REPORTABLE

Case Number : 423 / 2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

THE ROAD ACCIDENT FUND **Appellant**

and

MAGDELENE CAROLINE SAULS **Respondent**

Composition of the Court : **Hefer ACJ, Olivier, Streicher, Navsa JJA and Conradie AJA**

Date of hearing : **12 November 2001**

Date of delivery : **28 November 2001**

SUMMARY

Claim by betrothed lady witnessing her fiancé being injured - shock resulting in post-traumatic stress syndrome - claim allowed.

J U D G M E N T

P J J OLIVIER

OLIVIER JA

[1] On 18 March 1994, Stephen Sauls ('Sauls') parked his motorcar, a BMW, in a parking bay in Adderley Street, Cape Town. Accompanied by his fiancée, Magdelene Jackson ('the plaintiff') Sauls did some shopping during the lunch hour and returned to the BMW. The plaintiff got in and sat in the front passenger seat. Sauls intended to get into the driver's seat. However, he saw a truck ('the insured vehicle') driven by one Sadick approaching his vehicle from the back in its designated traffic lane, *i e* next to the parking bays. He saw that due to the size and proximity of the insured vehicle, it would be inopportune at that moment to open the door on the driver's side. He then leaned against the car with the front part of his body pressed against the door waiting for the insured vehicle to pass. In spite of this precaution, he was struck

by the insured vehicle. He was thrown forward and landed in front of the BMW. He was concussed. The plaintiff, who saw the collision, rushed to his aid. Bystanders warned her not to touch or move his body. They remarked on the deathly pallor of his face. The plaintiff thought that Sauls had been killed or seriously injured, *inter alia,* that his spinal column had been fractured She was led away from the scene in a state of shock and turmoil.

[2] Sauls was taken to hospital in an ambulance accompanied by the plaintiff. It transpired that he had suffered, apart from concussion, very slight injuries. He was treated for abrasions to the hip and discharged the same day. The plaintiff, however, was in a condition of shock and confusion and was very tense. On the night of the accident she slept badly and experienced nightmares, reliving the whole trauma. The next day she consulted a general practitioner and was treated for shock. On the Monday she returned to her work as a senior staff nursing sister, but

could not cope. She was subsequently diagnosed with a post-traumatic stress disorder which had become chronic and unlikely to improve. It was alleged that she will never be able to take up gainful employment again, will need extensive psychiatric treatment and medication, and has lost most of her previous enjoyments of life - she is now withdrawn, does not want to see anyone, is deeply depressed, suffers a pattern of sleep disturbance with intrusive, distressing and morbid dreams. It was also alleged that she has lost all interest in social, household and sexual activities and that her whole personality has changed for the worse. In short, her case is that as a consequence of her witnessing the injury to Sauls, she suffered severe emotional shock and trauma, which gave rise to a recognised and detectable psychiatric injury, *viz* post-traumatic stress disorder.

[3] The plaintiff duly instituted an action for compensation against the appellant, the statutory body which handles third party claims. She

claimed a very substantial amount from the appellant in respect of past and future medical expenses (mostly psychotherapy and counselling), loss of earnings and general damages (for permanent disablement and loss of amenities of life).

[4] The matter went on trial before Knoll J. It was agreed that the so-called merits would be disposed of first and the question quantum was to stand over.

[5] At the end of the trial, it was agreed or common cause that :

(a) As alleged by the plaintiff, the insured vehicle driven by Sadick had struck Sauls.

(b) The said collision was caused by Sadick's negligence.

(c) Sauls was injured as described above.

(d) For the purposes of this phase of the litigation, that the respondent had in fact suffered shock and emotional trauma, resulting in chronic post-traumatic stress disorder.

(e) There was at the time of the collision a very close relationship between the plaintiff and Sauls. They

were betrothed, had been living together as husband and wife for some time and were indeed married before the commencement of the trial.

[6] In a thorough judgment, Knoll J held in favour of the plaintiff. The appeal concerns the question whether that decision was correct.

