IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

Case No: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE	1st Plaintiff
MALOTI JAMES KOMAPE	2nd Plaintiff
MOKIBELO LYDIA KOMAPE	3rd Plaintiff
LUCAS KHOMOTSO KOMAPE	4th Plaintiff

And

MINISTER OF BASIC EDUCATION	1st Defendant
MEMBER OF THE EXECUTIVE COUCIL, LIMPOPO DEPARTMENT OF EDUCATION	2nd Defendant
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL	3rd Defendant
SCHOOL GOVERNING BODY, MAHLODUMELA LOWER PRIMARY SCHOOL	4th Defendant

And

TEBEILA INSTITUTE OF LEADERSHIP EDUCATION, GOVERNANCE AND TRAINING	First *Amicus Curiae*
EQUAL EDUCATION	Second *Amicus Curiae*

SECOND AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

1 This is a case about an unthinkable horror: the death of a five-year-old boy who drowned in human waste when he fell into a pit toilet at school. The boy was Michael Komape and his death was caused by the reckless acts of the school and the National and Provincial Departments of Education.

2 His death brought untold grief and suffering to his family. Their pain was exacerbated by the manner in which the school and the Departments of Education treated them after Michael's death. At no point did they accept responsibility for Michael's death. At no point did they acknowledge the horror of what they had allowed to happen. The family could not process their grief or move on with their lives whilst the Departments and the school continued to remain impervious to their responsibility for this tragedy. So, they sued the Departments and the school.

3 They claimed the usual delictual damages available to a family member for the wrongful death of their child. They claimed for emotional trauma and shock (claim A), future medical expenses (claim C), funeral costs (claim D), and loss of earnings (claim E).[1]

4 The family also claimed a declarator that the defendants breached their constitutional obligations under sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution[2] and a novel head of damages. They claimed a remedy for their grief. This is a claim over and above the claim for emotional trauma and shock. It is claim B in the particulars of claim. It is

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1 Pleadings Bundle pages 22 to 26 paras 29 to 37

2 Pleadings Bundle page 26 para 41.1

pleaded in the alternative: either as a claim for development of the common law of delict to encompass damages for grief, or a claim for constitutional damages for the breach of the defendants' constitutional duties.[3]

5 When the family first instituted their claim in June 2015, the common law of delict did not recognize a claim for grief following the negligently caused death of a family member. The law had allowed a claim for damages for nervous shock and emotional trauma but only if they manifested in psychological lesions that were confirmed by expert medical evidence.

6 Since then, the Supreme Court of Appeal has, on at least one occasion, awarded damages for grief without any evidence of psychological lesions. This was in the case of *Mbhele* where a mother sued the MEC for Health for her grief and depression following the stillbirth of her child.[4]

7 In these heads of argument, we will track the origins of the claim for pain and suffering under the common law and show that the claim has been developed and extended by courts over the last century whenever the facts of a case demanded it. This historical exercise is a classic example of common law development that is incremental and case-centric. We will show that this case demands a further development in order to provide an effective remedy to the Komape family for the conduct of the defendants that robbed them of their beloved child.

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3 Pleadings Bundle pages 23 to 24 paras 31 and 32

4 *Mbhele v MEC for Health for the Gauteng Province* 2016 JDR 2144 (SCA)

8 The defendants fought the family's claim right up until October 2017, when, in the month before the trial, they conceded liability for the wrong done to Michael and the Komape family. This was a grossly long period to delay justice to the Komape family. The defendants' eventual concession of liability means that they do not now have, nor ever had, a defence to the merits of the claims against them. They accept that they negligently caused the death of a five-year old boy who was in their care.

9 It is therefore common cause in this case that the state is responsible for an unimaginable loss to the Komape family. The only question is who should bear the burden of that loss. Should the Komape family bear it or should the state bear it?

10 The case is unique. It involves a school without adequate infrastructure that appealed for years to the Departments for money to build safe toilets. It involves recalcitrant Departments that never responded to these requests or the warnings from organisations such as Equal Education and Section27 that sanitation infrastructure at schools in Limpopo was dangerous. It made the school take matters into its own hands and employ a local villager to build temporary toilets in 2009 that were not designed for children nor certified as being fit for purpose. It allowed a pit toilet to rust and decay over four and a half years until a child eventually died in it. It is a tragedy that the state has tried to avoid and for which it has refused to be fully accountable.

11 It is a case that demands that the state bear the burden of the Komapes' loss.

12 Equal Education was admitted as an *amicus curiae* in the trial. It presented evidence of its extensive involvement with the Departments, both at national and provincial level, about the deplorable state of school infrastructure prior to Michael's death on 20 January 2014.[5]

13 It was also admitted to present oral and written argument to the court in relation to claim B. These heads of argument therefore address claim B. They will first assess the claim as a development of the common law and then as a claim for constitutional damages.

14 Whether the claim is accommodated within the common law of delict or is a direct constitutional claim for damages, it relies on a number of constitutional rights and duties.

15 The first of these is the right to an effective remedy.

THE RIGHT TO AN EFFECTIVE REMEDY

16 Section 38 of the Constitution provides that where a right in the Bill of Rights has been infringed, the court may grant appropriate relief. In *Fose*, the Constitutional Court held that appropriate relief means effective relief:

> *"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying*

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5 The evidence was given by Brad Brockman, the then General Secretary of Equal Education, whose evidence was admitted on affidavit and was marked "exhibit A" in the trial.

and the rights 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 this goal."[6]

17 Since *Fose*, the Constitutional Court has "consistently emphasised that, where a litigant does establish that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated."[7]

18 An appropriate remedy is also a "specially fitted or suitable" remedy. Kriegler J in *Fose* found that—

"suitability is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in [the Bill of Rights]. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One

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6 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69." Although the remedial provision considered by this Court in *Fose* was that of the interim Constitution, the two provisions are in all material respects identical and the . . . observations in that case are equally applicable to section 38" – *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 65.

