

The Price of Sadness: Comparison between the Netherlands and South Africa*

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Abstract

Bereavement can be a precipitating and perpetuating factor for various psychiatric injuries. However, the normal experience of bereavement also causes significant disruption and stress in an individual's psychosocial functioning. Both in the Netherlands and in South Africa, a clear distinction is drawn between sadness and psychiatric injury. Dutch law until recently did not make provision for compensation for sadness, but only for psychiatric injury. This has changed with the coming into operation of the *Wet Affectieschade* on 1 January 2019. In terms of South African law, there is no claim for compensation for sadness or bereavement. The authors are of the opinion that bereavement, sadness or grief resulting from bereavement causes significant distress and a continuum exists between normal and complex bereavement where a clear distinction does not exist. South African courts should, therefore, bear this in mind in actions for compensation for non-patrimonial loss for bereavement.

Keywords

Affectieschade; Bereavement; Causation; Damage; Damages; Delictual liability; Emotional shock; Germanic action for pain and suffering; Limitless liability – curtailing of; Persistent Complex Bereavement Disorder; Post-traumatic stress syndrome; Psychiatric injury; *Shockschade*; Wrongfulness.

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1 Introduction

In the Netherlands the courts have for many decades drawn a distinction between two types of non-patrimonial loss, namely *shockschade*, for which compensation could be claimed in terms of article 6:106 of the *Burgelijk Wetboek*,¹ and *affectieschade*, which was not actionable.² *Shockschade* involves more than sadness. It involves some kind of psychiatric injury, whereas *affectieschade*, on the other hand, entails feelings of sadness but no psychiatric injury.³ In the absence of the latter, even if the feelings of sadness are severe and the victim cannot cope, this type of damage was not actionable.⁴ The decisions of the *Hoge Raad* (Dutch Supreme Court of Appeal) in the *Jeffrey*⁵ and *Baby Joost*⁶ cases, in which the parents were denied compensation for non-patrimonial loss for *affectieschade*, started the long process towards amending the legal position to allow for compensation for this type of loss.⁷ Lindenbergh describes this as the biggest change in the law of damages since the *New Civil Code* came into operation.⁸

The Dutch Senate (*Eerste Kamer*) recently approved legislation making provision for compensating *affectieschade* subject to certain conditions.⁹ The legislation came into operation on 1 January 2019.¹⁰ The amendment affects not only the *Civil Code*, but also the *Penal Code*. This article is concerned with the amendments to the *Civil Code* only.

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¹ Dutch *Civil Code*.

² *Taxibus arrest* HR 22 Februari 2002, NJ 2002, 240 m.nt. JBM para 5.2 (hereafter the *Taxibus* case).

³ *Taxibus* case para 5.2.

⁴ *Taxibus* case para 5.2.

⁵ *Jeffrey* HR 9 October 1998, NJ 1998, 853.

⁶ *Baby Joost* HR 8 September 2000, NJ 2000, 734 (hereafter the *Baby Joost* case).

⁷ See below 2.2.1.

⁸ Lindenbergh 2018 *TPR* 1377.

⁹ *Eerste Kamer der Staten-Generaal* 2015 https://www.eerstekamer.nl/wetsvoorstel/34257_vergoeding_van; Ministerie van Justitie en Veiligheid 2018 <https://zoek.officielebekendmakingen.nl/stb-2018-132.html>.

¹⁰ *Eerste Kamer der Staten-Generaal* 2018 https://www.eerstekamer.nl/behandeling/20181009/publicatie_inwerkingtreding/document3/f=/vksf2ut09hzj.pdf; Ministerie van Justitie en Veiligheid 2018 <https://zoek.officielebekendmakingen.nl/stb-2018-132.html>.

In South Africa the courts do not award compensation for grief. In order to claim compensation for "emotional shock", some kind of psychiatric harm is required.¹¹ This was confirmed recently in the very tragic case of Michael Komape, who died when he fell into a pit toilet at school.¹² In that case the court, in following precedent, held that the claim for compensation for grief could not be allowed.¹³ In the *Life Esidimeni* arbitration award, on the other hand, compensation was awarded to the bereaved family members of the victims, with former Deputy Chief Justice Moseneke decrying the inadequacy of the common law remedy.¹⁴

This article will show that the line between bereavement and conditions such as Post Traumatic Stress Disorder is not always very clear and that there is a continuum of psychological and emotional conditions that could potentially arise from a traumatic event. The distinction between *shockschade* and *affectieschade* or, in South African parlance, mere sadness and psychiatric injury, is somewhat simplistic, and the courts should take each case on its facts rather than making a hard and fast rule.

The fear of the so-called "floodgates opening" has been a perennial problem in both the jurisdictions under discussion, however, the plaintiff ultimately has to prove harm, and once the harm has been proven, the "floodgate" problem can be averted by means of the application of the general principles of delict, in particular that of legal causation. The principles of delict, are, however, also infused with the values of the *Constitution*,¹⁵ such as equality and dignity, and any limitation of delictual liability on the part of defendants will take place within the ambit of the constitutional imperative to develop the Common Law.¹⁶

The monetary costs of the psychiatric treatment, being patrimonial loss, are recovered by means of the *actio legis Aquiliae*. This does not form part of

¹¹ *Barnard v SANTAM Bpk* 1999 1 SA 202 (SCA) (hereafter the *Barnard* case); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) (hereafter the *Bester* case). See, however, *Mbhele v MEC for Health for the Gauteng Province* 2016 ZASCA 166 (18 November 2016), where the court did not allude to the difference between grief and psychological injury.

¹² *Komape v Minister of Basic Education* 2018 ZALMPPHC 18 (23 April 2018) (hereafter the *Komape* case).

¹³ *Komape* case.

¹⁴ *In the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng and MEC of Health, Province of Gauteng* (19 March 2018) (hereafter the *Life Esidimeni* case).

¹⁵ *Constitution of the Republic of South Africa*, 1996.

¹⁶ Section 39(2) of the *Constitution of the Republic of South Africa*, 1996.

the discussion below. Instead, this note is concerned with non-patrimonial loss claimed in terms of the Germanic action for pain and suffering.

2 Dutch law

Dutch law recognises a clear dividing line between psychiatric injury (*shockschade*) and sadness (*affectieschade*). As mentioned in the introduction, until recently the courts did not award compensation for the latter. Commencing in 2003, a long process ensued to change the law in order to provide some relief (fixed amounts) for a clearly identified group of people. Below follows an exposition of the legal position prior to the amendment of the Civil Code, followed by an explanation of the relevant sections of the amended Civil Code.

2.1 *The position before the amendment of the law*

2.1.1 *The provisions of the Civil Code (Burgerlijk Wetboek)*

Part 10 of Book 6, Title 1 of the Civil Code governs the awarding of all damages, including compensation, for non-patrimonial loss. This part is entitled "Legal Obligations for Damages".¹⁷ Article 95 provides that damage that can be compensated in terms of the law consists of patrimonial loss ("*vermogensschade*") and other loss ("*ander nadeel*").¹⁸ The term "*ander nadeel*" implies loss that is not patrimonial. Not all non-patrimonial loss is compensable; only insofar as the law gives a right to compensation for this loss ("*voor zover de wet op vergoeding hiervan recht geeft*").¹⁹

Article 6:106 governs liability for non-patrimonial loss. Sub-section 1 lists the various instances in which a victim would be entitled to compensation:²⁰

¹⁷ *Wettelijke verplichting tot schadevergoeding.*

¹⁸ The original Dutch reads as follows: "De schade die op grond van een wettelijke verplichting tot schadevergoeding moet worden vergoed, bestaat in vermogensschade en ander nadeel, dit laatste voor zover de wet op vergoeding hiervan recht geeft".

¹⁹ Article 95 of the Dutch *Civil Code*.

