

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

CASE NO: 20373/2017

In the matter between:

MARIUS CRISTIANO OTTO

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Coram: P.A.L. Gamble, J

Date of Hearing: 23 February, 30 & 31 May 2023, 26 February & 23 April 2024

Date of Judgment: 31 January 2025

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be Friday 31 January 2025 at 10h30.

JUDGMENT DELIVERED ON 31 JANUARY 2025

GAMBLE, J:

INTRODUCTION

1. At around 00h30 on Saturday 11 June 2011, the plaintiff's mother, Ms. Emmerencia Charmaine Otto (aka Kaliema), was arrested at her home in McGregor

by members of the South African Police Services (SAPS) following a complaint of domestic disturbance. She was taken to the local police station and held in custody on a charge of riotous behaviour. Within an hour of her arrest, Ms. Otto was found dead in the cell in which she had been detained: she had committed suicide by hanging herself with her shoelaces.

2. Summons was issued in 2017 on behalf of the plaintiff by his grandmother (Ms. Emily Otto) in her representative capacity as guardian of the minor child who was born on 9 June 2000. Later, after he attained majority, the plaintiff was substituted as such in these proceedings.

3. In his claim against SAPS (finally amended during the course of the trial in January 2024) the plaintiff seeks damages on the grounds that the police were negligent in the manner in which they detained Ms. Otto (hereinafter conveniently referred to as “the deceased”). The individual heads of damage are, firstly, the plaintiff’s alleged loss of support by the deceased in the sum of R102 030,00. Secondly, for his estimated future medical expenses in the sum of R1 289 920,00 and thirdly, for general damages in the amount of R500 000,00 for shock, past and future pain, suffering, discomfort, disablement and loss of amenities of life.

4. The trial commenced on 23 February 2023 and concluded, after various postponements, on 23 April 2024. The Court was requested to determine both the merits and the quantum of the claim. In this judgment I do not intend dealing with the evidence of each witness *seriatim* – that is all a matter of record. Rather I shall narrate the sequence of events as they unfolded.

THE MATERIAL FACTS

5. The deceased was well-known to the police in McGregor, a village of only some 3000 inhabitants, many of whom are weekend and holiday visitors. The evidence shows that there had been incidents of domestic strife between her and her

partner, a certain Ms. Willemse, in the past and that both had previously been arrested for drunkenness.

6. On the evening of 10 June 2011, Sgt Wayne Page of the local constabulary received a report of trouble at the deceased's home in Keerom Street, McGregor. When he arrived there he found the deceased and Ms. Willemse arguing about money. He testified that the deceased was under the influence of alcohol. After he had intervened the two women calmed down and undertook to resolve their differences.

7. Sgt Page said that later that night (between 24h00 and 01h00) he received a further report that the two women were at it again and he hastened to the house accompanied by 2 colleagues, W/O Johannes Mei and Sgt Plaatjies, who travelled in a separate patrol van. As he approached the home, Sgt Page said he could hear that there was an on-going argument. When he asked the deceased to calm down she refused and told him that unless he took Ms. Willemse away, she would stab her there and then. W/O Mei confirmed this in his testimony.

8. When the trouble did not abate, Sgt Page said he decided to arrest the deceased on a charge of so-called "riotous behaviour"¹. The deceased refused to co-operate and was bundled into the back of the patrol van with the assistance of the other police officers. After a short drive of just 5 minutes, the deceased was taken to the charge office at the police station to be booked in by W/O Mei, who was stationed at Robertson but had been sent over to McGregor that night to conduct a so-called "station visit". He was the highest-ranking officer at McGregor that night and was responsible for issuing instructions to his subordinates in the absence of the station commander who was off duty.

¹ The precise details of the relevant statutory offence were never articulated in evidence but are of no moment.

9. At the police station the deceased was asked to hand over her belongings and in particular her shoelaces, but she resolutely refused. This presented a problem because police standing orders at the time required that any items that might be used by the detainee to harm herself (or others) had to be removed from her possession. The problem was compounded by the fact that there was no female officer on duty that night to conduct a physical search of the deceased. Once again, standing orders required that the detainee could only be searched by an officer of the same gender.

THE "HALFWAY"

10. This problem had evidently arisen before and so W/O Mei instructed Sgt Page to phone through to the police station in nearby Robertson (which is about 25km away) and ask for a female officer to be sent to search the deceased. An arrangement was then made for what was known in local police parlance as "*a halfway*". This procedure involved a patrol van from Robertson driving through to a spot near a farm called "Uitnood" (which is about halfway between the towns) with a female officer on board. At the same time the McGregor van would be driven through to the "halfway" with the female detainee and the latter would then be searched at the "halfway" by the female officer. Once the task was complete, the patrol vans would make an about turn and head back to their respective police stations.

11. On the night in question, the Robertson police sent Const. Sonia Rosenkrantz to search the deceased at the "halfway". She testified on behalf of the plaintiff at the trial and explained how the exercise usually happened. It appeared that Uitnood was on the border between the respective police districts and that the permission of the duty commander at Robertson was required for the search to take place. Issues of jurisdiction, budgetary constraints and wasteful expenditure were evidently present to the minds of the police at that time.

12. Const Rosenkrantz said she and her escort arrived at Uitnood where they stopped and waited. Shortly thereafter Sgt Page arrived, *sans* the deceased. It was not clear from the evidence why he drove alone – either he forgot to load the deceased into the back of the McGregor van, or he did not understand how the “halfway” worked: perhaps he thought he was required to collect Const Rosenkrantz and take her through to McGregor without giving consideration to the question of how she would later return to Robertson. Would the constable be driven back to Uitnood and the Robertson van be called back to the halfway, or would it be required to go all the way to McGregor and collect the female constable, or would she be taken back to Robertson in the McGregor van? Self-evidently, wasteful expenditure and budgetary constraints were not present to the mind of Sgt Page that night.

13. In any event, Const Rosenkrantz said that when Sgt Page arrived without the deceased, she was required to contact the duty commander at Robertson, Capt de Klerk, and obtain permission for the Robertson van to be driven through to McGregor. In the circumstances, the go-ahead was given and Sgt Page drove back alone escorting the Robertson van on its journey beyond the bounds of its jurisdiction.

14. When they arrived at McGregor, Const. Rosenkrantz said she was taken by Sgt Page to the female cells where she found the deceased hanging by her neck from the window bars. In a macabre twist of fate, the deceased had committed suicide by using the very laces the police had been duty bound to take off her. Sgt Page immediately cut loose the ligature, but the deceased had already breathed her last.

15. The circumstances under which the deceased came to be alone in the cell were described by Sgt Sivuyile Eric Mantshule, a policeman with some 18 years’ experience at the time, who was the McGregor charge office commander on the night in question. He testified that he had accompanied Sgt Page on the first visit to the deceased’s home that night and confirmed that both women were intoxicated and troublesome.

16. Sgt Mantshule said that he was alone on duty in the charge office later when Sgt Page and W/O Mei brought the deceased in after she had been apprehended. Sgt Mantshule said that police standing orders required an arrested person to be searched, and all her personal belongings removed before she could be locked up in a cell. These included items such as a belt, shoelaces and any other items of a personal nature that might be used by the detainee to harm herself or others.

