the loss of her baby. When she claimed for the loss due to the shock, the court denied compensation due to the fact that she was not related to the deceased and that it was not reasonably foreseeable that a person with normal susceptibilities would have suffered shock. In *McFarlane v EE Caledonia Ltd* 1994 2 All ER 1, the court denied a claim for psychiatric injury sustained by a claimant who was on a vessel, the *Tharos*, that attended to the Piper Alpha oil rig where an explosion and fire took place. The claimant alleged that his life was in danger, that he witnessed men in distress, on fire, and jumping into the sea. According to the facts, the vessel he was on was not in any danger and no one on the vessel sustained personal or psychiatric injuries. The court held that the bystander did not meet the criteria pronounced in *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 and that harm was not reasonably foreseeable to a person of normal susceptibilities. There was insufficient proximity with regard to time and place or the close relationship of love and affection.

¹¹² For example, in *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, one of the appellants, Harrison, who was present at the stadium where he witnessed the tragedy and lost two of his brothers, did not succeed in a claim for psychiatric injury. The court held that there was no evidence of "close ties of love or affection". Lord Ackner (406) stated "[t]he quality of brotherly love is well known to differ widely – from Cain and Abel to David and Jonathan".

¹¹³ *Taylor v A Novo (UK) Ltd* 2014 QB 150.

requirement of proximity had not been satisfied. In *McLoughlin v O'Brian*¹¹⁴ the plaintiff heard about the accident in which her husband and children were injured. Upon arrival at the hospital, approximately two hours after the accident, the plaintiff was informed that her youngest daughter had been killed and saw the extent of the injuries to her children and husband. The proximity requirement in this case was satisfied as the plaintiff's hearing of and seeing her injured children and that of her husband upon her arrival at the hospital qualified as the "immediate aftermath" of the accident.¹¹⁵ The House of Lords¹¹⁶ held that the nervous shock suffered by the plaintiff "had been the reasonably foreseeable result of the injuries to her family caused by the defendants' negligence; that policy considerations should not inhibit a decision in her favour; and that, accordingly, she was entitled to recover damages."

The secondary victim claims in both *Alcock*¹¹⁷ and *White*¹¹⁸ arose out of the Hillsborough Football Stadium disaster which occurred in Sheffield in 1989. Many people were either physically or psychologically affected. A football match was scheduled to take place that day between the Liverpool and Nottingham Forest Football clubs. The South Yorkshire Police was in charge of controlling the spectators at the match. An excessively large number of spectators was allowed to enter the grounds at a certain section, causing overcrowding and cramming which subsequently resulted in people being crushed. Just under one hundred people were killed and hundreds of people were physically injured. The Chief Constable of South Yorkshire admitted liability for the deaths and physical injuries. Claims for nervous shock resulting in psychiatric harm were instituted against the Chief Constable.¹¹⁹ In *White*¹²⁰ the claims were instituted by affected police officers who were not in any physical danger but assisted victims at the stadium, while in *Alcock*¹²¹ claims were instituted by family members, and in one instance a fiancé of a spectator who was killed or injured.¹²² The claim by the fiancé was allowed, the claim by a grandmother who brought up the child was not disbarred, while claims by brothers, brothers-in-law and sisters were denied.¹²³ In *Alcock* the limits were tested against a variety of

¹¹⁴ *McLoughlin v O'Brian* 1983 1 AC 410.

¹¹⁵ Steele *Tort Law* 331.

¹¹⁶ *McLoughlin v O'Brian* 1983 1 AC 410 411.

¹¹⁷ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

¹¹⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

¹¹⁹ *Witting Street on Torts* 77-79.

¹²⁰ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

¹²¹ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

¹²² See Lunney, Nolan and Oliphant *Tort Law* 345-349; *Witting Street on Torts* 77-79.

¹²³ *Witting Street on Torts* 77-78.

claims, where some stemmed from plaintiffs who witnessed the disaster from neighbouring stands, some relatives witnessed the events on the television, and some heard of the disaster on the radio. One of the plaintiffs saw the events of the disaster on the television and then rushed to the stadium to find out whether his son was injured only to find out that his son had indeed been injured and killed.¹²⁴ The claims in both *Alcock*¹²⁵ and *White*¹²⁶ except those claims relating to the police officers who were involved in the immediate vicinity where the deaths and injuries occurred, failed for fear of the floodgates opening to potential numerous claims. The reasoning of the court has been criticised by Deakin and Adams.¹²⁷ They state that the House of Lords could have dealt with the claims differently by requesting proof of the seriousness of the medical conditions; considering that the relaying of the news could be considered a *novus actus interveniens*; finding that the damage that occurred had been too remote; or that the medium of communication via the television applied in "removing the claimant from the category of 'proximate' persons".¹²⁸