[7] In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) this Court, per Botha JA at 779 held that there was no reason in our law why somebody who, as the result of the negligent act of another, has suffered psychiatric injury with consequent indisposition should not be entitled to compensation, provided the possible consequences of the negligent act would have been foreseen by a reasonable person in the place of the wrongdoer. It was further held that psychological or psychiatric injury is 'bodily injury' for the purposes of the predecessor of the legislation now under consideration.

[8] As far as negligence and the foreseeability test are concerned, foresight of the **reasonable** possibility of harm is required. Foresight of a mere possibility of harm will not suffice (see *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) at 1112 D - F). The general manner in which the harm will occur must be reasonably foreseeable, though not necessarily the precise or exact manner in which the harm will occur (see *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 840 B - C). The admission by the appellant that Sadick should have foreseen the reasonable possibility of harm to Sauls is not conclusive. The plaintiff must prove, on a balance of probabilities, that Sadick should have foreseen as a reasonable possibility that **she** would be harmed. As stated above, this does not mean that she must prove that Sadick should have foreseen the precise or exact manner in which the harm to

her would or could occur, but that she must prove that the general manner of its occurrence was reasonably foreseeable.

[9] This analysis leads inexorably to the factual question : did the plaintiff succeed in proving on a balance of probabilities that a reasonable person in Sadick's position should have foreseen that, by his careless driving, he would knock over Sauls and that, as a consequence, someone close to him would witness the collision and would suffer severe shock, distress and emotional trauma resulting in a psychiatric disorder? In *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) this Court, per Van Heerden DCJ, in discussing the application of the test for negligence in a comparable case, quoted at 214 B with approval a *dictum* of Mason J in *The Council of the Shire of Wyong v Shirt and Others* 146 CLR 40 :

> 'A risk of injury which is quite unlikely to occur … may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the

> probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.'

In the end, this requires a court of law to evaluate all the relevant facts in order to decide whether the harm caused was foreseeable as a reasonable possibility - see *Barnard*, *supra*, 214 D - E. In my view, the court *a quo* correctly held that the harm suffered by the plaintiff was foreseeable as a reasonable possibility.

[10] On behalf of the appellant much was made of the fact that despite the severity of the collision and the body of Sauls being spun around and thrown some distance forwards, he was only slightly injured. It was argued that under these circumstances the normal and foreseeable reaction of a person in the plaintiff's position would be some shock and trauma, which would disappear in a relatively short time, at the latest when it was established that Sauls was not seriously injured. That such

shock and trauma would lead to a very serious case of post-traumatic stress disorder, so it was argued was not reasonably foreseeable. Is this argument sound? I think not. Although it later transpired that Sauls was only slightly injured, the manner in which he was knocked off his feet, flung into the air and spun around, was witnessed by the plaintiff. This must have been a traumatic experience to any observer, much more so to one in a close relationship with the victim. What is more, when the plaintiff got out of the car and rushed to Sauls where he was lying on the ground, he was concussed; and a bystander drew attention to his deathly pallor. The plaintiff was justified, in my view, in thinking that Sauls had been mortally injured, and was dying. Although negligence is a question of fact, it is noteworthy that in *Barnard's* case this Court held that psychiatric injury to a mother who only heard that her teenage son had been killed, was reasonably foreseeable.

[11] It was not argued that a reasonable person in Sadick's position

could not or would not have avoided the accident. In my view, consequently, the plaintiff succeeded in proving on a balance of probabilities that Sadick was negligent *vis-à-vis* herself in his driving of the insured vehicle, and that his negligence factually caused the harm she complained of.

[12] This brings us to the question of legal causation, *ie* whether the harm or loss suffered is not too remote to be recognised in law. The test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play their part (see *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39 D - 41 B; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E - 701 F; *Smit v Abrahams* 1994 (4) SA 1 (A) at 14 F - 15 F; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764 I - 765 B).