17. Sgt Mantshule said that he went out to the parking area when Sgt Page stopped the van and saw that the deceased was unruly and rebellious. She was in a belligerent mood, talked loudly and refused to give her co-operation, refusing point blank to be searched, or to surrender her belongings. Sgt Page was then instructed by W/O Mei to do the “halfway” while the deceased was taken directly to the cells area by Sgt Mantshule.

18. The cell block at the McGregor police station comprised 4 individual cells – 1 for females, 1 for juveniles, 1 for “A class” male criminal suspects and 1 for “B class” males². Each cell was enclosed with a steel grate and the entire area was protected by a steel door. On the instruction of W/O Mei the deceased was placed by the sergeant in the female cell and the steel grate was closed. However, Sgt Mantshule said he left the outer steel door open and claimed that he could see what was happening in the female cell from where he stood a short distance away in the charge office.

19. Sgt Mantshule said that not long after the deceased was locked up, an unruly mob descended on the police station enquiring after her arrest and demanding to see the deceased. Chief among these was the deceased’s mother, Ms. Emily Otto. In the meantime, W/O Mei had returned to Robertson taking with him Sgt Plaatjies

² The classification of male detainess was according to the gravity of offences allegedly committed.

who had gone off duty at midnight, leaving Sgt Mantshule alone at the charge office while Sgt Page did “the halfway”. The former testified that he had his hands full keeping the crowd under control.

20. While all this was happening the worst eventuated: the deceased removed the laces from her shoes and strung herself up from the bars of the cell window. The postmortem examination later found that she had died as a consequence of “*asphyxia due to ligature strangulation following self-suspension (suicide)*”.

21. I propose to deal with the allegations made by the plaintiff in the particulars of claim in respect of the negligence of the defendant and the evaluation thereof. Consideration of the damages will then follow.

THE ALLEGATIONS CONTAINED IN THE PLEADINGS

22. The negligence of the police officers on duty is based on three discrete causes of action. Firstly, it is contended that the police breached their common law duties vis-à-vis a detainee in the position of the deceased. Secondly, it is alleged that the police were in breach of certain statutory duties under the relevant legislation and the code of conduct prescribed for police officers. Thirdly, it is alleged that certain constitutional rights of the deceased were breached. I shall deal with each cause of action separately.

COMMON LAW DUTY

23. In the particulars of claim as finally amended in January 2024, the plaintiff alleges that at common law the police were –

“(1) Obligated to protect the deceased whilst in custody, against harm, assault, violence and violent crime and to protect her dignity, life and freedom of security, including her bodily integrity;

- (2) Obligated to ensure and protect her well-being whilst in custody and be pro-active and responsive in such regard;
- (3) Obligated to detain the deceased separately from other detainees, the deceased having been arrested for being rebellious;
- (4) Obligated to patrol and inspect the cells at regular intervals and obligated to regularly check on the inmates in the cells;
- (5) Obligated to exercise reasonable care and take all necessary steps to prevent the deceased from injuring herself;
- (6) Obligated to place a cell-guard at the cells, given the fact that the deceased was not body searched at that stage;
- (7) Obligated to place a cell-guard at the cells, given the fact that the deceased had been arrested for being rebellious;
- (8) Obligated not to act with deliberate indifference to the health and safety of the deceased; and
- (9) Owed the deceased and Plaintiff a positive and pro-active duty of care in such regard."

24. In the plea the defendant deals with these allegations by-

- (1) Denying that the deceased had been arrested for "being rebellious";
- (2) Admitting the contents of para's 1-5, and 8-9, subject to the proviso that the police's common law duties were at all times exercised in the context of budgetary constraints imposed on the police service by the national fiscus; and
- (3) Denying para's 6 and 7.

SOUTH AFRICAN POLICE SERVICE ACT

25. In addition to the common law duties of the police (which are largely common cause), the primary statute on which the plaintiff relies is the South African Police Services Act, 68 of 1995 (the SAPS Act)

"12. **SOUTH AFRICAN POLICE SERVICE ACT:**

12.1 Further, and at all material times, the members of the Defendant were obliged by the preamble and section 14 of [the SAPS Act], to ensure the deceased's safety and security, to uphold and safeguard her fundamental rights as guaranteed by Chapter 3 of the Constitution of the Republic of South Africa, 108 of 1996 (hereinafter referred to as the "Constitution"), including her right to dignity, life and freedom and security as set out in Sections 10, 11 and 12 of the Constitution and to preserve the plaintiff's life and health."

In the plea the defendant admits the contents of this paragraph.

SAPS CODE OF CONDUCT

26. In addition to their alleged common law duties, the plaintiff alleged that the police were bound under the "SAPS Code of Conduct" to –

- “(1) Create a safe and secure environment for the deceased;
- (2) Prevent action(s) which may threaten the safety or security of the deceased;
- (3) Uphold the Constitution and the Law;
- (4) Render a responsible and effective service of high quality;
- (5) To utilize all the available resources responsibly;
- (6) Efficiently and cost-effectively to (sic) maximize their use;
- (7) To uphold and protect the fundamental rights of the deceased;
- (8) To act transparently and in an accountable manner; and
- (9) To exercise the powers conferred upon them in a responsible and controlled manner.”

Each of these statutory duties is admitted by the defendant in the plea.

CONSTITUTIONAL OBLIGATIONS

27. Lastly, in relation to the defendant's statutory duties, the plaintiff pleads that the members of the SAPS were obliged under the Constitution, 1996 to –

- “(a) Protect the deceased's dignity (s10) and life (s11);
- (b) Protect her freedom and security of person (s12), in particular that she was entitled to be free from all forms of violence (12(1)(c)), not to be tortured in any way (s12(1)(c)) nor to be treated or punished in a cruel, inhumane or degrading manner (12(1)(e));
- (c) Protect her right to bodily integrity.”

28. The defendant admits that it bore each of these constitutional obligations towards the deceased. However, in light of the principle of subsidiarity, it is not clear what cause of action the plaintiff relies on given that he has relied on breaches of the SAPS Act and the Code of Conduct promulgated thereunder.

THE ALLEGED BREACHES BY THE DEFENDANT OF ITS COMMON LAW AND STATUTORY DUTIES

29. The alleged breaches of the various duties owed by the defendant to the deceased are contained in one lengthy paragraph.