2.3 Summary

The influence of reasonableness in determining a duty of care for psychiatric harm in the tort of negligence is predominantly explicit. It is evident that psychiatric harm or at least general harm must be reasonably foreseeable.¹²⁹ Policy considerations play a vital role in limiting secondary victim claims for psychiatric harm. The question is whether it is fair, just and reasonable to impose a duty of care on secondary victims of psychiatric harm based on policy considerations (the third element of the three-fold test).¹³⁰ Naturally, there may be numerous claims emanating from people who watch or hear of an accident or disturbing incident. It would be unreasonable for the defendant to be held liable for all such claims; indeed, in some cases, liability may be indeterminate. Where that is the case, it would be unreasonable to impose a duty of care.

Turning to the standard of the reasonable person, it is applied *ex post facto* where specific reasonable foreseeability of psychiatric injury is required in respect of secondary victims and *ex ante* in respect of primary victims based

¹²⁴ Lunney, Nolan and Oliphant *Tort Law* 345.

¹²⁵ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

¹²⁶ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

¹²⁷ Deakin and Adams *Markesinis and Deakin's Tort Law* 116.

¹²⁸ Deakin and Adams *Markesinis and Deakin's Tort Law* 116.

¹²⁹ *Malcolm v Broadhurst* 1970 3 All ER 508 511; *Brice v Brown* 1984 1 All ER 997.

¹³⁰ Deakin and Adams *Markesinis and Deakin's Tort Law* 97-102. See para 2.2 above with regard to the three-fold test.

on the harm which would have been foreseen by the reasonable person.¹³¹ A primary victim must sustain psychiatric harm from a reasonable fear or belief of physical harm. The fact that a primary victim with inherent susceptibilities is entitled to claim compensation while a secondary victim with inherent susceptibilities is not may seem unreasonable and arbitrary. Also the fact that the standard of the reasonable person is applied *ex post facto* to secondary victims while *ex ante* in respect of primary victims may also seem unreasonable, in that the same standard should be applied to all victims. The judgment in *Page*¹³² has endured severe criticism by academic writers and by Lord Goff in *White*¹³³ mainly due to the following factors: the departure from the requirement of the reasonable foreseeability of psychiatric harm in a person of ordinary fortitude (a person with reasonable emotional and mental fortitude) on the part of a primary victim; the lenient requirement of the reasonable foreseeability of *physical or psychiatric* harm applied to the primary victim while the stricter requirement of reasonable foreseeability of *psychiatric* harm applied to secondary victims;¹³⁴ whether the distinction drawn between primary and secondary victims is necessary and useful; the misunderstanding of the thin-skull rule which extends liability to primary victims with inherent infirmities; the *ex ante* approach applied to the primary victim whereas the *ex post facto* approach applied to the secondary victim; and having the effect of limiting the definition of the primary victim to one who was in physical danger.¹³⁵

Lunney, Nolan and Oliphant¹³⁶ in the context of the tort of negligence, recommend that claims for psychiatric harm should be treated in the same manner as physical injury. They argue that the reasonable foreseeability of psychiatric injury is sufficient and submit that the special proximity requirements should be eliminated. Deakin and Adams¹³⁷ refer to the possibility of using the break in the causal link to limit liability and Lord Steyn in *White* stated:

[t]he law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. ... argued by Professor Stapleton. But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take

¹³¹ See para 2.2.1 above.

¹³² *Page v Smith* 1996 AC 155.

¹³³ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 474-480.

¹³⁴ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 474-480.

¹³⁵ See Bailey and Nolan 2010 *CLJ* 495; Mullany 1995 *J L & Med* 112; Handford 1996 *Tort L Rev* 5; Tan 1995 *Sing JLS* 649; Trindade 1996 *LQR* 22; Sprince 1995 *Professional Negligence* 124.

¹³⁶ Lunney, Nolan and Oliphant *Tort Law* 378.