7 *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) at para 40.

cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate."[8]

19 Similarly, in *Motau* the Constitutional Court held that to grant appropriate relief, the court must determine what is fair and just in the circumstances of a particular case:

"The various interests that might be affected by the remedy should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement; deter future violation; make an order which can be complied with; and which is fair to all who might be affected by the relief. It also goes without saying that the nature of the infringement will provide guidance as to the appropriate relief."[9]

20 Accountability is also an important factor in determining which remedy to grant against the state for violating rights or breaching its constitutional duties.[10]

21 Section 38 must be read together with section 172(1)(b) of the Constitution.[11] This section provides that when a court is deciding a constitutional matter within its power, a court may make any order that is just and equitable. The courts have held that this is an expansive

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8 *Fose* at para 97. While this was a concurring judgment in *Fose,* the Constitutional Court has since approved this passage in *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) at para 83.

9 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 85.

10 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras 85-86.

11 *Mhlope* at para 83. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro) and Others* 2005 (3) SA 280 (CC) at para 74.

remedy that can be used even if there has been no declaration of invalidity[12] or to grant relief beyond that which was claimed in the notice of motion.[13] This means that the bounds of the remedy a court can impose are restricted only by what is "just and equitable".[14]

> *"That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it, as it is empowered to."*[15]

22 Sections 38 and 172(1)(b) of the Constitution demand that this court ensures an effective remedy to the Komape family for their loss. Claim B provides the answer. It is a claim that recognises the crippling impact of the defendants' conduct and demands a remedy to vindicate the constitutional rights that have been breached.

THE CONSTITUTIONAL RIGHTS

23 The defendants' conduct in this case has violated a number of constitutional rights. These encompass the family's rights and late Michael's rights.

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12 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 97. This was adopted by Mogoeng CJ in *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC) at para 59.

13 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* 2017 ZACC 47 (29 December 2017) para 211

14 *Mhlope* at para 83.

15 *Mhlope* at para 83.

24 The family has rights to family life[16] and dignity,[17] both of which have been violated by the state's thoughtless conduct.

24.1 The Constitutional Court has confirmed the right to family life, explaining that family is of vital importance. It is the fundamental unit of our society. "Human beings are social beings whose humanity is expressed through their relationship with others".[18] Families provide security, support and companionship.[19] This right to family life is violated when the family unit is disrupted and there is an emotional distance in the family relationship; when the family loses the support of one another.[20] The loss of Michael has profoundly changed the Komape family and disrupted their family life. It has robbed them of their mutual support and created a distance between them.

24.2 The plaintiffs have explained in detail in their heads of argument, the indignities that Michael and his family have suffered.[21] Michael's family were not treated with the respect and concern worthy of human beings in our constitutional democracy.[22]

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16 *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42 (1 December 2017) para 49

17 *Dawood and Another v Minister of Home Affairs and Others* 2000 (2) SA 936 (CC) para 36

18 *Dawood* para 30.

19 *Dawood* para 31.

20 *Dladla* para 18.

21 Plaintiffs' heads of argument paras 54 – 71

22 *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 2

25 The state's conduct also violated Michael's rights to life,[23] dignity, basic education,[24] and to have his best interests taken into account.[25] The defendants had a duty to keep Michael safe.

25.1 The plaintiffs have explained the ways in which the state violated Michael's right to life, dignity and basic education.

25.2 As a five-year old child, Michael was entitled to expect that his best interests would be taken into account by the school. He, and his family, were entitled to expect that he would be kept safe while in the school's custody. He was dependent on the state and its employees to ensure his safety and to act in his best interests:

> "*Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma*."[26]

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23 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 166

24 *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) para 37

25 *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) para 17

26 *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) para 19

26 Nothing in the conduct of the defendants in this case was in the best interests of learners. For years, the National Department failed to commit to a minimum standard for infrastructure provision at public schools. During those same years, the Provincial Department ignored the repeated requests from Mahlodumela school for safe toilets. And the school itself, knowing that the toilets were rusted and decaying, allowed young learners to use the toilets without any adult supervision.

27 The state failed to treat Michael with the respect that he deserved and, since his death, they have failed to treat the Komapes decently. This is a requirement of the guiding principle of ubuntu that infuses our constitutional scheme. The state has singularly failed to understand its obligations of ubuntu and to treat this family and their lost child with humanness.

28 Ubuntu is closely connected with dignity and is a theme running through our constitutional values. It recognises:

> "*a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all*."[27]

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[27] *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 224

29 It requires a "deep respect for the humanity of another".[28] "The concept carries in it the ideas of humaneness, social justice and fairness."[29]

30 Our law recognises that the state has an obligation to act consistently with the value of ubuntu in order to forge the society that the Constitution envisages.[30] No part of the defendants' conduct in this case is consistent with treating either Michael or his family with respect. The state's conduct is the antithesis of ubuntu. It has been dismissive and callous.

31 There is no dispute in this case that these rights violations have occurred. The only question is whether this court should recognize a claim either under the law of delict or directly under the Constitution to remedy the Komapes' loss.

32 The Supreme Court of Appeal has recently provided guidance to courts on how to approach a case in which new remedies for constitutional rights violations are sought. It has held that a court must first consider the adequacy of an existing remedy before ordering separate constitutional damages. If existing remedies are deficient, then the next step is to try and remedy this inadequacy through a development of the common law to accommodate a more extensive claim.[31]

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28 *Dikoko v Mothatla* 2007 (1) BCLR 1 (CC) para 68

29 *Makwanyane* para 237

30 The Constitutional Court recognised in *S v Makwanyane* 1995 (2) SACR 1 para 260 that "*the death penalty does not belong to the society envisaged in the Constitution, is clearly in conflict with the Constitution generally and runs counter to the concept of ubuntu; additionally and just as importantly, it violates the provisions of Section 11(2) of the Constitution and, for those reasons, should be declared unconstitutional and of no force and effect."* This pertained to the punishments meted out by the state as the enforcer of our justice system. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the Constitutional Court para 37 explained how ubuntu is given effect to by eviction legislation. This obligation of ubuntu was applied to the state as landowner.

31 *Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA) para 22.