“15. **DEFENDEANT'S BREACH:**

15.1 In breach of the foregoing and further wrongfully and unlawfully and negligently, the said members [of the SAPS], whose full and further particulars are to the Plaintiff unknown, except where specified:

15.1.1. Failed to protect the deceased from harm;

15.1.2. They failed to comply with their duty of care towards the deceased;

15.1.3. They failed to remove all ligatures from the deceased and/or in the holding cell in which she was kept to be used by the deceased or someone else in hanging her;

15.1.4. They failed to comply with National instructions, standing orders and regulations of the South African Police Service with regard to the detention of the deceased;

- 15.1.5. They failed to inspect the relevant holding cell at all relevant times during the deceased's detention;
- 15.1.6. Failed to inspect the cell in which the deceased was detained at regular intervals and did not regularly check on the inmates in the cells;
- 15.1.7. Failed to take reasonable care and the necessary steps to prevent the deceased from being fatally injured;
- 15.1.8. Acted with deliberate indifference to the health and safety of the deceased;
- 15.1.9. Failed to exercise proper control over the deceased;
- 15.1.10. Failed to ensure the deceased's safety and security by virtue of the Common Law (as per par 11 above);
- 15.1.11. Failed to ensure the deceased's safety and security as set out in the Preamble of Section 14 and Section 15 of the SAPS Act (as per par 12 above);
- 15.1.12. Failed to secure a safe and secure environment for the deceased as required by the SAPS Code of Conduct (as per par 13 above);
- 15.1.13. Failed to visit the cell in which the deceased was every half hour, [SO 361.13(6)(a)(ii)]³ alternatively, failed to visit the cell in which the deceased was detained at more regular intervals, further alternatively failed to place a guard at the cell in which the deceased was detained, given the relevant facts as is (sic) repeated above herein;
- 15.1.14. Failed to release the deceased in terms of the provisions Section 56 of the Criminal Procedure Act, 51 of 1977;
- 15.1.15. Failed to enter the deceased's cell to ensure her safety (SO 361.13(6)(b)).
- 15.2. As a direct consequence of the above stated facts, the deceased died."

30. In the plea, the defendant denies each of the allegations made in para's 15.1.1 to 15.1.15, save for para 15.1.4 where the defendant pleads that the contents

³ This is evidently a reference to the SAPS Standing Orders promulgated under the SAPS Act.

thereof are vague and embarrassing and that the defendant “is consequently precluded from pleading thereto.”

STANDING ORDERS

31. In Standing Order (G) 41 Para 1, which was operative in 2011, SAPS members were cautioned that the Orders in question were “to be adhered to strictly”. Para 8(4) thereof is relevant to this matter and provides as follows:

“8(4) Search of the arrested person

In terms of section 23 of the Criminal Procedure Act, 1977, a member may search an arrested person. The purpose of such a search is twofold, namely to find any article that may be in such person’s possession and which could be used as evidence, and to find any article which such person could use to injure himself or herself or any other person.

(a) Every arrested person must always, **immediately upon his or her arrest**, at least be searched to determine whether he or she has any concealed weapons on him or her.

(b) The search of an arrested person must be undertaken in a decent manner which displays respect for the inherent dignity of the person as required by section 29 of the Criminal Procedure Act, 1977, and a person may only **be searched by a person of the same gender.**” (Emphasis added)

EVALUATION OF THE MERITS

32. Having heard the evidence of the various police officers (who testified first in the purported discharge of the evidential onus drawn by the defendant under the pleadings), it must be said the facts of this matter essentially speak for themselves – *res ipsa loquitur*. After her apprehension at her home, and before she could be detained in a cell, the Standing Orders required that the deceased be searched by a female police officer in order, inter alia, to prevent her from harming herself. She was not so searched and used an item on her person – her shoelaces – to intentionally

harm herself, with fatal consequences. The question that thus arises is whether the defendant is vicariously liable to the plaintiff in delict for the common cause conduct of its members vis-à-vis the deceased.

NEGLIGENCE

33. It is useful in these circumstances to revert to first principles. In the oft-quoted decision in Kruger⁴ the approach was authoritatively summarized by Holmes JA as follows.

“For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.”

34. Now, after another half century has passed, the approach remains the same. In Oppelt⁵ the Constitutional Court confirmed the *dictum* in Kruger which was summarized by Cameron J as follows –

“[106] In our law, Kruger embodies the classic test. There are two steps. The first is foreseeability – would a reasonable person in the position of the defendant foresee the reasonable possibility of injuring another and causing

⁴ Kruger v Coetzee 1966 (2) SA 428 (A) at 430E

⁵ Oppelt v Department of Health, Western Cape 2106 (1) SA 325 (CC) at [69]

loss? The second is preventability – would that person take reasonable steps to guard against the injury happening?”

35. In the present case, counsel for the defendant accepted in argument that the SAPS personnel on duty at McGregor that night owed the deceased a duty of care to search her and remove her shoelaces, and that they failed to do so. It is thus common cause that the plaintiff's claim for negligence is founded on an omission (as opposed to a positive act) which resulted in physical injury, and that the omission in issue here is the failure of the police to search the deceased before locking her up in the female cell.

WRONGFULNESS

36. It is now trite that an omission such as that which occurred in this matter, on its own, is not enough. Following the decision of the Appellate Division in Ewels⁶ and the various decisions at appellate level which have followed it, the plaintiff must establish the element of wrongfulness on the part of the police officers before delictual liability will be founded.

37. In Van Duivenboden⁷ the Supreme Court of Appeal (SCA) was concerned with the issue of inactivity by the police to act against a man in possession of a licensed firearm known for his tendency towards violent behaviour in circumstances where it was considered necessary, and which had resulted in the death of innocent persons and injury to a bystander. The matter thus has some resonance with the present matter.

38. In considering the element of wrongfulness, Nugent JA stressed the importance of the duty to take positive action on the part of state actors in appropriate circumstances.

⁶ Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 597

⁷ Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)

“[19] The reluctance to impose liability for omissions is often informed by a laissez faire concept of liberty that recognizes that individuals are entitled to ‘mind their own business’ even when they might reasonably be expected to avert harm, and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy, might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, **for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm.** The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability. That last consideration ought not to be unduly exaggerated, however, bearing in mind that the requirements for establishing negligence, and a legally causative link, provide considerable practical scope for harnessing liability within acceptable bounds...

[21] When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of state policy, or

where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates between matters of policy and matters that fall within what is called the ‘operational’ sphere of government though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. **However where the state’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.** For as pointed out by Ackermann J in Fose v Minister of Safety and Security in relation to the Interim Constitution (but it applies equally to the 1996 Constitution):

“... without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve that goal.” (Emphasis added; all internal references otherwise omitted)

39. A summary of the legal position was thereafter set forth by Brand JA in Two Oceans⁸.

⁸ Trustees for the time being of the Two Oceans Trust v Kantey and Templer (Pty) Ltd 2006 (3) SA 128

“[10] ...Negligent conduct giving rise to damages is, however, not actionable per se. It is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) para 12; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) para 12). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms (see eg Administrator, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) 833A; Van Duivenboden supra para 22 and Gouda Boerdery BK supra para 12).

[11] It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', i.e. whether it would be reasonable to impose a legal duty on the defendant (see eg Government of the Republic of South Africa v Basdeo and another 1996 (1) SA 355 (A) 367E-G; Gouda Boerdery BK supra para 12). Where that terminology is employed, however, it is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see eg Anton Fagan 'Rethinking wrongfulness in the law of delict' 2005 SALJ 90 at 109). Likewise, the 'legal duty' referred to in this context must not be confused with the 'duty of care' in English Law which straddles both elements of wrongfulness and negligence (see eg Knop v Johannesburg City Council 1995 (2) SA 1 (A) 27BG; Local Transitional Council of Delmas v Boshoff 2005 (5) SA 514 (SCA) para 20). In

fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulness was somewhat unfortunate. As was pointed out by Harms JA in Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA ([2006(1) SA 461 (SCA)], para 14), reference to a 'legal duty' as a criterion for wrongfulness can lead the unwary astray. To illustrate, he gives the following example: '[T]here is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty because of negligence, acted wrongfully.' (See also Knop v Johannesburg City Council supra 33D-E.)