¹³⁷ Deakin and Adams *Markesinis and Deakin's Tort Law* 116.

such a step. The second solution is to abolish all the special limiting rules applicable to psychiatric harm. That appears to be the course advocated by Mullany and Handford, *Tort Liability for Psychiatric Damage*. They would allow claims for pure psychiatric damage by mere bystanders: see (1997) 113 L.Q.R. 410, 415. Precedent rules out this course and, in any event, there are cogent policy considerations against such a bold innovation. In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as ... *Alcock* ... and *Page* ... as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.¹³⁸

The Law Commission recommended another option, to keep the requirement relating to secondary victims in respect of the close tie of love and affection and to eliminate the rest of the requirements.¹³⁹ This does indeed seem like a reasonable option which would result in a fair outcome for secondary victims claims as the closer the relationship between the primary and secondary victim, the more reasonably foreseeable the harm would be. No legislation has yet been promulgated and in 2007 the government rejected the Law Commissions reform proposal¹⁴⁰ giving the courts the flexibility to develop the law.¹⁴¹

Despite all the criticism and differential rules that apply to the primary and secondary victims, the influence of reasonableness is explicit in determining a duty of care with regard to psychiatric injury. The standard of the reasonable person is applied, and the reasonable foreseeability of harm is applicable to three elements of the tort of negligence (duty, breach and causation), all of which assist in limiting liability.

3 South African law: psychological harm

In South African Law, since the decision of *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*¹⁴² the brain and the nervous system are regarded as part of a person's body. In turn, therefore, an injury to the brain is regarded as a physical injury and may be compensable.¹⁴³ The

¹³⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 500.

¹³⁹ *Witting Street on Torts* 83-84.

¹⁴⁰ In the Great Britain Department of Constitutional Affairs 2007 <https://data.parliament.uk/DepositedPapers/Files/DEP2009-1863/DEP2009-1863.pdf>. In Australia claims for negligently inflicted psychiatric injury in most jurisdictions are regulated by legislation.

¹⁴¹ Lunney, Nolan and Oliphant *Tort Law* 377-380.

¹⁴² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 777, 779.

¹⁴³ Neethling and Potgieter *Law of Delict* 342 refer to a psychological lesion "as any recognisable harmful infringement of the brain and nervous system of a person".

courts, however, usually treat these claims with caution for various reasons, including *inter alia* that it is not easy to quantify; it may include a range of temporary emotions such as fear, sorrow, sadness, or grief; and it may lead to the opening of the floodgates to delictual liability.¹⁴⁴

As a result of following English law, the South African courts initially required that the claimant must have been in personal physical danger¹⁴⁵ and that the physical injury must have caused the resulting psychological harm. Liability in cases of secondary emotional shock was therefore not possible.¹⁴⁶ The court in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*¹⁴⁷ however, dispensed with the above requirements and following the approach applied in English law placed emphasis on the criterion of reasonable "foreseeability of harm" in order to ground liability for psychological harm.¹⁴⁸

In order to succeed in a delictual claim where psychological harm was sustained, the harm sustained must not be temporary or minor.¹⁴⁹ Trivial or temporary psychological harm, such as acute depression,¹⁵⁰ post-traumatic stress disorder,¹⁵¹ anxiety neurosis,¹⁵² impaired sleep,¹⁵³ mixed anxiety depressive disorder¹⁵⁴ or emotional trauma¹⁵⁵ is not compensable.¹⁵⁶ The South African courts have also not yet awarded damages for mere fear,

Also see *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 208-209; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 775, 779.

¹⁴⁴ See Loubser and Midgley *Law of Delict* 362 as well as the authority cited therein.

¹⁴⁵ *Mulder v South British Insurance Co Ltd* 1957 2 SA 444 (W).

¹⁴⁶ See *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) [73]; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA).

¹⁴⁷ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A).

¹⁴⁸ See para 2 above.

¹⁴⁹ If the psychological harm is not significant and temporary, the *de minimis non curat lex* principle may apply. See Van der Walt and Midgley *Principles of Delict* 317.

¹⁵⁰ *Majiet v Santam Ltd* 1997 4 All SA 555 (C).

¹⁵¹ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA); *Minister of Justice and Constitutional Development v X* 2015 1 SA 25 (SCA).

¹⁵² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 779, 782.

¹⁵³ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A).

¹⁵⁴ *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W).

¹⁵⁵ *Barnard v Santam Bpk* 1999 1 SA 202 (SCA).