33 We therefore start with the law of delict. The Constitutional Court has held that the law of delict protects, gives effect to, and provides remedies for violations of constitutional rights.[32] It is necessary to consider the current state of the law of delict, to track its development over the last fifty years and to determine whether it is adequate to vindicate the rights that have been violated in this case.

THE LAW OF DELICT

34 In this section of the heads of argument, we set out the origins and development of the actio iniuriarum, the aquilian action and the action for pain and suffering in our law of delict. This historical exercise is important because it shows that the action for pain and suffering is *sui generis* in nature. It was not known in Roman law and was received into our Roman-Dutch law from its Germanic heritage.

35 The action for pain and suffering is a remedy that does not fit neatly into either the *actio iniuiarum* or the *lex aquilia*. Despite this, however, it has been developed and expanded over time to provide redress in an increasing number of cases. We follow that development to emphasise the suppleness of the common law and to show that the courts do not shy away from developing the law when the facts of a case demand it.

The origins

36 In Roman law, actions for personality infringements were developed casuistically. The Twelve Tables introduced a variety of such actions. These “sentimental damages” could

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[32] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 33

only be claimed for intentional misconduct and mostly pertained to personality infringements that related to physical injury.[33] Though the Twelve Tables did recognise an action for the use of abusive language against another in public, or the defamation of another.[34] Over time, and as codified in the Praetors' Edict, there was greater recognition of offences against personal dignity not associated with physical transgressions.[35] Iniuria took on a more general meaning – an offence against another's person, dignity or reputation.[36] This general iniuria action was received into Roman-Dutch law.[37]

37 In De Villiers' translation of Voet's Commentary on the Pandects,[38] he says of dignity:

> *"Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment."*[39]

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33 M de Villiers, *The Roman and Roman-Dutch Law of Injuries*, 1899 (Juta & Co, Cape Town) at 3-4; J Neethling, J Potgieter and P Visser, *Neethling's Law of Personality*, 2ed, 2005, (LexisNexis Butterworths, Durban) at 40.

34 M de Villiers at 1-2.

35 M de Villiers at 6; J Neethling et al (*Personality*) at 40.

36 M de Villiers at 1-2 and 9. Ulpian's account, contained in the Digest, describes a general clause for damages for an injuria in a wide sense – meaning all willful aggressions upon the person of a free man. This included defamation and exposing women publicly to ignominy. M de Villiers at 6-7.

37 M de Villiers at 15.

38 Book 47, Title 10, *De Injuriis et Famosis Libellis*, in *The Roman and Roman-Dutch Law of Injuries.*

39 M de Villiers at 24-25.

38 De Villiers explains that the interests protected here are not patrimonial, they are "purely ethical". The reparation claimed in this action is for "that pain of mind which is naturally felt by anyone who has been the object of . . . disrespect which is evidenced by exposing another to contempt, ridicule, dislike, disfavour or disesteem."[40]

39 The courts in South Africa have endorsed this definition of the common law right to dignity, protected by the actio iniuriarum. This passage has been repeatedly cited by South African courts as an accurate statement of the law of injuria.[41]

40 Despite this wide definition of dignity, the action was generally not invoked for subjective infringements to dignity (purely hurt feelings), but rather infringements to reputation or good name.[42]

41 The actio iniuriarum provides satisfaction or "solatium" for the violation of personality interests in the form of injured feelings.[43] This solatium serves the purpose of retribution as well as reparation to soothe feelings of outrage at suffering an injustice.[44] In modern South African law, there is no formula for determining the quantum of a solatium. This is

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40 M de Villiers at 25.

41 *Minister of Police v Mbilini* 1983 (3) SA 705 (A) at 715-716. See also the cases cited therein. In addition, post the advent of our Constitutional democracy, the Courts still make reference to this understanding of dignity. See, for example, *Ryan v Petrus* 2010 (1) SACR 274 (ECG) at para 11; *Viviers v Jentile* 2010 JDR 1548 (GNP) at para 15; *H v W* [2013] All SA 218 (GSJ) at fn 99.

42 J Neethling et al (*Personality*) at 41. Though there is some debate about whether dignity could take on a wider meaning than simply social status and reputation. See J Neethling et al at 40-43.

43 J Neethling et al (*Personality*) at 52.

44 J Neethling et al (*Personality*) at 59.

within the courts' discretion given the facts of the case and what is just and fair in the circumstances.[45]

42 The Lex Aquilia, by contrast, was only concerned with patrimonial loss – the loss of property and earnings.[46] This too was received into Roman-Dutch and then South African law.

43 It is important to recall the historical emphasis of Roman law and its preoccupation with the physical and material. The Constitutional Court has recently reminded us that the law of delict originated in private vengeance: "a victim originally had the right to kill a wrongdoer, although this eventually became a right to merely exact the same kind of harm that he or she had suffered and then to demand the payment of money to cover any patrimonial loss caused by the wrong".[47]

44 The action for pain and suffering was not recognised in Roman law.[48] Instead, it originated in Germanic customs. It was developed in Roman-Dutch law by Grotius as an extension of the Aquilian action. Later, this form of relief was understood as a sui generis remedy that was a hybrid of the Aquilian action and the actio injuriaum. It was aimed at providing personal solace to the victim.[49] While the Aquilian action provided compensation for

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45 J Neethling et al (*Personality*) at 60.

46 M de Villiers at 3.

47 *MEC, Health and Social Development Gauteng v DZ* 2018 (1) SA 335 (CC) para 37

48 J Neethling, J Potgieter and P Visser, *Law of Delict*, 5ed, 2006 (LexisNexis Butterworths, Durban) at 15.

49 P Boberg, *The Law of Delict*, Vol 1: *Aquilian Liability*, 1984 (Juta&Co, Cape Town) at 517. This is why it was considered so personal it was no transmissible to heirs.

pecuniary loss, and the actio injuriarum provided satisfaction for hurt feelings, the action for pain and suffering aimed to provide compensation for hurt and suffering.[50]

The development of the action for pain and suffering

45 The action for pain and suffering began as a limited remedy which extended only to physical pain, suffering and disfigurement.[51]

46 Later, the action was developed to include various types of non-pecuniary loss, like shock and mental suffering, but the harm still had to flow from the plaintiff's own bodily injury. There was no relief for psychological harm by itself, or for grief and distress at the suffering or death of another.[52]

47 In 1973, in the case of *Bester*,[53] the Appellate Division extended the existing law. It recognized a claim for emotional shock or psychological injury where the plaintiff's body was not physically harmed but he was injured psychologically as a result of witnessing his brother's death. The case involved a motor vehicle accident that killed a six-year-old boy, W. His older brother, D, was running on the road two paces in front of W and so avoided the collision but witnessed his brother being hit and killed. As a result of witnessing his

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50 J Neethling et al (*Delict*) at 238.