[12] When we say that a particular omission or conduct causing pure economic loss is 'wrongful' we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not (see eg Telematrix (Pty) Ltd supra para 14; Local Transitional Council of Delmas supra para 19; Anton Fagan op cit 107-109). Perhaps it would have been better in the context of wrongfulness to have referred to a 'legal duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just to a 'legal duty'. I say this in passing and without any intention to change settled terminology. As long as we know what we are talking about. When a court is requested, in the present context, to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension. And as pointed out in Van Duivenboden (para 21) and endorsed in Telematrix (para 6)

in answering that question '... what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.' (internal references otherwise omitted)

40. In Loureiro⁹ the Constitutional Court (CC) stressed the importance of locating the consideration of such wrongfulness constitutionally. Van der Westhuizen J put it as follows.

“[53]...The enquiries into wrongfulness and negligence should not be conflated. To the extent that the majority judgment of the Supreme Court of Appeal did not distinguish between these, it is incorrect. The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability. [The wrongdoer’s] subjective state of mind is not the focus of the wrongfulness enquiry. Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault.”

41. Lastly there is the decision of the CC in Country Cloud¹⁰ where Khampepe J confirmed the approach to claims for pure economic loss (albeit in that matter in a purely commercial context) as follows.

“[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether “the social, economic and others costs are just too high to justify 4 In its written submissions in this Court, Country Cloud abandoned its claim for the R8.5 million in lost profits and focused solely on the R12 million loan amount. The Department also did not persist with the

⁹ Loureiro v Imvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC)

¹⁰ Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng 2015 (1) SA 1 (CC)

defences it raised in the High Court and Supreme Court of Appeal based on the lawfulness of the award of the completion contract and the lawfulness of its cancellation. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

[21] Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this Court in Loureiro recently articulated that the wrongfulness enquiry focuses on—

“the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.”

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: “that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages”, notwithstanding his or her fault.

[22] Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights, and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.

[23] So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed.

[24] In addition, if claims for pure economic loss are too-freely recognised, there is the risk of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. Pure economic losses, unlike losses resulting from physical harm to person or property—

“are not subject to the law of physics and can spread widely and unpredictably, for example, where people react to incorrect information in a news report, or where the malfunction of an electricity network causes shut-downs, expenses and loss of profits to businesses that depend on electricity.”

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

DISCUSSION ON THE MERITS

42. Counsel addressed the issue of wrongfulness fully in their heads of argument. On behalf of the plaintiff it was submitted that there can be no doubt that the fatal consequences which ensued upon the arrest of the deceased and the failure to search her were reasonably foreseeable in the prevailing circumstances. I agree. The deceased was intoxicated, she would not cooperate nor heed any warning and

her behaviour was volatile and unpredictable. Moreover, although it was the deceased who had earlier suggested to Sgt Page that she intended to do harm to her partner, common sense should have alerted the police to the fact that she might just as well turn that harm on herself or others. Counsel for the plaintiff further urged the Court to have regard to the police's statutory obligation to search the deceased before locking her up and the fact that the breach thereof was common cause.

43. Counsel for the defendant, on the other hand, readily accepted that in law the police owed the deceased a duty of care. But, he correctly argued, this was not the end of the enquiry - the Court had to be persuaded that the police behaved wrongfully on the night in question. In that regard, it was suggested that the police were really on the horns of a dilemma. The male officers on duty were not permitted to search a female detainee, while the standing orders required her to be searched before being detained. If the male officers had searched the deceased, they would have breached the Code and invaded her constitutional rights to privacy and dignity, with the possible consequence of a claim for such damages.

44. Consequently, it was argued, their decision to detain the deceased without searching her while a female officer from Robertson was transported over to conduct the search was reasonable given that the deceased would have been under the watchful eye of Sgt Mantshule in the charge office. It was said that no one could have anticipated that the latter would have been distracted from his duty to keep the deceased under surveillance and that the arrival of the unruly mob was entirely unexpected. It was argued that to impose liability on the police in such circumstances, particularly where the deceased had exhibited no suicidal tendencies, would have a "chilling effect" on the defendant, as the cases have stated.

45. I should mention *en passant* that it is common cause that the officers involved in this catastrophe were subjected to departmental discipline and found guilty of misconduct in relation to the way in which they failed to discharge their respective duties that night.

46. The cases to which I have referred require the Court to stand back, consider the matter objectively and ask whether it would be reasonable to hold the police liable for failing to adhere to the standing orders in the circumstances. In Van Duivenboden it was said that this exercise required consideration of all the relevant circumstances.¹¹ In that regard Nugent JA referred with approval to the following extract from Fleming¹²

“In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff’s invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.”

47. In conducting that enquiry, I consider that it is necessary to weigh up the reasonableness or not of the conduct of the police at McGregor that night by looking at the various options available to them.

48. Firstly, the police could have removed the deceased’s shoelaces with the minimum of invasion of her bodily integrity – no more of an invasion than holding the deceased by the arm in order to handcuff her or lead her away to the patrol van. Secondly, they should have conducted the “halfway” in accordance with the established practice by placing her in the rear of the patrol van and driving her to the “halfway” where she should have been searched by Const Rosencrantz before being driven back to McGregor and incarcerated. The likelihood of the deceased harming herself with her shoelaces during such a journey was minimal. Thirdly, if they had reason to depart from the standard practice and did not want to run the risk of her

¹¹ Van Duivenboden at [13]

¹² Fleiming The Law of Torts 4th ed at p136

being injured during the journey to and from the “halfway”, the police could have cuffed the deceased to an immovable object such as a burglar bar (or a heavy object such as a desk) in the charge office.

49. But, in clear breach of the Standing Orders, the police demonstrated what can only be termed gross ineptitude bordering on base stupidity. They deviated from the standard “halfway” practice and permitted an intoxicated person who was emotionally volatile to be incarcerated while in possession of the very objects they were duty-bound to remove from her to avoid the possibility of her harming herself or others. The spectre of deaths in detention has been a blight on our society for many decades and the purpose of the Standing Orders in relation to the treatment of detainees no doubt seeks to avoid the perpetuation of those horrors of the past.

50. Lastly, I proceed to consider what Nugent JA termed the *laissez faire* approach to the evaluation of wrongfulness. In the present context that might translate into posing the question whether the police were entitled to be indifferent to the deceased’s decision to end her own life. While the question raises debates of a moral and philosophical nature, the simple answer is that the Standing Orders required the police to take active steps to avoid the deceased harming herself: they were not entitled to express indifference thereto.