¹⁵⁶ See *Majiet v Santam Ltd* 1997 4 All SA 555 (C); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 779; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA).

sorrow, bereavement, sadness or grief.¹⁵⁷ Neethling and Potgieter¹⁵⁸ put it this way – the injury must be "reasonably serious".¹⁵⁹ For example, the courts have awarded compensation where the harm resulted in "major depressive disorder;" "serious shock", personality changes, and so forth.¹⁶⁰ Furthermore, generally, evidence should be produced to prove the psychological harm.¹⁶¹

In South African law, for a successful claim for psychological harm all the required elements of a delict must be proven; that is, conduct, wrongfulness, fault, causation and harm.¹⁶² However, as a result of the influence of English law¹⁶³ the courts have placed emphasis on the criterion of "reasonable foreseeability of harm" in order to determine liability for psychological harm,

¹⁵⁷ See the policy considerations referred to by Loubser and Midgley *Law of Delict* 362 as well as the authority cited therein. See *Komape v Minister v Minister of Basic Education* 2020 2 SA 347 (SCA) [40]-[44], where the court was not prepared to acknowledge the causing of bereavement and grief as a separate delictual claim. The trauma and shock experienced by the claimants were deemed to be part of psychiatric injuries which included allowance for bereavement and grief [51 ff]. Zitzke 2021 *Stell LR* 253ff argues that our law should recognise grief as a separate head of damage. Mukheibir and Mitchell 2019 *PELJ* 14ff argue that a claim for bereavement, sadness or grief should be allowed under the action for pain and suffering. However, in *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa* (Arbitration judgment, 2018, available at http://www.saflii.org/images/Life_EsidimeniArbitrationAward.pdf) (hereinafter referred to as "*Life Esidimeni*"), substantial constitutional damages were awarded for bereavement to the families in instances where the mentally ill family member died due to the state's neglect. The decision in *Life Esidimeni* however does not have binding authority as a judicial precedent as it was an arbitration ruling. In *Mbele v MEC for Health for the Gauteng Province* (355/2015) [2016] ZASCA 166 (18 November 2016) [11], the court awarded damages for severe grief and depression without the required proof. In *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) [38]-[39] Leach JA held that the common law had not changed and that *Mbele v MEC for Health for the Gauteng Province* is not authority "for the proposition that our law changed and that this court has recognised grief where there is no psychiatric lesion".

¹⁵⁸ Neethling and Potgieter *Law of Delict* 345 fn 126.

¹⁵⁹ See Loubser and Midgley's (*Law of Delict* 364) list of psychiatric injuries that have been recognised and where the courts have awarded compensation. Also see Zitzke 2019 *TSAR* 814ff and Mukheibir and Mitchell 2019 *PELJ* 14ff.

¹⁶⁰ See Ahmed and Steynberg 2015 *THRHR* 190-191 with regard to the list of cases.

¹⁶¹ See authority cited by Ahmed and Steynberg 2015 *THRHR* 184 fn 19. However, in *Mbele v MEC for Health for the Gauteng Province* (355/2015) [2016] ZASCA 166 (18 November 2016) [11], the court awarded damages for severe depression without any proof of psychological or psychiatric injury. Also see Zitzke 2021 *Stell LR* 253ff who calls for lowering the evidentiary requirement; Mukheibir and Mitchell 2019 *PELJ* 16 who refer to the decision of *Western Cape Department of Social Development v Barley* 2019 3 SA 235 (SCA) and point out that the court departed from the requirement of expert evidence in proving the existence of psychiatric harm.

¹⁶² See *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) [17].

¹⁶³ See Neethling and Potgieter *Law of Delict* 344 who states that our courts consistently sought guidance from English law.

which is generally contentious as reasonable foreseeability may be relevant in determining fault in the form of negligence and legal causation.¹⁶⁴ In *Barnard v Santam Bpk*,¹⁶⁵ the court stated that it was irrelevant whether "reasonable foreseeability" of harm was determined in the ambit of negligence or legal causation.¹⁶⁶ This approach that is applied in the English tort of negligence where adjudicators often do not clearly differentiate between the elements of liability and there is an overlap between these elements due to the role of reasonable foreseeability should not be followed.¹⁶⁷ It is submitted that our law is fundamentally different and the role of reasonable foreseeability of harm must be applied correctly within the parameters of the particular delictual elements in the interests of legal certainty.