51 J Neethling et al (*Delict*) at 15.

52 P Boberg at 516. See also *Union Government v Warneke* 1911 AD 657 at 665-6.

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

brother's death, D suffered serious shock that affected him psychologically and gave rise to an anxiety neurosis which had required medical treatment. D's father, acting as his guardian, sued the insurer of the driver of the motor vehicle who negligently caused the accident for the shock and psychiatric injury he sustained as a result of witnessing the accident. Until this point, the common law did not recognize a claim for pain and suffering brought by a person who was not injured in his own body as a result of the negligent conduct of another. This was because the courts feared opening the floodgates to "unlimited liability" where every bystander or distant relative might have a claim.[54] In addition, there were no clear principles in this field from Roman law on pain and suffering, and the Roman-Dutch authorities were brief on the subject. The courts were therefore guided by English principles that took a fairly restrictive view of "emotional shock".[55]

48 By 1973, South African law had inherited two "artificial" restrictions from English law:[56] the nervous shock had to result in physical injury; and the plaintiffs had to believe that they were in immediate danger or feared for their own safety.[57] The first restriction was the product an outdated distinction between mind and body and the Roman law's preoccupation with the physical body. The second restriction was designed to limit the scope of liability.[58]

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54 P Boberg at 174-75.

55 J Neethling et al (*Delict*) at 264.

56 J Neethling et al (*Delict*) at 264.

57 J Burchell, "An Encouraging Prognosis for Claims for Damages for Negligently Inflicted Psychological Harm", 116 *SALJ* 1999, 697 at 698.

58 J Burchell at 698.

49 In *Bester*, however, the Appellate Division did away with those two restrictions. It eschewed the notion that self-preservation was the only legitimate instinct that deserved protection and it held that the brain or nervous system was a part of the physical body and therefore psychological harm could be compensated.[59]

50 The court was, however, cautious to ensure against limitless liability. It held that a range of factors would have to be considered by a court before imposing liability on any particular defendant. These factors included: the foreseeability of such shock-induced injury; the severity or duration of the injury; the relationship between the plaintiff and the injured party; and the plaintiff's proximity to the scene of the accident.[60]

51 The flood-gates did not open after *Bester*. There were a handful of reported cases over the next two decades where plaintiffs successfully claimed for psychiatric injury following the negligent conduct of the defendant.

52 In 1999, the Supreme Court of Appeal developed the law further and removed the requirement that the plaintiff must have actually witnessed the accident or had close proximity to the scene. In the case of *Barnard*, a mother claimed damages for "nervous shock and psychic trauma" flowing from being told on the phone that her teenage son had died.[61]

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59 J Burchell at 698.

60 P Boberg at 176; J Burchell at 268;

61 *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

53 By 1999, the English law still required the plaintiffs to have actually witnessed the event of death themselves in order to claim damages. This had been incorporated into our law and was regarded as a limitation to the claim in the hands of those who were only told about the event of death afterwards. These are known as the “hearsay victims”.

54 This limitation to the claims of hearsay victims was articulated by the House of Lords in the case of *Alcock*,[62] which dealt with claims brought by the families who lost relatives in the Hillsborough stadium tragedy. The disaster saw almost a hundred people killed when officials let in too many fans to a football match. Many fans were crushed at the front of the spectator pens. The House of Lords took a very restrictive view of emotional shock and held that family members must have actually witnessed the event themselves in order to claim damages.

55 The Supreme Court of Appeal in *Barnard* found the House of Lords’ approach in *Alcock* overly restrictive and not based on any logic. It was a policy decision to limit liability. However, the SCA was not persuaded by the same policy considerations. It held that hearsay victims could also claim for nervous shock, provided that they had a detectable psychiatric injury. The Court held that the closer the relationship is between the deceased and the plaintiff, the more reasonable the inference that the defendant would have foreseen the nervous shock suffered. The court noted that fears of limitless liability were exaggerated because only a handful of claims for emotional shock had arisen since *Bester*.[63]

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62 *Alcock v Chief Constable of South Yorkshire* [1991] UKHL 5. *Barnard* at 210-12.

63 *Barnard* at 215-216.

56 The Court did, however, place a limitation on the availability of a remedy for those who are told about the negligently caused death of a loved one. It held that only psychological lesions confirmed by expert psychiatric evidence would found a claim for compensation. Although the mother in *Barnard* had also claimed for "emotional grief", the parties accepted that this did not amount to a psychiatric injury and conceded that no damages could be awarded for it.[64]

57 Until this point in our law, therefore, the courts had systematically expanded the claim for pain and suffering from an action concerned only with the pain and suffering that resulted from a bodily injury to the plaintiff himself, to an action that could be brought by a plaintiff who suffered psychological effects after being told of the negligently caused death of family member.

58 A line had therefore been drawn in our law between emotional shock or psychological harm, on the one hand, and "mere" grief or sorrow, on the other. As Burchell noted:

> *"The line between grief and sorrow, on the one hand, and compensatable psychiatric injury, on the other hand, may not be that easy to define in law, or psychology/psychiatry for that matter, but it is a distinction which is based on the sound ground of providing some limit to the action for negligently caused psychological harm, apart from the normal delictual requirements. It is also a distinction which has a long history in both the English and South African jurisprudence."*[65]

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64 *Barnard* at 205-06. Emphasis added.

