Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.s: A 440/2011
A 139/2012

Before: The Hon. Mr Justice Griesel
The Hon. Mrs Justice Ndita
The Hon. Mr Justice Binns-Ward

Date of appeal hearing: 29 January 2014
Date of judgment: 13 February 2014

In the matter between:

KI-XIA NG PAN HING	First Appellant
KIN SEHINSON	Second Appellant
STEPHANIE SEHINSON	Third Appellant
JIVAN SHYA NG PAN HING	Fourth Appellant
JEANETTE SEHINSON	Fifth Appellant
MEN HA CHOO FUN YOUNG	Sixth Appellant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT

BINNS-WARD J:

[1] In February 2007, six sisters came to Cape Town from the disparate parts of the world in which they lived for the celebration of their brother's 60th birthday. While here

they were involved in a serious motor vehicle collision, in which all of them sustained injuries. One of them, J.S from Toronto, Canada, died of her injuries six days later in hospital. The surviving sisters subsequently claimed compensation in terms of the Road Accident Fund Act 56 of 1996. The late J.S's spouse also sought compensation, as did the couple's only daughter. The claim of one of the sisters was settled. The other claims gave rise to litigation. The ensuing six actions were tried together before Klopper AJ in two stages during June 2010 and February 2011. It was agreed that the first appellant, who had been driving the vehicle in which the siblings had been travelling, had been equally at fault with the driver of the other vehicle in causing the collision. The matter therefore went to trial only on the issue of quantum, with the Fund accepting liability for 50 per cent of such damages as the first appellant was able to prove, and to the full extent of those which the other appellants could establish.

[2] The actions of J.S's surviving spouse and daughter were dismissed, while those of the four sisters were successful only to a limited degree. All six plaintiffs have come on appeal against the judgment of the trial court. The appeals are with the leave of the court a quo, granted on 26 August 2011.

Condonation

[3] In terms of rule 49(2) of the Uniform Rules, the appellants were required to deliver a notice of appeal within 20 days after the date upon which leave to appeal was granted, or within such longer period as might upon good cause shown be permitted. They failed to comply with this requirement. They have sought condonation of their non-compliance. The application for condonation was filed only in December 2013, at the same time as the appellants' heads of argument were delivered. The explanation offered for the non-compliance was that a notice of appeal would have been a supererogation, as the judge a quo had stated in his judgment granting leave to appeal that he was doing so 'on the grounds set out in their Notice of Appeal dated 1 August 2011'. (The so-called 'Notice of Appeal' thus referred to was in fact the appellants' notice of application for leave to appeal.)

[4] The explanation is unacceptable. The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have 'erred and misdirected himself'. As the respondent's counsel justifiably observed, a number of those grounds

were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals.[1] In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally. The effect of the notice of application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to *any* of them'.[2] [3]

[5] The appellants, however, did not redeem their non-compliance by belatedly delivering a notice of appeal, or applying for leave to do so out of time. That was regrettable, to say the least. Only two days before the appeals were due to be heard did the appellants tender, and then only on a contingent basis, a purported notice of appeal which merely replicated all the grounds set out in their application for leave to appeal, notwithstanding that it was evident by then that many of those grounds had been abandoned and, in fact, notice had been given that the fourth and sixth appellants' appeals were not being proceeded with at all. The very belatedly proffered notice was obviously entirely unacceptable. In effect, we were thus called upon to hear the appeal on the grounds apparent from the heads of argument delivered by their counsel. That is indeed the basis upon which appeals to the Supreme Court of Appeal are heard, there being no provision in the rules applicable when an appeal lies to that court for the

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[1] In *Himanchal v Moharom* 1947 (4) SA 778 (N) at 780 I, it was observed that a ground of appeal is bad if it specifies the finding of fact or rulings of law so vaguely as to be of no value either to the court or the respondent.

[2] Aldisert, *Opinion Writing*, (1990) at 89, commended to Australian counsel by McHugh J in *Tame v New South Wales* [2002] HCA 35, at para 70.

[3] A notice of appeal is fatally defective if it does not set out the grounds on which the appellant is going to rely, but is 'so widely expressed that it leaves the Appellant(s) free to canvas every finding of fact and every ruling of law made by the court a quo'; see *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385G-H.

delivery of a notice setting out the grounds thereof.[4] In *Mpondo v Road Accident Fund* [2011] ZAECGHC 24 (9 June 2011),[5] Dambuza J (Tshiki and Eksteen JJ concurring) held that matters raised only in heads of argument could not be entertained on appeal to a full court of the High Court. In that case, however, a notice of appeal had been delivered and the learned judge's remark was made in the context of an issue having been raised in the heads of argument that had not been adumbrated in the notice of appeal. In deciding whether the appeals should be entertained in the current rather different situation I consider the purpose of a notice of appeal must be kept in view. It is to define the ambit of the appeal for the benefit of the appellate court and the respondent. The court needs to know the issues arising out of the judgment of the court a quo that it is called upon to determine, and the respondent needs to be informed of what it has to address in argument. The respondent, which opposed the application for condonation, questioned whether, in the absence of a notice of appeal, there was in point of fact an appeal before us. It did not allege, however, that it was not able to deal with the appeals; indeed its affidavit opposing the condonation application was delivered only some weeks after it had delivered its heads of argument in the appeals. In the absence of any complaint from the respondent that it is prejudiced in being able to argue the appeals, I am inclined to hold that the issues that the court is called on to deal with are clear enough from the appellants' heads of argument. I am thus willing, albeit with some diffidence, to entertain the appeals, treating the heads of argument in lieu of a notice of appeal, as counsel on both sides acknowledged would be appropriate were we inclined to condone the absence of a proper notice of appeal.

[6] Condonation was also sought for the late filing of the record on appeal. In this connection the explanations given were also not entirely satisfactory – certainly not with regard to the length of the delay that was involved. However, having regard to the overall conspectus of relevant considerations, I am satisfied that it would be appropriate in the interests of justice to grant the application, which includes condoning the late filing of the appellants' heads of argument.

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[4] In the full court's judgment in *Kloof Investment 2004 CC v Gary Isaacs t/a Build-O-Rama Builders Merchants* WCC case no. A900/10 (5 August 2011), it was observed (at para 16) that it was incongruous that a more onerous procedure should apply to appeals to the full court than to the SCA. It was indicated (at note 3) that the incongruity would be drawn to the attention of the Rules Board so that the Board might consider harmonising the applicable procedures. This was duly done, thus far to no effect.

[5] At para. 19,

[7] Obviously, the costs of the application for condonation must be borne by the appellants.

[8] Turning then to address the appeals on their merits.

The first appellant (Ki-Xia Ng Pan Hing, known as Cecile)

[9] Despite it having been alleged in her amended particulars of claim that the first appellant had sustained 'a ruptured right kidney' and 'a fracture of the left pubic ramus', the evidence established that the only physical injury actually suffered by her was some bruising to her chest ('a chest wall contusion injury'), occasioned, no doubt, by the restraining forces exerted by her seatbelt during the collision.

[10] The heads of damages claimed by the first appellant at trial were comprised as follows: compensation for pain, suffering, disability and the loss of amenities of life (R200 000); loss of rental income (Canadian $27 300 - quantified in the particulars of claim as R150 000); and loss of income due to 'delayed career or promotional prospects' (Canadian $21 500). The claims for loss of income were predicated on the argument that the appellant had sustained a psychiatric injury, which adversely affected her opportunity for promotion at work and rendered her so demotivated that she could not arrange for the rental of certain apartments that she held as investments. I say that the claim was predicated on the *argument* that the first appellant had sustained a psychiatric injury because no *allegation* to that effect is to be found in the particulars of claim. (It bears mention in that respect that on more than one occasion during the trial the respondent's counsel complained about the discrepancies between the pleadings and the evidence being tendered. The trial judge also deprecated the shoddy drafting of the appellants' pleadings more than once in the course of his judgment.) The only basis on which the claims were cognisable for the purposes of judgment at first instance and thus also on appeal is because both parties proceeded at trial as if the claims had been properly pleaded; cf. *Shill v Milner* 1937 AD 101, at 105.[6]

[11] The trial court held that the evidence did not establish that the first appellant had sustained an identifiable psychiatric injury and dismissed her loss of income related

[6] It is thus unnecessary to deal with an application to amend the first appellant's particulars of claim that was moved in terms of supplementary heads of argument submitted after the hearing of the appeals.

claims. It awarded her R20 000 in general damages, being in respect of the effects of her aforementioned very limited physical injury. (Having regard to the agreed 50/50 apportionment, this in effect valued her general damages at R40 000.)

[12] According to the heads of argument, the first appellant appeals on the grounds that the general damages awarded to her were too low and that the trial court erred in dismissing her claim for loss of rental income. The first appellant did not pursue on appeal her claim for loss of income predicated on adversely affected career prospects.

[13] It is clear that the question whether the first appellant succeeded in establishing at the trial that she had sustained a psychiatric injury is central to the determination of her appeal. As alleged psychiatric injury was also the foundation of some of the claims of the other appellants it is convenient at this stage to rehearse the applicable principles generally.

[14] The recovery of compensation in delictual damages for 'nervous shock' or psychiatric injury has proven a contentious subject internationally. Because of the crucial role of policy considerations, especially due to concerns about potentially limitless liability, the development of the law in this area has been treated in some judgments as analogous, to the development of the law of delict in respect of the recovery of damages for pure economic loss. See in this regard, for example, the remarks of Lord Steyn in *White and Others v. Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1 (HL), at 31-2:

> Courts accept that a recognizable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no qualitative difference between physical harm and psychiatric harm. And psychiatric harm may be far more debilitating than physical harm.
>
> It would, however, be an altogether different proposition to say that no distinction is made or ought to be made between principles governing the recovery of damages in tort for physical injury and psychiatric harm. The contours of tort law are profoundly affected by distinctions between different kinds of damage or harm: see *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605, at 618E, per Lord Bridge of Harwich. The analogy of the relatively liberal approach to recovery of compensation for physical damage and the more restrictive approach to the recovery for economic loss springs to mind. Policy considerations encapsulated by Justice Cardozo's spectre of liability for economic loss "in an indeterminate amount for an indeterminate time to an indeterminate class" played a role in the emergence of a judicial scepticism since *Murphy v. Brentwood District Council* [1991] AC 398 about an overarching principle in respect of the recovery of economic loss: see Steele, *Scepticism and the Law of Negligence*, [1993] C.L.J. 437. The differences between the two kinds of damage have led to the adoption of incremental methods in respect of the boundaries of liability for economic loss.
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> Similarly, in regard to the distinction between physical injury and psychiatric harm it is clear that there are policy considerations are at work. That can be illustrated by reference to the Criminal Injuries Compensation Scheme. Section 109(2) of the Criminal Justice Act 1988 contains this restrictive rule:

> *"Harm to a person's mental condition is only a criminal injury if it is attributable - (a) to his having been put in fear of immediate physical injury to himself or another; or (b) to his being present when another sustained a criminal injury other than harm to his mental condition."*
>
> The reason for the restriction is that Parliament was fearful that a more liberal rule would impose an intolerable burden on the public purse. Parliament has also decided that the only persons who can claim bereavement damages are parents and spouses: section 1(A)(7) of the Fatal Accidents Act 1976. The spectre of a wide a class of claimants in respect of bereavement led to an arbitrary but not necessarily irrational rule.

[15] In English jurisprudence there has been a notable tendency recently to rein in the range of circumstances in which damages for psychiatric injury may be recovered, and to leave it to Parliament to determine by statutory provision on whatever relaxations to this restrictive approach might be thought appropriate. This has resulted in the formulation by the courts there, in particular the House of Lords, of confessedly arbitrary special criteria such as that mere bystanders to a traumatic event are not entitled to recover compensation for psychiatric injury even if its occurrence was eminently foreseeable; this much is illustrated in the historical overview provided in Lord Steyn's 'thus far and no further' opinion in *White and Others v. Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1 (HL).

[16] The decision in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL) established that a person who suffers reasonably foreseeable psychiatric illness as a result of another person's death or injury cannot recover damages unless he can satisfy three requirements, viz: (i) that he had a close tie of love and affection with the person killed, injured or imperilled; (ii) that he was close to the incident in time and space; (iii) that he directly perceived the incident rather than, for example, hearing about it from a third person.[7] In *Page v Smith* [1995] 2 All ER 736 (HL) a distinction was drawn between primary and secondary victims in the sense that a person within the range of foreseeable physical injury as a consequence of the tortious act ('primary victims') could recover compensation for psychiatric injury, whereas persons outside that range ('secondary victims') could recover only if the requirements established in *Alcock* were satisfied. The peculiar grounds of distinction drawn by the English courts were clearly directed at attempting to define special limits to the ability to claim compensation for psychiatric injury. The result, as Lord Steyn observed in

[7] Per Lord Steyn in *White*'s case supra, at 35.

White supra, at 38, is that 'the [English] law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify'.

[17] The Australian High Court, on the other hand, has eschewed these formulations and adopted an approach which would appear to draw no distinction between the compensability of negligently caused psychiatric injury and physical injury,[8] with the controlling criterion to avoid potentially limitless liability by the tortfeasor being the determination of whether on the peculiar facts of a given case there was a duty of care on the tortfeasor to avoid causing the harm suffered; see *Tame v New South Wales* [2002] HCA 35, especially at para 183.[9] Considerations of reasonable foreseeability, causation and remoteness of damage are weighed in the determination of the existence of a duty of care in a given case. This suggests an exercise closely corresponding to that in which our courts engage in making determinations under the rubrics of wrongfulness and 'legal causation'. The trend of relevant legal development in Australia has been similar to that in our own law.

[18] The number of reported cases in point in South African jurisprudence is very small. The effect of the judgment in *Bester v Commercial Union Versekeringsmaatskappy van S.A. Bpk* 1973 (1) SA 769 (A) was to treat psychiatric injury (provided it conformed to an identifiable psychiatric condition – *Afr.* 'herkenbare psigiese letsel'[10]) as legally indistinguishable from any other form of bodily injury, its organic basis lying in the effect of the wrongdoer's conduct on the claimant's nervous or neurological system. That approach was reaffirmed in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA); [1998] 4 All SA 403. In *Bester*, the Appellate Division pointed out that certain earlier judgments[11] upon which the respondent insurance company had predicated its argument that our law did not recognise a claim for 'nervous shock' where the effect was not associated with, or accompanied by, a physical injury in the ordinary sense, had in point of fact been adversely decided against the claimants on the

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[8] *Sed contra* the judgment of Callinan J at para 334.

[9] The principal judgment given in *Tame* (per Gummow and Kirby JJ) referred approvingly to the Supreme Court of Appeal's judgment in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) with regard to the contextual inaccuracy of the term 'sudden shock' and the rejection of the requirement of direct perception by the claimant of the event giving rise to the subsequent psychiatric illness.

[10] Or 'a recognised and detectable psychiatric injury', as it was put in *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA), at para 2.

[11] *Waring and Gillow Ltd v Sherborne* 1904 TS 340, *Sueltz v Bolttler* 1914 EDL 176 and *Mulder v South British Insurance Company Limited* 1957 (2) SA 444 (W).

grounds of remoteness or lack of foreseeability, not the absence of a remedy in delict. The Appeal Court held that there was no reason in our law to deny a claim for delictual damages sustained as a result of psychiatric injury, provided that such injury would have been foreseeable by a reasonable person in the position of the wrongdoer. The respondent's argument in *Bester* that psychiatric injury had to be accompanied by physical injury to be compensable was rejected as illogical and unfounded in legal principle.

[19] The notion that a psychiatric injury is compensable irrespective of whether the wrongful act physically wounded the victim logically entails accepting that the injury may be sustained by someone who is not present at the scene where the wrongful act is committed, for a direct physical connection is not a requirement. That much was confirmed in *Barnard*. The judgment in *Barnard* held that a negligent driver should foresee that in consequence of the serious physical injury or death of any person in a resultant collision third parties closely connected by love or affection to the deceased or injured person might suffer psychiatric injury upon being informed of the event. The plaintiff in *Barnard* was a mother who, it was accepted for the purpose of the judgment, had sustained psychiatric injury upon being informed telephonically, a few hours after the event, of the death of her young son in a motor vehicle collision.

[20] *Barnard* also confirmed, however, that liability does not follow merely because the damage is foreseeable. Policy considerations will determine whether in a particular case a sufficient causative connection (so-called 'legal causation') between the wrong and the consequent psychiatric injury should be recognised to justify fixing the wrongdoer with liability. In that regard Van Heerden DCJ endorsed the concern expressed by Navsa J in *Clinton-Parker v Administrateur, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) at 63B-D that

> *'Accident cases present particular policy problems. The floodgates will open if claims for nervous shock are not contained within manageable limits. An infinite number of people could claim for nervous shock upon viewing an accident and its consequences. So too with relatives or friends to whom an accident and its consequences are communicated. The number of deaths and severe physical injuries that occur in modern life due to motor vehicle and other accidents is great. The Courts may well, in adopting too liberal an approach to these situations and allowing bystanders and relatives to the umpteenth degree to claim damages, cripple economic activity*',

but considered that the fear of limitless liability was exaggerated, pointing to the minimal number of claims for psychiatric injury reported since *Bester*.[12] It was, however, emphasised in *Barnard* that the question whether particular conduct should be recognised as legally causative of a consequence falls to be decided on a case by case basis. In deciding that the allegations in the stated case in *Barnard* made out a cognisable claim, the Supreme Court of Appeal stressed the characteristics of the closeness of the mother-young son relationship and the comparatively short period of just a few hours that had intervened between the child's death and the mother being informed of it. These considerations - which are undeniably reflective of some of the requirements in *Alcock* supra – but, importantly, were not stated as essential criteria for the compensability of psychiatric injury in our law - bore on 'legal causation', a requirement for the attachment of delictual liability of which I shall treat later in this judgment. *Barnard* was distinguishable on its facts in material respects from the matters currently before us.

[21] It is plain from the judgments in *Bester* and *Barnard* that whether a psychiatric injury has been sustained by a claimant is a question that falls to be answered through the expert evidence of psychiatrists. That seems also to be the position in England[13] and Australia.[14] The appellants did not adduce *viva voce* evidence by a psychiatrist at the trial, but the expert summary reports of Dr Chris George, who is a psychiatrist, were put in on the basis that, assuming the underpinning factual assumptions were established in evidence, the expert opinion content thereof was admitted by the respondent.

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[12] Van Heerden DCJ's perspective falls to be contrasted with the following observations of Lord Steyn in *White and Others v. Chief Constable of South Yorkshire and Others* supra, a judgment delivered in England only three months after that in *Barnard* was handed down: '*In 1982 in McLoughlin* [*McLoughlin v O'Brian* [1983] 1 AC 410, [1982] 2 All ER 298 (HL)] *the House acted on the reassuring picture that the ". . . scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of the flood of litigation may be exaggerated . . .": at 421H, per Lord Wilberforce. This assumption has been falsified by the growth of claims for psychiatric damage in the last ten years. In Fear for the Future: Liability for Infliction of Psychiatric Disorder, essay in Torts in the Nineties (1997) ed. Nicholas J Mullany, the editor has attested to the "growing appreciation that the scope for psychiatric suits is much wider than traditionally perceived" and he listed the expansion into claims for workplace stress; suits by members of the armed services in respect of mental suffering; claims for psychiatric damage against medical practitioners and health authorities; and so forth. In addition the same author stated that there has in recent years been a steady growth in Australia in the more common place psychiatric injury proceedings based on the death, injury or imperilment of loved ones or fear of one's own safety: at 112. Moreover, nowadays it would be quite unrealistic to describe awards for psychiatric damage as modest.*'

[13] See, for example, *White* supra, at 33.

[14] See *Tame* supra, at para 194.

[22] According to his report, Dr George examined the first appellant at Cape Town on 21 July 2009 for the purpose of 'psychiatric evaluation and report'. With regard to 'Mental State Examination', the report records that '[the first appellant] *was cooperative and friendly during the consultation, she was able to give a clear and lucid account of herself and the accident. There was no evidence of cognitive or memory impairment, or depressed mood. However, when she spoke about the accident and her late sister, Jackie, she became sad and tearful and there was a recrudescence of unresolved grief.*' Under the sub-heading 'Conclusion', the report stated '[the first appellant] *has symptoms of chronic posttraumatic stress disorder which manifest when she is driving, she is more cautious and somewhat anxious in situations on the road which evoke memories of her accident, but her ability to drive or use her motor vehicle is not impaired in any way. Cecile has symptoms of unresolved grief and loss for her late sister, Jackie.*' Dr George recommended a course of behavioural psychotherapy to be prescribed by a clinical psychologist.

[23] I do not think that the trial judge can be faulted for deciding that the content of Dr George's report did not establish that the first appellant had suffered an identified psychiatric injury. That the judge was justified in holding that manifesting some symptoms of posttraumatic stress syndrome did not equate to a diagnosis that the appellant was suffering from the disorder itself was confirmed in the evidence of Ms Elspeth Burke, a clinical psychologist who testified at the trial in support of the appellants' claims. Quite apart from anything else, nothing in Dr George's report would go to explain why the appellant could not arrange the rental of her apartments. The symptoms of posttraumatic stress identified in the reports of both Dr George and Ms Burke manifested only in anxiety about driving according to his report.

[24] Grief and sorrow over the death of anyone held in deep affection is a natural phenomenon. The closer the relationship the greater the hurt that falls to be resolved in the grieving process and the longer and more disabling the effect of the process is going to be. That much is a matter of common human experience, which expert evidence is not required to establish. Damages are not recoverable in delict for normal grief and sorrow following a bereavement; see *Barnard* supra, at 217B. The position is the same in England and Australia.

[25] In *White* supra, at 33, Lord Steyn referred to two groups of persons with bereavement related 'mental suffering':

> First, there are those who suffered from extreme grief. This category may include cases where the condition of the sufferer is debilitating. Secondly, there are those whose suffering amounts to a recognisable psychiatric illness. Diagnosing a case as falling within the first or second category is often difficult. The symptoms can be substantially similar and equally severe. The difference is a matter of aetiology: see the explanation in Munkman *Damages for Personal Injuries and Death* (10th edn, 1996) p 118, note 6. Yet the law denies redress in the former case: see *Hinz v Berry* [1970] 1 All ER 1074 at 1075, [1970] 2 QB 40 at 42 but compare the observations of Thorpe LJ in *Vernon v Bosley* (No 1) [1997] 1 All ER 577 at 610, that grief constituting pathological grief disorder is a recognisable psychiatric illness and is recoverable. Only recognisable psychiatric harm ranks for consideration. Where the line is to be drawn is a matter for expert psychiatric evidence. This distinction serves to demonstrate how the law cannot compensate for all emotional suffering even if it is acute and truly debilitating.

Lord Steyn also remarked (at 32-3) on the '*the complexity of drawing the line between acute grief and psychiatric harm*', particularly in the context of the reality that '*the classification of emotional injury is often controversial*'.

[26] Windeyer J expressed the position thus in the Australian High Court in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, at 394:

> Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had.

[27] Acknowledging that there is a distinction between deep and disabling grief and psychiatric injury highlights the importance of cogent expert evidence being available to enable the courts to draw the distinction rationally. It was with the importance of the role of expert psychiatric opinion in mind that Gummow and Kirby JJ observed in *Tame* supra, at para 193, that concerns about limitless liability might be addressed '*if full force is given to the distinction between emotional distress and a recognisable psychiatric illness*'.

[28] The reports of both Dr George and Ms Burke identified that the first appellant's feelings of grief and loss had not been resolved. Those reports were prepared some two and a half years after the death of the first appellant's sister. Neither of the reports identified the first appellant's symptoms of unresolved grief as constituting an identified psychiatric injury or disorder. In her oral evidence, however, Ms Burke sought to aver that the first appellant's symptoms of unresolved grief referred to in both her and Dr George's reports constituted what she then, for the first time, referred to as 'complicated bereavement', a disorder apparently identified in the Diagnostic and Statistical Manual of Mental Disorders ('DSM IV'). She went on to say that the '*gold*

standard for treating a depressive disorder or an unresolved grief is psychotherapy, with an adjunct of – with antidepressants or medication'. Notably, however, there was no reference to a need for the first appellant to be treated with an adjunct of medication in either Ms Burke's medico-legal report, or that of Dr George.

[29] Under cross-examination, Ms Burke testified, with reference to the method of diagnosis in terms of the DSM IV, that '(w)*hen you diagnose somebody on* [?in] *psychiatric terms, you diagnose them on five axes and the V- Code, which would in this case be complicated bereavement, would be on axis 1, which would then entitle it to a - being a focus of clinical attention*'. The opacity of that evidence was only mildly ameliorated by the context in which it was given, which appears on the record as follows:

> And for a clinician or physician or therapist to make a diagnosis like post-traumatic stress disorder one would have to satisfy certain criteria? – Right.
>
> Of which there are about six? – At least.
>
> And the significance of that is that if you are diagnosed with a condition like post-traumatic stress disorder, then you have a psychological illness? – Yes. You have a disorder.
>
> As opposed to the DSM IV's treatment of grief and bereavement, which is different? – Yes, They're different diagnoses.
>
> But, more so, that they are clumped, grief and bereavement under a V- Code. Isn't that correct? – Quite right.
>
> Please explain to the Court what a V- Code is? – A V- Code is a diagnosis that you give, which is the focus of clinical attention. The physician's focus, or the clinician's focus of clinical attention.
>
> But which does not necessarily equate to a mental illness. Isn't that correct? – Does not necessarily, but it is - it is not necessary to a mental illness; it's something that is monitored….(intervention)
>
> A focus of clinical attention? – A focus of – and it is diagnosed on the axes.

Unfortunately, the respondent's counsel's endeavour to clarify the issues by further questioning was interrupted by an objection from the first appellant's counsel, who asserted that the questioning was inconsistent with the respondent's admission of the content of the reports of Ms Burke and Dr George. In consequence of the ensuing prolonged and inconclusive debate, during which the trial judge expressed himself to be unsure of the relevance of the line of enquiry, the issue was left up in the air. The result is that it is not clear on the record whether the condition of 'complicated bereavement'

constitutes an identified psychological injury, or merely a criterion by which the existence of an identified disorder, such as a major depressive disorder, can be determined. I do not think that a reference to the condition in Ms Burke's evidence in chief as 'pathological' or 'pathological grief' amounted, in the absence of any reasoning of the implication of any of the terms - especially as their employment had not been adumbrated in her rule 36(9)(b) summary, to enough in the circumstances to redress the deficiency. The *dicta* of the Australian High Court in *Tame* supra, at para 194, resonate with our own jurisprudence in *Bester* and *Barnard* in this connection:

> Properly understood, the requirement to establish a recognisable psychiatric illness reduces the scope for indeterminate liability or increased litigation. It restricts recovery to those disorders which are capable of objective determination. To permit recovery for recognisable psychiatric illnesses, but not for other forms of emotional disturbance, is to posit a distinction grounded in principle rather than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception. Doubts as to adequacy of proof (which are particularly acute in jurisdictions where civil juries are retained) are to be answered not by the denial of a remedy in all cases of mental harm because some claims may be false, but by the insistence of appellate courts upon the observance at trial of principles and rules which control adjudication of disputed issues.

This approach entails that in claims in which the occurrence of a psychiatric injury is in dispute the psychiatric evidence adduced to support the proposition must be clear and cogently reasoned, and it should be preceded by summaries that properly fulfil the requirements of Uniform Rule 36(9)(b). For the reasons given, the expert evidence tendered in the appellant's case did not measure up to the indicated principles and rules.

[30] I thus conclude that no basis has been made out to upset the trial court's finding that it had not been proved that the first appellant had sustained a psychiatric injury. There was in any event a body of anecdotal evidence to which the court could properly have had regard to find that even if the first appellant had sustained a psychiatric injury, its effects were not such as to prevent her from renting out her apartments. The appellant had resumed her work and leisure activities. There was no suggestion that she was not coping at work. She had in fact engaged an agent to let the apartments, but, for reasons that were not properly explained, found the arrangement unsatisfactory. Moreover, Ms Burke opined that the effects of unresolved grief or complicated bereavement manifested 'in waves' between periods of normalcy. If that were so, it remained unexplained why the first appellant could not have attended to the letting of the apartments during the periods of normalcy.

[31] In view of the findings in the preceding paragraph it is not necessary, in regard to the first appellant's claim for lost rental income, to consider and determine whether the claim was sustainable having regard to considerations such as foreseeability and remoteness.

[32] The first appellant's physical injuries were superficial. It is thus not surprising that we were not referred to any reported cases concerning quantification of damages that were closely in point. The quantification of an award of general damages entails an exercise of judicial discretion in the strict or narrow sense. An appellate court will not interfere unless an appellant is able to demonstrate a vitiating misdirection in the exercise of that discretion by the trial court.[15] In my judgment the first appellant has not shown any relevant misdirection by the trial court. If anything, the award erred on the side of generosity, but, in the absence of a cross-appeal, no more need be said.

[33] The appeal by the first appellant will therefore be dismissed.

The second appellant (Kin Sehinson)

[34] The second appellant, who was born in [.....], is the surviving spouse of the late J.S. At the time of the collision he was at home in Canada. On receiving the news that his wife had been injured and was unconscious in hospital, he and his daughter, Stephanie (the third appellant), flew to Cape Town and spent a few days at the bedside before Mrs J.S passed away. The second appellant was employed at the time in a computer systems related position as 'assistant administrator' by the well-known international company, Nortel. As is also well-known, Nortel ran into financial difficulties which resulted in the company filing for bankruptcy protection in January 2009. Subsequent thereto, in May 2009, the second appellant was retrenched. He did not receive any retrenchment or pension payment at the time. Although the trial judge raised in passing with one of the industrial psychologists who gave evidence the

[15] The position was, with respect, well put by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at 617: '*In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency*'. Cf. also *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA) ([2006] 1 All SA 468) at para 22.

inherent probability that the appellant must nevertheless have enjoyed a claim against a pension fund (as a matter of law, he probably also enjoyed a claim for retrenchment pay against the company under administration), the issue was not explored further. The second appellant had failed - despite evidence tendered in connection with one of the other appellant's claims that working age limits and ageism were not issues in Canada - to find alternative employment. In terms of his amended particulars of claim, the second appellant claimed compensation in the sum of R992 019,89, made up as to R290 019,89 in respect of medical and funeral expenses for his late wife and the balance, in the South African currency equivalent of Canadian $140 000, in respect of loss of support.

[35] The second appellant did not testify at the trial and the only *viva voce* evidence adduced on the merits of his claim was that of industrial psychologist, Mr Crous.

[36] The trial judge did not deal with the medical and funeral expenses claim in the judgment. He dismissed the claim for loss of support. The claim was dismissed because the judge found that the appellant had not been financially dependent on his wife at the time of her death and that any loss occasioned by his subsequent retrenchment more than two years afterwards was too remote. The appeal is against the dismissal of the loss of support claim.

[37] There was no evidence that the appellant had been dependent upon his wife for support at the time of her death. Indeed, the evidence was that the appellant's annual income from employment exceeded that of his wife by about Canadian $39 000, being C$99 000 *vis à vis* C$60 000. The argument advanced on appeal that a situation of mutual financial support might be inferred by applying the approach often used in child maintenance determinations of allocating the total income of the parents as to two parts per parent and one part per child finds no support in principle. The formulaic approach referred to by counsel is applied to give a rough indication of how an acknowledged maintenance obligation should be quantified. It has nothing to do with the determination of the existence of a duty of support. Whether there was a need by one person for financial support and a concomitant duty on another to provide it in a given case depends on the facts, notably whether there existed a relationship between the claimant and the deceased which would give rise in law to a duty of support and whether, in the context of any such duty, there was a need at the relevant time for support to be provided (cf. Neethling-Potgieter-Visser *Law of Delict* 6ed at 279 s.v.

'*Requirements for a claim of loss of support*'). As noted, there was no evidence that the appellant was reliant on the financial support of his late wife at the date of her death, or that it was reasonably anticipated that he would become so.

[38] It was argued on behalf of the second appellant in the heads of argument, however, that 'the determination of damages arises and/or is calculable up to and including when that claim is prosecuted' and that 'the deceased owed the second appellant a legal duty of support, and that her contribution to the joint household would have become discernable and calculable once the second appellant had become retrenched'. The argument appeared to suggest that if there were a contingent duty of support in existence at the date of death, a claim might competently be advanced. In their supplementary heads of argument, filed the day before the appeal was heard, the appellants' counsel invoked *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 (3) SA 577 (A), at 612B-C and 614G-615C and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839 B-C in support of this argument to contend that the court might have regard to events between the date of the delict and the trial to fix liability. That argument misconstrued the effect of the passages in the judgments relied upon. Those judgments did not go to considerations affecting the determination of liability, but held in relevant part that it was appropriate in determining the quantum of compensation for loss already incurred to have regard to events that had occurred between the date of the delict and the date of the trial.

[39] The respondent argued in its heads of argument simply that the appellant's retrenchment was irrelevant in the context of there having been no provision of, or duty to support by the deceased at the time of her death. It is, however, established that a claim in damages may lie in delict for prospective loss of support. The question arose in *Jacobs v Cape Town Municipality* 1935 CPD 474. In dealing with a submission that it was not enough for a plaintiff to establish (i) a relationship with the deceased which would give rise in law to a duty of support and (ii) a need to receive such support, but that it also had to be proved (iii) that at the time of death the deceased was actually providing such support, Sutton J observed:

> Mr. *Thompson* argued that it is not enough to prove these two facts, that it must also be proved that plaintiff was actually in receipt of maintenance at the time of the death of his son. He says that the action under the *Lex Aquilia* is dependent on *damnum*, that is patrimonial loss which must actually exist at the time of the death of the deceased. Patrimonial loss, however, includes

> prospective gains, see *Union Government v Warnecke* [1911 AD 657] and *Young v Hutton* 1918 WLD 90, and the plaintiff is entitled to recover for loss he has suffered owing to the death of his son. He has suffered patrimonial loss in being deprived of the support which would have accrued to him had his son continued to live. The plaintiff had a reasonable expectation of receiving benefit from the continuance of his son's life. In my opinion plaintiff is entitled to recover from defendant the prospective loss he has suffered owing to the death of his son, provided such loss is not too remote and conjectural. See *Bertram v Central South African Railways* 1905 TH 234, and *Taff Vale Railway Co. v Jenkins* 1913 AC 1.

[40] *Bertram v Central South African Railways* was a case in which a father claimed monetary compensation for alleged prospective loss consequent upon the deprivation of services that he alleged he might expect his son (aged nine when he was killed in a railway accident) to have provided in the future. Bristowe J appears to have implicitly acknowledged that there was no difficulty with the claim in principle, but rejected it on the basis that it was too conjectural, saying (at p. 237):

> It is suggested that there is a prospective loss, because under conceivable circumstances the boy might have been called upon to support his father. This seems to me to be far too conjectural to be made a ground of damages. The plaintiff is, comparatively speaking, a young man, and there is nothing to suggest that in the ordinary course of events he would ever be thrown upon his son for support. It might of course so happen; but if I were asked my opinion of the probabilities of the case I should say that the probabilities were the other way. In my opinion therefore this head of damages also fails.

[41] As the cases just referred to illustrate, the crucial question in a case like the second appellant's is really one of causation, more particularly 'legal causation'. Legal causation as a requirement serves as a moderating tool to regulate a defendant's liability so as to keep it in within bounds which legal policy would consider reasonable. Corbett CJ explained the nature and role of legal causation in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); [1990] 1 All SA 498 at 700E-701G (SALR) as follows:

> As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz 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. This is sometimes called "legal causation". (See generally *Minister of Police v*

Skosana 1977 (1) SA 31 (A), at 34 E – 35 A, 43 E – 44 B; *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A), at 1138 H - 1139C; *S v Daniëls en 'n Ander* 1983 (3) SA 275 (A), at 331 B – 332 A; *Siman & Co* (*Pty*) *Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914 F – 915 H; *Mokgethi en Andere v Die Staat*, a recent and hitherto unreported judgment of this Court, pp 18 - 24.) Fleming, *The Law of Torts*, 7th ed at 173 sums up this second enquiry as follows:

> "The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. 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 Mokgethi's case, *supra*, Van Heerden JA referred to the various criteria stated in judicial decisions and legal literature for the determination of legal causation, such as the absence of a *novus actus interveniens*, proximate cause, direct cause, foreseeability and sufficient causation ("adekwate veroorsaking"). He concluded, however, as follows:

> "Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie."[16]

It must further be borne in mind that the delictual wrong of negligent misstatement is relatively novel in our law and that in the case which in effect brought it into the world, *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), Rumpff CJ emphasized, with reference to the fear of the so-called "limitless liability", that this new cause of action could be kept within reasonable bounds by giving proper attention to, *inter alia* the problem of causation (see p 833 B).[17]

As observed in Joubert et al (ed) *The Law of South Africa* 2ed. vol 8(1) at para 132, '*In essence, therefore, the question of legal causation is not a logical concept concerned with causation but a moral reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant*'.

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[16] 'As far as the respective criteria are concerned, it also does not appear to me that they are much more precise as a standard (the supple standard) according to which it is determined, by reference to policy considerations, whether a sufficiently close connection exists between cause and effect. By that I do not suggest that one or even more of the criteria cannot usefully be applied subsidiarily in the application of the supple standard on a particular set of facts, but only that not all of the criteria can apply in every kind of factual context, or be used in every case as a more concrete basis for determining the limits of legal liability' (my translation).

[17] The learned Chief Justice's exposition is so well-known that ordinarily it would not have been called for to set it out *in extenso*. I have quoted it in full only because I am mindful that this judgment will be read by the litigants who are outside this country and probably will not have their South African legal advisors close at hand to explain the arcane concept of legal causation.

[42] In the current case the claim for the need for the support the appellant alleges he would have received from his wife but for her death in the collision arose, as mentioned, more than two years after the collision itself. Moreover, it arose in the context of an intervening event, which was entirely unconnected to any wrongdoing by the insured driver. The anecdotal evidence suggests that the appellant's inability to obtain replacement employment was due to the fact that his retrenchment coincided with a slump in the Canadian economy.

[43] The elements of a loss of support claim were identified by Corbett JA in *Evins v Shield* supra, at 839B, as '(a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support'. The critical date for the accrual of the claim is the date of the deceased's death and the determination of *damnum* falls to be made with reference to that date. Seen from the perspective of the date of the insured driver's wrongdoing, which corresponded closely with the date of the deceased's death, the prospect of the second appellant becoming dependent on the deceased would have appeared unlikely, which also suggests that the harm suffered was not readily foreseeable. In the circumstances, and having regard to the effect of unrelated intervening events, I do not consider that there is a proper basis to upset the trial judge's finding that the appellant had not satisfied the requirement of establishing legal causation.

[44] I am also in any event not satisfied that the evidence adduced in support of the second appellant's claim adequately established the quantum of his loss. In this regard I have in mind the absence of any evidence concerning the pension scheme of which the appellant in all probability must have been a member during his employment by Nortel and as to the existence or prospects of payment of a claim for retrenchment compensation against the company under administration in bankruptcy protection. In the latter respect it is evident from the content of the letter advising the appellant of his retrenchment that it was contemplated that the business of the company would be continued, or its intellectual property disposed of for the benefit of creditors, for the appellant was reminded that he remained subject to applicable restraints and confidentiality obligations. There was no explanation as to why such evidence was not

adduced, and it would not have been for the trial court to try to make bricks without straw in the circumstances.

[45] The appeal of the second appellant therefore also falls to be dismissed.

The third appellant (Stephanie Sehinson)

[46] As mentioned, the third appellant is the daughter of the late J.S. She was born on [……]. At the time of the collision in which her mother was fatally injured, the third appellant was in her third year of study towards a four-year primary degree in medical science at the University of Western Ontario. Upon receiving the news that her mother had been injured, she travelled to Cape Town with her father, the second appellant, to be at the hospital bedside.

[47] In terms of her amended particulars of claim the third appellant claimed general damages for 'emotional shock' suffered as a consequence of the death of her mother in the collision. It was alleged in that connection that she continued 'to exhibit symptoms of a complicated bereavement and post-traumatic stress syndrome'. She also claimed damages in respect of loss of support, quantified in the sum of Canadian $1300 per month for a period of four years from March 2007 until her 25th birthday in 2011. In addition, the third appellant claimed the sum of just over R1,3 million in respect of past and future loss of income due to the dislocation of her academic studies, allegedly due to the effects of her 'psychological distress and/or disorder', and the consequential adverse influence on the choice and commencement of her vocational career.

[48] The third appellant did not give evidence at the trial. The *viva voce* evidence adduced in support of her case comprised of that of Mr Piet Crous, an industrial psychologist, and the aforementioned Ms Burke. (An actuary also gave evidence in respect of the computation of her loss of support and income claims.) The content of a medico-legal report of the psychiatrist, Dr George, who examined the appellant in July 2009, was admitted by the respondent on the basis described earlier. Certain documentation pertaining to the appellant's performance at university was also put in evidence, without objection by the respondent.

[49] Dr George concluded that the third appellant was '*suffering from a major depressive disorder caused by a complicated bereavement reaction following the death of her mother and aggravated by the downturn in her life situation, especially her*

failure to progress with her studies, and her father's own personal unhappiness'. (There was no finding that the appellant suffered from a post-traumatic stress disorder, as alleged in her particulars of claim.)

[50] Ms Burke's report on her consultation with the appellant, also in July 2009, confirmed in her oral evidence, concurred with Dr George's finding that the appellant was suffering from a mood disorder. She determined, on the basis of a score on the Becks Depression Inventory, that the depression was 'moderate'.

[51] Both Dr George and Ms Burke recommended that the appellant should be treated on a course of psychotherapy and anti-depressant medication.

[52] The trial court dismissed the third appellant's claims. It appeared from the heads of argument that the appellant was appealing against the dismissal of each of her heads of claim, but in a notice delivered two days before the hearing it was intimated that she was not proceeding with the appeal in respect of the dismissal of her loss of support claim.

[53] I shall deal first with the claim for general damages. In his judgment the trial judge expressed disagreement with the submission by the respondent's counsel that there was 'a total absence of a factual link between the diagnosis of depression and the accident', observing that there was 'certainly nothing to suggest that there was any other cause for this condition'. He was, however, of the opinion that the failure of the appellant to testify, together with shortcomings in the investigative quality of the work of the industrial psychologist and contradictions between the anecdotal evidence reported by Dr George, Ms Burke and Mr Crous gave rise to such unresolved difficulties that 'it would not be fair and reasonable in the circumstances to award a claim for general damages'.

[54] While the trial judge's criticism of the quality of the evidence and the discrepancies between the pleaded case and the evidence adduced was entirely justified and does have a bearing on other heads of her claim, he was wrong, in my judgment, to have denied the third appellant any compensation in general damages on that account. The effect of the respondent's admission of the report of Dr George was that it was common ground that the appellant was suffering from a major depressive disorder as a consequence of her mother's death. Ms Burke's evidence confirmed, to the extent that confirmation was required, that the disorder was a recognised psychiatric disorder of a sort conforming to the requirement expressed in *Bester* and *Barnard*. It was indeed so

that the condition had been *aggravated* by circumstances that were not necessarily, or sufficiently closely, connected with the effects of the appellant's mother's death, but that goes to the degree of the disorder, without detracting from the evidence of its existence and its primary cause. In the circumstances I consider that the evidential shortcomings should have been taken into account by adopting a cautious and conservative approach to determining the award that fell to be made, rather than by dismissing the claim out of hand; cf. *Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at 74-5. There is evidence that the mood disorder manifested in the appellant being anxious and moderately depressed. The disabling effect of the disorder was not, however, such as to prevent her from working, or maintaining her relationships with a circle of friends.

[55] I should perhaps mention that the court a quo, apparently accepting the characterisation suggested by the respondent's counsel, treated the third appellant's claim for compensation for psychiatric injury as that of a so-called 'hearsay' victim, in the sense that the expression was employed by Van Heerden DCJ in *Barnard*. I agree with the submission by the appellant's counsel that the third appellant was not a 'hearsay' victim, certainly not in a pure or complete sense. The facts in *Barnard* were summarised earlier in this judgment.[18] Unlike the plaintiff in *Barnard*, the third appellant came into the presence of the deceased shortly after the collision and spent what must have been a traumatic and emotional few days by her mother's bedside before Mrs J.S succumbed to her injuries. The trauma of hearing that her mother had been grievously injured in a collision was followed by a period of direct exposure to her mother's final suffering and death. Without wishing it to be understood that I consider the labels to be important, I would incline to describe the third appellant as a 'secondary victim' rather than a 'hearsay' one. The distinction really does not seem to be material on the peculiar facts. The relationship between a parent and child is plainly one that would make it readily foreseeable that either might suffer psychiatric injury as a result of the traumatic and violent death of the other. The interval between the collision and the ensuing death of Mrs J.S was relatively short, so it cannot be said that the connection between the insured's driver's wrongdoing and the ensuing death was so

[18] At para [19].

tenuous as to call into question whether the negligence was legally causal of the resultant damages.

[56] The respondent's counsel argued that the effect of the evidence was to show only that the third appellant was suffering from a relevant mood disorder caused by her complicated bereavement at the time that she was seen by Dr George and Ms Burke in July 2009, and that there was no evidence as to the position before or after that date. On that basis counsel contended that the injury should be treated as a matter *de minimis*, and compensation not awarded. The argument was misconceived in my view. The evidence of Ms Burke concerning 'complicated bereavement' would suggest a type of prolonged and unresolved grieving. The probabilities are that the condition observed by Dr George in July 2009, which was admittedly reflective of the appellant's response to the death of her mother, would have been manifest during the intervening period from early 2007 to 2009. Ms Burke's description of the condition indicated that the depression would not have been unmitigated throughout that period, but would have manifested in waves with intervening periods of normality. I do not consider, however, that the respondent should be liable to compensate the appellant for the aggravating effect of extraneous causative factors unconnected to the insured driver's negligence. The contention by the appellant's counsel that the respondent should be liable in this respect on the basis of the principle that a wrongdoer takes his victim as he finds him suggests a misunderstanding of the principle. The effect of the principle is not to make a wrongdoer liable for harm he did not cause.[19] There was no evidence that the appellant's depression about her father's loss of employment and reduced financial circumstances would not have occurred had she not already been depressed on account of her complicated bereavement.

[57] In all the circumstances there was no reason in policy to deny the remedy and absolve the Road Accident Fund from statutory liability. The third appellant's appeal against the dismissal of her claim for general damages will therefore be upheld.

[58] We were not referred to any cases closely in point in respect of the quantification of damages. We thus have to do the best we can. As mentioned, notwithstanding her depression, the appellant was able to maintain a reasonably

[19] Compare the observation by Lord Goff of Chieveley in *White* supra, at 11 *fin* that the egg-shell skull rule is 'a principle of compensation, not of liability'.

functional and intact social and working life. In the circumstances I consider that an award of R50 000 would meet the justice of the case.[20]

[59] Turning to the third appellant's claim for loss of income. As mentioned, the claim was predicated on the alleged dislocation of the appellant's academic studies and the resultant delay in the commencement of her post-graduate career. In order for the loss of income claim to enjoy any prospect of success, it was necessary that the third appellant prove that but for the effect on her of her mother's death she probably would have completed her degree in June 2008. The evidence fell short of what was required.

[60] While it would seem that the appellant had satisfactorily completed the first and second years of the degree course, it is evident that the picture changed in the third year. The evidence as to the circumstances and timing of the deterioration in her performance was unclear. The documentary record reflects that the appellant withdrew from a number of courses for which she had enrolled in the 2006/2007 academic year. While Mr Crous recorded in his report that the appellant was informed that her mother had been injured shortly before she was due to commence writing the examinations (i.e. in February 2007) and Ms Burke stated in hers that she had been told that the appellant was busy with her examinations when she learned about her mother's misadventure, the witnesses who testified at the trial were unable to controvert the information derived by the respondent's counsel from the university's website that the mid year examinations are written in December each year.

[61] The evidence of Mr Crous and Ms Burke about the circumstances of the appellant's poor performance in the 2006 fall/winter examinations was not only inconsistent, it was also hearsay in nature. The respondent's lead counsel made it clear early in the trial that he objected to the admissibility of the hearsay evidence of the expert witnesses as evidence of the facts. It was evident that counsel who represented the appellants at the trial had initially thought that he would be able to conduct the claimants' cases without adducing their evidence. The objection by the respondent's counsel alerted the appellant's advocate to the perils of his intended course and a postponement of the part-heard trial was obtained to enable the claimants to be called. Most of them did subsequently give evidence, but the third appellant did not. No reason

[20] Compare the award of R60 000 in what I regard to have been the more serious case of psychiatric injury in *Mokone v Sahara Computers (Pty) Ltd* (21881/09) [2010] ZAGPPHC 279 (25 November 2010).

for her failure to have done so was put on record. (During the trial, interjections by the appellant's counsel during the cross-examination of Mr Crous by the respondent's counsel suggested that the former might have considered it unnecessary to call the third appellant because there was agreement between the parties' industrial psychologist expert witnesses as to the appellant's likely career path. If that was the case, he was misdirected. It was apparent that the joint minute signed by Crous and one Fritz, an industrial psychologist initially engaged by the respondent, was produced in circumstances in which Fritz had not had an opportunity to investigate the case. The minute had been produced under very tight time constraints only in order to comply with the directions of the judicial case manager. Qualitatively, it did not bear scrutiny. It was also apparent that the acceptance by Mr van Huyssteen - the industrial psychologist subsequently engaged by the respondent, who testified at the trial –of the career path postulated in Crous's report was offered with the express (and appropriate) reservation that the matter would depend on the supporting factual evidence, which he had been unable to verify. During Crous's cross-examination, it became painfully apparent that the witness's investigation of the factual background had been, at best, superficial. In some instances, such as concerning the subjects written by the third appellant during the 2007/8 academic year, Crous's report was inconsistent with the content of documentation which he had obtained from the university. The trial court was thus not bound to attach any weight to the apparent agreement between the experts.)

[62] In the result it was unclear when the appellant withdrew from, or 'dropped'[21] half the courses for which she was listed in the first part of the 2006/7 academic year. It was also unclear why she was unable to continue with her studies. Her course record shows that in the second half of the 2006/7 academic year (that is after her mother's death) she successfully completed two courses which she had not taken in the mid-year examinations. It seems that she ran into further difficulty in the 2007/8 academic year, although Crous appears to have been incorrect when he suggested that she had failed

[21] The third appellant stated in an email to Mr Crous that she had 'dropped' the courses. The email had been sent in response to an enquiry directed to her during the trial as to the meaning of the abbreviation 'WDN' on her academic course record. The implication of dropping a course suggests something quite different to me to merely not writing the examination. But whatever the actual position, the appellant's failure to testify left the court unable to determine the facts with sufficient confidence.

most of her courses that year. The documentary records indicate that she was placed on anti-depressant medication between January and March 2008, but this was discontinued because the side-effects made her feel physically unwell. I agree with the trial judge that the circumstances of the third appellant's apparent ability to pursue her studies in the months after her mother's death and her subsequent lack of progress in the 2007/8 academic year is something that cried out for, but did not receive, adequate investigation and explanation. Ms Burke opined that the third appellant was disabled by her depressive disorder from continuing with her studies until she had been successfully treated. But that opinion does not explain why the appellant was able to cope successfully with the courses she passed after her mother's death. The third appellant's failure to do well in or pursue her studies also has to be judged in the context of her ability to hold down employment during the relevant period and the fact that there was a significant stressor in her life in the period from 2008 related to the insecurity of her father's employment (the anecdotal evidence indicated that many of Mr J.S's co-employees at Nortel were being retrenched during 2008) and his subsequent retrenchment in May 2009. Documentation to which we were taken by the appellant's counsel during the argument of her appeal indicated that the appellant had been placed on probation by the university, but had failed to meet the conditions of probation. The effect of this failure appears to have been that she was barred from pursuing her degree course for a year. The evidence did not illuminate why the appellant was placed on probation, what the character of the probation was, or what its terms were. The context - to the extent that it has been established - raises questions about the cogency of Ms Burke's opinion as to the objectively discernible effect of the appellant's depression and suggests that the failure of the appellant to pursue her academic career might have been just as much due to extraneous factors that had nothing to do with the consequences of the insured driver's negligence.

[63] In the circumstances I have not been persuaded that the court a quo erred in dismissing the third appellant's claim for loss of income.

[64] The third appellant has achieved substantive success on appeal and is thus entitled to her costs in the appeal, as well as her costs of suit at first instance. (I do not propose to follow the rather unusual approach of the trial court on costs, which was to award costs componentially, awarding them in favour of those of the claimants in respect of the heads of claim on which they were successful and awarding costs against

them on heads of claim on which they did not succeed.) Three counsel, including a silk, were engaged to argue the appeal on the appellants' behalf, whereas only one advocate appeared for them at the trial. In my view the third appellant's recoverable costs in the appeal should include the fees of only one counsel, and for the assistance of the taxing master I would indicate that I think that the engagement of a counsel of senior-junior standing would have sufficed to meet the demands of the case.

The fourth appellant (Jivan Shya Ng Pan Hing, known as Dominique)

[65] The fourth appellant delivered notice two days before the hearing that she would not proceed with her appeal. The notice was not accompanied by a tender to pay the respondent's wasted costs. No reasons were advanced why the appellant should not in the circumstances be ordered to pay the wasted costs of the respondent in her appeal, including the costs of two counsel. As the appeal was not withdrawn, it seems appropriate in the interest of finality that an order be made dismissing it.

The fifth appellant (Jeanette Sehinson)

[66] The fifth appellant, a resident of Sydney, Australia, was born on 13 November 1949, and thus 57 years of age at the time of the collision. She was employed at the time as a payroll clerk by a large company, and was still so employed when she gave evidence at the trial, in February 2011. It was alleged in her particulars of claim that she sustained a soft tissue injury of the left knee (described in the report of Prof Driver-Jowitt as 'effusion left knee'), an abrasion elbow [?] and a fracture of the pelvis. The latter injury and its consequences were by far the most significant feature of the appellant's case. It was uncontested that as a consequence of the collision the appellant suffered from a posttraumatic stress disorder that manifested especially in a fear of driving and being in crowded shopping malls and that she also suffered from 'symptoms of chronic major depressive disorder'. Ms Burke determined her depression to be of moderate severity using the Becks Depression Inventory. The pleaded claim made no reliance on the psychiatric or psychological effects of the collision, but despite this the respondent agreed to the admission of the reports of Dr. George and Ms Burke

in evidence, and made no objection to Ms Burke's oral evidence in support of the appellant's claim.

[67] The only issue that the fifth appellant is pursuing on appeal is the dismissal of her claim for compensation for loss of earning capacity. The appellant's pleaded claim for loss of earning capacity was founded on two postulates, apparently stated in the alternative. The first was that she would be forced to retire from her current employment at least three years earlier than the age of 70, which had been her intended retirement age, and the second was that as a consequence of the *sequelae* to her injuries the fifth appellant would suffer a forfeiture or delay in obtaining the promotion that she would otherwise have obtained in 2011 to a position commanding 'almost double' the salary of the position that she did hold.

[68] The trial judge appears to have accepted the appellant's evidence that she intended to work until 70. I believe that he was correct to have done so. Her evidence in this connection was forthright and convincing. It was to the effect that she still intends to work until 70 and considers that she will be able to achieve this. The claim that was advanced based on the prospect of forced early retirement, notwithstanding the appellant's own views on the subject, was premised on the opinion of certain expert witnesses, only one of whom (Ms Burke) gave oral evidence.

[69] Dr. George, the psychiatrist, made no observations whatsoever in his original report that would suggest that the appellant's ability to continue working had been meaningfully compromised. His diagnosis appears to have been premised on what he recorded the appellant as having relayed to him. As to depression, the only symptoms he described were the appellant's report that she was 'still emotional and cries a lot and … has difficulty sleeping'. This was balanced by the information that the appellant's appetite was normal, her weight stable and that she remained socially active.

[70] However, in an addendum report written in response to a letter from the appellant's attorney, dated 30 September 2009, Dr George gave a far more pessimistic impression of the appellant's condition than he had in his main report. What had previously been described as '*symptoms of* a major depressive disorder' became a diagnosis that the appellant was suffering from 'chronic major depressive disorder'. The previously expressed opinion that the appellant would benefit from a course of cognitive behavioural psychotherapy, with antidepressant medication to be considered depending on the outcome of such psychotherapy, became an opinion that even with

'optimal treatment' there would always be 'residual symptoms of chronic posttraumatic stress disorder, which will be aggravated by persistent discomfort from chronic pain'. In his addendum report Dr George opined that the appellant 'is severely disabled by her psychological and physical symptoms, she is able to commute independently to work but only with difficulty; even with optimal treatment it is unlikely that [the appellant] will be able to pursue her occupation for much longer due to her disabilities, and despite her previous intention to work until the age of 70 years, she will most likely need to take early retirement'.

[71] What is striking upon a consideration of the two reports produced by Dr George is the absence of any explanation why the pessimistic outlook expressed in the addendum report had not been reflected in the main report. There is also no indication in either report of any insight by Dr George into how the appellant was actually coping at work, even without the intervention of psychotherapy or anti-depressant medication. The absence of any reasoning in support of the conclusions expressed in either of the reports is also striking.

[72] Ms Burke also produced an addendum report in response to a letter from the appellant's attorney dated 30 September 2009. In Ms Burke's case the addendum report did not have anything like the markedly different complexion from the original manifested in Dr George's reports. Ms Burke did opine that it was unlikely that the appellant would be able to complete the diploma course for which she had subscribed without effective psychotherapeutic or psychiatric treatment. She recorded that the appellate was unwilling to undergo such treatment. The tenor of Ms Burke's addendum report would seem to suggest that she was under the impression that completion of the diploma course would assure the appellate a promotion at work. In that context she opined:

> Completing her financial diploma course and gaining promotion at work under these circumstances [i.e. without effective therapeutic intervention] is highly unlikely and therefore the trajectory of her career has undoubtedly been compromised.

Ms Burke also appeared to have been under the impression that the appellant's functioning in the workplace had deteriorated since her injury in the collision because she spoke of the effect of psychotherapy and medication as being to 'to enable [the appellant] to maintain her *previous* form of occupational functioning' (italicisation

provided for emphasis). Ms Burke's addendum report concluded with the following comments:

> However the passage of time is known to ameliorate even the greatest losses and depressive episodes themselves can resolve over time. Although her psychological response will be maintained by her physical difficulties it may be possible for her when she has processed the events of 2007 to improve. The fact that she is about to turn 60 in November 2009 may mitigate (sic) against her ability not only to accomplish this but to take on new occupational challenges.

[73] Prof Driver-Jowitt noted that as at July 2009 the appellant continued to suffer pain in the pelvis. She reported to him that she was unable to sit for more than 15 minutes and that she had an altered 'ambulatory pattern', which made it more energy consuming to walk and resulted in her being less stable on her legs. He stated that continued pain in the appellant's right sacro-iliac joint and the abutment, identified radiologically, of her right L5 transverse process onto the iliac blade would justify surgery to fuse the sacro-iliac joint with the fifth lumbar vertebra. He opined that 'it is probable that continuing to work in her *previous* occupation will become untenable and it is unlikely that she could continue to work into the near future' (italicisation supplied for emphasis).

[74] It is not explained why Prof Driver-Jowitt described the appellant's current occupation as 'her previous occupation'. As in the case of Dr George, Prof Driver-Jowitt's report does not indicate any investigation of or insight into the appellant's actual performance at work subsequent to her injury.

[75] The appellant's evidence was that she returned full time to work in September 2007 after a period of convalescence, during which she had gradually increased the time that she was able to spend daily at work. She appears to have a supportive employer. Investigation into her performance at work since she resumed her fulltime employment indicated that she has been performing at pre-injury levels. One has, I think, to judge her own evidence that she still intends to retire at 70 in this context. The appellant also testified that the advice she had received from her treating doctors in Australia was that fusion surgery was not indicated.

[76] Ms Pringle, the occupational therapist, reported that the appellant walked with a normal gait and sat through the four assessments she conducted 'without any obvious discomfort'. Ms Pringle found that the appellant experienced discomfort when crouching and needed support when rising from a crouched position. She also found that the appellant's balance had been compromised in that she needed bannister support

when ascending or descending stairs, but that notwithstanding these disabilities the appellant was generally 'agile and mobile'. Ms Pringle's anecdotal evidence that the appellant enjoyed taking drives into the countryside outside Sydney with her husband over weekends, occasionally staying away overnight during long weekends and that she also continued to take trips overseas from Australia was confirmed by the appellant in her own testimony. The occupational therapist was of the opinion that the appellant would be able to continue with her current type of work 'as long as she wishes to'.

[77] Certainly, the appellant's own evidence, corroborated by the reports from her supervisors garnered by the industrial psychologists as well as the report by Ms Pringle, gives a far more positive picture than the gloomy forecasts of Dr George and Prof Driver-Jowitt.

[78] It would be reasonable to accept that the effects of her injuries did disrupt, and may even have ended, the fifth appellant's continued study towards a four-year diploma course in accounting. Whether or not the appellant would have completed the course but for the collision is a matter for speculation. Completion of the course would have improved her chances of promotion, but would have afforded no guarantee of more remunerative employment.

[79] It is clear that the learned acting judge in the court a quo took all the evidence fully into account. He preferred the evidence of the appellant herself, supported by the opinion of the occupational therapist, that she would be able to continue to work until her planned retirement age. As the judge put it, 'The opinion of Ms Pringle…seems to me to reflect a situation which in the light of the totality of the evidence is most probable and reasonable'. The trial judge also held, after considering both the positives and the negatives, that it had not been established as a matter of probability that the appellant had lost the likelihood of promotion to a better paying position before her retirement. In my view the judge's conclusions have not been shown to be wrong; indeed, there was nothing in the appellant's heads of argument to show where it is contended that the judge went wrong. In oral argument counsel submitted that the opinion of Prof Driver-Jowitt should have been accepted by the trial court in preference to that of Ms Pringle. I do not agree. The trial court's approach, which weighed all the evidence holistically in determining upon a conclusion, cannot be faulted.

[80] The appeal of the fifth appellant will therefore be dismissed.

The sixth appellant (whose name was variously rendered in her combined summons as Men Ha Shya Ng Poon Hing or Men Ha Choo Fun Young, and who is called Marie-Noelle)

[81] The sixth appellant also gave notice two days before the hearing that she would not proceed with her appeal. There was no tender to pay the respondent's wasted costs. In this case, as in the matter of the fourth appellant, an order will be made dismissing the appeal and directing that the appellant shall be liable to pay the respondent's wasted costs on appeal, including the costs of two counsel.

Appeals against costs orders made by the trial court

[82] In supplementary heads of argument filed on the day before the hearing, the appellants advanced submissions on three of the costs orders made by the trial court. The costs orders against which the appellants thus appeal were (i) an order declaring that 'the costs of the overseas journeys by the parties on behalf of the Plaintiffs are not awarded' (para 7 of the orders made by the trial court s.v. '*Terms of payment and costs*'); (ii) an order directing that the appellants had to pay the wasted costs occasioned by the postponement of the trial on 7 June 2010 (para 8 of the orders made by the trial court s.v. '*Terms of payment and costs*') and (iii) an order that 'each party is to bear half the costs of preparing the transcript in this matter' (para 10 of the orders made by the trial court s.v. '*Terms of payment and costs*').[22]

[83] The declaration on the costs of 'overseas journeys' was not felicitously worded. The foreign travel and attendances to which the order was apparently directed related to a round the world trip undertaken by counsel who appeared for the appellants at the trial, the appellants' attorney and Mr Crous, during which, at stops in Mauritius, Sydney, Australia, and Ontario, Canada, the two legal practitioners and the expert witness consulted with some of the appellants and other persons connected with the third appellant's history at university and concerning the employment of the second,

[22] There was no appeal against the award by the trial court of costs on a componential basis in respect of the claims of the first, fourth and sixth appellants in terms whereof some of these appellants' heads of claim were upheld with costs and others dismissed with costs; an approach that will certainly make the taxation of the costs pertaining to those actions a rather complicated exercise.

fifth and sixth appellants. We were informed by the respondent's counsel that the respondent had sought a declaration that the expenses related to this exercise should not be recoverable. Unfortunately, the judgment of the court a quo did not set forth the reasons for making the declaration. In my view, however, the court a quo erred in principle in granting it. It is for the taxing master to determine what attendances and expenses to allow as being reasonably necessary for the conduct of the litigation; see uniform rule 70(3). While it is permissible, and indeed often useful, for the court in its judgment to express its views on costs-related issues for the assistance or guidance of the taxing master, judges should not usurp the latter's role and functions, cf. *Transnet Ltd. t/a Metrorail and Another v Witter* 2008 (6) SA 849 (SCA), [2009] 1 All SA 164 at para 19 and AC Cilliers, *Law of Costs* (LexisNexis loose-leaf edition) at 13.11.[23]

[84] In the current case one of the issues that would require consideration in the taxation of the contested fees, expenses and attendances is the ability to have obtained the information or evidential material gathered during the journey remotely, using modern means of communication. There was some indication in the evidence that interviews conducted with representatives of the fifth appellant's employer might not have been possible remotely and that the degree of cooperation obtained was achieved by the industrial psychologist only by having been physically present in Sydney. On the other hand it is not that clear why a visit by the trio to Mauritius was necessary. Another question that arises is that even if it is determined that say a trip by the industrial psychologist was reasonably necessary, was it necessary that he be accompanied by the legal representatives, and if so, whether the presence of not only the attorney, but also the advocate was required. I mention these observations merely to

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[23] The respondent's counsel sought to defend the trial judge's declaration relying on a *dictum* by Innes CJ in *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 AD at 69 that *'…the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge*'. Read in context, however, it is clear that the learned Chief Justice meant no more than it is in general within the sole discretion of the judge, to be exercised judicially, of course, whether to award costs in favour of one party or another, irrespective of the result of the case. The question in issue in *Kruger Bros* was whether the appeal, which was solely against the order of the court of first instance as to costs, was properly before the Appellate Division without leave of the court a quo in the face of s 3(b) of Act 1 of 1911, which provided '*No judgment or order made by consent, or as to costs only, which by law are left to the discretion of the Court, and no interlocutory order shall be subject to appeal, save by leave of the Court or Judge making the order*'. The question in the current case is whether, and if so, to what extent, the fees and expenses related to the overseas expedition in terms of the costs order made in favour of the first, fourth, fifth and sixth appellants should be allowed consequent upon paragraph 5 of the orders made in the trial judgment. Those are questions for the taxing master to determine.

illustrate that the question of what, if anything, should be allowed on taxation in this regard, raises multi-faceted matters, which were not fully debated before us and which, in any event, should properly be argued before, and determined by, the taxing master.

[85] The trial judge also did not provide any reasons in respect of the second of the abovementioned costs orders. It was argued on behalf of the appellants that the respondent should have borne the costs of the postponement of the trial because the need for the postponement fell to be ascribed to the respondent's late notice in terms of rule 36(9) in respect of the expert evidence of Mr van Huyssteen. The postponement was required in order to enable some of the appellants to come to South Africa to give evidence at the trial. I am not convinced that the late notice was the sole or primary reason for the change of heart by the counsel who conducted the trial on behalf of the appellants about running the case without calling them as witnesses. As mentioned earlier, it appears to me rather that counsel's initial approach was based on a misapprehension about the effect of the admission by the respondent of various expert opinion summaries. In the circumstances I am not persuaded that we can find that the trial judge misdirected himself in the exercise of his discretion in directing the appellants to pay the wasted costs occasioned by the postponement.

[86] As to the third costs order, it is usual for parties who require a transcript of trial proceedings to be produced during the course of a trial to agree amongst themselves how the cost of obtaining it will be met. That evidently did not happen in the current case. In this case too the order made was not particularly happily worded because there were in fact seven parties to the action proceedings being tried. The intended meaning is clear enough, however. It is that the respondent bear half of the cost and the appellants, between them, the other half. I do not think that the trial judge misdirected himself in making such an order having regard to the fact that the appellants elected to consolidate their actions for the purpose of trial and that some of them succeeded with their claims and some did not. Indeed, this aspect of the appeals was not strongly pressed in argument by the appellants' lead counsel, advisedly so.

[87] The appellants' success in having para 7 of the orders made by the trial court s.v. '*Terms of payment and costs*' set aside does not merit reflection in the costs of the appeals. It merely affects how the principal costs orders made by the trial court (which remain unaltered) will be dealt with on taxation.

<u>The record on appeal</u>

[88] Not only was the record on appeal lodged out of time. It was in an unsatisfactory state. It contained a considerable amount of material that should have been omitted. We were at least favoured with a note from the appellants' counsel in terms of Western Cape Consolidated Practice Note 46(5) advising us of the significant portions of the record that it was unnecessary for us to read.

[89] An appellant's attorney is under an obligation to ensure that the record on appeal is not burdened with unnecessary and superfluous material, and to seek to obtain the agreement of the respondent's legal representatives to its exclusion. The issue, and the extent to which the obligation is too often honoured in the breach than the observance, was comprehensively rehearsed in the recent full court judgment in *Eye Site Gauteng Incorporated and Others v Stanley & De Kock Optometrist Incorporated* [2012] ZAWCHC 103 (3 February 2012) at para 39-51. Counsel were called upon in terms of a memorandum issued by the presiding judge to address why a punitive costs order should not be made for non-compliance with the obligation in the current case and what form it should take. The appellants' counsel argued that we should do no more than disallow the recovery by the appellants' attorney from his clients of a portion of the costs of preparing the record. The respondent's counsel argued that the appellant's attorney should be ordered to pay a portion of the respondent's perusal costs *de bonis propriis*. In my view the approach contended for by the appellants' counsel would meet the justice of the matter. The respondent's attorney would in any event have had to consider the request that the appellants' attorney should have made to agree on a curtailed record and in the course of that exercise would no doubt have had to peruse much of the material that fell to be left out in order to satisfy himself that its exclusion was appropriate. In the circumstances I consider that it would be appropriate to order that the appellants' attorney be precluded from recovering 25% of the costs of preparing the record from his clients. (The fees that the appellants' attorney is precluded from recovering against his clients will obviously also not be taxable against the respondent in respect of the third appellant's appeal.)

Orders

[90] The following orders are made:

1. Save as provided in para 4, below, the appeals of the first, second, fourth, fifth and sixth appellants are dismissed with costs, including the costs of two counsel.
2. The appeal of the third appellant is upheld in part as follows:
   2.1 The order of the court a quo dismissing the third appellant's claims with costs is set aside and substituted with an order awarding the third appellant the sum of R50 000 as compensation in respect of her claim for general damages (excluding loss of earning capacity).
   2.2 The respondent is ordered to pay the third appellant's costs of suit in the court a quo, which shall include the qualifying fees of Dr George and Ms Burke.
   2.3 Subject to the further provisions concerning costs in para 5, below, the respondent is also ordered to pay the third appellant's costs on appeal, including the costs of one counsel.
3. Save to the extent set out in para 2 and para 4, the third appellant's appeal is otherwise dismissed.
4. The declaration as to costs made in paragraph 7 of the orders made by the court a quo s.v. 'Terms of payment and costs' is set aside.
5. The appellants' attorney is precluded from recovering from the appellants 25% of the fees and expenses to which he would otherwise have been entitled in respect of the preparation of the record on appeal.
6. The appellants are ordered, jointly and severally, the one paying the others being absolved, to pay the respondent's costs in respect of the condonation application.

A.G. BINNS-WARD
Judge of the High Court

We concur:

B.M. GRIESEL
Judge of the High Court

T.C. NDITA
Judge of the High Court

Before:	**Griesel, Ndita and Binns-Ward JJ**
Hearing:	**29 January 2014**
Judgment delivered:	**13 February 2014**
Appellants' counsel:	**M.A. Crowe S.C.**
	A.K. Blommaert
	P. Eia
Appellants' attorneys:	**Allan G Jones Inc,**
	Goodwood
Respondent's counsel:	**T.D. Potgieter S.C.**
	A. Bhoopchand
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