CAUSATION

51. I did not understand counsel for the defendant to question the issue of causation, the final link in the chain of delictual liability. The classic test to establish causation was recently restated as follows by the SCA in Za.¹³

“[30] The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, eg by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E-H. What it

¹³ Za v Smith and another 2015 (4) SA 574 (SCA)

essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty (see eg Minister of Safety & Security v Van Duivenboden 2002 (6) SA 431 (SCA) para 25; Minister of Finance v Gore NO [2006] ZASCA 98; 2007 (1) SA 111 (SCA) para 33. See also Lee v Minister of Correctional Services [2012] ZASCA 30; 2013 (2) SA 144 (CC) para 41.)"

52. Applying that approach to the instant case, there can be no doubt that the death of the deceased was causally linked to the failure of the police to adhere to their common law and statutory obligations.

CONCLUSION ON THE MERITS

53. In my considered view, the convictions of the community would hold that there can be no question of absolving the police for their failure to do what was required of them. The breach of their legal obligations was serious: they intentionally deviated from a standard, safe "halfway" practice, in the process reducing the staff compliment at the police station to one, while leaving the deceased to her own devices. The conduct of the police raised, rather than reducing, the risk of harm to the deceased and in my respectful view no right-minded person would seek to excuse such conduct. The options open to them in the circumstances were self-evident and would neither have breached the constitutionally entrenched rights of the deceased

nor impaired the efficient discharge of their duties. If the police were on the horns of a dilemma, it was of their own making.

54. Consequently, I conclude that the plaintiff has established the requisite element of wrongfulness and that the defendant is to be held vicariously liable for the action (or, more properly, the inaction) of its members stationed at McGregor that night.

QUANTUM

55. In the original particulars of claim dated November 2017 the plaintiff claimed the sum of R655 000,00, made up of –

55.1	General damages	R350 000,00;
55.2	Estimated loss of support	R250 000,00;
55.3	Past medical expenses	R5 000,00;
55.4	Estimated future medical expenses	R50 000,00.

It was expressly recorded that no actuarial principles had been applied to these calculations and that the plaintiff reserved the right to amend the figures in due course.

56. In preparation for the trial the parties each appointed mental health professionals to assist in the evaluation of the plaintiff's condition. I shall revert to this shortly but point out that there was a joint minute prepared on 3 March 2022 in that regard, in which agreement on various aspects was recorded. In addition, the plaintiff procured the services of an actuary to calculate his loss of support arising from the death of his mother and the estimated cost of future medical treatment.

57. As pointed out at the commencement of this judgment, in his amended particulars of claim dated 30 January 2024, the plaintiff's damages have been recalculated and now total R1 891 950,00, with the claim for past medical expenses having been abandoned, the claim for general damages having been increased to

R500 000,00, the claim for the past loss of support having been reduced to R102 030,00 and the claim for estimated future medical expenses having been increased to R1 289 920,00. I shall deal firstly with the loss of support claim.

PAST LOSS OF SUPPORT

58. The plaintiff was aged 11 years when the deceased died and attained majority on 9 June 2018. His claim for loss of support is thus for the 7-year period from 2011 to 2018. The evidence of Ms. Emily Otto, a pensioner and retired municipal worker from McGregor, was that the plaintiff resided with the deceased and that she supported him. The plaintiff on the other hand said that he stayed with his mother during the week and with his grandmother over weekends. It is thus fair to conclude that the deceased and her mother shared the maintenance of the child but that the deceased probably shouldered more of the responsibility.

59. Ms. Otto testified about the deceased's employment and said that she worked as a seasonal employee on wine and olive farms in the district. Her paltry earnings there were said to have ranged between R125 - R150 per day. Ms. Otto said further that the deceased also worked on a farm known as "Koringsrivier" where she also performed domestic functions earning a similar remuneration. None of this evidence was challenged.

60. The plaintiff filed a report by Munro Forensic Actuaries on 30 January 2024 in which his alleged loss of support was actuarially calculated. The factual assumptions made were that as a seasonal farm worker the deceased earned between R105 – R125 per day for 5 days a week over a 6-month period. A further assumption was made that the deceased worked as a casual worker for R50 – R100 per day for 5 days a week over a 6-month period. The rates used for the calculations are based on Ms. Otto's evidence and are in my view fair, being on the conservative side.

61. The actuarial report calculates the capital value of the plaintiff's loss of support as R107 400,00 to which a 5% contingency deduction is applied to arrive at the figure of R102 030,00 which is now claimed. I consider that a 5% deduction for general contingencies is too low and would replace it with 10% to take account of the vagaries associated with the deceased's employment, including periods of unemployment and rates of remuneration. In my view, awarding the plaintiff R96 600,00 under this head of damage would be fair to both parties.

GENERAL DAMAGES

62. This part of the plaintiff's claim is predicated on the psychiatric injury and the sequelae thereof sustained as a consequence of him learning of his mother's death by suicide. On this aspect, the Court heard the evidence of Ms. Colleen Law, a clinical psychologist in private practice in Cape Town, who was retained by the plaintiff, and Dr Larissa Panieri-Peter, a forensic psychiatrist also in private practice in Cape Town, who was initially retained by the defendant but was called to testify as an expert witness on behalf of the plaintiff.

63. Ms. Law filed a detailed report dated 31 August 2018 after seeing the plaintiff a month earlier. She concluded that the plaintiff "*probably suffered from Post-Traumatic Stress Disorder (PTSD) following his mother's sudden death in 2011 which has negatively impacted on academic and interpersonal functioning.*" She recommended that the plaintiff receive psychotherapy to address the condition. These findings were confirmed by Ms. Law in evidence given on 31 May 2023.

64. In 2019 the defendant was furnished with a report by Ms. Juana Horn, also a clinical psychologist in Cape Town, who thoroughly investigated Ms. Law's diagnosis of PTSD with reference to the relevant literature. Ms. Horn held the view that PTSD had been conclusively established but went on to say that, even if Ms. Law's diagnosis was correct, the proposed treatment regime would not adequately address the condition due to the passage of time – she opined that treatment of PTSD

was required to be undertaken relatively soon after the event which had triggered the condition. Ms. Horn did not testify.

65. Dr Panieri-Peter first consulted the plaintiff in February 2021 via an online platform and reported her findings to the defendant's attorneys. She later saw him in person in August 2023, at a time after the trial had commenced and after the plaintiff had given evidence on 31 May 2023. The doctor was provided with a transcript of the proceedings to date which she considered in the compilation of her supplementary report. The thrust of the psychiatrist's report was that when she observed him, she came to the conclusion that the plaintiff was suffering from a Major Depressive Disorder (MDD) rather than PTSD.

66. As mentioned above, Ms. Law and Dr Panieri-Peter met and compiled a joint minute dated 3 March 2022. At that stage Dr Panieri-Peter was still advising the defendant. The minute recorded some initial points of disagreement between the experts but ultimately it transpired that these were resolved, and the following points of agreement were noted.

“CONFIRMATION OF AREAS OF AGREEMENT

9. Both professionals agree that Mr. Marius Otto has been significantly adversely impacted by the violent and unexpected death of his mother, his primary attachment figure, especially because he has no other parent to turn to.

10. The death of his mother has been traumatic for Mr. Otto, and symptoms arising from the negative traumatic impact subsist today, long after the event.

11. Both professionals agree that PTSD and MDD commonly occur co-morbidly as well as that PTSD commonly develops into MDD, particularly when left untreated. Both professionals agreed that Mr. Otto may over time have presented with various symptoms of both diagnoses and continues to present residual symptoms of MDD.

12. Both professionals agreed that Mr. Otto required early treatment (psychiatric and psychotherapeutic) following the death of his mother.

13. Both professionals agreed that Mr. Otto requires current psychotherapeutic intervention. Dr. Panieri-Peter agreed to defer to the joint minute (17 August 2020) between Ms. Law and Ms. Horn regarding the nature and length of the psychotherapeutic intervention.

14. Both professionals agree that Mrs. Otto (Mr. Otto's maternal grandmother) presented with symptoms of depression and required psychiatric and psychotherapeutic intervention. Although both professionals understood that she is not the main claimant in this case; Mrs. Otto became Mr. Otto's primary maternal figure when his mother died. Her mental state and framework of understanding her daughter's (his mother's death) shaped his understanding of his mother's death. As his primary parental figure, her ongoing mental state impacts his social and occupational development and functioning. Both professionals agree that a period of psychotherapy (approximately 1 year) as well as psychiatric intervention (anti-depressant) would benefit Mrs. Otto and therefore Mr. Otto as well. It is recommended that she be treated with a first line SSRI such as Fluoxetine 20mg daily or Sertraline up to 150mg daily.

15. in her report Dr Panieri-Peter had recommended family therapy, Ms. Law agreed that Mr. Otto would benefit from a period of family therapy including Mrs. Otto.

16. Both professionals remain in agreement that Mr. Otto's recurring headaches should be medically investigated, but that they may signify somatization of psychological distress. The costs of this may need to be considered in determination of the quantum.

CONCLUSION

17. There are no outstanding areas of agreement between the findings, conclusions, and recommendations of each professional."

67. In her evidence, Ms. Law stood by her initial assessment of PTSD and said that the failure to treat this psychiatric injury had affected his mental health over a

passage of time. She had, however, not evaluated the plaintiff since her initial report and was unable to comment on his condition at the time of trial.

68. After the trial was adjourned *sine die* on the third day (31 May 2023), Dr Panieri-Peter was requested to prepare an updated report, which she did on 21 September 2023. When the defendant indicated that it did not intend calling Dr Panieri-Peter, the plaintiff seized the opportunity when the matter resumed on 26 February 2024.

69. Dr Panieri-Peter's detailed supplementary report was filed in the pleadings in terms of Rule 36(9)(b) and formed the basis of her evidence, neither of which will be repeated in any detail herein. Suffice it to say that the psychiatrist's evidence was not challenged by the defendant. The gist of Dr Panieri-Peter's opinion was that she accepted that the plaintiff was correctly diagnosed as having suffered from PTSD subsequent to the suicide of his mother. However, that untreated condition had then morphed into a full-blown MMD, which condition persisted as at the beginning of 2024.

70. Dr Panieri-Peter motivated her finding of an MMD by referring to the accepted criteria in the leading American textbook on psychiatry – The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, more commonly referred to as “the DSM-V”. This opinion was accepted by the defendant. The plaintiff's current symptoms under the DSM-V include –

- (i) Feelings of sadness and irritability;
- (ii) A struggle to enjoy many aspects of his life;
- (iii) Feelings of hopelessness and worthlessness;
- (iv) Social withdrawal;
- (v) Difficulty in concentration and focus;
- (vi) Change in sleep patterns – either too much or too little; and
- (vii) Suicidal ideation.

71. Given that it is common cause that the plaintiff has been correctly diagnosed as having previously suffered from Post Traumatic Stress Disorder and is presently suffering from a Major Mood Disorder (in common parlance depression), what remains to be addressed is the suggested treatment for the latter and the cost thereof. This will be discussed below under the claim for future medical expenses. I turn next to the quantification of the claim for general damages.

THE CASE LAW ON PSYCHIATRIC INJURY

72. Bester¹⁴ is the leading case involving psychiatric injury¹⁵. There the Appellate Division held that there was no reason in law not to grant damages to a party who had suffered what it termed “senuskok” (nervous shock). This was confirmed by the SCA in Barnard¹⁶ in which the court required a plaintiff to prove the existence of a known psychiatric injury¹⁷.

73. In the initial stages of claims for psychiatric injury, the courts required that a plaintiff should have personally witnessed the event which gave rise to such injury e.g. to have been present at the scene of a motor collision. But that strict approach gave way to a more benevolent interpretation. So, in Sauls¹⁸ a person who had travelled in an ambulance from the scene of an accident with the injured person and witnessed the latter’s pain and trauma, was granted damages for “*severe emotional shock and trauma, which gave rise to a recognized and detectable psychiatric injury viz post-traumatic stress disorder.*”

¹⁴ Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A)

¹⁵ Although the term “psychological” has also been used on occasion, the correct term is “psychiatric” as one finds in the relevant textbooks (e.g. the DSM-V).

¹⁶ Barnard v Santam Bpk 1999 (1) SA 202 (SCA)

¹⁷ “n Erkende psigiatriese letsel”

¹⁸ Road Accident Fund v Sauls 2002 (2) SA 55 (SCA) at [2]

74. In the Full Bench judgment of this Division in Hing¹⁹, Binns-Ward J conducted an extensive enquiry into the law, both local and international, relating to compensation for psychiatric injury. At the outset, His Lordship noted that there was no longer a requirement in our law that the claimant had to have been present during the damage causing event.

“[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.”

75. Binns-Ward J went on to stress two important considerations in deciding cases involving psychiatric injury. Firstly, he said that it was important to distinguish such injury from the type of grief ordinarily suffered by a person as a consequence of a bereavement of a loved one or family member. Secondly, the court stressed that the question whether a psychiatric injury had been suffered by a claimant fell to be determined through the evidence of an expert witness such as a psychiatrist.

76. In relation to the former consideration, Binns-Ward J cited the following passage from the speech of Lord Steyn in White²⁰.

¹⁹ Hing and others v Road Accident Fund 2014 (3) SA 350 (WCC)

²⁰ White v Chief Constable of South Yorkshire and others [1999] 1 All ER 1 (HL) at 33.

“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.”

77. Binns-Ward J then said the following with reference to, inter alia, the cases already cited above.

“[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.”

78. In conclusion on this point, Binns-Ward J referred to the Australian decision in Tame²¹ which had cited Barnard with approval.

²¹ Tame v New South Wales [2002] HCA 35

“[29] ...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.”

79. In regard to the second consideration, Binns-Ward J made the following observation.

“[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*’.”

80. In this matter, the Court has the expert evidence, firstly, of Dr Panieri-Peter and, secondly, Ms. Law regarding the fact that the plaintiff's condition is indeed a psychiatric injury, adequately documented under the DSM-V. Given that Dr Panieri-Peter was originally consulted by the defendant, its counsel could hardly seek to dispute her opinion. Rather, he questioned the likely duration of the prescribed treatment in light of what was termed the plaintiff's natural resilience – exhibited by his subsequent ability to obtain a matric certificate and his keen interest in playing and coaching cricket.