²⁰ The original Dutch reads as follows: "Voor nadeel dat niet in vermogensschade bestaat, heeft de benadeelde recht op een naar billijkheid vast te stellen schadevergoeding: (a) indien de aansprakelijke persoon het oogmerk had zodanig nadeel toe te brengen; (b) indien de benadeelde lichamelijk letsel heeft opgelopen, in zijn eer of goede naam is geschaad of op andere wijze in zijn persoon is aangetast; (c) indien het nadeel gelegen is in aantasting van de nagedachtenis van een overledene en toegebracht is aan de niet van tafel en bed gescheiden echtgenoot, de geregistreeerde partner of een bloedverwant tot in de tweede graad van de overledene, mits de aantasting plaatsvond op een wijze die de overledene, ware hij nog in leven

- a) where the perpetrator had the intention (the Dutch word used is "*oogmerk*") to cause the damage;
- b) where the victim suffered physical injury, or his honour or good name was damaged, or he suffered personal harm in any way; or
- c) where there is damage to the memory of a person who has passed away. In this case, a number of people are mentioned, namely a spouse from whom the victim was not separated, the registered partner of the victim or any blood relation up to the second degree of the deceased. The proviso here is that the deceased, had he been alive, would have had a claim for damage to his honour or good name.

It would appear that where there is intention on the part of the perpetrator, it does not matter for what type of damage compensation can be claimed. It is not clear whether damages claimed in terms of subsection (a) would include compensation for *affectieschade*, which was not compensable prior to 1 January 2019.

2.1.2 "*Ander nadeel*" – *The difference between shockshade and affectieschade*

Article 6:106 makes provision for the recovery of non-patrimonial loss, including loss for emotional shock. The courts have drawn a distinction between shockshade and *affectieschade*.²¹

Shockshade entails an injury to the plaintiff as a result of a confrontation with an injury to, or the death of a loved one.²² The injury suffered by the plaintiff goes beyond feelings of sadness. In order to have a claim for *shockshade*, the plaintiff has to suffer some kind of psychiatric harm; (referred to by Verheij²³ as "*een in de psychiatrie erkend ziektebeeld*") for example, Posttraumatic Stress Disorder.

Affectieschade, on the other hand, entails damage which is a consequence derived from the death or injury of another, where that other person is the victim of wrongful conduct, but where the plaintiff nevertheless suffers feelings of sadness.²⁴ At the time of the drafting of article 6:106, the drafters

geweest, recht zou hebben gegeven op schadevergoeding wegens het schaden van zijn eer of goede naam."

²¹ See for example *Taxibus* para 5.2.

²² Verheij *Vergoeding van Immateriële Schade* 115.

²³ Verheij *Vergoeding van Immateriële Schade* 115.

²⁴ See the *Jeffrey* case and the *Baby Joost* case discussed below.

were of the opinion that recognising *affectieschade* as compensable would have adverse consequences; for example, compensation could result in the "commercialisation" of sorrow and result in a situation where, for example, a widow has to maintain the level of her sadness and not enter into a new relationship.²⁵

Two decisions of the *Hoge Raad* led to the legislative process in terms of which *affectieschade* would become actionable.²⁶ The first of these is the *Jeffrey*²⁷ case.²⁸ On 14 November 1990, as on several previous occasions, the parents of a little boy named Jeffrey took him for a swimming lesson at a swimming pool belonging to the Free University in Amsterdam. Jeffrey suffered from motion problems and the swimming lessons, under the supervision of a swimming therapist, were part of his therapy. His mother was also present. During the lesson, the therapist lowered the bottom of the pool, thus increasing the depth thereof. After the lesson, Jeffrey and his mother went to shower, each taking a shower in a separate area. The therapist, after having gone to the staff cloakroom to get changed, noticed that one of the shower doors was open and the shower was running. She found Jeffrey's mother in the other shower and they went to look for him. Upon arriving at the pool, they found Jeffrey in the pool, under the water. He was taken from the water and rushed to hospital where he was resuscitated, however, he had suffered severe brain damage and died some days later.

The parents approached the court for relief against the society that managed the swimming pool.²⁹ They claimed a declaration of rights in stating that the Society was liable for the death of the child and damages. This declaration was a prerequisite to their damages claim. The court *a quo* and the *Hoge Raad* rejected both claims. It was held that they had not shown "*voldoende belang*" or a clear interest to hold the society liable. While they had shown an emotional interest, it was not of sufficient legal relevance.

²⁵ The legislative process from 2000 to 2011 is described in detail by Essen *Vergoeding van Immateriële Schade* 39-61.

²⁶ Tweede Kamer der Staten-Generaal 2002-2003 <https://www.recht.nl/doc/kst28781-3.pdf> 4. Also see Juridisch Bureau Letselschade en Gezondheidsrecht 2015 <https://www.juridischbureauletselschade.nl/de-ontwikkeling-van-het-wets-voorstel-omtrent-affectieschade/>.

²⁷ *Jeffrey* case 853.

²⁸ *Jeffrey* case 853.

²⁹ A society known as the *Vereniging voor Christelijk Wetenschappelijk Onderwijs*.

The second case was that of *Baby Joost*.³⁰ In this instance, the parents of a boy called Joost sued a medical practitioner and the hospital for damages. When Joost was four years old he had to undergo surgery to have a hernia corrected. During the course of the operation he suffered brain damage, as a result of which he was severely handicapped, physically and mentally. His parents claimed compensation under various heads of damages, *inter alia*, the need to modify the home and to purchase a modified vehicle to accommodate the handicapped child. They also claimed compensation for non-patrimonial loss. This claim was allowed although reduced by the court of the first instance, but both the court of appeal and the *Hoge Raad* rejected the claim for non-patrimonial loss on the basis that no wrongfulness could be established *vis-à-vis* the parents. Mere sadness would not suffice as a basis for compensation.

In the *Taxibus* case,³¹ the *Hoge Raad* drew a distinction between non-patrimonial loss which was compensable and that which was not. In this case a mother, as she was exiting her house, saw her daughter lying in the driveway. She had been run over by a so-called taxibus and her skull had been cracked open. The mother called an ambulance and went to turn her child over onto her back. In the process of the mother's turning the child over, the mother's hand inadvertently entered the child's skull. Not only did the mother experience deep sadness as a result of the child's death, but she also presented with serious depression and Posttraumatic Stress Disorder as a result of this experience. The court of the first instance rejected the claim for compensation for sadness.³²

Both the court of appeal³³ and the *Hoge Raad*³⁴ allowed the claim for non-patrimonial loss insofar as it related to her psychiatric harm (*shockschade*). The claim for *affectieschade* was rejected.³⁵ The mother contested the differentiation between *shockschade* and *affectieschade*, which had been made by the court. The *Hoge Raad* dismissed the cross appeal by the mother questioning the distinction between the two types of non-patrimonial loss, stating that Dutch Law had never made provision for compensation for feelings of sadness.³⁶

³⁰ *Baby Joost* case 734.

³¹ *Taxibus* case.

³² *Taxibus* case para 1.

³³ *Taxibus* case para 3.3(i).

³⁴ *Taxibus* case para 5.4.

³⁵ *Taxibus* case paras 3.3(j) and 5.3.

³⁶ *Taxibus* case para 5.4.

2.2 Compensation for sadness – The legal position after 1 January 2019

2.2.1 The legislative journey³⁷

The journey toward the recognition of *affectieschade* as a ground for damages has been a long one, commencing in 2000 in the aftermath of the decisions in the *Jeffrey* and *Baby Joost* cases.³⁸ From the report of the Attorney General³⁹ on the facts of the *Jeffrey* case, it is clear that the legislature at the time of the drafting of Article 6:106 never intended for *affectieschade* to be compensable. Some of the arguments against compensating this loss considered by the drafters included the following:

- a) compensation could result in a commercialisation of sadness and lead to situations where, for example, a widow would have to maintain a certain level of sadness and not commence a new relationship;
- b) the possibility of odious practices where a defendant could dispute the closeness of the relationship between the deceased and the plaintiff; and
- c) defining the "*kring van de gerechtigten*" or parties entitled to *affectieschade* could be problematic for a judge.

The process towards the new legislation commenced in 2000, when a member of the *Tweede Kamer* (the Dutch lower house) posed certain questions to the then Minister of Justice, AP Korthals.⁴⁰ This was followed a few months later by a motion to amend the Civil Code to allow for the compensation of *affectieschade*. The legislature was faced with the choice of amending the *Civil Code* to make provision for *affectieschade*, or to leave it to the courts.⁴¹ The latter option was not ideal because that would place a judge in the position of having to interpret the law *contra legem* (that is, a situation of a hard case making bad law) in order to accommodate the

³⁷ The legislative process from 2000 to 2011 is described in detail by Essen *Vergoeding van Immateriële Schade*.

³⁸ Nederlands Juristenblad 2003 <https://www.njb.nl/wetgeving/wetsvoorstellen/affectieschade.5743.lynkx>.

³⁹ In cases decided by the Hoge Raad, the Attorney-General may write a detailed legal opinion that is added as an addendum to the judgment. The court has a choice as to whether or not to follow this opinion. See Hoge Raad Der Nederlanden 2018 <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Over-de-Hoge-Raad>.

⁴⁰ Tweede Kamer *Aanhangsel Handelingen* 2000/2001, Nr 105. See Lindenbergh 2010 *Nederlands Juristenblad* 1530-1532 for an overview of the process.

⁴¹ Essen *Vergoeding van Immateriële Schade* 59.

claimant.⁴² This could lead to legal uncertainty, both in the case of liability insurers and victims.⁴³

Over the next few years, the matter was debated and draft legislation was presented to the *Tweede Kamer*, debated and further amended and later approved, in March 2005.⁴⁴ In terms of the draft legislation certain parties could receive compensation in the amount of €10 000. The fixing of the amount is regarded by Hartlief⁴⁵ as the "Achilles heel" of the legislation, because it treats everyone the same, irrespective of the seriousness of the harm.

The draft legislation was referred thereafter to the *Eerste Kamer*, where it was debated again. Many questions were raised, particularly in connection with the fixed amount of compensation for which the draft legislation made provision. In a plenary session held in 2006, questions were raised as to whether *affectieschade* should be compensated. The Minister of Justice had ordered in the interim that an investigation be undertaken.

Throughout the process, there was an underlying fear of an increase in litigiousness ("*Amerikaanse toestanden*"; "*claimcultuur*"),⁴⁶ which permeated the debates.⁴⁷ As a result, the legislative process was put on ice⁴⁸ and in 2010 the *Eerste Kamer* voted against the draft legislation.⁴⁹

The process towards compensating *affectieschade* started afresh in 2015 when new draft legislation was submitted to the legislature.⁵⁰ The new draft legislation had a broader ambit; making provision for different amounts of compensation, depending on various factors (see below). The list of potential claimants was also expanded. The draft legislation was passed by

⁴² Also see Hartlief *Leven in Een Claimcultuur* 13.

⁴³ Tweede Kamer der Staten-Generaal 2002-2003 <https://www.recht.nl/doc/kst28781-3.pdf> 4. Also see Juridisch Bureau Letselschade en Gezondheidsrecht 2015 <https://www.juridischbureauletselschade.nl/de-ontwikkeling-van-het-wetsvoorstel-omtrent-affectieschade/>.

⁴⁴ Also see Hartlief *Leven in Een Claimcultuur* 13.

⁴⁵ Hartlief *Leven in Een Claimcultuur* 13.

⁴⁶ Also see Hartlief *Leven in Een Claimcultuur* 1, 2, 14.

⁴⁷ Tweede Kamer 20 April 2017 TK 71; Eerste Kamer *Stemming* 23 March 2010. Also see Hartlief *Leven in Een Claimcultuur* 12.

⁴⁸ Van Wees 2006 *Tijdschrift voor Personenschade* 12; and further De Jong 2012 <http://arno.uvt.nl/show.cgi?fid=128492>.

⁴⁹ Eerste Kamer der Staten-Generaal 2005 https://www.eerstekamer.nl/behandeling/20051011/korte_aantekening_3/document3/f=/vj45mdfxsyi0.pdf. Also see De Jong 2012 <http://arno.uvt.nl/show.cgi?fid=128492>.

⁵⁰ Tweede Kamer *Vergaderjaar* 2014-2015, 34 257, Nr 2.

the *Tweede Kamer* in May 2017⁵¹ and in April 2018, the *Eerste Kamer* voted in favour thereof.⁵²

2.2.2 *The position from 1 January 2019*

Several changes have been introduced to the Dutch *Civil Code* to allow for the compensation of *affectieschade*.⁵³ The *Wet Affectieschade* came into operation on 1 January 2019.⁵⁴

In terms of the new law, the following are entitled to claim compensation for *affectieschade*:⁵⁵

- a) a spouse (provided that the spouses are not separated at the time of the harm-causing event);
- b) a partner of the victim;
- c) the parents of the victim;
- d) the children of the victim;
- e) someone who, at the time of the accident, in the family context, was responsible for caring for the victim;
- f) someone for whom, in the family context, the victim had been caring at the time of the accident; or
- g) any person who was in a close enough relationship with the victim where the requirements of reasonableness and fairness would require that the person was entitled to compensation for *affectieschade*.⁵⁶

The purpose of the legislation, according to Minister Dekker, is to recognise the grief of someone whose life has been turned upside down as a result of

⁵¹ Tweede Kamer *Overzicht van Afdeling Inhoudelijke Ondersteuningstemmingen* 9 Mei 2017.

⁵² Eerste Kamer der Staten-Generaal 2015 https://www.eerstekamer.nl/wetsvoorstel/34257_vergoeding_van.

⁵³ Ministerie van Justitie en Veiligheid 2018 <https://zoek.officielebekendmakingen.nl/stb-2018-132.html>.

⁵⁴ Rijksoverheid 2018 <https://www.rijksoverheid.nl/actueel/nieuws/2018/04/10/eerste-kamer-stemt-in-met-vergoeding-van-affectieschade>. For a detailed discussion of the new legal position see Lindenbergh 2018 *TPR* 1377-1382.

⁵⁵ Article 107(2) of the Dutch *Civil Code* as amended.

⁵⁶ The Dutch text for subsection (g) is quoted here for the sake of clarity. It reads as follows: "een andere persoon die in een zodanige nauwe persoonlijke relatie tot de gekwetste staat, dat uit de eisen van redelijkheid en billijkheid voortvloeit dat hij voor de toepassing van lid 1 onder b als naaste wordt aangemerkt".

someone else's mistake.⁵⁷ While the compensation of *affectieschade* cannot remove the pain of the next of kin of the victim, it does acknowledge the pain and provides some solace and closure.⁵⁸

The amount that will be awarded to the plaintiff in a successful claim will be between between €12500 and €20000.⁵⁹ Exactly how much a plaintiff will receive will depend on the following:⁶⁰

- the relationship between the plaintiff and the victim;
- whether the victim died; and
- in the case of injury, whether the injury was both serious and permanent.

The Dutch Association of Insurers⁶¹ supports the new legislation despite the fact that it recognises that a greater burden will be placed on insurance companies. The support for the legislation is the result of the fact that there are clear guidelines and hence certainty about who would qualify ("*vaste kring van gerechtigden*") and for how much. As a result, the fear of "*Amerikaanse toestanden*" has been addressed.

3 South African law

The cases of *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*⁶² and *Barnard v SANTAM Bpk*⁶³ are generally regarded as the leading cases insofar as compensation for non-patrimonial loss arising from emotional shock is concerned. As will be seen below, these cases and others that followed them required some form of psychiatric lesion or

⁵⁷ Rijksoverheid 2018 <https://www.rijksoverheid.nl/actueel/nieuws/2018/04/10/eerste-kamer-stemt-in-met-vergoeding-van-affectieschade>. Also see Eerste Kamer *Nadere Memorie van Antwoord Eerste Kamer, Vergaderjaar 2017-2018*, 34 257.

⁵⁸ Article 107(2)(g) of the Dutch *Civil Code*.

⁵⁹ "Besluit vergoeding affectieschade" *Staatsblad van het Koninkrijk der Nederlande* 2018 133. For a table of amounts see Hengreen 2015 <https://www.slotletselschade.nl/wet-affectieschade/>.

⁶⁰ "Besluit Vergoeding Affectieschade" *Staatsblad van het Koninkrijk der Nederlande* 2018 133.

⁶¹ Verbond van Verzekeraars 2018 <https://www.verzekeraars.nl/publicaties/actueel/verbond-blij-met-nieuwe-wet-affectieschade>. Also see Personenschade Instituut van Verzekeraars 2018 https://stichtingpiv.nl/wp-content/uploads/2018/12/PIV1809_bulletin-4_WTK_11122018.pdf.

⁶² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) (hereafter the *Bester* case).

⁶³ *Barnard v SANTAM Bpk* 1999 1 SA 202 (SCA) (hereafter the *Barnard* case).

injury.⁶⁴ Neetling and Potgieter regard this as a simple application of the maxim *de minimis non curat lex*, that harm which is not reasonably serious will not be compensable.⁶⁵ In the years after these cases were reported, other cases were decided that confirmed the principles formulated in the *Bester* and *Barnard* cases, while there have also been cases that seemed to have dispensed with the explicit requirement of psychiatric injury, such as *Mbhele v MEC for Health for the Gauteng Province*.⁶⁶

3.1 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*

In this case, two brothers aged 11 and 6 were crossing a road. The younger boy was hit by an oncoming car and was killed. The elder brother did not sustain any physical injuries but presented with serious shock, which resulted in an anxiety neurosis. This required psychiatric treatment.

The court found that there is no reason why our law would not allow an action for satisfaction where someone has suffered harm in the form of nervous shock as a result of a psychiatric injury that necessitates treatment. Where, however, the shock amounted to "negligible emotional shock, which does not last long and has no effect on the health of the person", it will not be compensable.⁶⁷

3.2 *Barnard v SANTAM Bpk*

In this instance, the appellant was the mother of a 13-year old son that was a passenger in a bus which collided with a car. It was common cause that the driver of the car had been negligent. The boy succumbed to his injuries. The appellant had been informed of this when the hospital where the boy had died called her husband. The appellant instituted an action in terms of

⁶⁴ Loubser and Midgley *Law of Delict* 362 and the discussion that follows.

⁶⁵ Neethling and Potgieter *Law of Delict* 302.

⁶⁶ See below. Also see Loubser and Midgley *Law of Delict* 362; Neethling and Potgieter *Law of Delict* 300-301.

⁶⁷ *Bester* case para H779. The original Afrikaans reads as follows: "Om bostaande redes kom ek dus tot die gevolgtrekking dat daar in ons reg geen rede bestaan waarom iemand, wat as gevolg van die nalatige handeling van 'n ander, sensuskok op psigiatriese besering met gevolglike ongesteldheid opgedoen het, nie op genoegdoening geregtig is nie, mits die moontlike gevolge van die nalatige handeling voorsien sou gewees het deur die redelike persoon wat hom in die plek van die onregpleger sou bevind het. Ek verwys hier nie na niksbeduidende emosionele skok van kortstondige duur wat op die welsyn van die persoon geen wesenlike uitwerking het nie, en ten opsigte waarvan genoegdoening gewoonlik nie verhaalbaar sou wees nie." See the discussion in Loubser and Midgley *Law of Delict* 362 and further.

the predecessor of the *Road Accident Fund Act*,⁶⁸ the *Multilateral Motor Vehicle Accidents Fund Act*.⁶⁹ The defendant in this instance was an insurance company, one of the "appointed agents" in terms of the Act. The plaintiff claimed compensation on the basis that she had suffered serious emotional shock and the effects thereof, as well as a great deal of sadness. The court had to answer two legal questions, firstly, whether compensation for emotional shock could be claimed if the plaintiff was not a witness to the accident and secondly, whether the plaintiff's sadness constituted harm for the purposes of a delictual action.⁷⁰

Regarding the first question, the court was clear that the fact that a plaintiff hears about the accident and does not see it does not necessarily preclude a claim for damages. The elements of delict have to be proven and the plaintiff has to prove harm in the form of psychiatric injury.

The court in this instance merely reiterated what had been decided in the *Bester* case. Van Heerden JA held that mere sadness is not enough; the plaintiff would have to prove psychiatric injury in order to be successful in a claim for compensation.⁷¹

3.3 Road Accident Fund v Sauls⁷²

In the *Sauls* case the court had to decide whether to uphold the appeal of the Road Accident Fund against a victim who had been awarded compensation for emotional shock. In this case the plaintiff had witnessed an action in which her fiancé was injured, albeit not seriously. She was diagnosed as suffering from Posttraumatic Stress Disorder with hardly any prognosis of recovery. The court, correctly it is submitted, held that the correct approach would be to apply the general principles of delict.⁷³ The relationship between the primary and secondary victims will play a role, as will the seriousness of the injury of the primary victim; however, these will be factors that the court will take into consideration, together with legal policy, reasonableness, fairness and justice.⁷⁴ The court found that the plaintiff had proven that she suffered from psychiatric injury and in principle,

⁶⁸ *Road Accident Fund Act* 56 of 1996.

⁶⁹ *Multilateral Motor Vehicle Accidents Fund Act* 93 of 1989.

⁷⁰ *Barnard* case 208D-E.

⁷¹ See Loubser and Midgley *Law of Delict* 363-364; Neethling and Potgieter *Law of Delict* 301-302.

⁷² *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) (hereafter the *Sauls* case).

⁷³ The *Sauls* case para 17.

⁷⁴ The *Sauls* case.

was entitled to compensation.⁷⁵ The Road Accident Fund's appeal was accordingly dismissed.⁷⁶

3.4 *Mbhele v MEC for Health for the Gauteng Province*⁷⁷

Ms Delisile Mbhele sued the MEC for Health of the Gauteng Province, claiming damages for emotional shock. The claim was based on the fact that after having been transferred from a clinic to the Chris Hani Baragwanath Hospital because of an emergency case due to foetal distress, she was left waiting. As a result of delays and a series of failures on the part of the staff, the baby was stillborn. After the birth, the plaintiff was taken into a ward with babies and despite asking to be removed from the ward, she was left there for eight hours. She had to identify the baby at the mortuary but was so distressed that she fainted. As no one else could identify the baby, she was assisted and then compelled to identify the baby.

The court was satisfied on the basis of the facts that the plaintiff had proven emotional shock. After having discussed the condition of the plaintiff subsequent to the still birth of her child, the court concluded that:⁷⁸

[H]er behaviour months after the death of the baby shows that she had difficulty coping and that she still has not recovered completely. For all those reasons we are satisfied that a case was made for a claim for emotional shock.

From the judgment it appears as if no psychological evidence was led and the court did not refer to either the *Bester* or the *Barnard* cases (the latter is mentioned in a footnote in the case).

3.5 *The case of Michael Komape*

In the recent case of *Komape*,⁷⁹ the issue of compensation for bereavement came before the court. Michael Komape was a five year old boy. He was a learner in Grade R at Mahlodumela Lower Primary School at Chibeng village near Seshego. He had been in the school for three days when he disappeared. The principal called his mother, who was of the opinion that he may have gone to the crèche he used to attend. His mother went to the school and was informed that the school staff had searched everywhere for

⁷⁵ The *Sauls* case para 18.

⁷⁶ The *Sauls* case para 19.

⁷⁷ *Mbhele v MEC for Health for the Gauteng Province* 2016 ZASCA 166 (18 November 2016) (hereafter the *Mbhele* case).

⁷⁸ The *Mbhele* case para 11.

⁷⁹ *Komape v Minister of Basic Education* 2018 ZALMPPHC 18 (23 April 2018) (hereafter the *Komape* case).

him. His mother then went to the crèche where she was informed by a small child that Michael had fallen into a pit toilet. When the mother arrived at the toilet, she saw his hand protruding from the pit and fainted. She called for help but was told that they had to wait for someone to retrieve the body from the pit. Shortly after that, her husband, Michael's father, arrived and saw his dead son in the toilet. The body was eventually retrieved from the toilet. The post mortem evidence showed that he had drowned.⁸⁰

This tragedy happened against the background of a dysfunctional school system in the Limpopo province. In particular, the matter of the poor state of the toilets had been raised by the organisation that represented the plaintiffs.⁸¹ The plaintiffs claimed the following:⁸²

- a) compensation for the emotional shock and grief suffered by the plaintiffs and their minor children. The basis of this claim was "a wrongful and negligent breach of a variety of duties of care toward Michael which caused his death";
- b) the alternative claim was for punitive damages, aimed at the punishment for and deterrence of wrongful conduct on the basis that Michael's constitutional rights were breached; and
- c) an alternative averment included the fact that the plaintiffs and their minor had suffered from post-traumatic stress syndrome.

There are a number of problems regarding the way in which these claims were formulated;⁸³ however, these are beyond the scope of this article.

The plaintiffs could not prove Posttraumatic Stress Syndrome and hence, also not the requisite psychiatric injury. In response to the request to develop the common law to include damages for grief, the court held that

⁸⁰ The *Komape* case paras 17-21.

⁸¹ The *Komape* case para 24.

⁸² The *Komape* case paras 17-21.

⁸³ Claim A makes reference to a duty of care owed to the deceased. First of all, South African law, unlike English law of negligence, does not work with "duty of care". The term "legal duty" is used in the context of wrongful omissions. "Duty of care" is used in the context of negligence. Furthermore, the parents cannot claim on a duty owed to someone else; their claim has to be based on an infringement of their own rights. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (hereafter the *Fose* case) the Constitutional Court rejected the notion of punitive damages. There are arguments that can be made for punitive damages on the basis of the fact that in *Fose* the 1993 *Constitution* applied, which applied vertically, but in this case the plaintiff did not explain why the decision in *Fose* should be overturned. While the court in this case did refer to *Fose*, no mention was made of the punitive damages issue.

there is no distinction between grief and other psychiatric harm.⁸⁴ A claim for grief that results in psychiatric injury will be actionable. In the absence of psychiatric injury, the claim cannot be upheld.⁸⁵ The court furthermore held that in the absence of proof of psychiatric injury, there could be "bogus and an unwarranted proliferation of claims for psychiatric injuries" that could result in "limitless claims for every conceivable cause of grief whether insignificant without expert psychiatric evidence".⁸⁶

In the *Taxibus* case discussed above, the *Hoge Raad* held that there is a clear distinction between harm in the form of psychiatric injury (*shockschade*), and harm in the form of bereavement or grief, (*affectieschade*) seemingly implying that grief cannot cause psychiatric harm. It is submitted that the view adopted in *Komape* is the better view, because it makes provision for the fact that grief can be debilitating in some instances, despite its not resulting in Posttraumatic Stress Disorder.

In coming to the decision not to award compensation for the parents' sadness, the court in *Komape* followed the decisions in the *Bester*⁸⁷ and *Barnard* cases⁸⁸ insofar as it held that the plaintiff would have to establish some kind of psychiatric harm in order to succeed with a claim for emotional shock.

3.6 *Western Cape Department of Social Development v Barley*⁸⁹

This case tells the story of a five year old girl who died while in the care of an early care facility known as Auntie Dawn's, in Pinelands, Cape Town, on 14 October 2010. The facility was registered as a partial care facility by the Western Cape Government. After the child's death the parents sued both the person who operated the facility, a Mrs Moore, and the Western Cape Government.

The Western Cape Government appealed the decision of the High Court. The Supreme Court of Appeal upheld the decision of the High Court insofar

⁸⁴ The *Komape* case para 39.

⁸⁵ The *Komape* case para 39.

⁸⁶ The *Komape* case para 39.

⁸⁷ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A).

⁸⁸ *Barnard v SANTAM Bpk* 1999 1 SA 202 (SCA).

⁸⁹ *Western Cape Department of Social Development v Barley* 2019 3 SA 235 (SCA) (hereafter the *Barley* case).

as the liability for damages was concerned. The claim against the Provincial Government was dismissed.

The court per Dambuza JA referred to *Barnard's* case, in terms of which proof of psychiatric injury was required for the purposes of a claim for emotional shock.⁹⁰ While the parents claimed that they had suffered psychiatric injury in the form of post-traumatic stress disorder and depression, they presented no evidence to this effect.⁹¹ The High Court, referring to the foreseeability of harm in the case of the special relationship between a mother and a child, allowed the claim despite the deficiencies of the evidence.⁹² The Supreme Court of Appeal upheld the claim as far as Mrs Moore was concerned, again despite the fact that no evidence of psychiatric injury was presented to the court.⁹³

3.7 The tragedy of the Life Esidimeni patients

When the news of the tragic deaths of 118 psychiatric patients who had been moved from Life Esidimeni to a number of NGO's became known, it led to outrage and horror. The facts are described in a fact sheet on the website of the Section 27 organisation.⁹⁴ The death of these patients has been described as "the greatest cause of human rights violation since the dawn of our democracy".⁹⁵ In the introduction to his arbitration award, former Deputy Chief Justice Dikgang Moseneke wrote the following:⁹⁶

This is a harrowing account of the death, torture and disappearance of utterly vulnerable mental health care users in the care of an admittedly delinquent provincial government. It is also a story of the searing and public anguish of the families of the affected mental health care users and of the collective shock and pain of many other caring people in our land and elsewhere in the world.

The award not only contained scathing criticism of the suffering, torture and deaths of the victims and the resultant trauma inflicted on the families. The

⁹⁰ The *Barley* case para 24.

⁹¹ The *Barley* case para 24.

⁹² The *Barley* case para 24.

⁹³ The *Barley* case para 50.

⁹⁴ Section 27 2017 <http://section27.org.za/wp-content/uploads/2017/02/Life-Esidimeni-Fact-Sheet-1.pdf>.

⁹⁵ Adv Dirk Groenwald in his opening statement. See, for example Bornman 2017 <https://www.news24.com/SouthAfrica/News/life-esidimeni-the-greatest-cause-of-human-right-violations-since-democracy-20171009>.

⁹⁶ The *Life Esidimeni* case para 1.

inadequacy of the common law in addressing the trauma suffered by the families was likewise condemned:⁹⁷

In effect the Government has invited me to squeeze this pervasive and reeking violation of our Constitution and many valuable laws into psychological injury and shock for which R180 000 might be the going rate in trial courts under the common law. I decline that invitation.

Judge Moseneke awarded R180 000 per claimant for general damages, but on top of that, he awarded a further amount of R1 million for what he referred to as "as appropriate relief and compensation for the Government's unjustifiable and reckless breaches" of certain sections of the *National Health Act*.⁹⁸ It would appear that the purpose of this award is that of aggravated or even punitive damages, although these terms are not used. The fact that the purpose of the latter award is not specified, for example as compensation for patrimonial loss, seems to reinforce this idea.

4 Bereavement as psychiatric injury

The distinction between "mere sadness or bereavement" and "psychiatric injury" is not very clear. Instead of two watertight categories there is a continuum of conditions, as will be shown in this section. As bereavement is a normal process of human life, the responses to bereavement, including sadness, are also part of the normal processes of the experience of living, and there are many cultural norms, expectations, rituals, and coping mechanisms that are associated with bereavement.⁹⁹ Intense yearning or longing for the deceased, intense sorrow and emotional pain, and preoccupation with the deceased or the circumstances of the death are expected responses occurring in bereavement. A sequence of responses including protest or denial, searching, despair, detachment and the reorganisation of life would be expected in most bereaved persons.¹⁰⁰ The pangs of grief can often come in waves when memories of the deceased are triggered through experiences, objects, photographs and other reminders.¹⁰¹

The duration of a normal grieving process would differ from culture to culture, but a common observation would be that the expectations of a culture may not entirely relate to the internal experience of the bereaved. In western cultures, many people would expect the bereaved to be able to

⁹⁷ The *Life Esidimeni* case para 218.

⁹⁸ *National Health Act* 61 of 2003; The *Life Esidimeni* case paras 3, 226.

⁹⁹ APA DSM 5 168.

¹⁰⁰ Sadock and Sadock *Synopsis of Psychiatry* 64.

¹⁰¹ APA DSM 5 161,194.

reengage with normal social and occupational functions after only a few weeks and be able to pursue new relationships within the first year. However, the internal, psychological and emotional bereavement process does not adhere to societal norms, and many *sequelae* of the bereavement remain for much longer. Particularly, in the bereavement process for the death of a spouse, the remaining feeling of loneliness is a very common lingering experience.¹⁰²

To consider the experience of bereavement as a "psychiatric injury", a clinician could consider how the individual's experience of bereavement is exceptional in its going beyond an expected response to that bereavement. When considering the diagnosis of psychiatric disorders, a clinician is always called to consider how the observed symptoms are not culturally or age appropriate responses, and also to consider how the symptoms cause significant distress and functional impairment.¹⁰³ Some disorders that might be triggered or exacerbated by the experience of bereavement include certain mood disorders, particularly a Major Depressive Episode and Major Depressive Disorder, an anxiety disorder such as Separation Anxiety Disorder, and trauma-related disorders such as Posttraumatic Stress Disorder, Acute Stress Disorder, and Other Specified Trauma and Stressor-Related Disorder (Persistent Complex Bereavement Disorder).¹⁰⁴

4.1 Bereavement and mood disorders

It is possible to see bereavement exacerbating the experience of Major Depression (either as an episode, or in the course of a mood disorder such as Major Depressive Disorder, or Bipolar I or II). It would also be possible to observe bereavement in a person's life as a potential trigger for a Major Depressive Episode, but this may give a clinician reason for caution in diagnosing a single Major Depressive Episode (MDE) as a symptom of Major Depressive Disorder (MDD). Periods of sadness should not generally be diagnosed as MDE unless there is clarity that the experience is, in fact, depression.¹⁰⁵ The dynamics of depression are different from those of sadness or pangs of grief in bereavement, as will be elaborated on shortly.¹⁰⁶

Responses to a significant loss (eg bereavement, financial ruin, losses from a natural disaster, a serious medical illness or disability) may include feelings of

¹⁰² Sadock and Sadock *Synopsis of Psychiatry* 64.

¹⁰³ APA *DSM 5* 20-21.

¹⁰⁴ APA *DSM 5* 125-126, 191-194, 271-280, 289.

¹⁰⁵ APA *DSM 5* 168.

¹⁰⁶ APA *DSM 5* 125-126.

intense sadness, rumination about the loss, insomnia, poor appetite, and weight loss noted in Criterion A [of the DSM 5 criteria for a MDE], which may resemble a depressive episode. Although such symptoms may be understandable or considered appropriate to the loss, the presence of a major depressive episode in addition to the normal response to a significant loss should also be carefully considered. This decision inevitably requires the exercise of clinical judgment based on the individual's history and the cultural norms for the expression of distress in the context of loss.

Certainly, criteria that relate to severity, duration, and clinically significant distress or impairment should be met if making a diagnosis of MDE at the time of bereavement.¹⁰⁷

The DSM 5 notes distinguishing features that can assist in determining if one is observing grief or MDE, stating that in grief, the "predominant affect is the feelings of emptiness and loss". This is distinguished from MDE, where the predominant affect "is persistent depressed mood and the inability to anticipate happiness or pleasure".¹⁰⁸ In grief, it would be common to continue to be able to experience other emotions, such as humour at the memories of the deceased, thankfulness for the life of the deceased, enjoyment and comfort when surrounded by loved ones. Also, the self-esteem of the bereaved is usually intact, whereas a person experiencing MDE would commonly experience feelings of "worthlessness and self-loathing".¹⁰⁹ If suicidal thoughts are present, grief would see these thoughts as arising from wanting to join the deceased, whereas in MDE, suicidal thoughts would revolve around one's own worthlessness, being undeserving of life, or being unable to cope with the psychological pain of depression.¹¹⁰ Grief is often stimulus-bound and quite fluid in its progression, whereas depression is experienced as more constant and pervasive.¹¹¹

When working with a bereaved person who would be expected to display intense sadness, a clinician would remain aware that the bereavement may not be the only life experience causing distress in the person's life. The bereaved may have a pre-bereavement diagnosis or predisposition to a mood disorder, or depression in particular. The DSM notes that:¹¹²

... when [bereavement and an episode of MDD] do occur together, the depressive symptoms and functional impairment tend to be more severe and

¹⁰⁷ APA *DSM 5* 168.

¹⁰⁸ APA *DSM 5* 161.

¹⁰⁹ APA *DSM 5* 168.

¹¹⁰ APA *DSM 5* 168.

¹¹¹ Sadock and Sadock *Synopsis of Psychiatry* 64.

¹¹² APA *DSM 5* 155.

the prognosis is worse compared with bereavement that is not accompanied by Major Depressive Disorder [and that] bereavement-related depression tends to occur in persons with other vulnerabilities to depressive disorders, and recovery may be facilitated by antidepressant treatment.

4.2 Bereavement in children and separation anxiety disorder

As Separation Anxiety Disorder is most prevalent in children under the age of 12,¹¹³ it is important to consider this in the context of bereavement in children. In children, "grief reactions are coloured by developmental levels and concepts of death and may not resemble adult reactions".¹¹⁴ Bereavement responses are quite varied and manifest in different behaviours that reflect their underlying experience of the bereavement. Misbehaviour, and behaviours such as throwing themselves into activities, may reflect a feeling of abandonment by the loved one and mistrust of others who may abandon them in the future. Feelings of self-blame for the death are also common.¹¹⁵ The determination between normal bereavement responses and more clinically significant or severe *sequelae* would need careful clinical judgment.

A psychiatric condition that may possibly occur in bereaved children is Separation Anxiety Disorder (SAD). This is an excessive fear or anxiety concerning separation from home or attachment figures. This "often develops after life stress, especially a loss", for example the death of a relative. It is distinguished from normal bereavement in that:¹¹⁶

... intense yearning or longing for the deceased, intense sorrow and emotional pain, and preoccupation with the deceased or the circumstances of the death are expected responses occurring in bereavement, whereas fear of separation from other attachment figures is central in separation anxiety disorder.

4.3 Bereavement and posttraumatic stress disorder

Bereavement could lead to the onset of Acute Stress Disorder or Posttraumatic Stress Disorder (PTSD), if the death of the person happened in a way that could be considered a trauma to the bereaved, either by way of experiencing a traumatic incident alongside the deceased, witnessing, or learning about the traumatic incident in which the person died. This would obviously be a very specific set of circumstances. The DSM 5 notes that if the traumatic event precipitating PTSD is an actual or threatened death of

¹¹³ APA DSM 5 192.

¹¹⁴ Sadock and Sadock *Synopsis of Psychiatry* 67.

¹¹⁵ APA DSM 5 155.

¹¹⁶ APA DSM 5 191-194.

a loved one, "the event(s) must have been violent or accidental".¹¹⁷ In violent and unnatural deaths, grief responses are intermingled with anxiety, feelings of victimisation and violation, fear, horror and vulnerability, and a "disintegration of cognitive assumptions ensues"; the grief responses may be more intense and prolonged than for natural deaths.¹¹⁸

4.4 *Complicated bereavement and persistent complex bereavement disorder*

Having considered the possibility of bereavement as a precipitating or perpetuating factor for specific psychiatric injuries, the present authors will now consider bereavement itself as a significant disruptive factor in an individual's psychosocial wellbeing, their social and occupational functioning. This will begin to unpack the idea of the existence of a continuum between ordinary sadness arising from bereavement, and specific psychiatric injuries that can be triggered or exacerbated by bereavement.

Duffy and Wildnote that:¹¹⁹

[W]hilst there has been understandable caution against over-pathologising normal grief responses, there is increasing evidence that prolonged grief is associated with marked functional impairment, has distinct characteristics from bereavement-related depression and anxiety, and has been validated across different cultures, age groups and types of bereavement.

Currently the DSM 5 includes in presentations of "Other Specified Trauma- and Stressor-Related Disorder" a designation of "Persistent Complex Bereavement Disorder", noting that "this disorder is characterised by severe and persistent grief and mourning reactions".¹²⁰ This would be similar to the new disorder, Prolonged Grief Disorder (PGD) that will be included in the 11th edition of the International Classification and Diseases (ICD-11).¹²¹

With regard to classifying Persistent Complex Bereavement Disorder (PCBD) as a separate psychological disorder, the DSM 5 includes it as a Condition for Further Study. This section of the DSM 5 proposes potential criteria for conditions that require further research before being included as a disorder. The proposed criteria are put forward by expert consensus based on existing research, and the proposed criteria cannot be used for

¹¹⁷ APA DSM 5 271, 280.

¹¹⁸ Sadock and Sadock *Synopsis of Psychiatry* 67.

¹¹⁹ Duffy and Wild 2017 *Cognitive Behaviour Therapist* 1-2.

¹²⁰ APA DSM 5 289.

¹²¹ Killikelly and Maercker 2017 *Eur J Psychotrauma* 3-4.

clinical purposes.¹²² Nonetheless, Persistent Complex Bereavement is included as a specifier of an included disorder, namely Other Specified Trauma- and Stressor-Related Disorder¹²³ and the ICD-11 will probably include a similar disorder (PGD). Therefore, the proposed criteria of PCBD are useful in our distinguishing between normal or complicated bereavement responses, and those that could be classified as precipitate or perpetuate a distinct psychiatric injury. The proposed condition for further study in the DSM 5 known as Persistent Complex Bereavement Disorder follows what was called "complicated grief" in the DSM IV-TR.

In distinguishing between PCBD and normal grief, the DSM 5 notes that:¹²⁴

... it is only when severe levels of grief response persist at least 12 months following the death and interfere with the individual's capacity to function that Persistent Complex Bereavement Disorder [would be] diagnosed.

Duration, severity and impairment, therefore, form the basis of a diagnosis of PCBD. The proposed criteria of PCBD cover certain domains that will be elaborated.

4.4.1 Closeness of the relationship

The first proposed diagnostic criterion is that the "individual experienced the death of someone with whom he or she had a close relationship".¹²⁵ It is considered a risk factor if the bereaved had a particularly dependent relationship on the deceased, or if the deceased was a child.¹²⁶

4.4.2 Duration and frequency of severe grief responses

Grief responses such as a "persistent yearning/longing for the deceased", "intense sorrow and emotional pain in response to the death", or "preoccupation with the deceased ... [or]... circumstances of the death" should be experienced:¹²⁷

... on more days than not and to a clinically significant degree and [persist] for at least 12 months after the death in the case of bereaved adults and 6 months for bereaved children.

¹²² APA DSM 5 783.

¹²³ APA DSM 5 289.

¹²⁴ APA DSM 5 792.

¹²⁵ APA DSM 5 789.

¹²⁶ APA DSM 5 791.

¹²⁷ APA DSM 5 789.

In addition, at least six symptoms that indicate either "reactive distress to the death" and/or "social/identity disruption" should also be:¹²⁸

... experienced on more days than not and to a clinically significant degree, and have persisted for at least 12 months after the death in the case of bereaved adults and 6 months for bereaved children.

These potential symptoms are enumerated under the two categories, namely reactive distress to the death and social/identity disruption.

4.4.2.1 Reactive distress to the death

Clinically significant distress as a reaction to the death could manifest in a "marked difficulty accepting the death", "experiencing disbelief or emotional numbness over the loss", having "difficulty with positive reminiscing about the deceased", experiencing "bitterness or anger related to the loss", having "maladaptive appraisals about oneself in relation to the deceased or the death (e.g., self-blame)", and displaying "excessive avoidance of reminders of the loss".¹²⁹

4.4.2.2 Social/identity disruption

Disruption in the social functioning and identity of the bereaved could be manifested in a "desire to die in order to be with the deceased", having "difficulty trusting other individuals since the death", "feeling alone or detached from other individuals since the death, "feeling that life is meaningless or empty without the deceased", or having "the belief that one cannot function without the deceased", experiencing "confusion about one's role in life", or having "a diminished sense of one's identity (e.g., feeling that a part of oneself died with the deceased)", or having "difficulty or reluctance to pursue interests since the loss or to plan for the future (e.g., friendships, activities)".¹³⁰

4.4.3 *Distress and impairment*

As with all psychiatric conditions, the individual's symptoms need to cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning" and the "bereavement reaction [should be] out of proportion to or inconsistent with cultural, religious, or age-appropriate norms".¹³¹ These criteria would become particularly important in the

¹²⁸ APA DSM 5 789-790.

¹²⁹ APA DSM 5 790.

¹³⁰ APA DSM 5 789.

¹³¹ APA DSM 5 790.

clinicians' judgment in distinguishing between normal grief responses and a clinically significant disruption. Exploration of pre-morbid functioning and the cultural and religious context of the bereaved would be important in any diagnosis.

Kaplan and Sadock¹³² suggest that three patterns of complicated grief are notable, namely chronic grief, hypertropic grief and delayed grief. Chronic grief is "often highlighted by bitterness and idealisation of the dead" and is common where the bereaved's relationship with the deceased was extremely close or dependent. Hypertropic grief is observed after sudden or unexpected deaths, bereavement responses are particularly intense, and normal coping or mitigating strategies do not work. Delayed grief is "marked by prolonged denial; anger and guilt may complicate its course".¹³³

4.4.4 Prevalence

The DSM 5 suggests that approximately 2, 4%-4, 8% of bereaved persons would experience PCBD (APA, 2013, 791). The incidence of PCBD as to be included in the ICD-11 is estimated to be between 4, 2% and 9, 8%. Among those bereaved due to a violent death, the prevalence is much higher at between 10% and 15%, and is as high as 14%-74% for those who experienced a disaster.¹³⁴

These proposed statistics of the prevalence of PCBD in the DSM 5 indicate that a small minority of bereaved persons experiences this extraordinary form of grief. This provides an important context for the consideration of the "floodgate" argument which the present authors will now discuss.

5 Debunking the "floodgates" argument

The fear of the "floodgates of liability" being opened in certain situations is not new, but it is generally accepted in South African law that the "flood" ("*oewerlose aanspreeklikheid*") can be stemmed by the correct application of the elements of delict, in particular the elements of wrongfulness and legal causation.

These cases dealt with instances of negligent misrepresentation, but the principles are the same; namely, in order to avert the fear of burgeoning liability, the elements of delict ought to be used correctly.

¹³² Sadock and Sadock *Synopsis of Psychiatry* 65-66.

¹³³ Sadock and Sadock *Synopsis of Psychiatry* 66.

¹³⁴ Killikelly and Maercker 2017 *Eur J Psychotrauma* 3-4.

In *International Shipping Co (Pty) Ltd v Bentley*,¹³⁵ Corbett JA, quoting *Fleming on Torts* states the following:¹³⁶

As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.

In this regard the *Sauls* case, dealing with emotional shock and discussed above, is relevant.¹³⁷ The court emphasised the application of the general principles of delict in reply to the "floodgate" argument raised by the counsel for the defendant:¹³⁸

I can find no general, 'public policy' limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the onus of proof. It is not justifiable to limit the sort of claim now under consideration, as has been offered as one solution, to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc.

The court does not disregard the relationship between the "primary and secondary victims"; this is taken into account when considering "legal policy, reasonableness, fairness and justice". This would fit within the ambit of the test for legal causation as formulated in the *International Shipping* case, namely:¹³⁹

... whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part

The "proximity" factor discussed in 4.4.1, for example, could be taken into account in considering the legal causation question.

In addition to the elements of wrongfulness and legal causation's being used to curtail limitless liability, the element of harm also limits liability in that a plaintiff has to prove damage or harm for a delictual action to ensue. From section 4 above, it is clear that drawing a distinction between "bereavement

¹³⁵ *International Shipping Co (Pty) Ptd v Bentley* 1990 1 SA 680 (A) (hereafter the *International Shipping* case).

¹³⁶ The *International Shipping* case para 67.

¹³⁷ The *Sauls* case.

¹³⁸ The *Sauls* case para 17.

¹³⁹ *International Shipping* case 700E.

or sadness" on the one hand and psychiatric injury on the other is somewhat simplistic. There are conditions that currently do not amount to psychiatric injury under consideration for inclusion in the DSM5, and that will therefore fall within the ambit of harm, even though these conditions may currently not be recognised.

In deciding the issue of liability for damages arising from non-patrimonial loss, avoiding the "floodgates of liability" entails an exercise in going "back to basics", in this case, basics being a correct application of the principles of delict.

However, post 1994 these principles also have to be infused with the values underpinning the *Constitution* and in particular the fundamental rights enshrined in the Bill of Rights. In deciding whether to hold perpetrators liable, the courts have to take into account the constitutional imperative to develop the common law and in thus doing to promote the spirit, purport and objects of the Bill of Rights. Unless and to the extent that a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, a limitation of liability cannot infringe on basic rights such as dignity, equality and the security of the person. This has been illustrated very clearly by the Constitutional Court in a number of cases where the common law principles of the law of delict were developed to ensure liability for perpetrators. In *Carmichele v Minister of Safety and Security*¹⁴⁰ the Constitutional Court per Ackerman and Goldstone JJ noted that the courts *a quo* had erred in not finding that the defendant's omission was wrongful, in that they had applied the pre-constitutional test for wrongfulness, thus overlooking the demands of section 39(2).¹⁴¹ Other cases that expanded the common law principles include *K v Minister of Safety and Security*¹⁴² and *F v Minister of Safety and Security*¹⁴³ (vicarious liability "course and scope requirement") and *Lee v Minister of Correctional Services*¹⁴⁴ (factual causation).

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,¹⁴⁵ dealing with a case of pure economic loss.

¹⁴⁰ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

¹⁴¹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 37.

¹⁴² *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

¹⁴³ *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

¹⁴⁴ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC).

¹⁴⁵ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC).

Khampepe J recognised the fact that the application of the elements of delict could be used in limiting liability:¹⁴⁶

So the element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated. But it should be noted – and this was unfortunately given little attention in argument – that the element of causation (particularly legal causation, which is itself based on policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness.

In *H v Fetal Assessment Centre*,¹⁴⁷ the Constitutional Court had to address the issue of limitless liability when dealing with a so-called wrongful life claim. Previously these claims were not allowed in South African law.¹⁴⁸ The Court per Froneman J, affirming the potential existence of an action for wrongful life, applied the general principles of the law of delict. The element of wrongfulness was used to address the fear of limitless liability.¹⁴⁹ The court, with reference to *Country Cloud*, used the element of wrongfulness to address the problem of limiting liability. At the same time, the court also considered the best interest of the child, in particular Section 28(2) of the Bill of Rights, in deciding whether there had been a breach of a legal duty, which would be indicative of the wrongfulness of the omission in question.¹⁵⁰

6 Conclusion

Expanding the limits of delictual liability invariably gives rise to the fear of opening the floodgates of liability or the "*owerlose aanspreeklikheid*". South African law has a long history of the limits of the law expanding in a very restrained way so as to avoid the opening of the floodgates. The Dutch legislature, likewise, wished to avoid the *Amerikaanse claimcultuur* and initially did not recognise sadness or a sense of bereavement without psychiatric injury as a ground for damages. After a long journey of almost two decades, the *Wet Affectieschade* came into operation in January 2019, making provision for fixed amounts of compensation to a specific list of people who suffer this type of loss. The distinction between *shockschade* and *affectieschade*, therefore, remains. South African law has likewise drawn a clear distinction between ordinary sadness or bereavement and psychiatric injury. It is clear from research, however, that there is no clear

¹⁴⁶ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC) para 25.

¹⁴⁷ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

¹⁴⁸ *Stewart v Botha* 2008 6 SA 310 (SCA); *Friedman v Glicksman* 1996 1 SA 1134 (W).

¹⁴⁹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) paras 67-68.

¹⁵⁰ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 69.

dividing line between mere sadness and psychiatric injury, and that the courts should recognise that there is a continuum of conditions, and decide in each case whether or not the plaintiff has in fact suffered harm.

The diagnostic criteria of various long recognised and well researched psychiatric disorders that could be precipitated, perpetuated or exacerbated by a bereavement would be useful in determining a specific psychiatric injury. However, the enduring desire of the DSM and the ICD of including some continuum of bereavement that is complicated, depending on various circumstances and factors, indicates the very seriousness and disruptive nature of bereavement in a person's life and functioning. This disruption is not always well accommodated by social norms which can place a high and possibly unrealistic demand on bereaved persons' returning to normal social and occupational functioning rapidly. Bereavement is a significant and distinct area of suffering that exists on a continuum and needs to be recognised as a genuine cause of disruption in an individual's social and occupational functioning.

Even in the absence of the safeguards provided by the diagnostic criteria, application of the general principles of delict will avert limitless liability. In particular, the elements of wrongfulness and legal causation could be used effectively in an attempt to curtail limitless liability. The limitation of liability can never take place at the expense of the fundamental rights of the victims. The dignity of the victims of bereavement and emotional shock requires the courts to consider their claims to give effect to the spirit, objects and purport of the Bill of Rights. The development of the common law of delict will continue to expand the parameters of the law of delict, but not without limitation.

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List of Abbreviations

Am J Psychiatry	American Journal of Psychiatry
APA	American Psychiatric Association
Br J Psychiatry	British Journal of Psychiatry
DSM 5	Diagnostic and Statistical Manual of Mental Disorders 5 th ed
Eur J Psychotraum	European Journal of Psychotraumatology
ICD-11	International Classification and Diseases 11 th ed
MDE	Major Depressive Episode
MDD	Major Depressive Disorder
PCBD	Persistent Complex Bereavement Disorder

PGD

Prolonged Grief Disorder

PTSD

Posttraumatic Stress Disorder

SAD

Separation Anxiety Disorder

TPR

Tijdschrift voor Privaatrecht