The conduct which leads to the psychological harm could be in the form of an omission¹⁶⁸ or a commission. If one takes a typical road accident as an example - the conduct of the wrongdoer could lead to the injury or death of the primary victim resulting in psychological harm to the secondary victim upon hearing of the accident or seeing the effects of the accident.¹⁶⁹

According to the traditional approach to determining wrongfulness, wrongfulness usually lies in the infringement of a right or the breach of a legal duty.¹⁷⁰ In cases of psychological injury the person's physical-mental integrity (a constitutionally recognised right)¹⁷¹ is usually infringed.¹⁷² Thus, the defendant's infringement of the plaintiff's physical-mental integrity is found to be unreasonable where no ground of justification is applicable, grounding wrongfulness.¹⁷³ As Neethling and Potgieter¹⁷⁴ point out – due to the courts equating physical and psychological harm, any conduct leading to such harm will in principle infringe the "personality right to physical integrity," which is wrongful.¹⁷⁵ The courts have recently held that wrongfulness depends on whether it is reasonable to hold the wrongdoer

¹⁶⁴ See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 225; Ahmed and Steynberg 2015 *THRHR* 189.

¹⁶⁵ *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 210.

¹⁶⁶ See Neethling and Potgieter *Law of Delict* 347.

¹⁶⁷ See para 2.2 above.

¹⁶⁸ The omission on the part of the defendant who had a legal duty to act positively in preventing the psychological or psychiatric harm sustained by the plaintiff may be held delictually liable.

¹⁶⁹ See Ahmed and Steynberg 2015 *THRHR* 181 fns 1 and 190.

¹⁷⁰ Neethling and Potgieter *Law of Delict* 35.

¹⁷¹ Section 12(2) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷² Neethling and Potgieter *Law of Delict* 344-345.

¹⁷³ Neethling and Potgieter *Law of Delict* 344.

¹⁷⁴ Neethling and Potgieter *Law of Delict* 345.

¹⁷⁵ See Ahmed and Steynberg 2015 *THRHR* fn 190.

liable for the harm, in this instance the psychological harm, assuming that all the other elements are present.¹⁷⁶

Psychological harm may be caused intentionally¹⁷⁷ or negligently, leading to delictual liability.¹⁷⁸ However, fault may not be required in certain instances, for example, if the psychological or psychiatric injury was caused by the conduct of a domestic animal and the *actio de pauperie* is applicable.¹⁷⁹

The standard of the reasonable person is applied in determining negligence and the criteria of reasonable foreseeability and preventability of harm is used.¹⁸⁰ The question is whether the reasonable person would have foreseen the reasonable possibility that the conduct in question might cause the relevant psychological harm suffered by the plaintiff and, if so, would have taken reasonable steps to prevent it from occurring.¹⁸¹ In respect of the reasonable foreseeability of harm, the general nature of the harm and the general manner of its occurrence must be foreseen in respect of a specific plaintiff,¹⁸² (a concrete approach and not an abstract approach).¹⁸³ If it can be concluded on a balance of probabilities that the reasonable person in the position of the defendant should have foreseen the reasonable possibility of psychological injury to the specific plaintiff and would have taken reasonable steps to avoid the harm, then negligence is present.¹⁸⁴ "Reasonable foreseeability of harm" in respect of a secondary victim could sometimes be more challenging to prove.¹⁸⁵ Botha JA in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*¹⁸⁶ stated that in

¹⁷⁶ See Loubser and Midgley *Law of Delict* 179-180.

¹⁷⁷ See for example *Boswell v Minister of Police* 1978 3 SA 268 (E); *Waring and Gillow Ltd v Sherborne* 1904 TS 340 348; *Els E v Bruce, Els J v Bruce* 1922 EDL 295 298-299; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) with regard to intentionally inflicted emotional harm.

¹⁷⁸ See the authority referred to by Ahmed and Steynberg 2015 *THRHR* 182 fns 6, 75-76 and 191.

¹⁷⁹ See for example, *Fourie v Naranjo* 2008 1 SA 192 (C) and the authority cited in Ahmed and Steynberg 2015 *THRHR* 191 fn 77.

¹⁸⁰ Neethling and Potgieter *Law of Delict* 346.

¹⁸¹ See *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 213; *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCC) [18].

¹⁸² See *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60.

¹⁸³ See Ahmed and Steynberg 2015 *THRHR* 192-193 as well as the authority cited therein in respect of the cases where the courts have referred to the concrete approach. Thus, it is not necessary that the precise extent of the psychological or psychiatric harm should have been reasonably foreseen (Neethling and Potgieter *Law of Delict* 347 fn 141).

¹⁸⁴ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60.

¹⁸⁵ Ahmed and Steynberg 2015 *THRHR* 194.