65 J Burchell at 702.

59 The arbitrariness of this line drawing is reflected in a recent decision of the Western Cape High Court in *Hing*.[66] The case reiterated the state of the law to be that a plaintiff may only claim damages which have resulted from an identifiable psychiatric injury that is demonstrated through expert evidence; while grief in uncompensatable. But despite recognizing that our law has drawn this line between psychiatric injury and grief, the court highlighted that extreme grief may include debilitating suffering. Diagnosing grief versus a recognisable psychiatric illness is "often difficult. The symptoms can be substantially similar and equally severe. The difference is a matter of aetiology."[67]

60 In 2016, the Supreme Court of appeal rejected this bright line. It awarded damages for "shock, grief and depression" to a mother whose child was stillborn after she received negligent treatment from the medical staff at Chris Hani Baragwanath Hospital. The facts of the case are heartbreaking.

61 In *Mbhele*,[68] the mother of an unborn child was transferred from her local clinic to Chris Hani Baragwanath Hospital because her baby was in foetal distress. When she arrived at Chris Hani, she was not treated as an emergency case. After more than an hour, a doctor saw her and ordered a CTG scan which was also delayed for a long time. Despite the fact that the CTG scan showed foetal distress, the nurse who conducted the scan did not report the results to the doctor and so the mother was not attended to promptly. Instead, she was left alone to progress in labour without being monitored. She delivered a stillbirth. After the delivery, she was taken to the labour ward where she was told that her baby had died. She

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66 *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC).

67 *Hing* at para 25 quoting *White and Others v Chief Constable of South Yorkshire and Others* [1999] 1 All ER 1 (HL) at 32-33

68 *Mbhele v MEC for Health for the Gauteng Province* 2016 JDR 2144 (SCA)

was then taken to a ward with mothers of new-born babies. Each bed in the ward had a cot attached to it. The other mothers had their babies with them feeding them and holding them while the plaintiff had no baby. When she asked to be moved to another ward and for her family to be phoned, she was ignored for about eight hours.[69]

62 The High Court dismissed her claims for emotional shock and constitutional damages for the loss of a right to rear a child. She appealed to the Supreme Court of Appeal. The case was conducted on the basis of an agreed statements of facts.

63 The agreed statement of facts described the impact of the loss on the plaintiff. It recorded the following:

> "*The death of the baby left her with a feeling of emptiness. For months after the death of the baby she shut herself behind closed doors and did not wish to socialise with family and friends . . . She had prepared for the birth of the baby by buying clothes, toys and [baby necessities] . . . After returning home she often took the clothes and the clothes and toys she had bought for Tebogo [the still born baby] out of the chest of drawers that she had specially bought for [him], put them on her bed, and weep over them . . . She squandered all her money after the death of Tebogo because she had lost reason to work . . . When she fell pregnant [again], she found that she had lost enthusiasm that she had had with her first pregnancy. She did not have a baby shower, nor did she buy as much as she did for the first child. She finds that Siyabonga [the second child] has not substituted Tebogo . . .*

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69 *Mbhele* para 3

She has a friend whose child would have been the same age as Tebogo. When the child reaches certain milestones she thinks of Tebogo and painfully wonders how Tebogo would have been like or doing at the same age . . . When Siyabonga disappears, she becomes extremely nervous. She cannot overcome the feeling of anxiety the moment she realises that Siyabonga is not present."

64 There was no expert medical evidence led at the trial and therefore no confirmation that the death of her baby had resulted in any cognisable psychological lesion. This did not deter the SCA from awarding damages. It held that "although no medical evidence was presented, there can be no doubt that the appellant experienced severe shock, grief and depression" as set out in the agreed statement of facts.[70] She was awarded damages of R100,000.[71]

65 The SCA has therefore already extended the claim for pain and suffering to include "emotional distress"[72] that does not manifest in a diagnosed psychiatric lesion. It did so in a case that cried out for a remedy. No woman should be left unattended at a public hospital while her baby is in foetal distress. No woman should, after delivering a stillbirth, be taken to a labour ward and left there on her own to encounter the sight of mothers with their new born babies while she looks at the empty cot next to her bed.

66 The absence of expert medical evidence in this case did not prevent the court from granting a remedy for the hospital's flagrant breach of the mother's rights.

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70 *Mbhele* para 19

71 *Mbhele* para 19

72 *Mbhele* para 11

67 The catalogue of case law development sketched above illuminates one consistent theme. Where the facts of a case demand it, the law will provide a remedy.

68 When a child suffered severe psychological trauma watching his brother die, the law came to his aid (*Bester*). When a mother suffered emotional shock after being informed on the telephone about the death of her son, with whom she had a very close relationship, the law awarded her damages (*Barnard*). When a baby died during delivery because of the gross indifference of medical staff at a public hospital, the mother was awarded damages despite not proving that she had suffered a psychiatric lesion (*Mbhele*).

69 The Komapes' claim in this case presents the next opportunity for development. It is a case in which, in addition to a general damages claim for emotional shock, the family seek damages for their grief. The family's claim for emotional shock (claim A) has been conceded by the defendants on the merits.[73] There is no debate that they are entitled to an award of general damages that compensates them for the psychiatric injury they have suffered. But their right to claim further damages for their grief (claim B) is not conceded.

70 The question is therefore whether this case demands such an additional remedy.

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[73] Defendants' counsel address: Transcript page 44

WHY DEVELOPMENT IN THIS CASE?

The facts

The pain

71 All the plaintiffs gave evidence at the trial. They spoke in emotional terms about the extent of their grief following Michael's death and the impact of his death on the family.

72 Ms Komape found Michael's body when the toilets were searched. She saw his hand stretching out from the toilet. This image was particularly difficult for her to process because it was a sign that he was asking for help, and no-one came.[74] She would see his out-stretched hand during her sleep.[75] After Michael's death, she cried all the time during the night.[76]

73 Ms Komape resisted the notion that Michael's death was an accident. She said if it had been an accident, she would have been able to accept it. But it was not an accident. The toilets were old and rusty.[77] The principal of the school knew this and was responsible for taking care of Michael. They ought to have looked after him. Instead, he died in a toilet surrounded by the waste products of other people.[78] She said that the pain she had

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74 Ms Komape's testimony: Transcript page 66

75 Ms Komape's testimony: Transcript page 76

76 Ms Komape's testimony: Transcript page 77

77 Ms Komape's testimony: Transcript page 61

78 Ms Komape's testimony: Transcript page 92

experienced was particularly acute because of the manner in which Michael died.[79] Dying by drowning in the waste of others is an unthinkable horror.

