THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 754/2018 and 1051/2018

In the matter between:

R K **FIRST APPELLANT**

M K **SECOND APPELLANT**

Y K **THIRD APPELLANT**

L K **FOURTH APPELLANT**

and

MINISTER OF BASIC EDUCATION **FIRST RESPONDENT**

MEMBER OF THE EXECUTIVE COUNCIL,

LIMPOPO DEPARTMENT OF EDUCATION **SECOND RESPONDENT**

PRINCIPAL OF MAHLODUMELA LOWER

PRIMARY SCHOOL **THIRD RESPONDENT**

SCHOOL GOVERNING BODY

MAHLODUMELA LOWER PRIMARY

SCHOOL **FOURTH RESPONDENT**

and

EQUAL EDUCATION ***AMICUS CURIAE***

Neutral citation: *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019)

Coram: Navsa, Leach, Tshiqi, Wallis and Mbha JJA

Heard: 2 September 2019

Delivered: 18 December 2019

Summary: Practice – *amicus curiae* – test as to who should be admitted – application to be admitted as *amicus* dismissed.

Emotional shock – principles relevant to such a claim – grief associated with psychiatric lesion caused by emotional shock recoverable without necessity to develop the common law in line with the spirit of the Constitution.

Constitutional damages – when to be awarded – where claimants fully compensated for loss sustained and public funds better served elsewhere – constitutional damages not awarded.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller J sitting as court of first instance):

A The appeal succeeds to the extent that the order of the court a quo is altered as follows:

'1 The words "the claim is dismissed" in para 1 of the order are deleted and substituted by the following:

(a) In respect of the claim for emotional shock and grief, the first and second defendants are ordered to pay the following amounts, jointly and severally, the one paying the other to be absolved:

(i) R350 000 for Mrs K;

(ii) R350 000 for Mr K;

(iii) R200 000 for Ms Y K;

(iv) R200 000 for Mr L K;

(v) R100 000 for each of the minor children M, O and B K.

2 The words 'Claim A' and 'The claim for grief is dismissed' are deleted from para 2 of the order.

3 Paragraph 3.1 of the order is deleted and substituted with the following:

'3.1 The claim for future medical treatment in respect of the minors M, O and B K succeeds. The first and second defendants are ordered to pay for the future treatment in respect of:

(a) M K, the amount of R6 000.

(b) O K, the amount of R6 000.

(c) B K, the amount of R6 000.'

B The first and second respondents are to pay the appellants' costs of the appeal, jointly and severally, the one paying the other to be absolved. Such costs are to include the disbursements incurred by two counsel who appeared *pro bono* for the appellants in travelling to and being accommodated in Bloemfontein in order to present this appeal.'

JUDGMENT

Leach JA (Navsa, Tshiqi, Wallis and Mbha JJA concurring)

[1] On 20 January 2014 S K (S), who was at the time just five years of age, suffered the most appalling and undignified death when he fell into a pit latrine at his school in Limpopo, and drowned in its sludge and filth. In due course the appellants, being S's parents and siblings, instituted action in the Limpopo Division of the High Court claiming damages they alleged they had sustained arising out of his death, including separate claims for emotional shock and grief. Their claims succeeded in part but, in the main, were dismissed. They appealed to this court with leave of the court a quo.

[2] I record at the outset that Equal Education, a registered non-profit and public benefit organisation, also appeared as *amicus curiae* and supported

certain of the appellant's claims. The application of Richard Spoor Inc (RSI), a firm of attorneys, to intervene as a further *amicus* was dismissed at the commencement of the appeal. In dismissing that application, we indicated that our reasons would be given in our judgment in the appeal. They are set out in the paragraphs below.

RSI's application to intervene

[3] Rule 16 of the rules of this court, which are essentially the same as Rule 10 of the rules of the Constitutional Court, require a party applying to be admitted as an *amicus* to briefly describe its interest in the proceedings and the position it intends to adopt; to set out the submissions it wishes to advance and their relevance to the proceedings; and its reasons for believing they would be useful to the court and different of those of the other parties. In attempting to comply with this requirement, RSI explained that it is the class representative in a class action against a large South African company, Tiger Brands, on behalf of the families of 86 children who were amongst more than 200 persons known to have died in an outbreak of listeriosis. That claim, like the present appeal, has attracted nation-wide attention. In both that matter and the present, so RSI submitted, the common law needs to be developed in line with the values enshrined in our Constitution, so as to provide equitable redress for close family members of children who are wrongfully killed. It averred that its submissions in this regard differed from those of the other parties and that it would therefore be of assistance to this court.

[4] Despite certain similarities to the present case, there were insurmountable obstacles to admitting RSI as an *amicus*. In *National Treasury v Opposition to*

Urban Tolling Alliance[1] a political party, the Democratic Alliance, sought to intervene in interdict proceeding brought by the respondents to prevent the appellants implementing a tolling system on certain roads in Gauteng. In refusing its application to be an *amicus*, Moseneke DCJ stated the following:

'I do not propose to revisit the ideal attributes of a party that seeks to be admitted as a friend of the Court. It is sufficient to observe that an *amicus* must make submissions that will be useful to the Court, and which differ from those of the parties. In other words, the submissions must be directed at assisting the Court to arrive at a proper and just outcome in a matter in which the friend of the Court does not have a direct or substantial interest as a party or litigant. This does not mean an *amicus* may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome *and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation*.' (Emphasis added.)[2]

[5] RSI's application did not pass the threshold of this test for a number of reasons. First, an *amicus* should be objective and not seek to advance an interest of its own. That is not here the case. Mr Spoor, who appeared on behalf of RSI, informed us from the bar that he and his firm were acting on a contingency basis in the claim brought against Tiger Brands. That being so, despite their professed intention to be acting in the present matter solely in the interest of developing the common law, there can be no doubt that they enjoyed a financial interest in attempting to persuade this court that damages for a claim thus far unrecognised in this country, should be awarded. Should such a claim be established, the beneficiaries of the class action would probably receive a substantially higher payment than would otherwise be the case, and RSI's contingency fee be concomitantly increased. RSI thus also had its own personal financial interest at stake. For that reason alone, it would be inappropriate to admit RSI as an *amicus*.

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[1] *National Treasury & others v Opposition to Urban Tolling Alliance & others* CCT 38/12 [2012] ZACC 18; 2012 (6) SA 223 (CC).
[2] See further *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) para 7.

[6] Furthermore, in the *National Treasury* case, the Constitutional Court refused to admit the Democratic Alliance as *amicus* as its 'overall partisan position is better suited to a litigant than a friend of the court'.[3] This case is even more extreme as RSI is indeed a litigant who seeks in another action to have a different court uphold its argument on an extension of the common law. If this were to be allowed, and RSI admitted as an *amicus*, it would steal a march on its opposition, Tiger Brands, whose contrary voice in that matter would not be heard. In this way it could obtain a precedent, binding on the high court which hears its matter, to the obvious prejudice of its opposition. This is both opportunistic and unfair, and for policy reasons should not be allowed. It is inappropriate to allow RSI to advance its own litigious interest under the guise of being an *amicus*.