¹⁸⁶ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 781.

instances where the victim is in personal danger, it is easier to conclude that the possibility of harm should have been reasonably foreseeable as compared to instances where the plaintiff saw the harm being inflicted or heard of it. Ultimately, the court must consider the facts and the surrounding circumstances in order to determine whether the psychological harm was reasonably foreseeable and whether the defendant could have reasonably taken steps to prevent the harm.¹⁸⁷

When one intentionally causes shock to another, the court has stated that the defendant "must foresee the natural consequences of his intentional act."¹⁸⁸ Thus consciousness of unreasonableness of the conduct is required.¹⁸⁹

In respect of factual causation, the defendant must have factually caused the psychological harm.¹⁹⁰ There is no *numerus clausus* of causes of psychological harm. The harm may be caused by fear of one's safety¹⁹¹ or that of another.¹⁹² The courts encounter problems with finding legal causation.¹⁹³ The flexible criterion¹⁹⁴ is applied in determining legal causation and Olivier JA in *Road Accident Fund v Sauls*¹⁹⁵ stated that factors such as "reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play a part." What must be established is whether there is a close enough relationship between the defendant's conduct and the psychological harm sustained in order for the defendant to be held liable for the psychological harm in view of policy considerations based on reasonableness, fairness and justice.¹⁹⁶ Therefore, if the psychological harm is too remote, for example, if a secondary victim did not have a close relationship with the primary victim and saw an incident over the television,

¹⁸⁷ See *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 780; *Majiet v Santam Ltd* 1997 4 All SA 555 (C) 558.

¹⁸⁸ The two elements of intention are direction of the will and consciousness of wrongfulness (see in general Neethling and Potgieter *Law of Delict* 159-165). Also see *Boswell v Minister of Police* 1978 3 SA 268 (E) 274; Ahmed and Steynberg 2015 *THRHR* 194.

¹⁸⁹ Neethling and Potgieter *Law of Delict* 40, 162.

¹⁹⁰ *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215.

¹⁹¹ *Hauman v Malmesbury Divisional Council* 1916 CPD 216.

¹⁹² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) (brother); *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) (fiancé); *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) (wife and child).

¹⁹³ See for example, *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215.

¹⁹⁴ *S v Mokgethi* 1990 1 SA 32 (A) 39-41. See *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215; Ahmed and Steynberg 2015 *THRHR* 195.

¹⁹⁵ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 61.

¹⁹⁶ *S v Mokgethi* 1990 1 SA 32 (A) 40-41.

his or her psychological harm may be regarded as too remote and the defendant may not be held delictually liable for the secondary victim's psychological harm.

In South African law, there is no *numerus clausus* with regard to which type of relationships are recognised by the courts.¹⁹⁷ In *Road Accident Fund v Sauls*, the court stated 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".¹⁹⁸ The number of secondary victims who could for example hear and see the aftermath of an accident could be limitless. The policy considerations in respect of indeterminate liability and the floodgates argument have indeed been considered by our courts.¹⁹⁹ The flexible approach to establishing legal causation could however be easily applied to limit liability with respect to the psychological harm sustained by secondary victims.²⁰⁰

The thin-skull rule or principle of taking the victim as one finds him or her applies and if the psychological harm was reasonably foreseeable, then the wrongdoer would be liable for the loss despite the loss being aggravated by a pre-existing condition.²⁰¹

3.1 Summary

The influence of reasonableness on claims for psychological harm is prevalent and predominantly explicit, particularly with the requirement of the reasonable foreseeability of harm. As mentioned above,²⁰² the criterion of the reasonable foreseeability of harm, although contentious, may be applicable under the elements of negligence and legal causation. In establishing wrongfulness, the defendant's infringement of the plaintiff's right to physical integrity must be unreasonable and it must be reasonable to hold the defendant liable. In determining negligence, the standard of the "reasonable person" is applied and the criteria of reasonable foreseeability and preventability are applicable. The reasonable foreseeability of harm as a criterion is used to limit the liability for claims in terms of legal causation.

¹⁹⁷ See Ahmed and Steynberg 2015 *THRHR* 196 in respect of the list of relationships.

¹⁹⁸ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) para 17. Cf *Swartbooij v Road Accident Fund* 2013 1 SA 30 (WCC) 34.

¹⁹⁹ See *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 63; *Majiet v Santam Ltd* 1997 4 All SA 555 (C) 558.

²⁰⁰ Ahmed and Steynberg 2015 *THRHR* 197.

²⁰¹ See *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (C) 342-343; *Majiet v Santam Ltd* 4 All SA 555 (C) 567; *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 65.

²⁰² In para 3.