74 Mr Komape testified that when Michael's body was finally retrieved from the pit, he could not go close to the body because he would have been sick.[80] He, like Ms Komape, spoke of troubled sleep during which he would see Michael's outstretched hand.[81]

75 He testified that no-one from the school explained to him how Michael had died and he did not know whether there had been any investigation of the death.[82] He explained that it had been very difficult to find closure. He spoke of a sickness in the family following Michael's death.[83]

76 Michael's sister, Lydia Komape, testified that the Department's conduct of the case was an insult to her family.[84] She said that the family did not want to speak about Michael's death because they feared hurting each other.[85] She said that if he had died in another way, they may have been able to talk about it. "But he died in the faeces of other people". "No-one wants to talk about that". "No-one wants to die in that way".[86]

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79 Ms Komape's testimony: Transcript pages 92-3

80 Mr Komape's testimony: Transcript page 145

81 Mr Komape's testimony: Transcript page 145

82 Mr Komape's testimony: Transcript page 146

83 Mr Komape's testimony: Transcript page 147

84 Ms L Komape's testimony: Transcript page 222

85 Ms L Komape's testimony: Transcript page 226-7

86 Ms L Komape's testimony: Transcript page 227

77 Michael's brother, Lucas Komape, also testified. He was in Grade 10 when Michael died. He found it very difficult to concentrate at school after his death. He would think of Michael before he went to sleep because that is when they used to play together.[87] He said the death affected the family badly. They could no longer sit together. Before the death, they used to talk together; after the death, they could not because it had hurt them all so much.[88]

78 During cross examination, Lucas refused to accept that Michael's death was an accident. He said it was deliberate because when he was at the school in 2006, the toilets were damaged. The school knew the toilets were damaged long before Michael's death and they did nothing. They were required to make the toilets safe and they failed.[89]

The conduct

79 The evidence at trial included both the affidavit evidence of Equal Education and the oral testimony of the plaintiffs' witnesses. The evidence established the following about the defendants' conduct:

79.1 For many years before January 2014, the defendants were made aware of the dangerous state of sanitation infrastructure at schools in Limpopo.[90]

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87 Mr L Komape's testimony: Transcript page 235-6 and 239

88 Mr L Komape's testimony: Transcript page 239

89 Mr L Komape's testimony: Transcript page 243-4

90 Exhibit A; Affidavit of Brockman: paras 20, 42;

annexure EE11 to Brockman's affidavit: March 2013 comments on the draft Norms and Standards Regulations, paras 46 and 60

annexure EE12 to Brockman's affidavit: appendix to the March 2013 comments on the draft Norms and Standards Regulations, pages 16 and 20

79.2 The national and provincial authorities knew that the pit toilets in the majority of the schools in Limpopo were dangerous.[91] In March 2013, the Department had indicated to Section27 that the work on sanitation facilities at the schools identified on the implementation plan would be completed by 30 June 2013.[92] This date came and went, however, without the necessary work being completed. By October 2013, Mahlodumela had been included in at least one list of schools that would receive sanitation infrastructure support.[93] This work was not, however, undertaken before Michael died on 20 January 2014.

79.3 The national and provincial departments had received repeated request from Mahlodumela school to construct new toilets from 2004 to 2009.[94] These requests were never acknowledged.[95]

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annexure EE17 to Brockman's affidavit: appendix to the October 2013 comments on the draft Norms and Standards Regulations, page 6

91 This was traversed in the evidence of Mr Heywood from page 471 of the Transcript, with reference to the following documents in the Trial Bundle:

pages 653, 664, 669, 671, 673

pages 92, 97, 101, 103

92 Heywood testimony: Transcript page 500 referring to Trial Bundle page 116 para 4.5

93 This appears in the Mvula Trust "Sanitation and Water Backlogs Eradication Prograame October 2013" Trial Bundle page 687, at page 689 top line. According to the programme, "16 enviroloos" were to be constructed.

94 Malothane testimony: Transcript page 953 where the first letter of 28 June 2004 (Trial bundle page 643) is discussed to Transcript page 959 where the letter of 27 July 2009 is discussed (Trial bundle page 646)

95 Malothane testimony: Transcript page 958

79.4 The school knew that the particular toilet into which Michael fell was a temporary structure[96] built by a local villager[97] and never inspected to determine whether it was fit for purpose.[98]

79.5 By January 2014, the temporary toilet structure that had been constructed in 2009 was rusted and decaying.[99] It ought to have been replaced at least two years after it was installed.[100] It was an "accident waiting to happen".[101]

79.6 It would have cost the Department R500 per seat to replace the toilets at Mahlodumela with structurally sound and safe pit latrines.[102]

79.7 On the day of Michael's death, Charles Malebane, who had taken photographs shortly after Michael's body was found, was forced to delete the photographs.[103]

79.8 No proper investigation into the circumstances of Michael's death was conducted by the authorities.[104]

79.9 The defendants' witnesses were consulted for the first time a few days before they were called to testify.[105]

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96 Steel testimony: Transcript page 442

97 Malothane testimony: Transcript page 971 and 976

98 Malothane testimony: Transcript page 971

99 Malothane testimony: Transcript page 973

100 Steel testimony: Transcript page 441

101 Malothane testimony: Transcript page 1000

102 Steel testimony: Transcript page 449

103 Mr Malebane's testimony: Transcript pages 175-8235-6 and 239

104 Mr Komape's testimony: Transcript page 147; Heywood testimony: Transcript page 559

105 Rasekgala testimony: Transcript page 1014

79.10 At no point prior to October 2017, did any of the respondents accept responsibility for Michael's death.

79.11 None of the defendants have apologised to the Komape's for their role in the death of their beloved son.[106]

80 Mr Heywood, who gave evidence for the plaintiffs described the defendants' culpability on the basis of foreseeability. He said that collapsing and filthy toilets are "predicatable", "monitorable" and "foreseeable". They should have been acted upon by the Department. According to Mr Heywood, "you can plan for toilets".[107] That planning was fatally lacking in this case.