[13] In my view, the so-called flexible approach or test of legal causation does not require in the present case either a denial of or limitation to the plaintiff's claim, apart from questions of proof of the quantum of damages. It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so, is, in my view, a necessary and reasonable limitation to a plaintiff's claim. See *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 208 J - 209 A and 216 E - F. From what has been said above, the harm caused to the plaintiff was reasonably foreseeable and could easily have been avoided. The harm was caused directly to the plaintiff, she being in the BMW and witnessing the collision first hand. No *novus actus interveniens* in the legal sense was proved. And in the light of our law's clear attitude that claims in respect of negligently caused shock and emotional trauma resulting in a

detectable psychiatric injury are actionable, (see *Bester*, *supra*; *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W); *Majiet v Santam Ltd* [1997] 4 All SA 555 (C); *Barnard v Santam Bpk*, *supra*) one would require clear and convincing reasons why the action in the present case should not succeed or not succeed to the full extent of the plaintiff's loss.

[14] In this connection counsel for the appellant argued that the distinguishing factor in the present claim is the serious harm caused to the plaintiff compared with the negligible harm caused to the primary victim, Sauls. He argued that if the present claim where the primary harm is negligible is allowed, the floodgates will be opened to a multitude of claims, where huge amounts will be sought for secondary harm, whether genuine or simulated. Potentially every motor collision case could and, he argued, probably will in future sprout claims of the sort now before us.

[15] Furthermore, he argued, if the present claim is allowed to a live-in lover or betrothed, what is there to negate similar claims by partners to a customary or common law or religious union, children, parents, grandchildren, favourite uncles and aunts, close friends, *etc*. Even without any further development, and taking the facts of the case now before us as they stand, counsel for the appellant argued, the potential liability of every member of society is increased beyond imagination. Claims of this kind would, if allowed, counsel argued, very soon bankrupt the Road Accident Fund.

[16] The worrisome argument is not so much the slightness of the harm to Saul as compared with that to the plaintiff. Her claim is an independent one, and does not derive from the seriousness of Saul's injuries, but from her own perceptions of the collision, the way his body was flung away, and the apparent gravity of his condition for some time thereafter. The worrisome and contentious feature in this case is the

absence, at the time of the accident, of ties of consanguinity between Sauls and the plaintiff. They were betrothed and living together as husband and wife. If the door is opened to claims in such a situation, it may be opened to claims by various categories of persons, as mentioned above. This is really where the floodgates argument comes in.

[17] Over the years various limitations to claims of the sort now under consideration have been considered, here and abroad. They have been considered in the South African cases mentioned above, and do not need repetition. I can find no general, 'public policy' limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the onus of proof. It is not justifiable to limit the sort of claim now under consideration, as has been offered as one solution, to a defined relationship between the primary and secondary victims, such as parent and child, husband and

wife, *etc*. Of course in determining limitations a court will take into consideration the relationship between the primary and secondary victims. The question is one of legal policy, reasonableness, fairness and justice, *ie* was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration. It is true that in the previous South African cases where the plaintiffs have succeeded in damages claims for psychiatric injury, there has been either a blood or a legal relationship - *Barnard*, *Bester*, *Clinton-Parker* and *Majiet*, *supra*. In *Masiba and Another v Constantia Insurance Co Ltd and Another* 1982 (4) SA 333 (C) at 343 E - F Berman AJ was of the view that sort of claim now under discussion was actionable, even if the injury or harm was threatening only to the claimant's chattel, such as his motor car. Such a claim is not now before us, and the decision as to the correctness of *Masiba*, on this point, must stand over for another day.

After a thorough review of previous decisions in England, Lord Keith of Keinkel formulated the applicable principle as follows in his speech in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A C 311 at 397 C - F :

> 'As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bond by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.'

With respect, I agree with this principle and, as a consequence in particular cases, such as the present are, of giving an action to one who is engaged to the primary victim.

[18] A further existing limitation is, of course, proof of the actual harm suffered and its *sequelae*, the burden of which rests on the claimant. It is in this frequently neglected field that extravagant claims will be exposed.

[19] In the present case, I have come to the conclusion that the plaintiff has proved on a balance of probabilities that she is, in principle, entitled to compensation and damages because of the psychiatric injury which she has suffered as a consequence of the collision on 18 March 1994 between Sauls and the insured vehicle driven by Sadick.

[20] The following order is made :

The appeal is dismissed with costs, including the costs of two counsel.

P J J OLIVIER JA

CONCURRING :

HEFER ACJ

STREICHER JA

NAVSA JA

CONRADIE AJA