What must be established is whether there is a close enough relationship between the defendant's conduct and the psychological harm in order for the defendant to be held liable in view of policy considerations based on reasonableness, fairness and justice. In respect of intention, the defendant must be conscious of the unreasonableness of the conduct and foresee the consequences of his or her intentional act. The psychological harm sustained must be "reasonably serious" and not minor or trivial. Furthermore, if the harm was reasonably foreseeable, the defendant may be held liable for all the harm or loss sustained by the claimant despite the claimant's pre-existing condition as per the "thin skull rule".

4 Conclusion

In English and South African law there is no precise definition of psychiatric or psychological harm but some form of medically recognised psychiatric or psychological harm is required, which is that the harm must be reasonably serious; that is, it must not be trivial or minor. In English law the primary victim must sustain psychiatric harm from a reasonable fear of harm to himself or herself. With regard to secondary victims, the psychiatric harm must be induced by some form of shock. The influence of reasonableness on harm is implicit in the sense that it is unreasonable to hold the defendant liable if the harm was not medically recognised or minor.²⁰³

Some form of conduct on the part of the defendant is required in both jurisdictions whether the harm was inflicted intentionally or negligently. Thus, it would be unreasonable to hold the defendant liable without any form of conduct.²⁰⁴

Wrongfulness is generally required in the South African law. According to the traditional approach to determining wrongfulness, the infringement of the claimant's physical-mental integrity must be unreasonable. A person's physical-mental integrity is not only protected under the law of delict but is also a constitutionally protected right.²⁰⁵ Thus, in terms of delictual liability, the defendant's infringement of the plaintiff's physical-mental integrity is found to be unreasonable where no ground of justification is applicable, grounding wrongfulness. In terms of constitutional imperatives, protected rights may be limited if the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."²⁰⁶ All factors must be taken into account in determining whether the limitation

²⁰³ See para 1.3 above.

²⁰⁴ See paras 2.1, 2.2 and 3 above.

²⁰⁵ See para 3 above.

²⁰⁶ See Neethling and Potgieter *Law of Delict* 18.

is lawful, which includes *inter alia* the nature of the protected right, the purpose of the limitation as well the nature and extent of the limitation.²⁰⁷ The right to *corpus* or body is considered as one of the most valuable legally protected interests and in this light infringements of the physical-mental body are in principle wrongful, but exceptions do apply, for example in cases of omissions where the factual infringement is not wrongful *per se*.²⁰⁸ As Neethling and Potgieter point out, due to the courts equating physical and psychological harm, any conduct leading to such harm will in principle infringe on the "personality right to physical integrity" which is wrongful. According to the recent approach to determining wrongfulness, the question is whether it would be reasonable to hold the wrongdoer liable for the psychological harm.²⁰⁹ The influence of reasonableness at least on the recent approach is explicit. There is no element of wrongfulness in English law but with the residual tort stemming from the rule in *Wilkinson v Downton*, the defendant's wilful positive act of infringing the claimant's right to personal safety, leading to the psychiatric harm, must be unreasonable. The influence of reasonableness is thus implicit.²¹⁰ With regard to the tort of negligence in English law, wrongfulness from a South African perspective is in a sense established under the element of duty. The influence of reasonableness is explicit with two of the elements, that is, the reasonable foreseeability of harm to the plaintiff and whether it is fair just and reasonable to impose a duty of care. English law uses this latter element to limit the liability of claimants. In respect of proximity, the influence of reasonableness is implicit in that there must be reasonable proximity in time and space between the event and the resulting psychiatric harm and reasonable proximity of the relationship between the primary and secondary victim.²¹¹

Policy considerations play a part in both jurisdictions in limiting liability for psychiatric harm. In English law, in *White*²¹² Lord Steyn²¹³ summarised the main policy considerations for limiting liability with regard to negligently caused psychiatric harm and why it is in a sense treated differently from claims for physical harm.²¹⁴ It is understandable how due to these policy considerations the courts applied additional requirements or control mechanisms on secondary victims, in particular the proximity requirements.

²⁰⁷ See Neethling and Potgieter *Law of Delict* 18.

²⁰⁸ See Neethling and Potgieter *Law of Delict* 394.

²⁰⁹ See para 3 above.

²¹⁰ See para 2.1 above.

²¹¹ See para 2.2 above.

²¹² *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 493.

²¹³ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 492.

²¹⁴ Giliker *Tort* 130-131.