The impact on rights

81 The facts described above show that a number of the family's and Michael's constitutional rights were violated in this case.

82 Michael's death shattered the family's right to family life, which is an incident of the right to dignity. Before his death, they would talk to each other. They were a close family unit. After his death, the circumstances in which he died were so horrific that it prevented them from speaking to each other because they were afraid of causing more pain.

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106 Mr Komape's testimony: Transcript page 150

107 Heywood testimony: Transcript page 601

83 All of the family members who testified spoke of the impact of his death on their sense of well-being. Many of them had trouble sleeping. Ms Komape cried herself to sleep at night. Lucas Komape struggled to concentrate at school. They all felt a great sadness.

84 The family also spoke with great anger about how the school and the Department treated them. They were not treated with the dignity and respect they deserved. No-one ever came to accept responsibility for what had happened. No-one was accountable for it. Instead, the defendants fought the case for three and a half years, only to conceded liability on the merits in the month before the trial.

85 The state's callousness and indifference in the face of this tragedy is relevant to the damages that the state should be ordered to pay. Last year, in *Bridgman NO*, the Western Cape High Court admonished a municipality who was sued for damages arising from the rape of a mentally-disabled woman that occurred on premises they were required to keep safe. The municipality had long been aware from the evidence that it was accountable for this tragic event but nevertheless persisted in denying liability until the trial. The court found that the state's attitude had placed a burden on the claimant to prove her trauma. The municipality knew from the medical evidence that requiring her to testify in court would traumatise her further but it pressed on.

86 The court held that an organ of state must be accountable and responsive and must take responsibility for its omissions.[108] It found the municipality's stance unacceptable.

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[108] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) para 70

"*The approach of the Municipality added insult to her injury and it further violated her dignity. A remedy for injury should be given when words or conduct involve degradation or an element of insult. This translates into damages*."[109]

87 Michael's rights were violated in the most grievous manner in this case. His life was taken from him. Three days after starting school at Mahlodumela, he went to relieve himself and fell into human waste and drowned. No-one at the school accompanied him to the toilets, which were rusted and decaying. No-one was there to help him out when he fell in and stretched out his hand to save himself.

88 His most basic entitlement to receive education in a safe place was infringed. He received education in an environment that was dangerous to all the pupils at Mahlodumela and, ultimately, fatal to Michael.

The need for development

89 It is the violation of these rights that requires vindication. The existing common law does not compensate for these infringements. It concerns itself with the individual and the medically attested psychiatric lesions that a traumatic event can cause in a person. It is bedded in a person's corpus.[110] It does not concern itself with the further consequences of the trauma of losing a child. It does not focus on the family as a collective and ask what has been taken from it. It does not consider whether the family members have been treated with the dignity and respect that ubuntu demands. It does not consider the enduring sorrow

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109 *Bridgman NO v Witzenberg Municipality and Others* 2017 (3) SA 435 (WCC) at para 221.

110 *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) para 67

and heartache that accompanies a horrific tragedy that was preventable if only the Education Department had responded to the school's request and spent R2000 on safe toilet seats at Mahlodumela.

90 The existing common law also does not concern itself with the victim's rights. It does not provide a remedy for the violation of Michael's constitutional rights to family life, to basic education, to have his best interests protected and, above all else, his dignity.

91 The need for deterrence is also not adequately addressed by the existing common law. Deterrence is an accepted aim of remedial orders, particularly where the conduct is egregious.[111] This case falls at the extreme end of egregious conduct. It is not just a negligently caused death. It is a case of repeated, and yet unexplained, inaction. It is a case where the defendants' knowledge of the unsafe conditions at Mahlodumela was clearly established and their reckless disregard for the warnings is undeniable.

The arguments against development

92 The catalogue of the case law set out above displays two policy considerations that have cautioned courts to place limits on the delictual damages that may be recovered by a plaintiff. The first relates to a fear of creating limitless liability for defendants. The second concerns a risk of double compensation.

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111 *Fose* para 96 per Kriegler J

Limitless liability

93 The Supreme Court of Appeal had already recognized in *Barnard* that the concern of limitless liability was probably overstated given the limited number of claims since the Appellate Division developed the law in 1973 in *Bester*.

94 Furthermore, this particular case is unique.

94.1 It involves state conduct. That is a distinguishing factor for two reasons. The first is that the state bears responsibility for a number of rights under the Constitution that private parties do not, such as the right to basic education. Only the state has positive obligations to provide basic education.[112] The second distinguishing factor is that the Constitution sets heightened standards for the exercise of public power by the state and its officials.[113] The state must be accountable and responsive and take responsibility for its omissions.[114]

94.2 It involves a level of recklessness that approximates intentional conduct. The law has never been concerned with limiting liability where the defendant's conduct is intentional. It has held that a person who intentionally shocks another cannot complain if the law holds him responsible, and the scope of his liability is coterminous with the ambit of his intentions.[115] The facts here establish that the Departments knew of the dangerous state of the toilets at Mahlodumela and did

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112 *Governing Body of Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) paras 57 to 58

113 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 44

114 *Witzenberg Municipality* supra.

115 *Boswell v Minister of Police* 1978 (3) SA 268 (E)

nothing. The school knew that the toilets were rusted and decaying and failed to fix them. Its conduct was unconscionable[116] and the loss it caused must be compensated.

94.3 Doing justice to the Komape family requires more than a general damages award for their psychological lesions. Not all cases of the death of a loved one will bear the gruesome features of this case. Here, the victim died in unthinkable circumstances, circumstances that could have been avoided if a mere R2000 had been paid to remedy the situation. Here, the defendants knew for years before the event that the toilets in Limpopo schools were unsafe. Here, the defendants refused to be accountable and to accept responsibility for the family's loss in any meaningful way.