COMPARATIVE CASE LAW

81. Counsel for the plaintiff referred the Court to a good number of earlier decisions on point and invited the Court to consider these in coming to a just decision. Counsel for the defendant offered nothing by way of comparison and made the bald and unsubstantiated submission that R30 000,00 was sufficient.

82. The point of departure in comparing the extent of earlier awards in determining general damages was stated as follows by the SCA in Seymour²².

“[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that. As pointed out by Potgieter JA in Protea Assurance,²³ after citing earlier decisions of this court:

‘The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other

²² Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)

²³ Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A) at 535H - 536B

cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

83. More recently, in Mbhele²⁴, a claim for “emotional shock” on the part of the mother of a still born child, the SCA, before conducting a detailed review of a number of the earlier cases, issued the following cautionary words.

“[13] In order to determine general damages, courts acting *in arbitrio iudicis* and generally tending towards conservatism have regard to considerations such as awards in comparable cases, inflationary changes in the value of money, and problems arising from collateral benefits. Importantly, in making an award, a court is not bound by one or other method of calculating general damages. It has a wide discretion. As this court frequently pointed out, each case must be determined on its own unique facts.”

84. I propose to deal with just some of the cases in point referred to by plaintiff's counsel. First, there is Maart²⁵ in which a mother was compensated for the “emotional shock”²⁶ she suffered when her son was shot and killed by the police after

²⁴ Mbhele v MEC for Health for the Gauteng Province [2016] ZASCA 166 (18 November 2016) at [13]

²⁵ Maart v Minister of Police [2013] ZAECPHC 19 (19 April 2013)

²⁶ It is clear from the judgment that the Court was dealing with a case involving what is more generally

she had summonsed them to deal with his anti-social behaviour. The court awarded her R200 000 in 2013, which has a present value of around R350 000.

85. The facts were that the plaintiff in that matter was found by her consultant psychiatrist to be -

“...markedly depressed and psychotic symptoms are present. Emotional distress increased with discussion of the sequence of events and her presentation is in keeping with persistent chronic post traumatic stress disorder syndrome. Her mood is secondary to this disorder. Her affect demonstrated depression and anxiety. She has hallucinatory experiences and expresses paranoid indication of delusional intensity.”

86. The court in Maart further had regard to the following considerations.

“[33]...It is however apparent in this matter that the injury here suffered has had and continues to have a profound effect upon the plaintiff. The pervasive effect of the psychological trauma and its ongoing severely debilitating effect on the plaintiff are undoubtedly related to the particular circumstances giving rise to her loss. These are factors which bear upon the quantum of an appropriate award of general damages.”

87. Second, there is Walters²⁷ in which the plaintiff claimed damages for the “psychological sequelae” arising from the death of her husband by suicide after he had been arrested and detained by the police for drunkenness. The matter is thus on all fours with the instant case. The Court considered the following factors alleged by the plaintiff as sequelae

- “(a) *Mood disorder (depression);*
- “(b) *Post traumatic stress disorder;*
- “(c) *Feelings of hopelessness;*
- “(d) *Phobic response behaviour to members of the South African Police*

called psychiatric injury.

²⁷ Walters v Minister of Safety and Security [2012] ZAKZDHC 19 (12 April 2012)

Services;

(e) Occupational problems;

(f) Self image and body image disturbances;

(g) Neuro Psychological deficits of functionary aetiology;

(h) The need for ongoing psychological treatment.”

The court was satisfied that the plaintiff had suffered PTSD and depression as a consequence of the suicide and awarded her R185 000 in 2012. The current value of that award is of the order of R340 000.

88. Lastly, there is the much-publicised case of RK²⁸ in which the members of the K family sued for the emotional shock they collectively suffered when an 8 year old child fell into a pit latrine at a rural school in Limpopo and drowned. The SCA overturned the judgment of the trial court and awarded the plaintiffs amounts ranging between R100 000 and R350 000. The present value of the latter figure is of the order of R450 000.

89. In a detailed re-consideration of the law along the lines of Hing, the SCA reaffirmed the requirement that plaintiffs must establish “a psychiatric lesion” before they are entitled to compensation for the trauma arising from the death of a loved-one or family member. Having been satisfied that it had been conclusively established that the plaintiffs had suffered PTSD and/or depression, the SCA concluded its findings on the quantum as follows.

“[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 (sic), if ever, directly comparable. I have however had regard to the award of R100 000 in Mbhele’s case which, as I’ve mentioned,

²⁸ RK and others v Minister of Basic Education and others 2020 (2) SA 347 (SCA)

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 R200 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.”

CONCLUSION ON GENERAL DAMAGES

90. The plaintiff's evidence as to his personal circumstances and the consequences of his mother's death may be summarized as follows. He is presently 25 years old and has part-time employment at a carpentry business in Mc Gregor, earning R1250/week, although his interests lie in computers. His relationship with his mother appears to have been good notwithstanding her apparent anti-social behaviour. He only learned that her death was occasioned by suicide a while after she had died when an uncle took him into his confidence. He was nevertheless particularly upset at the time because his mother had died the day after his 11th birthday and she had planned a special celebration for him – something she could ill afford and which had never happened before.

91. The suicide caused the plaintiff considerable emotional grief and he had difficulty concentrating at school: he failed the year in which he lost her. That notwithstanding, the plaintiff eventually passed matric and was actively involved in cricket, both as a player and a coach of a local side. The plaintiff is reported to harbour very negative feelings towards the police whom he regards as responsible for the death of his mother. The plaintiff now has a child by his life-partner, and he struck

the Court as a responsible young man with resilience and determination. He does appear to wish to get on with his life and is not wallowing in self-pity.

92. At an early stage the plaintiff experienced headaches and dizziness, and his grandmother took him to see a psychiatrist in Worcester. She used her medical aid cover to pay for this but when she lost her job there were no longer funds available and so the plaintiff only benefited from one session. The impression gained from the expert evidence is that he would benefit from the treatment regime suggested by Ms. Law and Dr Panieri-Peter. That regime contemplates psychotherapy for a fixed period of time as well as medication.

93. There is, however, a practical problem – apparently the nearest clinical psychologist is in Worcester which is about 65km away and would require the plaintiff to travel by minibus taxi – first to Robertson and then on to Worcester – which would probably be about an hour either way. He would also have to take time off work to attend such therapy. A brief perusal of the internet suggests that there may be options (albeit limited) open to the plaintiff in Robertson but there are also many clinical psychologists who consult on-line these days. I am thus optimistic that with the right care and treatment the plaintiff should be able to address his mental health challenges and resume a meaningful and productive life.

94. Taking all of these considerations into account and being guided by the trends in the cases decided more recently, I have come to the conclusion that an award of R300 000,00 in respect of general damages will be fair to both parties.

FUTURE MEDICAL EXPENSES

95. It is common cause that the plaintiff is entitled to be compensated for his anticipated future medical expenses in relation to the regime proposed by the experts. However, the extent thereof is a matter of some dispute. The plaintiff initially presented the evidence of Ms. Law at the end of May 2023 and at that stage she was

cross-examined by counsel for the defendant with reference to the report of Ms. Horn, who had concluded that the plaintiff suffered from depression and not PTSD. The problem with the reports of both psychologists was that they were out of date, having been based on consultations with the plaintiff in 2018 – 19.

96. After the conclusion of Ms. Law's evidence, the defendant indicated that it intended calling Dr Panieri-Peter as its witness on the quantum. However, the doctor was not immediately available and so the matter was postponed sine die. Eventually, the matter was set down to continue on 26 February 2024, when the defendant indicated that it did not intend calling Dr Panieri-Peter. Thereupon, the plaintiff proceeded to adduce her evidence.

97. Dr Panieri-Peter explained that she had originally consulted with the plaintiff (on the instructions of the defendant) in February 2021, and that this consultation took place virtually in light of the COVID-19 restrictions then in place. Her evidence was based, in the main, on her report of 21 September 2023 which was based on an in-person assessment conducted at her rooms in Rondebosch earlier that month. The report was, as I have said, also based on the witness' perusal of the record to date.

98. Dr Panieri-Peter held the view that, whatever the situation may have been in relation to the earlier diagnosis of PTSD, in September 2023 she considered the plaintiff to be clinically depressed in terms of the relevant criteria under the DSM-V for MDD. This condition seems to have developed as a consequence of the untreated PTSD suffered earlier. Accordingly, the doctor considered that the plaintiff required treatment for depression. His anticipated future medical expenses are thus to be based on this diagnosis. I did not understand the defendant's counsel to contend otherwise.

99. The proposed treatment regime for the plaintiff's depression is multi-faceted. It involves long-term pharmacological intervention, a short-term admission of

21 days to a psychiatric clinic where the plaintiff will receive intensive psychotherapy and thereafter regular psychotherapy over a period of months and years. The defendant accepts that there should be an admission as proposed at Kenilworth Clinic, medication at the rate of R2000,00 per month for 1 year and 12 monthly psychiatric consultations of an hour's duration each at the rate of R3301 per hour. The defendant does not concede that any psychotherapy after the clinic discharge is necessary.

100. Dr Panieri-Peter said that State health services in the Western Cape were in crisis and that it would be very difficult to manage the plaintiff's needs. She thus suggested private mental health care, which the defendant accepts. The in-patient admission could take place at either Kenilworth Clinic in Cape Town (where the cost would be of the order of R55 000 – R60 000 for 3 weeks) or The Pines in Worcester (where the cost would be around R75 000 for that period). This was just the cost of the admission and did not include the additional cost of a psychiatrist attending to the plaintiff during such admission, which would be at the rate of R3301 per session. In my view, an admission to The Pines would be preferable to Kenilworth, given its proximity to the plaintiff's home which would enable his family to visit him during such a stay.

101. As far as psychological support is concerned, Dr Panieri-Peter contemplates weekly sessions for 8 months – thus 32 sessions at R2000/hour – and a further fortnightly session for 2 years – thus a total of 48 sessions. Presumably, account is taken of an annual break for the therapist and patient. In total then the plaintiff would require 80 sessions at the current rate of R2000/session.

102. Lastly, as far as the pharmacological intervention is concerned, Dr Panieri-Peter considered that the plaintiff may require medication for the rest of his life at the current rate of R2000/month. In my view this is excessive and I would consider that provision should be made for periodic interventions over the anticipated duration of his life with an aggregate of 5 further years after the first year of intervention.

103. On 30 January 2024, the plaintiff filed a supplementary report from Munro Forensic Actuaries reflecting the estimated present capitalized cost of his anticipated future medical expenses. The base figures used therein were from 2023 and are thus more than a year old. The calculations were based on different assumptions to those which I consider fair and reasonable and, importantly, do not contain any deduction for contingencies for the vagaries of life, such as early death, the difference in the variance of the individual cost items and, importantly, the fact that the plaintiff might decide not to avail himself of certain (or any) of the proposed therapies, or might make sufficient recovery that he will not require the full extent thereof. Unfortunately, this is not a Road Accident Fund matter where the cost of future medical expenses can be monitored through the issue of a statutory certificate which would entitle the plaintiff to claim as and when he incurred such expenses.

104. In light of the extent of the imponderables in this case regarding the future medical costs, I consider that a significant contingency is warranted and that 20% would be a fair contingency deduction in respect of the plaintiff's future medical expenses

105. Counsel for the defendant suggested that a fresh actuarial calculation ought to be made based on directions issued by the Court. I agree. The order that I will thus make will direct the actuaries to prepare a fresh calculation in respect of the the plaintiff's anticipated future medical expenses and present same to the parties. The plaintiff will then be entitled, if necessary, to approach this Court for a variation of the order to include this revised figure.

106. The revised actuarial calculation is to be made on the basis of the following assumptions-

- (i) The plaintiff will be admitted as an in-patient to The Pines in Worcester for 21 days at a total cost of R75 000,00;

- (ii) During his admission to The Pines, the plaintiff will receive daily psychotherapy at the rate of R3300/session (i.e. 21 sessions);
- (iii) After his discharge from The Pines the plaintiff will receive a further 80 sessions of psychotherapy at the rate of R2000/session;
- (iv) After his discharge from the Pines the plaintiff will require medication at the rate of R2000/month for 24 months;
- (v) After the expiry of the said 24-month period, the plaintiff will require medication at the rate of R2000/month intermittently over a further 5 year period (i.e. 60 x R2000) for the remainder of his anticipated lifespan;
- (vi) A contingency deduction of 20% is to be applied to the future medical expenses.

107. In the event that the actuaries require clarification of any of these assumptions they are to submit a written request to the plaintiff's attorneys of record with a copy to the defendant's attorneys. The plaintiff's attorneys are to then submit such request to the Court's erstwhile Registrar, Ms. Battista.

THE ORDER OF THE COURT IS AS FOLLOWS:

- A. The defendant shall pay to the plaintiff the sum of R300 000,00 in respect of general damages;
- B. The defendant shall pay to the plaintiff the sum of R96 600,00 in respect of his loss of support;
- C. The defendant is liable to pay to the plaintiff the estimated cost of his future medical expenses;
- D. The calculation of such future medical expenses is to be undertaken by Munro Forensic Actuaries (Munro) within 21 days of this order, such calculation to be based on the assumptions set out in para 106 above;
- E. In the event that Munro require clarification of any of the Court's assumptions they are to do so in accordance with the procedure set out in para 107 above;

F. Either party may approach this Court on 5 days' notice to the other side for a variation of this order so as to include the aforesaid calculation arrived at by Munro therein;

G. The amounts payable by the defendant in terms of para's A and B of this order shall attract interest at the prescribed rate from date of judgment to date of payment;

H. Interest shall be payable on the future medical expenses at the prescribed rate, such interest to run from 5 days after receipt of the Munro calculation as contemplated above until date of payment;

I. The defendant is to pay the plaintiff's costs of suit on the party and scale as taxed or agreed, such costs to include the qualifying expenses of

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- i. Ms. Colleen Law;
- ii. Dr. Larissa Panieri-Peter;
- iii. Munro Forensic Actuaries.

GAMBLE, J

APPEARANCES:

For the plaintiff: Mr. C Carolissen
Instructed by JG Swart Attorneys Inc
Crawford

For the defendant: Mr. J van der Schyff
Instructed by The State Attorney
Cape Town