South African law, followed a similar approach and reasoning in not treating claims for psychological harm on an equal footing with physical harm and treading with caution with regard to secondary victims' claims.²¹⁵ In the South African law of delict the rules of proximity as applied in English law to determine a duty of care are not applicable but legal causation as mentioned would sufficiently address claims of secondary victims where policy considerations based on reasonableness, fairness and justice would apply. If the psychiatric harm is considered too remote, in the instance of a secondary victim seeing the incident on television and where such victim did not have a close relationship with the primary a victim, then it would be considered too remote. Therefore, it is unfair, unjust and unreasonable for the defendant to be held liable for the psychiatric injury sustained by the secondary victim.²¹⁶

In both jurisdictions, generally²¹⁷ the psychological or psychiatric harm may be inflicted either negligently or intentionally. With regard to intention, the influence of reasonableness is implicit in that the defendant must be conscious of the unreasonableness of his or her conduct in causing the harm.²¹⁸ In respect of negligence as a form of fault, the influence of reasonableness in both jurisdictions is explicit. The question is whether the reasonable person would have foreseen the possibility of the psychological or psychiatric harm and would have taken reasonable steps to prevent it. In South African law, the standard of the reasonable person is used *ex ante*, while in English law it is used *ex post facto* for secondary victims and *ex ante* for primary victims.²¹⁹

Both jurisdictions generally use the but-for test to determine factual causation. The influence of reasonableness is implicit in that it would be unreasonable to hold the defendant liable if his or her conduct was not the factual cause of the psychiatric or psychological harm. In South African law the influence of reasonableness is explicit on the flexible test for determining legal causation where the question is whether there is a close enough relationship between the defendant's conduct and the psychological harm in view of policy considerations based on reasonableness, fairness and justice. The reasonable foreseeability of harm test plays a subsidiary role in determining legal causation and the influence of reasonableness on this test is explicit. Both jurisdictions acknowledge that an alternative cause and a

²¹⁵ See para 3 above.

²¹⁶ See para 3 above.

²¹⁷ Where strict liability is not applicable.

²¹⁸ See paras 2.1 and 3 above.

²¹⁹ See paras 2.2 and 3 above.

novus actus interveniens could break the causal link. In English law the defendant cannot be held liable for damage that was too remote from the original breach of duty and generally foreseeability of harm is required but not in the way it occurred.²²⁰

The influence of reasonableness on the thin skull-rule is explicit in both jurisdictions. Thus, if the psychological or psychiatric harm was reasonably foreseeable, then the wrongdoer would be held liable for all the loss despite it is being aggravated by pre-existing conditions. In English law, liability for psychiatric harm was extended to primary victims with inherent susceptibilities as per the thin-skull rule, but not to secondary victims. The exact type of psychiatric harm need not be reasonably foreseeable for primary victims, but it must be for secondary victims.²²¹

The influence of reasonableness is prevalent in both the jurisdictions discussed, whether it be implicit or explicit. A successful claim for psychological or psychiatric harm depends on whether there was an unreasonable infringement of the interests in bodily integrity, where there was unreasonable conduct in causing such harm and whether it is reasonable to hold the defendant liable for the harm caused. In both jurisdictions policy considerations generally play a prevalent role in limiting liability.

On a last note, there is no denying that South African and English law face the same problem which is controlling or limiting liability for claims stemming from psychological or psychiatric injury. The distinction between primary and secondary victims seems to have been a necessary and practical distinction. Hence the application of the rules relating to proximity in English law and remoteness in South African law. If there is any lesson to be learned for South African law it is not to make reasonable foreseeability of psychological harm the central and unifying feature in this area of law.²²² We could find ourselves further conflating the elements of delictual liability, unfairly applying different standards to primary and secondary victims, and in effect bringing legal uncertainty into our law. This is indeed what has happened in the English tort of negligence, where adjudicators often conflate the elements of liability due to the role of reasonable foreseeability and admittedly apply different standards to primary and secondary victims, thus causing confusion. Where the criterion of the reasonable foreseeability of harm is considered under the elements of legal causation and negligence

²²⁰ See paras 2.2 and 3 above.

²²¹ See paras 2.2 and 3 above.

²²² See fn 80 above.

in our law, it should be considered by applying the tests for the elements correctly.²²³

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List of Abbreviations

CLJ	Cambridge Law Journal
J L & Med	Journal of Law and Medicine
LQR	Law Quarterly Review
PELJ	Potchefstroom Electronic Law Journal
Sing JLS	Singapore Journal of Legal Studies
Stell LR	Stellenbosch Law Review

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Tort L Rev	Tort Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg