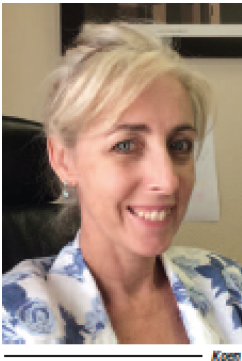


# “Shocking” developments



Emotional shock can be described as a condition where a person suffers psychologically due to the infringement of mental and intellectual wellbeing, emotional sorrow, sadness or grief.

Section 19(g) of the RAF Amendment Act states that the Road Accident Fund is not liable for any damage suffered from emotional shock sustained as a result of a motor vehicle accident by someone who has witnessed, or observed, or was informed of the bodily injury or the death of another person. This section constitutes a complete exclusion of such claims by anyone not directly injured in an accident. The question is, can a person be indirectly compensated for emotional shock if it is proven by way of expert reports and testimony that the psychological trauma suffered resulted in events that give rise to a claim of general damages.

Actions for emotional shock were first introduced to our law as an actionable ground in the case of *Bester v Commercial Union Insurance Company SA Limited* 1973(1) SA 769 AD. Several emotional shock cases followed and laid the foundation on which claims for emotional shock in terms of the RAF Act prior to amendment would be successful:

- The brain and nervous system are as much a part of the physical organism as is a leg or an arm and an injury to them is the same as an injury to a leg or an arm;
- The yardstick of reasonable foreseeability of harm;
- The existence of a very close relationship between the Plaintiff and the victim.

It seems that in an effort to curb opening the floodgates to emotional shock claims, the legislature introduced the exclusion in terms of s19(g). However, claims against the wrongdoer in terms of the common law have not been excluded. Since the Amendment Act, however, there have been no decided cases dealing with emotional shock directly. However, in November 2014, the North Gauteng High Court gave judgement in the case of *Fourie and Another v Road Accident Fund* 2014 (2) SA 88 (GNP) C. These are the facts of the case: The Plaintiffs, husband and wife, and their three minor children, were involved in an accident when an articulated truck failed to stop at a stop street and collided into their vehicle. They were trapped in the vehicle for many hours during which time two of the three children died. One child survived.

The Defendant claimed that in terms of s19(g) of the Act it was not liable for damages sustained as a result of emotional shock. It sought to apply a restrictive interpretation of the s19(g) exclusion and contended that one of the purposes of the exclusion was to limit the RAF's liability in order to create a financially sustainable and fair compensation system.

Defendant's Counsel stated that:

- the serious injury and psychological Sequelae, if proven, were caused by the Plaintiffs witnessing the death of the two minor children.
- if the court should find that a claim for emotional shock be denied as well as any Sequelae thereto, then any claim for a consequential loss of income should also be denied.
- the Plaintiffs were not entitled to any general damages or any award for loss of earnings.

It was stated that the serious injury allegedly suffered by the Plaintiffs was as a result of emotional shock due to them observing the death of two minor children, which had psychological consequences. The court, therefore, should not allow the claim for general damages and should also disallow any influence it may have on the loss of income suffered as it was specifically excluded in terms of the Amendment Act. The intention of the legislature in s19 was to exclude " *loss or damage*" that fell within a particular, narrow ambit as set out in s19(g), namely suffered as a result of emotional shock only. The Plaintiffs' counsel argued that the exclusion in terms of s19(g) did not apply because:

- the Act was a piece of social legislation and, therefore, should be interpreted widely.
- the Act was created for the exclusive benefit of the victim.
- it was trite law that legislation should be interpreted with as little restriction as possible.
- the many injuries suffered by the Plaintiffs included psychological trauma.
- In terms of s19(g) the legislature's intention was to exclude damages that fell within its very narrow limitations (damages suffered due to emotional shock).
- the Plaintiffs' claims did not fall in this narrow limitation as the injuries they suffered were not confined to emotional shock as a result of the death of their two sons.

It was particularly noted that, taking into account the various sources and case law referred to, the exclusion pertained to emotional shock suffered by someone not directly involved in the accident, that is " *secondary emotional shock*".

Furthermore it was stated that this exclusion differs from other exclusions in the Amendment Act in that the common law right against the wrongdoer was not removed. The Plaintiffs' contention was that the Act sought to exclude the emotional shock suffered by someone not directly involved in the accident or who did not sustain injuries. The motivation for this exclusion seems to be the cost and difficulty in dealing with such claims. The court found that it was clear that the legislator wanted to avoid emotional shock cases where secondary emotional shock and trauma were being dealt with. This was to avoid the floodgates being opened and the RAF being inundated with claims which were difficult to investigate. The Fourie case was different from secondary emotional shock cases in that:

- the Plaintiffs were directly involved in the motor vehicle accident.
- they suffered other injuries including emotional shock.
- they were trapped in the vehicle for several hours.
- they were not bystanders or strangers.
- they were trapped in the vehicle in their injured state where they witnessed the deaths of their minor children.

The court found, based on the evidence of the experts, that the exclusion in terms of s19(g) did not apply as it was impossible to differentiate between the accident and the deaths of the two children in relation to the sequelae suffered. The fact that they were all involved in the accident changed things, as it excluded them from experiencing " *secondary shock*". It was also noted that South African law accepts that there is no difference between the psyche, the brain and a leg or an arm. As such, the injury to the brain or psyche can be seen in the same light as an injury to the leg or arm. Finally, it was noted that no emotional shock cases had been decided on since the implementation of the exclusion in terms of s19(g), consequently there was nothing with which to compare the

Fourie case. The court stated that it doubted the intention of the legislature was to exclude claims in circumstances such as the Fourie case and that its intention was to strictly exclude those not directly involved in the accident. The Plaintiffs were granted their claims for general damages and the subsequent claims for loss of earnings. It remains to be seen whether the RAF will take the Fourie case on Appeal. What is evident is that the door has been opened ever so slightly for emotional shock cases which qualify under the very limited circumstances defined in the case.

***Koen is a director of Maponya.***

Article by LYNNE KOEN