[7] The submissions that RSI proposed advancing were in any event unlikely to be of any assistance. As set out below, the appellants' claim against the respondents in this matter is founded on aquilian liability in which they seek to recover damages sustained by reason of the respondents' negligence. RSI's contention, however, is essentially that the appellants have misconstrued their remedy and ought rather to have relied upon the *actio iniuriarum*, a claim based not on negligence but on a defendant's intention to injure. To that extent, RSI sought not to support the appellants but, rather, to make out a separate cause of action on their behalf, a cause of action which has not been pleaded, in respect of which the necessary evidence was not led at the trial and was thus not on record before this court on appeal. Accordingly RSI's submissions in that regard, albeit different from those of the parties, would be of no assistance to this court to determine what we are bound to determine in respect of the pleaded claim and the parties' evidence. The argument in respect of the *actio iniuriarum*

[3] *National Treasury* para 14.

is simply not an issue before us, and the question of intent upon which it would have been founded was not explored in the court a quo.

[8] Finally, but no less importantly, apart from suggesting that the appellants ought to have sought to establish liability under a different remedy, RSI's argument in regard to the policy considerations motivating an extension of the common law and the award of constitutional damages was essentially the same as counsel for both the appellants and Equal Education intended presenting. On this aspect as well it was thus inappropriate to allow RSI to burden us with argument that was superfluous. For these reasons RSI's application for admission as *amicus curiae* was dismissed.

The facts

[9] I turn then to consider the background relevant to the issues raised on appeal. S attended the Mahlodumela Lower Primary School, in a rural area of the Limpopo province. The toilets provided for learners at the school were in an appalling and disgusting condition. For years complaints on behalf of the school had been addressed to the provincial education authorities who had been requested to improve the pit latrines. There had been no response. Eventually, in an attempt to attempt to overcome the problem, a local handyman had been employed some five years previously to construct and install an elementary platform and seating structure over the pits. But it had not lasted well and due to corrosion, wear and tear, by January 2014 the toilets were in an abysmal condition.

[10] Although the evidence established that it would have cost as little as R500 per seat for structurally sound seats to have been built, the education authorities failed to do so. By October 2013, the Mahlodumela Lower Primary School had been placed on a list of schools scheduled to receive sanitation infrastructure

support. Unfortunately, no work had taken place before the tragedy that took place several months later.

[11] It seems that on 20 January 2014, when S went unattended to the toilets to relieve himself, the seat collapsed and pitched him into the pit. When, later, he could not be found, enquiries were made to his home to ascertain if he was there. His mother, Mrs K, learning that the school authorities were looking for him, rushed to the school in panic. She was there when, eventually, S's body was found in the pit below the toilet, the seat of which had collapsed. He had drowned, and was lying in the filth in the pit with hand outstretched as if seeking help. The school staff would not let Mrs K remove him, despite her belief that he could still be saved. His body was left in the pit for hours, covered in muck and human faeces until, eventually, it was removed.

[12] Understandably, the terrible circumstances of S's death haunted his parents. Mrs K testified how she had fainted upon seeing S's body in the pit and that she thereafter experienced nightmares during which she was haunted by his hand reaching out towards her. A similar nightmare haunted Mr K, who had arrived on the scene after his wife and had sat near the body until emergency services arrived and removed it hours later. Both Mr and Mrs K were diagnosed with having post-traumatic stress disorder, and for years had difficulty in sleeping and required psychological counselling.

[13] S's siblings were also affected by the circumstances of his death. The relationship between S and Y K, the third appellant, had been close. She had taken on a parental role in relation to S and had helped to bath him and prepare him for school. He slept in her bedroom. Y did not believe that S had died until she saw his body in the pit. She, too, experienced trouble sleeping after the tragedy and had flashbacks to the moment she had seen him in the pit. She

exhibited extreme symptoms of post-traumatic stress disorder, similar to her mother's.

[14] L K, S's adult brother and the fourth appellant, also shared a close relationship with S. On hearing of his death, he tried to get to the toilet to see what had happened but the police stopped him from doing so. He, too, displayed symptoms related to post-traumatic stress disorder and bereavement. When seen by a psychologist almost two years later, he was still very sad and was struggling to cope, having difficulty both with his concentration and in sleeping. Similar difficulties were experienced by the other children, O, M and B K.

The claims

[15] Bearing the above facts and circumstances in mind, I turn to the appellants' claims. Mrs and Mr K were cited, respectively, as first and second plaintiffs. They sued in their personal capacities as well as in their capacities as parents and natural guardians of their three minor children, M, O and B. The third and fourth plaintiffs are two major children of the first and second plaintiffs. The Minister of Basic Education, the MEC, Limpopo Department of Education, the principal of S's school and the school's governing body were cited as first to fourth defendants, respectively. The principal and the governing body, however, appear to have been parties in name only, and at the conclusion of the trial no order was made against them. I also did not understand them to have been actively interested in this appeal. This judgment will therefore regard them as not being parties and I shall refer to the Minister and the MEC as being the respondents.

[16] The claims of the plaintiffs are somewhat tortuously framed in their particulars of claim. Lengthy averments were made in regard to negligence and the breach of duties owed to S (including allegations of events occurring after

his death). It was then alleged that S died as a result of such negligence and the breach of these duties. In para 26 of the claim, it was alleged that, as consequence of his death, the appellants had suffered 'grief, emotional trauma and shock and damages at common law developed in accordance with s 39(2) of the Constitution'. At para 28, the appellants went on to also allege that they had suffered 'post-traumatic stress disorder and bereavement' and that in addition, the first and second appellants (namely S's parents) had suffered a 'depressive disorder'. Whether the consequences alleged in para 26 were the same as those in para 28 is unclear.

[17] Be that as it may, the particulars of claim went on to set out a number of separate claims:

(a) In Claim A it was alleged the appellants had suffered various amounts of damages as a result of the 'emotional trauma and shock' they had experienced (whether this was due to the facts particularised in para 26 or para 28 was not stated).

(b) In Claim B they claimed, not individually but cumulatively and 'as the immediate family', the amount of R2 million in respect of grief as compensation 'based on the common law as developed in accordance with s 39(2) of the Constitution'. Alternatively, it was alleged that on the basis articulated in para 26, they were entitled to that sum as constitutional damages 'in accordance with the development of the common law under s 39(2) of the Constitution'.

(c) Claim C was a claim in respect of future medical expenses to be incurred to treat the appellants' impaired medical health resulting from the shock and trauma they had suffered due to S's death. Essentially these related to the cost of counselling sessions.

(d) In Claim D, the sum of R34 105,80 was claimed in respect of S's funeral costs.

(e) In Claim E the first appellant claimed loss of earnings as a result of the trauma she had suffered arising from S's death.

(f) Finally, but without explaining the necessity for such an order, the plaintiffs sought a declaratory order to the effect that the respondents had breached their constitutional obligations in respect of the rights contained in various sections of the Constitution.

[18] At a pre-trial conference, the respondents admitted that the first and second appellants and their minor children had 'suffered emotional trauma and shock' as a result of S's death. Then, in a joint minute of the clinical psychologists who were to be called as experts, it was recorded that the appellants had suffered severe trauma and required further psychotherapy. Further, on 11 October 2017, the respondents made a without prejudice offer to settle, in which they stated that they conceded the 'merits in respect of the delictual claim'.

[19] The offer of settlement was not accepted, and so the matter went to trial. On the first day of the hearing the respondents' concession of the merits was repeated. They accepted that negligence on their part had led to S's death, that the merits of Claim A were no longer in dispute and that, in respect of that claim, only the quantum of damages needed to be proved. In the light of this concession and the circumstances surrounding S's death, if ever a case called out for settlement it was this one. For some reason, however, the respondents did not settle and the trial proceeded, undoubtedly at huge cost to the State. This really ought to have been avoided and the funds better employed in national interest eg by improving sanitation systems at rural schools.

[20] Be that as it may, at the end of the day, despite the respondents' concession relating to the merits and the subsequent evidence of both the

plaintiffs and an expert psychologist relating to their emotional suffering, it is somewhat startling to say the least that the court a quo dismissed Claim A for emotional trauma and shock. It also dismissed the claim for grief in Claim B but, on the alternative in Claim B (ie the claim for constitutional damages), also somewhat startlingly as it was relief that had not been asked for, it issued a structural interdict in the following terms:

'2.1 Alternative to Claim B

2.2 The first and second respondents are ordered to supply and install at each rural school currently equipped with pit latrines in the Province of Limpopo with:

2.2.1 a sufficient number of toilets for each school for the use of children which are easily accessible, secure and safe and which provide privacy and promote health and hygiene based on an assessment of the most suitable safe and hygienic sanitation technology.

2.3 The first and second respondents, are ordered to furnish this court with the following information:

2.3.1 a list containing the names and location of all the schools in rural areas with pit toilets for use by the learners;

2.3.2 the estimated period required to replace all the current pit toilets at schools so identified.

2.3.3 a detailed program developed by the relevant experts based for the installation of the toilets on an assessment made in respect of the suitable sanitation technology requirements of each school inclusive of a proposed date (and reasons for the proposed date) for the commencement of the work referred to *supra*.

2.4 The first and second defendants shall, for the order to be implemented deliver detailed reports under cover of affidavits at this court which must *inter alia* comprehensively deal with all the issues referred to above on or before 30 July 2018.

2.5 The plaintiffs are at liberty to deliver an answering affidavit within 20 days of the reports being delivered. And if so, the defendants will have the rights to reply, if necessary within 15 days. Both parties may thereafter place the matter on the opposed roll for hearing (and for further directives, if necessary) on a date to be arranged with the trial Judge.'

[21] In respect of Claim C, the claim for future medical expenses, the merits of which had also been conceded at the commencement of the trial, an order by agreement was made in respect of the first, second, third and fourth plaintiffs during the course of the trial. In respect of two of the younger siblings, M and O, the court in its judgment made an order based on a finding that they were entitled to receive six sessions of psychotherapy to help them deal with the severe trauma they had suffered. However, no allowance was made for psychotherapy for the youngest child, B, due to no specific claim for this having been made. In respect of Claims D and E, the parties reached agreement and a separate order in their regard was made before the end of the trial. However, the declaratory order sought by the appellants was refused.

[22] The appellants proceeded to apply for leave to appeal against the dismissal of their prayer for a declaratory order relating to the defendants breach of constitutional obligations. They also sought leave to appeal against the dismissal of Claim A, as well as the dismissal of the claim for grief in Claim B, but not against the award of the structural interdict granted in the alternative to the latter claim. They also sought leave to appeal against the refusal of future medical expenses for B. The court a quo granted such leave in respect of the grief claim in Claim B but refused leave in the other respects. This court, however, granted such leave.

[23] Due to the manner in which the claims were pleaded, I intend to deal at the outset with Claims A and B. For the reasons set out below, these are substantially intertwined, both with each other and with the alleged need to develop the common law so as to entitle the appellants to recover damages for the grief they have suffered arising out of S’s death.

Claims A and B

[24] In common law countries, claims for so-called nervous or emotional shock have historically been treated with a good measure of suspicion and wariness. Underlying considerations appear to have been, inter alia, that the shock experienced by witnesses to gruesome events is one of the many vicissitudes of life which people have to face and live up to, and should therefore not be regarded as actionable, and that to recognise shock as actionable might open the floodgates of litigation. Thus in *Bourhill v Young*[4] Lord Porter said 'the driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including . . . the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm'.[5]

[25] However, for many years now, such a claim has been recognised in this country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury. Thus, in *Bester v Commercial Union*[6] this court, seemingly influenced to an extent by developments in England,[7] held a psychological or psychiatric injury to constitute a 'bodily injury' for the purposes of delictual liability, and that there was no reason in our law why a claimant who suffered such an injury as the result of the negligent act of another should not be entitled to receive compensation.

[26] In *Barnard v Santam*,[8] this court subsequently confirmed the existence of a remedy where a plaintiff sustained 'nervous shock', although Van Heerden ACJ pointed out that the term was outmoded and misleading as the only question should be whether the plaintiff sustained a detectable psychiatric

[4] *Bourhill v Young* [1943] AC 92.
[5] At 117.
[6] *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* 1973 (1) SA 769 (A).
[7] See 779D-G.
[8] *Barnard v Santam Beperk* 1999 (1) SA 202 (SCA).

injury. Significantly Van Heerden ACJ declined to follow the restrictions applicable in the United Kingdom as laid down in cases such as *McLoughlin* and *Alcock*, referred to below, that such a claim was not available to a person who suffered psychiatric injury in consequence of a report of harm to a near relative (in that case a mother being told of her son's death in a motor accident). Such a 'hearsay' claimant is entitled to recover damages for psychiatric injury whether they are in proximity to, or come upon, the victim of the accident or are told about it later. The test for liability is far more dependent upon the relationship between the claimant and the victim.

[27] The same approach was followed by this court in *Road Accident Fund v Sauls*.[9] In that matter a plaintiff witnessed his fiancé being struck by a motor vehicle in his near vicinity. She thought he had been killed or seriously injured (fortunately neither was the case) and was left in a condition of shock and confusion. She was subsequently diagnosed with a post-traumatic stress disorder which became chronic and unlikely to improve. As was summed up in this court, 'her case is that as a consequence of her witnessing the injury to [her fiancé] she suffered severe emotional shock and trauma which gave rise to a recognised and detectable psychiatric injury . . .'. In holding the defendant liable, Olivier JA explained:[10]

'It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so is, in my view, a necessary and reasonable limitation to a plaintiff's claim . . . I can find no general, "public policy" limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the *onus* of proof.'

[9] *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA).
[10] *Sauls* paras 13 and 17.

[28] The law in England was more inflexible than ours. Following the decision in *Bourhill*, not much changed in the United Kingdom for some 40 years until the decision in *McLoughlin v O'Brian* [1983] 1 AC. In that matter, whilst Lord Wilberforce observed that the law still denied the claim of an ordinary bystander to an incident 'either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large',[11] he went on recognise the claim of a wife for damages for shock. She had suffered a severe psychiatric illness as a result of learning of her daughter's death and being exposed to the distressing sights and sounds of her husband and children when she went to the hospital to which they had been taken after having been grievously injured in a motor accident. The court held that such a claim could be allowed, subject to policy restrictions as to the class of persons whose claims should be recognised, the proximity of such persons to the accident, and the means by which the psychiatric illness was caused (sometimes referred to as relationship, spatial and sensory policy restrictions).[12]

[29] Since then, claims for what has commonly, albeit incorrectly, come to be called nervous or emotional shock have been allowed in England, where it can be said that the shock gave rise to a psychiatric injury. Thus, in *Alcock v Chief Constable*[13] although a claim for nervous shock was disallowed, essentially on the basis that the damages were too remote, Lord Oliver stated:

'There is . . . nothing unusual or peculiar in a recognition by the law that compensatable injury may be caused just as much by direct assault upon the mind or the nervous system as by direct physical contact with the body. This is no more than the natural and inevitable result of the growing appreciation by modern medical science of recognisable causable connections between shock to the nervous system and physical or psychiatric illness. Cases in which damages are claimed for directly inflicted injuries of this nature . . . are not, in their essential

[11] At 422.
[12] See eg C Sappideen and P Vines *Fleming's The Law of Torts* 10 ed (2011) para 8.130.
[13] *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310; [1991] 4 All ER 907 (HL).

elements, any different from cases where the damages claimed arise from direct physical injury . . . .'

As appears from these cases as well as the decisions, inter alia, in *White & others v Chief Constable of Yorkshire & others*[14] and *Vernon v Bosley (1)*[15] in English law damages are now recoverable for nervous shock or pathological grief disorder (ie grief which became so severe as to be regarded as abnormal and giving rise to psychiatric illness), if certain preconditions for recovery are satisfied.

[30] The development of the law on this issue in England was, to a large extent, mirrored in Australia, New Zealand and Canada. In all three of those jurisdictions, damages for 'nervous shock' are now recoverable where the claimant suffers either a physical consequence or some medically identifiable psychiatric illness or injury.[16] In *Tame's* case in Australia, however, the court the court stressed that many of the concerns relating to the recovery of psychiatric injury receded if full force was given to the distinction between emotional distress, on the one hand, and recognisable psychiatric illness, on the other. Doing so reduced the scope for indeterminate liability or increased litigation, and restricted recovery to disorders capable of objective determination. As the learned authors of *Fleming's Law of Torts* put it, the court 'repudiated' the earlier policy limitations 'and held that liability was based on reasonable foreseeability unfettered by other restrictions'.[17]

[31] It is clear from this that our law is closely aligned to that which prevails in Australia, and is more flexible than that of England which is bound by certain policy limitations. However, in all three of these jurisdictions, as well as those

[14] [1998] UKHL 45; [1999] 1 All ER 1 (HL).
[15] [1997] 1 All ER 577 (CA).
[16] See eg in Australia, *Tame v New South Wales; Annetts v Australian Stations (Pty) Ltd* [2003] 211 CLR 317 HCA; in New Zealand, *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 197-199 NZCA; in Canada *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 [41] SCC.
[17] *Fleming's Law of Torts* para 8.130 at 177.

of Canada and New Zealand, a plaintiff can only claim damages for so-called nervous or emotional shock where it is suffered as a consequence or cause of a detectable psychiatric injury. Gleeson CJ summarised the position succinctly in the following terms:

'. . . save in exceptional circumstances, a person is not liable in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance or despondency, without any resulting recognised psychiatric illness.' (*Tame v New South Wales* para 7.)

To similar effect in *Van Soest v Residual Health Management Unit* para 28 it was said:

'The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.'

[32] Accordingly, there is no difficulty in recognising in principle the legal basis of the appellant's Claim A, which as I understand the pleading, is a claim for emotional shock attributable to a psychiatric lesion caused by the circumstances of S's death. It is a claim long recognised in this country and supported by the other common law jurisdictions I have mentioned. I shall return to whether given the facts of this case, liability in respect of that claim was established.

[33] But before doing so, it is necessary to deal with the validity in law of a claim brought under a separate heading for grief or bereavement, allegedly suffered as a result of negligence but which does not flow from a psychiatric lesion (which, as I understand the particulars of claim, constitutes Claim B.)

[34] In that regard, none of the jurisdictions I have mentioned have ever recognised such a claim at common law. For example in England, in his speech

in *Alcock*, Lord Ackner said 'major mental suffering, although reasonable foreseeable, if unaccompanied by physical injury, is not a base for a claim for damages'.[18] And in his speech in the same case, Lord Oliver explained the reason for this refusal as follows:[19]

'Grief, sorrow, depravation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinarily and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. . . . but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.'

Similarly, in his speech in *White v Chief Constable*, Lord Griffiths said:

'Bereavement and grief are a part of the common condition of mankind which we will all endure at some time in our lives. It can be an appalling experience but it is different in kind from psychiatric illness and the law has never recognized it as a head of damage. We are human and we must accept as a part of the price of our humanity the suffering of bereavement for which no sum of money can provide solace or comfort.'

[35] This, too, has been the approach in this country. More than a century ago, in *Waring and Gillow Ltd v Sherborne*,[20] Innes CJ held there was no authority in our law for awarding damages 'for mental suffering unaccompanied by physical injury or illness in an action founded on negligence'. That conclusion was reinforced by this court in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 658.[21] As De Villiers JP stated in his judgment in that case, after referring to an ancient Scottish decision:

'. . . the Scotch Court of Session held that a husband was entitled to recover for injury and loss by the sudden and violent death of his wife in his feelings, comfort and domestic happiness, but the report is not very satisfactory. . . I have looked in vain . . . for the reasons for extending the law so far. *Voet* (l. c.) recognises that damages for *dolor* . . . can be obtained by a freeman for an injury to himself, but there is no authority for extending this to injury to his feelings through the death of another. It may be desirable that a husband should be able to

[18] At 917h-j. See further *McLoughlin v O'Brian* at 418D and 431G-H.
[19] *Alcock* at 931*a-b*.
[20] *Waring and Gillow Ltd v Sherborne*1904 TS 340 at 348.
[21] See at 662, 666 and 673-4 in particular.

recover damages as a *solatium* for his wounded feelings and for loss of comfort and domestic happiness, but that is an extension of the law which must be made by the Legislature.'

[36] In England, albeit to a limited extent, the legislature indeed came to the assistance of certain close relatives who were given a statutory right by the Administration of Justice Act 1982, s 3 thereof having inserted a new section into the Fatal Accidents Act 1976, so as to found an action to claim damages for bereavement.[22] It was pursuant to this that in *Kerby v Redbridge*,[23] the court said:

'Mr Coghlan . . . reminds me that the common law, rightly or wrongly, affords no right to damages for what are described as "the normal emotions by way of grief, sorrow or distress attendant on the loss of a loved one". . . . The only entitlement lies in statute . . . by way of damages for bereavement.'[24]

[37] Similarly, in both Australia and Canada, where claims for grief are also not recognised without proof of psychiatric injury, certain relief has been extended by way of statute.[25] However, in this country, despite the lapse of more than a century and the invitation in *Union Government v Warneke*, no such statutory extension has been made and the position remains unchanged.[26] This is presumably for reasons similar to those articulated by Lord Oliver as quoted above, and the perceived fear of opening the floodgates to claims for grief without any associated psychiatric injury.

[38] It was argued on behalf of the appellants, however, that our law had relaxed even further and that this latter requirement was no longer valid. The argument in this regard was based upon the judgement of this court in *Mbhele v*

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[22] Charlesworth and Percy on *Negligence* 12 ed (2011) 16-27.
[23] Cf *Kirby v Redbridge Health Authority* (QB) [1994] PIQR Q1.
[24] See further *Regan v Williamson* [1976] 1 WLR 305 (QB) at 308D-H.
[25] *Fleming's The Law of Torts* § 8.170, *Mason v Peters et al* (1982) 39 OR (2 d) 27; 139 DLR (d) 104: 22 CCLT (Ontario Court of Appeal). See further *Barnard v Santam* at 216B-D.
[26] See *Bester v Commercial Union* at 779H and *Barnard v Santam* at 216I-217B.

MEC for Health for the Gauteng Province.[27] In that matter, due to negligence on the part of certain hospital authorities, the appellant's child was stillborn. She instituted action for damages in the high court. The matter was decided on a stated case under Uniform rule 33. The court of first instance held that the appellant had abandoned her claim for emotional shock and her claim was dismissed. This court, on appeal, found that the high court had erred in finding that the appellant's claim for emotional shock had been abandoned and proceeded to consider whether it had been proved. It held that it had, and awarded the appellant R100 000 as damages, saying that there could be no doubt 'that the appellant experienced severe shock, grief and depression'. It did so without specific agreement as to the existence of a psychiatric lesion having been set out in the stated case.

[39] On the strength of this, it was argued that this court had been prepared to allow damages for grief without proof of there having been a psychiatric injury to the appellant. It was unfortunate that the trial court had attempted to decide the matter on a stated case without all the necessary facts being fully and clearly set out, as was indeed observed by this court in its judgment. However, the stated case did record that the appellant had suffered from depression, in itself a mental illness, and it was further held that the appellant had suffered from emotional shock justifying damages which, too, by its very nature, implies a psychiatric lesion. At first blush, then, there was sufficient factual material to show that this was a case in which psychiatric harm had been suffered. But even more importantly, no reference was made to any of the authorities which have previously prescribed that grief, without an underlying psychiatric lesion associated therewith, cannot be the subject of a damages claim. Without those cases and the ratio of their decisions having been debated and adjudicated, it cannot be said that they have been overruled by a simple passing comment

[27] *Mbhele v MEC for Health for the Gauteng Province* (355/15) [2016] ZASCA 166.

relating to grief. The decision in *Mhbele* is therefore no authority for the proposition that our law has changed and that this court has recognised a claim for grief where there is no psychiatric lesion.

[40] Recognising this difficulty, counsel both for the appellants and for the *amicus* argued that the common law should be developed having regard to the spirit, purport and objects of the Constitution to either recognise a claim for grief and bereavement experienced as a result of S's death without there being an underlying psychiatric lesion, or to allow an award to the appellants for so-called 'constitutional damages' flowing from their grief and bereavement.

[41] In considering these arguments, it is important to remember that s 39 of the Constitution prescribes that when it becomes necessary to develop the law, it should be done in the light of the ethos of the Constitution. However, courts should not attempt to develop the common law under the aegis of the Constitution unless it is necessary to do so, and that the major engine for law reform should be the legislature rather than the courts – see *Carmichele v Minister of Safety and Security*.[28] As the Constitutional Court further stated in *Fose v Minister of Safety and Security*,[29] our common law of delict is flexible and will in many cases be broad enough to provide all the relief that would be appropriate for a breach of the constitutional right, depending of course on the circumstances of each particular case.[30]

[42] Accordingly, the starting point for the enquiry in regard to both issues, namely, the development of the common law and the claim for constitutional damages, is to consider whether the common law provides an adequate or

[28] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 35-36.
[29] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[30] Para 58.

appropriate remedy for the breach complained of in the present case.[31] As was explained by the Constitutional Court in *Mighty Solutions*[32], the steps to be taken before developing the common law are as follows:

'Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.'

[43] I must immediately record that the arguments before us did not address the question in accordance with this taxonomy, especially in explaining in what way the current state of the law offended against the spirit, purport and object of the Bill of Rights or the terms of any amendment and the wider implications eg the effect on the Road Accident Fund, which we understand is currently in straitened financial circumstances.[33]

[44] In any event, as interesting as the arguments may have been, on the facts of this matter neither issue is ripe for decision as the case can be decided on the common law principles set out above.

[45] At the outset, the fallacy in the appellants' argument that the common law needs to be developed, is that in the light of the facts in the present case no such development is required for their grief, feelings of bereavement and loss to be taken into account in the assessment of their damages. As pleaded as part of the background in the particulars of claim, it is alleged that as a result of the

[31] See *Minister of Police v Mboweni & another* 2014 (6) SA 256 (SCA) para 21.
[32] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 38.
[33] Cf https://www.moneyweb.co.za/news/south-africa/road-accident-fund-hits-the-wall/

respondents' negligence, the appellants had suffered from post-traumatic stress disorder whilst the first and second appellants had also suffered a depressive disorder. At a pre-trial conference held on 11 August 2017 the respondents admitted that the plaintiffs and their minor children had suffered 'emotional trauma and shock' as a result of S's death.[34] In doing so, and in conceding delictual liability as already discussed, the respondents clearly envisaged such emotional shock and trauma to embrace the psychiatric injuries suffered by the appellants ie their post-traumatic stress and depressive disorder. After all, as I've described in detail above, liability could only follow if there was a psychiatric lesion. Indeed in their heads of argument they rely upon the definition of 'emotional shock' (the claim in respect of which they conceded) described in *Jaensch v Coffey*[35] as '. . . the sudden sensory perception that is by seeing, hearing or touching of a person, thing or event which is so distressing that the perception of the phenomenon affronts or insults the Plaintiff's mind and causes a recognizable psychiatric illness'.

[46] Furthermore, at the outset of the hearing, when their counsel informed the court a quo 'the defendants have conceded liability in respect of Claim A' he stated that the claim for grief 'is not really dependent on . . . the development of the common law'. This is the clearest indication that the concession of the 'merits' of the claim went beyond a mere concession of negligence on the respondents part and embraced the psychiatric injury that had resulted. Importantly in this regard, the respondent's counsel also stated that the claim of R2 million for grief (ie Claim B) was 'intertwined' with Claim A.

[47] It is clear from all of this that the respondents admitted that S's death had caused each of the appellants to suffer psychiatric injury with which their extended period of grief and sense of bereavement was associated. Once the

[34] (CB 13-14).
[35] *Jaensch v Coffey* (1984) 155 CLR 549 at 567 (referred to in 9 *Lawsa* 2 ed para 545).

respondents had admitted this and conceded liability in respect of the claim, there was no longer a lis in respect of which the appellants bore the onus of proof beyond establishing the quantum of their damages. This they purported to do, in part, by the expert evidence led at the trial. In doing so, the evidence further corroborated that which the respondents had conceded. The psychologist, Mr Molepo, explained that the symptoms of depression and post-traumatic stress disorder, suffered as a result of the emotional trauma the appellants had undergone, embraced the grief they had experienced. He explained that their feelings of grief and bereavement were psychological reactions to the significant emotional trauma they had undergone due to the shock caused by the circumstances surrounding S's death and contributed to their psychiatric injuries.

[48] The court a quo dismissed the appellants' Claim A as it felt that 'due to the insufficiency of the expert evidence, the appellants had not suffered psychiatric lesions. In the light of what I have said, it clearly erred and misdirected itself in that regard. The existence of the psychiatric lesions was not only common cause but established by the evidence. The appellants were therefore entitled to claim and recover damages not for what might be called 'normal'[36] or emotional grief[37] but for a pathological grief disorder forming part of their psychiatric injury. Consequently, the common law does not need to be developed any further to provide them with redress. This conclusion renders it unnecessary to decide whether the appellants would have been entitled to damages for grief had they not suffered the psychiatric injury they did.

[49] The complicating factor in this case is the manner in which the damages were claimed. By reason of what I've said, the damages for grief should have been included in Claim A as part of the psychiatric injury the shock of S's death

[36] *Hing & others v Road Accident Fund* 2014 (3) SA 350 (WCC) para 24.
[37] A description used by Van Heerden ACJ in *Bester's* case at 217A-C.

had caused (and in respect of which liability was conceded.) Instead they were claimed in Claim B on the basis that to recover such damages required development of the common law (which as I've explained in the present case, it does not.) So what is to be done about this?

[50] It would be extremely unfair to disregard the symptoms of grief and bereavement which the appellants have suffered because of the manner in which their claim was pleaded. This counsel for the respondents conceded. He also conceded that in assessing liability for damages under Claim A, regard should be had to the appellants' extended period of grief; and that what was allowable in respect that claim should not be limited in financial terms to the amounts claimed in the particulars of claim. This was consistent with his statement at the outset of the trial that the claim for grief was intertwined with Claim A, and would seem to be a practical and sensible solution. The result is that the appeal against the dismissal of claim A must succeed; and to the extent that the appellants are entitled to damages for grief and bereavement, account must be taken of this in assessing the proper quantum of damages under that head. The appeal against the dismissal of claim B fails because the recoverable damages described therein are to be compensated under Claim A.

[51] In the light of this, I turn to consider the quantum of the damages suffered by the appellants in respect of the claim for emotional trauma and shock, which will include allowance for their grief and bereavement. In in doing so, I have had regard not only to the evidence of the claimants who testified but also to the psychological assessment reports prepared by the clinical psychologist, Ms Sodi. Although she did not testify, her reports were adopted and referred to without demur by the psychologist who did testify, Mr Molepo.

[52] As appears from these reports and Mr Molepo's evidence, all of the claimants sustained emotional shock, which is understandable given the circumstances under which poor S met his death. As already mentioned, they all suffered from post-traumatic stress disorder, bereavement and grief and, in addition the first and second appellants suffered from depression. Common difficulties experienced by all were fatigue, difficulty in sleeping, lack of concentration, poor appetite, labile emotions, sadness and grief; and particularly in the case of the first and second appellants, nightmares and flashbacks of S lying in the pit with his hand outstretched. They were also angry at the education authorities for failing to provide meaningful assistance, particularly at S's funeral. Ms Sodi opined some five months after S's death that Mrs K was suffering a major depressive disorder associated with grief. Her opinion in regard to Mr K was similar. The third and fourth appellants she felt also was suffering from a stress disorder and grief, as were the two minor children O and M, who were then 12 years of age. The youngest of the family, B, who was eight years of age, was the least affected but that is understandable given the well-known resilience of small children.

[53] The family continued to experience these symptoms for several years, albeit with diminishing severity. But although time is a great healer, when seen by Mr Molepo in April 2016, more than two years after the tragedy, they were still suffering. Even the youngest, B, became tearful when the name of his late brother was mentioned. This notwithstanding, their condition had improved substantially and will hopefully continue to do so. It was Mr Molepo's opinion that they would all benefit from further psycho-therapy.

[54] A common theme running through the evidence of the claimants who testified, was that their mental agony and grief had been exacerbated by the unfeeling attitude of the education authorities. Mr K was prevented from

removing S's body from the pit, with the principal telling him that it was too late anyway. When he and another took photographs of the scene, they were forced to delete them and were threatened with criminal charges. When Lucas tried to see the body of his brother the police prevented him from doing so. The family complained that the first contact the school's staff had made with them after the tragic events that took S's life was to ask if they could use his name on certain furniture that had been donated to the school sometime after his death, but failed at the time to enquire as to how the family were coping. They also expressed feelings of insult by reason of the lack of support extended to them from the provincial and national education authorities. The offer of settlement which they had received years after the incident they regarded as an insult.

[55] Importantly, the respondents' attitude obliged the appellants to come to court to obtain redress in proceedings which have been drawn out. Although, as I have already said, this was a case which cried out for settlement, the appellants were obliged to go to trial, submit to the rigours of the hearing, and to re-live the trauma of the past in excruciating detail. This included being subjected to unsympathetic and, at times, cruel and denigrating cross-examination. All of this must have aggravated their mental agony. The respondents' attitude to the litigation, up to and including this appeal in which in certain respects they attempted to defend the indefensible, is to be deprecated in the strongest possible terms. As a result, the appellants have been prevented from getting on with their lives and recovering from their trauma.

[56] Attempting to determine an adequate solatium for the appellants' suffering is, of course, a daunting task as no monetary compensation can ever make up for their loss. Some guidance may be obtained by having regard to awards in previous cases but comparisons are always odious, particularly as the facts in different cases already, if ever, directly comparable. I have however had

regard to the award of R100 000 in *Mbhele*'s case which, as I've mentioned, flowed from the death of a child at birth, as well as the various cases collected in that judgment. In seeking guidance from such previous awards, allowance must also be made for the effects of inflation. At the end of the day, court is called upon to exercise the discretion to determine amount which it feels is fair and reasonable to both parties given the particular circumstances of the case in question. Bearing all of this in mind, I am of the view that, taking into account the emotional shock, trauma and grief that has been suffered, it would be reasonable in respect of Claim A to award Mrs and Mr K each the sum of R350 000, Y and L K (respectively the third and fourth appellants) each the sum of R150 000 and the minor children O, M and B K each the sum of R100 000. This will be reflected in the order set out below.

Constitutional damages

[57] It was argued on behalf of the appellants, that even if Claim A was to succeed and include an allowance for grief, this court should make a further award of constitutional damages in respect of Claim B as the constitutional rights of the appellants to a peaceful family life had been breached. This it was argued would vindicate the breach of the appellants' rights, and such an award would bring home to the authorities the necessity to provide adequately for children's sanitation at schools.

[58] Constitutional damages have been awarded in the past in respect of financial loss which would otherwise not have been recovered at common law. Thus in *Kate*[38] where there had a serious delay in processing an application for a disability grant which was ultimately paid, this court granted constitutional damages equivalent to the interest which would have been payable on the money which had been unlawfully withheld. Similarly in *Modderfontein*

[38] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

Squatters[39] this court, in an award subsequently endorsed by the Constitutional Court,[40] ordered the State to pay damages equivalent to the value of land that had been lost due to a squatter invasion that occurred after the State failed to provide land for occupation by the residents of an informal settlement. See further *Mahambehlala*[41] and *Mbanga*[42] both judgments in which constitutional damages were ordered to be paid in circumstances similar to that in *Kate's* case. However, there is no reported decision in this country where constitutional damages have been awarded as a solatium for breach of a right where there has been no financial loss, either direct or indirect, or where the compensation had been awarded for a physical or psychiatric injury.

[59] It seems to me, in principle, that where, as here, persons have been compensated for their damages suffered by reason of an injury, physical or psychiatric, any further damages would effectively amount to a punishment for breach of a right for which compensation has already been granted. Nor, in this case, would this be justified to bring home to those in authority the necessity of dealing with the appalling state of sanitation facilities provided at schools. The documentation available shows that this has been brought home to them time and again. In this regard, I can do no better than refer at some length to the judgment of Ackermann J in *Fose* where the learned judge said:[43]

'[71] I agree with the criticisms of punitive constitutional damages referred to . . . above. Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is anything but an illusion. Nothing in our own recent history, where substantial awards for death and brutality in

[39] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).
[40] *President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 (5) SA 3 (CC) para 65-66.
[41] *Mahambehlala v MEC for Welfare, Eastern Cape & another* 2001 (1) SA 342 (SE).
[42] *Mbanga v MEC for Welfare, Eastern Cape & another* 2002 (1) SA 359 (SE).
[43] Paras 71-72.

detention were awarded or agreed to, suggests that this had any preventative effect. To make nominal punitive awards will, if anything, trivialise the right involved.

For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police force or other effective remedial steps taken.

[72] In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform", it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.'

[60] It was argued on behalf of the appellants that this approach was not set in stone and that since it had been delivered, other jurisdictions had recognised claims for constitutional damages flowing from breaches of constitutional obligations. For example, in *Ward*[44] a Canadian court recognised that harm is done to society when the State violates constitutionally protected rights as, it felt, this impairs public confidence and diminishes public faith in the efficacy of constitutional protection.[45] It concluded that the breach of a constitutional right causes harm to a claimant's intangible interests and should not preclude a resilient claimant from recovering damages simply because a substantial psychological injury cannot be proved.[46]

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[44] *Vancouver (City) v Ward* [2010] 2 SCR 28.
[45] *Ward* para 28.
[46] *Ward* paras 24 and 27.

[61] In New Zealand, too, compensation has been granted for the breach of a constitutional rights. In *Dunlea v Attorney-General*[47] such an award was made as it 'embraces the extra dimension of vindicating the claimant's right, a right which has been vested with an intrinsic value, and it is that intrinsic value to the claimant for which he or she must be compensated over and above the damages which the common law torts have traditionally attracted'.[48] Similarly in *Liston-Lloyd v The Commissioner of Police*[49] similar sentiments were expressed, with the court holding that an individual 'should be able to feel secure in the knowledge that the State will respect his or her [constitutional] rights, and the State should be required to compensate him or her for injury or loss resulting from the failure to do so'.[50] And in Ireland, the courts have recognised that aggravated and exemplary damages may be awarded against the State where the government has taken 'oppressive, arbitrary or unconstitutional action'.[51] The Irish Supreme Court also sanctioned exemplary damages for constitutional rights and violations in order to mark its particular disapproval of conduct.[52]

[62] The appellants also placed emphasis upon the recent arbitration award in the *Life Esidimeni*[53] case which involved the death of numerous patients who were moved from a properly equipped medical facility to various institutions incapable of meeting their needs. The arbitrator, a former Deputy Chief Justice of this country, recognised that the rights of the families of those who had died had been violated and awarded substantial compensation as constitutional damages. However not only does this lack the binding force of judicial

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[47] *Dunlea v Attorney-General* [2000] 3 NZLR para 67.
[48] *Dunlea* para 67.
[49] *Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614.
[50] Paras 42-44.
[51] *Kennedy v Ireland* [1987] IR 587 at 594.
[52] *Conway v Irish National Teachers Organisations* [1991] 2 IR 305 at 317.
[53] *Life Esidimeni Arbitration Award* at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf.

precedent, but the facts of that case are substantially different to the present and each case must be decided in the light of its own peculiar circumstances.

[63] Depending upon the facts and circumstances of any particular case, the approach of awarding constitutional damages to mark displeasure may well be justifiable in theory, but there are practical considerations as well. The social and political circumstances in Canada, New Zealand, Ireland and other jurisdictions abroad are quite unlike those which pertain in this country. Here there is a chronic shortage of what would in foreign jurisdictions be regarded as basic infrastructure; and here the public purse could be far better utilised for the benefit of many than in paying a handful of persons a substantial sum over and above the damages they have sustained and for which they have been compensated. Furthermore the breach of rights involved in the failure to provide proper sanitation facilities at schools is, on the evidence, widespread and affects the rights of a large number of scholars across Limpopo. I can see no reason why the K family should be the beneficiaries of an additional award of constitutional damages in order to vindicate the rights of all scholars to proper sanitation facilities at schools. I do not think things have changed so much in this country that the approach set out in *Fose* is no longer appropriate. In my view there is no room for an award of constitutional damages.