Double compensation

95 The principle against double compensation was described in *Zysset* as follows:

> "*The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917B. Similarly,*

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116 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) para 57

and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action."[117]

96 This statement of the law was confirmed with approval by the Supreme Court of Appeal in *Coughlan*.[118] The issue that arose in that case was whether foster child grants made to the foster parent of children whose mother was killed by the driver of a motor car, and for which the Road Accident Fund admitted liability, were deductible from damages awarded for loss of support to the children. The SCA held that the foster child grants would amount to double compensation and so they would have to be deducted from the amount of damages awarded for loss of support.[119]

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117 *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) 278 A – B

118 *Road Accident Fund v Coughlan NO* 2014 (6) SA 376 (SCA) para 13

119 *Coughlan* (SCA) para 25

97 The SCA's decision was overturned on appeal to the Constitutional Court. In finding that the grants did not amount to double compensation, Constitutional Court emphasised the different nature and purpose of foster child grants.[120]

98 An award of damages for grief in this case would also not amount to double compensation. The damages for grief (pursued in claim B) serve a different purpose to the damages for emotional shock (pursued in claim A). As we have highlighted above, damages for emotional shock compensate the plaintiff for the medically detectable psychological consequences of the death of a loved one. Its Roman-Dutch origins in our law tie it to an enduring preoccupation with injury to the body, albeit one particular part of the body – the mind.

99 An award for damages for grief is not concerned with the body. It focusses on the other effects of the death of a loved one. Its compass is broader. It considers all the rights of the plaintiff and the victim and assesses the full extent of their loss, including the infringements of their rights to family life and dignity.

100 There is accordingly no risk of double compensation in this case because the purpose of the remedy for grief is to compensate for a range of rights that are not considered relevant to the assessment of an award of damages for psychological lesions.

101 Compensation for psychological injury, medically verified, does not begin to provide effective redress for the egregious conduct of the state in this case. The state, both before

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120 *Coughlan NO v Road Accident Fund* 2015 (4) SA 1 (CC) para 51

and after Michael's death, acted in callous disregard for the safety of young children in their care and then of the dignity of the Komapes when this carelessness took their child's life. This shows contempt for the rights of Michael Komape and his family and for the value of Ubuntu.

102 Our law currently does not provide compensation for this kind of violation – this affront to a society that values human life, the safety of our children and the care and concern we have for those who have suffered terrible and unimaginable loss. This, too, deserves compensation if we are to take the society envisioned in the Constitution seriously and to sanction and condemn the state's conduct when it is inconsistent with this vision.

ALTERNATIVELY, CONSTITUTIONAL DAMAGES

103 *Mboweni* requires this court first to consider the existing common law and test its adequacy before recognizing a claim for constitutional damages. We have set out above why the existing common law is inadequate and should be developed to include a claim for grief in this case.

104 If, despite the developments that have already occurred in this area of the law and the SCA's recent recognition of a claim for grief in *Mbhele*, this court concludes that the common law should not be developed, it will next need to consider whether to award constitutional damages to the Komapes.

105 The Constitutional Court in *Fose* explained that courts have an obligation to provide an effective remedy whenever there has been an infringement of a constitutional right. In this case, the gravity of the violation of Michael and his family's rights cries out for a remedy

that not only compensates for the physical and patrimonial consequences of their loss but also marks society's outrage at the state's conduct. It requires a remedy that effectively holds the state accountable for its failure and that recognises the state had constitutional obligations towards Michael and his family that were shamefully ignored.

106 When the Constitutional Court considered constitutional damages in *Fose*, it noted that section 24(1) of the Canadian Charter – which provides for a remedy that is "appropriate and just in the circumstances" for the infringement of Charter rights – was in effect the same as section 38 of the South African Constitution.[121] At that stage, however, the Canadian Supreme Court had not yet awarded constitutional damages. It did so, thirteen years later in *Vancouver v Ward*.[122]

107 The Court in *Ward* even quoted *Fose* with approval and endorsed our Constitutional Court's approach to the vindication of constitutional rights with damages. This approach recognises that there is additional harm done to society when the state violates constitutionally protected rights. This is because "they impair public confidence and diminish public faith in the efficacy of the [constitutional] protection".[123]

108 The plaintiffs' heads of argument make out the case for constitutional damages and we align ourselves with their submissions. In particular, the plaintiffs list the requirements for an award for constitutional damages as set out in *Ward*: a constitutional right has been breached; damages are just and appropriate in the circumstances in that they fulfil the

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121 *Fose* at para 82.

122 *Vancouver (City) v Ward* [2010] 2 SCR 28.

123 *Ward* at para 28, discussing *Fose* at para 81.

functions of compensation, vindication of rights, and deterrence of future breaches; and the absence of countervailing factors like alternative remedies or interference with good governance.[124]

109 In this case, it is evident that Michael's and his family's rights have been grossly violated. The state should bear the burden of that loss. It should be required to pay a measure of damages that signifies that this type of rights' violation is not tolerated in a constitutional state that places value on life, on children and on family. The state has not shown any countervailing factors that would prevent a substantial damages award to mark society's disapproval of its reckless conduct.

CONCLUSION

110 Michael's tragic death was not an accident. For years, it was a disaster waiting to happen. The issue of inadequate and unsafe infrastructure at public schools, especially those deliberately left behind in the past, is well chronicled and was well known to the defendants.

111 The state cannot let its children die in undignified and abhorrent circumstances when they are charged with protecting and educating them in a safe environment. They must take responsibility for this outrage. They must be held accountable.

112 It is not enough that they compensate the Komapes for the medical injuries they can demonstrate with doctors and scientific evidence. The harm is far greater than this. It lies in the fact that this family will be haunted by the thought of Michael desperately seeking

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[124] Plaintiff's heads of argument at para 319, citing *Ward* at para 4.

help in his final moments and that he was abandoned by the adults trusted to look after him. It is in the harm done to our society when our elected officials fail to protect our children and then turn their backs when the worst happens.

113 We stand with the plaintiffs and echo their plea for a suitable and effective remedy.

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TABLE OF AUTHORITIES

Cases

Other Authorities