The declaratory order

[64] I turn now to deal with the court a quo's refusal to grant a declaratory order relating to the respondents' breach of their constitutional obligations. It was argued that in the light of the finding that the respondents' actions breached the rights of the K family to equality, dignity, life, safe environment and basic education, the court ought to have issued the declarator the appellants sought rather than refusing it on the basis that it would serve no immediate purpose. This argument was based squarely upon s 172(1)*(a)* of the Constitution which

provides that when deciding a constitutional matter, a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. Relying upon decisions such as *Minister of Health v Treatment Action Campaign (No 2)*[54] and *National Director of Public Prosecutions v Mohamed NO*[55] it was argued that the Constitutional Court had confirmed the existence of this duty insofar as it applies to state policy, and that where a court finds that a policy is inconsistent with the Constitution it is obliged under s 172(1)*(a)* to make a declaration to that effect.[56]

[65] That is no doubt so, but I do not think it can be said to have been state policy to have provided only such abysmal sanitation infrastructure, and the structured interdict issued by the court a quo was aimed at ensuring an improvement at the school. In addition, the court a quo in its judgment castigated the education authorities for failing to provide proper toilet facilities at schools, stating that those which had been provided were not fit for human use and that it was clear that 'due to lack of political will no effort was made to better the situation at schools of which the [MEC, Department of Education] was well aware'. This stinging rebuke, which this court endorses, will hopefully in itself move those in authority to take action to improve the situation.

[66] Furthermore, but a compelling factor as was stressed by this court in *Kate*,[57] a declarator is most appropriate where it will serve a useful purpose in clarifying or settling legal disputes to hopefully present new ones from arising. In that matter, the invitation to issue a declarator was refused as this court felt that there could be no doubt that the conduct of the administration was

[54] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) paras 99-106.
[55] *National Director of Public Prosecutions & another v Mohamed NO & others* 2003 (1) SACR 561 (CC) para 56.
[56] See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) para 101.

[57] *Kate* para 28.

constitutionally unlawful and there would therefore be no purpose in any further pronouncement to that effect. In the present case, the authorities are well aware of the problem and their obligation to overcome it. Thus far they seem to have lacked the capability to do so, but that will not be overcome by a declaratory order. Moreover the declaratory sought, namely, that the respondents had breached various sections of the Constitution would not identify the conduct which is the subject of the order nor identify the respects in which constitutional obligations were breached. It would thus be inappropriate to issue a declaratory in such indeterminate terms.

[67] In these circumstances, I do not think this court can say that the court a quo did not exercise its discretion judicially in not granting the declarator the appellants sought. That being so, there is no room for this court to interfere on appeal.

Future medical expenses

[68] I turn now to consider the future medical expenses claimed in respect of B. In respect of Claim C, the court a quo allowed M and O each R6 000 in respect of future medical expenses, but disallowed any amount in respect of B as there had been no specific claim on his behalf in the particulars of claim. Of course there should have been such a claim, and it is surprising to say the least that an amendment in that regard was not sought. But it would be unjust to disallow B his due merely because of the straitjacket of the claim as pleaded. Counsel for the respondents was constrained to concede during argument that justice demanded that the award be altered to allow B a sum in respect of the loss which appears not to have been claimed due to an oversight. That, too, was a sensible and practical approach to an obvious injustice.

[69] For these reasons, the award in respect of Claim C should be altered. I can see no reason why B should not be awarded the same sum as his siblings, an amount not challenged on appeal. The award in respect of Claim C will therefore be altered to include the sum of R6 000 in respect of B' future medical expenses.

Costs

[70] That brings me to the question of costs. The appellants have succeeded on appeal, and costs should follow that event. We have been alerted, however, to the fact that two of the three counsel who appeared for the appellants acted *pro bono* and do not seek to be included in the costs order. In these circumstances, those counsel are not only to be thanked for their services but it is fair and reasonable to issue an order similar to that in the court a quo allowing them to recover the reasonable costs of their disbursements in travelling to and accommodating themselves in Bloemfontein for this appeal.

[71] Further in regard to costs, I should mention that the court a quo ordered the respondents to pay the costs of the *amicus curiae*. It did so as it felt the *amicus* had been of assistance 'by advancing comprehensive and useful argument'. I accept the *amicus* was of assistance, but that in itself was no reason for it to be awarded its costs. An *amicus* appears not as a party, but as a friend of the court, and it is trite that it is thus not entitled to costs.[58] However, there is no appeal against that order and, wisely, the *amicus* did not seek its costs in this court – in which it was, in any event, probably somewhat fortunate to have been recognised given that its argument was substantially the same as that of the appellants. Having said that, we are grateful to counsel who appeared on its behalf, whose argument was skilful and illuminating.

[58] *Ex parte De Vos* 1953 (2) SA 642 (SR) at 643D-H.

Further evidence

[72] One further issue needs to be mentioned. The appellants filed an application to place what it referred to as 'new evidence' before this court on appeal, contending it to be relevant to their claim for constitutional damages as well as the declaratory order that they sought. This ran into hundreds of pages, and appeared to have been evidence compiled in response to the structured interdict issued by the court a quo. The essence of the appellants' contention in this regard was that this evidence showed that the respondents had failed to properly comply with their undertakings under the structured interdict. This information was really a matter for the court a quo, which had ordered the first and second respondents to report to it in respect of various issues as set out in paras 2.3 and 2.4 of the order it granted.[59] In any event, many of the allegations appeared to be disputed or a matter of political, rather than legal, relevance. And, at the end of the day, the application was not formally moved before us and no reference was made to these documents. Nothing further needs be said about the issue.

Result

[73] In the light of what is set out above, the following order will be made:

A The appeal succeeds to the extent that the order of the court a quo is altered as follows:

'1 The words "the claim is dismissed" in para 1 of the order are deleted and substituted by the following:

(a) In respect of the claim for emotional shock and grief, the first and second defendants are ordered to pay the following amounts, jointly and severally, the one paying the other to be absolved:

(i) R350 000 for Mrs K;

(ii) R350 000 for Mr K;

[59] Quoted in para 19 of this judgment.

(iii) R200 000 for Ms Y K;

(iv) R200 000 for Mr L K;

(v) R100 000 for each of the minor children M, O and B K.

2 The words ‘Claim A’ and ‘The claim for grief is dismissed’ are deleted from para 2 of the order.

3 Paragraph 3.1 of the order is deleted and substituted with the following:

‘3.1 The claim for future medical treatment in respect of the minors M, O and B K succeeds. The first and second defendants are ordered to pay for the future treatment in respect of:

(a) M K, the amount of R6 000.

(b) O K, the amount of R6 000.

(c) B K, the amount of R6 000.’

B The first and second respondents are to pay the appellants’ costs of the appeal, jointly and severally, the one paying the other to be absolved. Such costs are to include the disbursements incurred by two counsel who appeared *pro bono* for the appellants in travelling to and being accommodated in Bloemfontein in order to present this appeal.’

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L E Leach
Judge of Appeal

Appearances

For the Appellants:	V Maleka SC (with him A Hassim and N Stein)
Instructed by:	Section 27, Braamfontein
	Webbers, Bloemfontein
For the Respondents:	M S Phaswane (with him K Ramaimela)
Instructed by:	The State Attorney, Polokwane
	The State Attorney, Bloemfontein
Amicus Curiae:	K Hofmeyr (with her H Cassim and A Armstrong)

Equal Education Law Centre, Khayelitsha

Webbers, Bloemfontein